

No. 26-349

IN THE
Supreme Court of the United States

SAMUEL BANKMAN-FRIED,
Petitioner,
v.
UNITED STATES,
Respondent.

**On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit**

**BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF PETITIONER**

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INTEREST OF *AMICUS CURIAE*¹

The National Association of Criminal Defense Lawyers, or NACDL, is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crimes or misconduct. NACDL was founded in 1958 and has a nationwide membership of many thousands of direct members and up to 40,000 attorneys in affiliate organizations. NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. NACDL files many *amicus* briefs each year in this Court and other federal and state courts, seeking to assist in cases presenting issues important to criminal defendants, criminal defense lawyers, and the criminal legal system.

INTRODUCTION AND SUMMARY OF ARGUMENT

NACDL urges the Court to grant Petitioner Samuel Bankman-Fried's petition for a writ of certiorari on both questions presented. As to the second question presented, NACDL's position is that the Eighth Amendment does not permit a criminal fine that destroys any future prospect of earning a livelihood—an issue that has divided courts across the

¹ Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus* or its counsel made any monetary contributions intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2, counsel of record for all parties received timely notice of the intent to file this brief.

country. This brief focuses on the first question presented and the need for meaningful limits on the use of loss evidence in fraudulent-inducement prosecutions.

1. This Court has long been concerned about the reach of the wire fraud statute, 18 U.S.C. § 1343, which potentially criminalizes large swathes of behavior. In *Kousisis v. United States*, 605 U.S. 114 (2025), this Court expanded the statute’s reach by resolving a circuit split and holding that wire fraud is actionable even when the defendant does not seek to cause—and in fact does not cause—the victim any net pecuniary loss, *id.* at 120–21; *see also id.* at 124 (“[T]he wire fraud statute is agnostic about economic loss.”). Yet in *United States v. Bankman-Fried*, 179 F.4th 104 (2d Cir. 2026) (Pet. App. 1a–32a), the Second Circuit permitted the Government to present highly prejudicial evidence of loss to the jury while precluding the defense from offering rebuttal evidence. By allowing juries to hear evidence of how alleged victims are financially impacted after the alleged fraud at issue is already “complete,” *id.* 17a, the Second Circuit has further expanded the prosecutor’s arsenal in applying an already far-reaching statute.
2. While the wire fraud statute may be “agnostic about economic loss,” *Kousisis*, 605 U.S. at 124, jurors are not. The Second

Circuit’s ruling risks wrongful convictions because evidence of financial harm—however potentially misleading—can be extraordinarily compelling to jurors. The danger is particularly acute in complicated financial cases. When jurors cannot readily determine whether the Government has proven deceit or materiality beyond a reasonable doubt, evidence that an alleged victim lost “billions” offers an easy and emotionally compelling substitute. Jurors may therefore resolve uncertainty in the Government’s proof not by finding reasonable doubt, but by treating financial harm as evidence that a fraud must have occurred. That is precisely the kind of evidentiary shortcut that can produce wrongful convictions. Three features of jury decision-making heighten that risk. First, when confronted with misleading evidence of loss, jurors may construct narratives that assign defendants a causal role in creating that loss. Second, hindsight bias may lead jurors to infer fraudulent intent simply because they perceive that a negative outcome occurred. And third, studies suggest that jurors may treat financial injury as evidence of guilt, independent of other evidence. That risk is especially pronounced here, where the court admitted evidence of loss even though no customer lost money.

3. The Second Circuit's holding may also induce more innocent defendants to plead guilty. When presented with a plea offer, defendants evaluate it "in the shadow of trial," comparing the likely plea sentence against the likelihood of conviction and the sentence they would face after trial. In the wake of *Bankman-Fried*, wire fraud defendants must also weigh the possibility that prejudicial, emotionally compelling—and even misleading—loss evidence will be admitted against them, increasing the risk of conviction even where the Government's evidence falls short on the actual elements of wire fraud. Meanwhile, with a credible threat of introducing that evidence at trial, prosecutors can induce more pleas. Under those circumstances, even innocent defendants may be more likely to accept plea bargains.

ARGUMENT

- I. ***Kousisis’s* Expansion of the Reach of the Wire Fraud Statute Requires Disciplined Gatekeeping of Loss Evidence.**
 - A. **This Court Has Long Been Concerned About the Reach of the Wire Fraud Statute.**

The “undeniably broad” language of the wire fraud statute, 18 U.S.C. § 1343, has long risked prosecutorial overreach. *Kousisis v. United States*, 605 U.S. 114, 135 (2025) (citation omitted). Former federal prosecutor and now-Judge Rakoff likened the mail fraud statute to a prosecutor’s “Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart—and our true love,” whose “simplicity, adaptability, and comfortable familiarity” surpassed even that of RICO and conspiracy law. Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 771 (1980). “[E]xpansive [judicial] glosses on the mail and wire fraud statutes have led to their liberal use by federal prosecutors,” *United States v. Weimert*, 819 F.3d 351, 356 (7th Cir. 2016), threatening to “turn[] prosecutors and courts into morality police with a commission to prosecute and punish harmless lies,” *Kousisis*, 605 U.S. at 151 (Gorsuch, J., concurring in part and concurring in the judgment).

This Court has repeatedly limited the scope of the fraud statutes out of concern for federalism, fair notice, and lenity. *See, e.g., Ciminelli v. United States*,

598 U.S. 306, 314–16 (2023); *Kelly v. United States*, 590 U.S. 391, 399, 403–04 (2020); *Skilling v. United States*, 561 U.S. 358, 400–02, 408 (2010); *Cleveland v. United States*, 531 U.S. 12, 19, 24 (2000); *McNally v. United States*, 483 U.S. 350, 357–60 (1987). As Justice Scalia described, both the mail and wire fraud statutes have been “invoked to impose criminal penalties upon a staggeringly broad swath of behavior,” creating potential notice and due process problems. *Sorich v. United States*, 555 U.S. 1204, 1309 (2009) (Scalia, J., dissenting from denial of certiorari). This Court has thus “recognized that incautious reading of the statute could dramatically expand the reach of federal criminal law, and [it has] refused to apply the proscription exorbitantly.” *Pasquantino v. United States*, 544 U.S. 349, 377 (2005) (Ginsburg, J., dissenting). The import is clear: “due process and federalism principles require the government to proceed with caution when bringing fraud prosecutions.” *United States v. Porat*, 76 F.4th 213, 223 (3d Cir. 2023) (Krause, J., concurring).

Thus, “there is a continued need for vigilance, lest prosecutors convert the fraud statutes—and the lengthy prison sentences that they can trigger—into tools to regulate good morals and business ethics.” *Id.* at 223–24. That vigilance is particularly important after *Kousisis*.

B. *Kousisis* Expanded Wire Fraud’s Reach While Emphasizing the Need for Meaningful Limits.

In *Kousisis*, this Court recognized as actionable wire fraud the “fraudulent-inducement theory”: that liability attaches anytime “a defendant uses falsehoods to induce a victim to enter into a transaction,” even if the defendant need not—and “often will not—aim to inflict economic loss.” 605 U.S. at 122 (citation modified). The Court noted that “a fraud is complete when the defendant has induced the deprivation of money or property under materially false pretenses.” *Id.* at 127 n.5.

The impact of expanding the reach of the wire fraud statute is profound. Prior to *Kousisis*, wire fraud was the most common lead charge in white-collar prosecutions, reaching nearly 1,300 annual federal prosecutions by 2023. See TRAC, *Wire Fraud Charges and Convictions Projected to Reach Record Levels in FY 2023* (Jul. 21, 2023), <https://tracreports.org/reports/723/>. In March 2026, wire fraud was the top lead charge in white-collar criminal prosecutions, constituting the top charge in almost half of such actions filed in federal district court. See TRAC, *White Collar Crime Prosecutions for March 2026* (May 21, 2026), https://tracreports.org/tracreports/bulletins/white_collar_crime/monthlymar26/fil/. And because *Kousisis* resolved a circuit split—five courts of appeals had declined to recognize the theory, see 605 U.S. at 120–21—it has expanded the universe of conduct that can be prosecuted under the wire fraud statute. In the

Second Circuit alone, fraudulent-inducement prosecutions have proliferated. *See, e.g., United States v. Engler*, 2026 WL 1249878, at *20 (W.D.N.Y. Jan. 29, 2026), *report and recommendation adopted*, 2026 WL 785316 (W.D.N.Y. Mar. 20, 2026); *United States v. Weiser*, 2025 WL 2662273, at *3 (S.D.N.Y. Sept. 16, 2025); *United States v. Peraire-Bueno*, 2025 WL 2062021, at *10 (S.D.N.Y. July 23, 2025).

While recognizing the viability of this theory, the *Kousisis* Court expressed appropriate concern about its potential reach. The Court emphasized the materiality requirement “as the principled basis for distinguishing everyday misstatements from actionable fraud” and a “limit” that “substantially narrows the universe of actionable misrepresentations.” *Kousisis*, 605 U.S., at 131–32, 135 (citation modified); *see also id.* at 146 (Thomas, J., concurring) (“Because a demanding approach to materiality is all that prevents an ‘extraordinarily expansive view of liability’ from rendering the federal wire fraud statute nearly limitless in scope, lower courts should hold the Government to its word.” (citation omitted)). And it reaffirmed that a traditional property interest—not mere information—must be the object of the fraud to prevent converting “every lie” into “a fraud offense subject to a possible 20-year sentence.” *Id.* at 133–34. While expanding the theory upon which wire fraud may be prosecuted, the *Kousisis* Court simultaneously emphasized the rigor with which courts must police its boundaries.

**C. *Bankman-Fried* Constitutes a Further
Expansion of the Wire Fraud Statute.**

While *Kousisis* expanded the universe of conduct subject to wire fraud prosecution, *Bankman-Fried* made the newly available prosecutions easier to prove by allowing the Government to introduce the very evidence *Kousisis* deemed unnecessary—evidence that victims suffered pecuniary loss.

The Government in *Bankman-Fried* proceeded under a fraudulent-inducement theory: “FTX customers were defrauded as soon as Bankman-Fried transferred their money to Alameda regardless of how strongly he believed he might later return the money.” Pet. App. 13a. Whether customers suffered pecuniary harm was “immaterial as a matter of law.” *Id.* 12a. Yet the district court permitted the Government to wield that theory as both a sword and shield.

The Government introduced evidence of FTX’s and Alameda’s bankruptcies as “intertwined inextricably” with the alleged crimes and argued that customers permanently lost their funds. *Id.* 14a. That claim was not only inaccurate—all customers have been repaid the value of their deposits as of the commencement of the bankruptcy proceedings—but also irrelevant to the Government’s theory, which disclaimed any need to show Bankman-Fried intended to cause economic loss or that loss actually occurred. Indeed, as the Second Circuit explained, “anything that occurred after ‘the minute the misappropriation happen[ed]’ was irrelevant.” *Id.* (citation omitted).

Yet the court also barred Bankman-Fried from rebutting these claims. While the Government could

introduce bankruptcy evidence “to explain to the jury its view of what allegedly happened here,” *id.*, the defense was prohibited from explaining *its* view, including that customers stood to be repaid the value of their deposit. Although the Government misleadingly claimed that billions were “gone” for good, A-1078-79,² Bankman-Fried could not correct the record that no such loss had occurred.

Kousisis expanded the prosecutor’s reach; *Bankman-Fried* risks putting a more powerful weapon in the prosecutor’s hands. The treatment of loss evidence in *Bankman-Fried* demonstrates the need for meaningful guardrails: such evidence has, at a minimum, diminished probative value in a fraudulent-inducement case, yet, as discussed below, can exert an outsized and unfairly prejudicial influence on the jury.

II. The Second Circuit’s Ruling Will Result in More Wrongful Convictions.

As detailed below, loss evidence poses a particular risk of distorting jurors’ judgments. *First*, it can dominate the narrative jurors construct to decide guilt. *Second*, it activates well-documented cognitive biases—especially hindsight bias—that can lead jurors erroneously to infer fraudulent intent from a bad outcome. *Third*, empirical studies show that the magnitude of a victim’s loss can itself increase the likelihood of conviction, regardless of the evidence of guilt. These effects can lead jurors to convict based on the magnitude of the loss rather than actual evidence of fraud, risking wrongful convictions. Because these

² Citations to “A-” refer to the appendix in the Second Circuit.

effects are difficult to correct through jury instructions, and because loss is not an element of fraudulent inducement, lower courts need evidentiary safeguards to prevent loss evidence from overwhelming the proof of fraud.

A. How Jurors Process Evidence Makes Loss Evidence Particularly Salient.

Loss evidence is particularly compelling because of how jurors process evidence introduced at trial. The influential “Story Model for Juror Decision Making,” developed by Nancy Pennington and Reid Hastie, explains that jurors do not experience a trial as a collection of separate facts. Rather, as evidence comes in piecemeal over the course of days or weeks, jurors actively engage in “story construction,” organizing the information into a coherent story (or stories) about what happened. *See* Nancy Pennington & Reid Hastie, *Explaining the Evidence: Tests of the Story Model for Juror Decision Making*, 62 J. Personality & Soc. Psychology 189, 190 (1992) [hereinafter Pennington & Hastie, *Explaining the Evidence*].

The story “the juror constructs determines the juror’s decision.” Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 Cardozo L. Rev. 519, 521 (1991) [hereinafter Pennington & Hastie, *Cognitive Theory*]. Jurors connect pieces of evidence and the inferences they draw—some of which “may be suggested by the attorneys and some [] constructed solely by the juror”—to create a causal narrative. Pennington &

Hastie, *Explaining the Evidence*, *supra*, at 190; see also Pennington & Hastie, *Cognitive Theory*, *supra*, at 541 (“[C]ausal explanations are constructed spontaneously in the course of decision making.”). Once the evidence is fully presented, jurors learn the possible range of “verdict categories,” usually during the judge’s instructions at the end of trial. Pennington & Hastie, *Explaining the Evidence*, *supra*, at 191. They then determine which verdict best matches the story they have constructed. *Id.* Thus, “story construction enables comprehension and organization of the evidence so that evidence can be meaningfully evaluated against multiple verdict judgment dimensions.” *Id.* at 192.

The research further shows that “easier-to-construct stories dominate[] [jurors’] decisions.” *Id.* at 193. The evidence admitted at trial is “strongly related to the causal role of the item in the story associated with a subject’s verdict.” Pennington & Hastie, *Cognitive Theory*, *supra*, at 541. When a story accounts for more of the evidence presented at trial—what Pennington and Hastie call “coverage”—jurors afford that narrative more acceptability and confidence. Pennington & Hastie, *Explaining the Evidence*, *supra*, at 190. As detailed below, when loss amount evidence is admitted—particularly large losses—that evidence can play an outsized and misleading role in the story jurors construct, and thus in the ultimate verdict.

B. Loss Evidence Activates Well-Established Biases that Lead to Errors in Judgment.

Loss evidence can be particularly influential—and misleading—because jurors are susceptible to hindsight bias, which has been well-studied in this context. “Hindsight bias is a well-understood and extensively documented bias in human judgment.” G. Mitu Gulati, et al., *Fraud by Hindsight*, 98 Nw. U. L. Rev. 773, 778 (2004). This “powerful” bias leads decision-makers—jurors and judges alike³—to “use outcomes to judge the prior probability of an event.” Shari Seidman Diamond & Jessica M. Salerno, *Empirical Analysis of Juries in Tort Cases*, 414, 426 in *The Research Handbook on the Economics of Torts* (Jennifer H. Arlen ed., 2013). Provided with an outcome, decision-makers “naturally make secondary inferences about the causal events leading up to the outcome,” including the defendant’s state of mind and intent. Gulati, et al., *supra*, at 778, 819; *see also* Scott A. Hawkins & Reid Hastie, *Hindsight: Biased Judgments of Past Events After the Outcomes Are Known*, 107 Psych. Bulletin 311, 314–16 (1990). Simply put, knowing that a decision turned out badly can (wrongly) make it seem like that outcome was the result of negligence or intentional misconduct: “[w]hat looks today like fraud, in many circumstances might have once been nothing more than misplaced

³ That this bias affects judges, too, suggests that courts must guard against it in their own rulings. *See* Chris Guthrie, et al., *Inside the Judicial Mind*, 86 Cornell L. Rev. 777, 800–05 (2001) (summarizing and providing evidence of judicial hindsight bias).

optimism.” Gulati, et al., *supra*, at 773; *see also id.* at 774 (“Hindsight blurs the distinction between fraud and mistake.”).

Research in legal and non-legal settings demonstrates the hindsight bias and its effect. In one classic study, participants who knew that an accident had occurred were much more likely to find negligence than those who did not. *See* Kim A. Kamin & Jeffrey J. Rachlinski, *Ex Post ≠ Ex Ante: Determining Liability in Hindsight*, 19 Law & Hum. Behav. 89, 99 (1995). Similarly, studies involving allegedly illegal searches found that the outcome of the search—while irrelevant—heavily influenced participants’ judgments of the search’s legality. *See* Dorothy K. Kagehiro, et al., *Hindsight Bias and Third-Party Consentors to Warrantless Police Searches*, 15 Law & Hum. Behav. 305, 311–12 (1991). The effect extends beyond legal judgments: when given descriptions and outcomes of decisions, people rate the thinking as better and the decision-maker as more competent when the outcome was favorable than when it was unfavorable. Jonathan Baron & John C. Hershey, *Outcome Bias in Decision Evaluation*, 54 J. Personality & Soc. Psych. 569, 569 (1988). And “empirical studies have shown that the more negative the outcome, the more pronounced the hindsight bias.” Nicolas Bourtin, *Combatting Hindsight Bias in White-Collar Criminal Investigations*, 257 N.Y.L.J. (Apr. 3, 2017); *see also* Erin M. Harley, *Hindsight Bias in Legal Decision Making*, 25 Soc. Cognition 48, 51 (2007).

In close cases, hindsight bias alone can change the verdict. Studies suggest that up to a third of jurors

may shift their evaluations depending on whether they were exposed to hindsight outcomes or not. See Maggie Wittlin, *Hindsight Evidence*, 116 Colum. L. Rev. 1323, 1361–62 (2016) (reviewing literature). For example, a classic mock-jury study found that exposing participants to hindsight—there, that a flood had occurred—shifted findings that a municipality was negligent in failing to hire a bridge operator from 24% of participants to 57.7%. See Kamin & Rachlinski, *supra*, at 93, 98.

Hindsight bias is particularly present and pernicious in fraud cases, which often turn on the defendant’s intent. The wire fraud statute requires proof of a “specific intent to commit the unlawful act,” *Kousisis*, 605 U.S. at 150 n.2 (Gorsuch, J., concurring) (citation omitted), which is assessed contemporaneously with the transaction or representation at issue, see *U.S. ex rel. O’Donnell v. Countrywide Home Loans, Inc.*, 822 F.3d 650, 662 (2d Cir. 2016). Hindsight bias can turn that inquiry on its head, leading a jury to start with a negative outcome and work backward, erroneously ascribing fraudulent intent to the defendant. As the literature explains, “a bad outcome alone might lead people to believe that [fraud occurred],” or that “a bad outcome was not only predictable, but was actually predicted by [the defendant].” Gulati, et al., *supra*, at 774 (discussing hindsight bias in the securities-fraud context). The danger is that “innocent mistakes, poor judgment, or even negligence can look like intentional conduct when viewed through the magnifying lens of hindsight.” Bourtin, *supra*, at 2. When courts fail to scrutinize the admission of misleading and prejudicial

loss evidence, that failure alone can lead to wrongful convictions.

Hindsight bias is more likely to bite in complex fraud cases, where lay jurors are presented with mountains of information and unfamiliar industries, terms, and concepts. The amount of evidence that jurors must consider appears to be increasing with electronic discovery. See Jenia I. Turner, *Managing Digital Discovery in Criminal Cases*, 109 J. Crim. L. & Criminology 237, 239 (2019) (noting that “voluminous digital discovery” is common in white-collar prosecutions). In *Bankman-Fried*, which had “among the largest ever collected in a white-collar securities fraud case prosecuted by the federal authorities in Manhattan,” more than six million pages of emails, Slack messages, and other digital records were collected as evidence. See David Yaffe-Bellany & Matthew Goldstein, *Emails, Chat Logs, Code and a Notebook: The Mountain of FTX Evidence*, N.Y. Times (May 23, 2023). Under these conditions, hindsight bias may become even more prevalent. First, “adding more information increases the size of the bias”: “the more antecedent facts that can be integrated into an explanation for the outcome, the more inevitable it will seem.” Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. Chi. L. Rev. 571, 585 (1998). Second, hindsight bias is negatively correlated with familiarity: bias is reduced “when the subject is familiar with the task, i.e., has expertise in or experience with the task.” Jay J.J. Christensen-Szalanski & Cynthia Fobian Willham, *The Hindsight Bias: A Meta-Analysis*, 48 Organizational Behav. & Hum. Decision Processes 147, 162 (1991). For lay

jurors, trial conditions—involving unfamiliar, complex information—may magnify the effect of the bias. Cf. Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts*, 10 *Applied Cognitive Psych.* 519, 521 (1996) (noting that jurors are susceptible to cognitive biases, such as anchoring bias, because they “consider a great deal of information in making [] judgments”).

Nor can jury instructions necessarily cure the problem. In the study of mock jurors exposed to hindsight knowledge in a negligence case, “judicial debiasing instructions failed to reduce the hindsight bias.” Kamin & Rachlinski, *supra*, at 99. That finding is consistent with other scholarship, which indicates that simple remedies fail to reduce the bias—indeed, because “the feeling that an outcome was both inevitable and predictable is impossible to avoid” and “resists efforts to avoid it.” Rachlinski, *supra*, at 588.

For decades, courts and legislatures have recognized and attempted to mitigate the power and risk of hindsight bias in fraud cases.⁴ In civil litigation, Judge Friendly coined the phrase “fraud by hindsight,” noting that “failure to make [clairvoyant]

⁴ Attuned to hindsight bias in other contexts, courts “suppress the introduction of evidence that might exacerbate the hindsight bias, such as subsequent remedial measures taken by a tort defendant.” Gulati, et al., *supra*, at 780; see also, e.g., *Flaminio v. Honda Motor Co.*, 733 F.2d 463, 471 (7th Cir. 1984) (precluding evidence of defendant’s remedial measure because “juries are believed to overreact to evidence of subsequent remedial measures.”). Indeed, across tort, patent, securities, corporate, and evidence law, “the legal system has developed adaptations to the bias’s influence.” Rachlinski, *supra*, at 602–24.

perceptions does not constitute fraud.” *Denny v. Barber*, 576 F.2d 465, 470 (2d Cir. 1978) (Friendly, J.). “Courts cite concerns with hindsight in nearly one-third of all published opinions in securities class action cases.” Gulati, et al., *supra*, at 775. The “fraud by hindsight” doctrine “arises from judges’ awareness that knowledge of the bad outcome biases judgments in favor of concluding that fraud had occurred, even if it had not.” *Id.* Pleading requirements for securities fraud class actions have been designed specifically “to deter suits premised solely on ‘fraud by hindsight.’” Bourtin, *supra*, at 2.

Against this overwhelming legal and scientific evidence, allowing jurors to consider loss amount—let alone catastrophic loss amount—in a fraudulent-inducement case is particularly anomalous after *Kousisis*, which makes clear that economic loss is not an element of wire fraud. Doing so risks allowing the magnitude of the outcome to substitute for proof of fraud—precisely the kind of hindsight-driven error that can lead to wrongful convictions under the wire fraud statute.

C. Jurors Are More Likely to Convict Defendants Because of Higher Perceived Injury, Regardless of Evidence of Guilt.

The danger posed by hindsight bias is not merely theoretical. Empirical research shows that the magnitude of the harm itself can influence jurors' judgments in both criminal and civil cases. In criminal cases, evidence of the amount of a victim's loss, by itself, can make jurors more likely to convict; in civil cases, evidence of the amount of injury or damage can make jurors more likely to find the defendant liable. That danger is particularly troubling where the Government's theory—fraudulent inducement—does not require proof of an intent to cause pecuniary loss at all. Allowing the jury to hear evidence of enormous losses, knowing that their magnitude can tip the scales toward conviction, invites precisely the kind of unfair prejudice that leads to wrongful convictions.

Studies of elder financial abuse demonstrate the point. Several have found that merely increasing the amount of money stolen produced higher rates of guilty or liability verdicts, even holding other evidence constant. *See, e.g.,* Sayword Kaiser, et al., *Perceptions of Elder Financial Abuse in the Courtroom*, 37 J. Elder Abuse & Neglect 83, 91, 95–96 (2025) (in an elder financial abuse study, finding that there “were significantly more plaintiff decisions/guilty verdicts when there was a high amount of money stolen [\$100,000] compared to when there was a low amount of money stolen [\$10,000]”); Jonathan M. Golding, et al., *When a Son Steals Money From His Mother:*

Courtroom Perceptions of Elder Financial Exploitation, 25 J. Elder Abuse & Neglect 126, 137 (2013). In one study, mock criminal-trial jurors read the same case summary, containing identical information and evidence, except that the victim health status and amount allegedly stolen—\$500 or \$5,000—varied. Golding, et al., *supra*, at 132. The amount stolen, independent of other evidence, “was a significant predictor of guilt rating”—that is, “a higher amount of money being stolen led to higher guilt ratings than a lower amount.” *Id.* at 137. Juries are thus moved toward convicting by evidence that has no bearing on guilt or innocence—a distortion of the factfinding process that can produce wrongful convictions.

A similar phenomenon—“fusion”—is well-studied in the civil context. In negligence cases, although “the severity of the plaintiff’s injury legally should not affect the decision maker’s assessment of the defendant’s negligence,” research demonstrates that injury severity affects liability findings. Diamond & Salerno, *supra*, at 425–26 (reviewing literature). As one literature review explains, “[p]resented with an injured plaintiff, jurors naturally search for a cause of that injury[,] and the defendant is a plausible candidate.” *Id.* at 426. In one simulated automobile negligence case, evidence that an injury was either “mild” or “severe” affected liability judgments. Edith Greene, et al., *The Effects of Injury Severity on Jury Negligence Decisions*, 23 Law & Hum. Behav. 675, 689–90 (1999). That finding suggested that “jurors may inappropriately attend to the outcome of the defendant’s actions (i.e., the severity of the plaintiff’s

injuries) in judging the defendant's liability—a situation that is explicitly proscribed by the laws of negligence.” *Id.* at 689. In another study, jurors found it more likely that the defendant caused the plaintiff's injury when shown a \$5 million compensatory-damage demand than when shown a \$20,000 demand. *See* Chapman & Bornstein, *supra*, at 523–26.

Conversely, research suggests that suppressing evidence of injury can “debias” jurors by removing impermissible considerations during liability determinations. One study asked some mock jurors to consider automobile negligence without hearing evidence of the plaintiff's injuries; compared to the group that heard evidence about both the defendant's conduct and the plaintiff's injuries, “withholding evidence related to injuries sustained by the plaintiff, as in the bifurcated condition, eliminated the impact of that evidence on negligence judgments.” Alison C. Smith & Edith Greene, *Conduct and its Consequences: Attempts at Debiasing Jury Judgments*, 29 *Law & Human Behav.* 505, 509–10, 512, 514 (2005). This intervention was “effective” because it “remove[d] from jurors' consideration the very information that has been found to bias their decisions in the first place.” *Id.* at 522–23.

Our law recognizes that some evidence—such as “Other Crimes, Wrongs, or Acts,” Fed. R. Evid. 404—is presumptively inadmissible (unless a particular showing of relevance is made) not because it is irrelevant, but because it may be *too* influential to jurors. As Justice Jackson explained, “such facts might logically be persuasive that [the defendant] is by propensity a probable perpetrator of the crime.”

Michelson v. United States, 335 U.S. 469, 475 (1948). Such evidence is thus “not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so overpersuade them as to prejudice one with a bad general record and deny him a fair opportunity to defend against a particular charge.” *Id.* at 475–76. “The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.”⁵ *Id.* at 476.

The empirical evidence underscores the need for guidance from this Court on how loss evidence should be treated in fraudulent-inducement cases. Like character evidence, loss evidence, if relevant at all, may be so psychologically powerful that it risks “weigh[ing] too much with the jury.” *Id.* at 475–76. And that risk is particularly serious where, as here, economic loss is not an element of the charged offense: the evidence has little legitimate probative value, yet its potential to influence the jury is enormous.

⁵ To be sure, that policy governing propensity evidence is now largely codified in Fed. R. Evid. 404. But *Michelson*—which predated Rule 404—illustrates this Court’s recognition that even probative evidence should be excluded in certain circumstances.

III. *Bankman-Fried* Will Result in More Innocent Defendants Taking Pleas.

The risk of wrongful convictions from *Bankman-Fried's* holding extends beyond trial. A system that admits evidence of (enormous) losses may pressure even innocent defendants to plead guilty rather than risk a jury verdict driven by sympathy for victims or anger towards defendants. A defendant facing a fraudulent-inducement prosecution will have to weigh the very real possibility that jurors will be moved by the magnitude of the victims' losses, even though those losses do not necessarily bear on whether the defendant committed fraud. When legally unnecessary evidence can substantially increase the risk of conviction, it can distort not only the jury's verdict but also the defendant's decision whether to exercise the constitutional right to trial.

Plea negotiations occur in the "shadow of trial" because of the influence "exerted by the strength of the evidence and the expected punishment after trial." Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 Harv. L. Rev. 2463, 2467 (2004) (noting limitations with this model). This influential model posits that a rational "defendant pleads guilty if the offered sentence is less than or equal to his or her expected value of the trial." Shawn D. Bushway, et al., *An Explicit Test Of Plea Bargaining In "The Shadow Of The Trial"*, 52 Criminology 723, 725 (2014). It predicts that defendants compare the likely plea sentence with "the likelihood of conviction at trial and the likely post-trial sentence." Bibas, *supra*, at 2465. And the well-known trial penalty further increases the

expected cost of going to trial: trial sentences—including for fraud offenses—are more than triple the average post-plea sentence. See NACDL, *The Trial Penalty: The Sixth Amendment Right to Trial on the Verge of Extinction and How To Save It* 15, 21 (July 10, 2018), <https://www.nacdl.org/Document/TrialPenaltySixthAmendmentRighttoTrialNearExtinct>.

Evidentiary rules cast a long shadow on plea bargaining. “Though formally applicable only at trial, [evidence rules] effectively govern plea negotiations, as they define the relative bargaining positions and perceived strengths of each side.” Talia Fisher, *Evidence Law in the Age of Plea Bargaining*, 112 U. Va. L. Rev. 1259, 1304 (2026) (describing but noting limitations of the traditional shadow-of-trial model). Because these rules determine what evidence the prosecution can wield at trial, they shape the parties’ expectations and negotiations, including their “sense of the likely outcome of trial.” *Id.*; see also Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L. J. 1969, 1971 (1992) (Both “parties [] consider all the evidence that will come in at trial.”). Evidence rules thus have a “constraining force” on prosecutorial plea-bargaining by limiting the evidence on which the prosecution can expect to rely at trial. Fisher, *supra*, at 1307 (traditional shadow-of-trial model).

The Second Circuit’s holding increases the prosecution’s leverage in plea negotiations in fraudulent-inducement cases by permitting the Government to threaten trial with evidence that is both highly compelling and legally unnecessary to prove fraud. Prosecutors “seek to induce guilty pleas

by . . . let[ting] defendants see what damning evidence will be adduced at trial.” Easterbrook, *supra*, at 1971; *see also* Office of the U.S. Attorneys, U.S. Dep’t of Justice, U.S. Attorneys’ Manual § 9-27.420 (instructing federal prosecutors to consider “[t]he likelihood of obtaining a conviction at trial” in plea bargaining). In turn, defense counsel is more likely to recommend a plea when they perceive a higher likelihood of conviction. *See* Kelsey S. Henderson, *Examining the Effect of Case and Trial Factors on Defense Attorneys’ Plea Decision-Making*, 27 Psych., Crime & Law 357, 358, 380 (2021). At a minimum, any careful defense attorney must counsel a client—even an innocent one—that jurors are likely to be moved at some level merely by hearing that complaining witnesses lost “billions” of dollars. If both parties know that the Government can introduce prejudicial (and potentially misleading) loss evidence at trial, the result is likely more guilty pleas. *See, e.g.*, Allison D. Redlich, et al., *The Psychology of Defendant Plea Decision Making*, 72 Am. Psychologist 339, 349 (2017) (recounting research that more charges and years in prison increased the likelihood of innocent defendants taking guilty pleas, and, where risk of trial conviction is high, “plea rates of (mock) guilty and innocent defendants do not differ significantly”).

Judges have recognized the problem that *Bankman-Fried* will compound—that innocent defendants will plead guilty to avoid longer sentences. With “judicial latitude,” prosecutors “threaten[] layers of additional charges and decades of additional prison time if defendants dared to exercise their right to trial by jury.” *Hunter v. United States*, 146 S. Ct. 1702,

1718 (2026) (Gorsuch, J., concurring). “[T]he prosecutor-dictated plea bargain system, by creating such inordinate pressures to enter into plea bargains, appears to have led a significant number of defendants to plead guilty to crimes they never actually committed.” J. Rakoff, *Why Innocent People Plead Guilty*, N.Y. Rev. Books (Nov. 20, 2014); *see also* J. Rakoff, *Why the Innocent Plead Guilty and the Guilty Go Free* 28, 23 (2021) (criticizing how prosecutors can “bludgeon defendants into effectively coerced plea[s]”); *Lafler v. Cooper*, 566 U.S. 156, 185 (2012) (Scalia, J., dissenting) (noting how plea bargaining “presents grave risks of prosecutorial overcharging that effectively compels an innocent defendant to avoid massive risk by pleading guilty to a lesser offense”). Scholars have “estimated that anywhere from 1.6% to 27% of defendants who plead guilty may be factually innocent.” NACDL, *supra*, at 17; *see also* Vera Inst., *In the Shadows: A Review of the Research on Plea Bargaining*, 44 (Sept. 2020), <https://www.vera.org/publications/in-the-shadows-plea-bargaining> (“[R]esearch does appear to confirm that, among the millions of cases that are settled through guilty pleas each year, a meaningful number of people are actually innocent of the crimes with which they were charged.”).

A rule of evidence that permits the Government to increase the perceived risk of conviction with evidence that is unnecessary to prove the charged offense does more than prejudice the trial. It alters the defendant’s choice whether to have a trial at all. For an innocent defendant, that can mean pleading guilty not because the evidence establishes fraud, but

because the cost of allowing a jury to hear it is too great to bear.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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