No. 23-909

In The
Supreme Court of the United States

STAMATIOS KOUSISIS and
ALPHA PAINTING & CONSTRUCTION CO., INC.,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Third Circuit

REPLY BRIEF

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INTRODUCTION

Less than two years ago, the government told the Court that deciding the validity of the fraudulent-inducement theory is "critically important to us for [the] kinds of fraud that we prosecute all the time"—frauds just like this one: a false promise to advance whatever social policy interests a contracting party deems important enough to incorporate into a contract for goods and services. Tr. of Oral Arg., *Ciminelli v. United States* (21-1170), at 39. It entreated the Court to bless the fraudulent-inducement theory because without it, the government cannot deploy the cudgel of a property-fraud prosecution against schemes to injure those or other intangible interests without harming traditionally recognized property interests, which are economic interests. The Court left the question open.

In a familiar pattern (Pet.3, 32-33), the government now backtracks to avoid losing ground in the circuits that consider fraudulently inducing a commercial exchange to be property fraud *per se*. To obscure the circuit split, it denigrates as mere "terminological distinctions" the outcome-determinative fissures lower courts continue to spotlight, the substance of which the government ignores. Nor does it address Petitioners' point that the only difference between the right-to-control theory and the fraudulent-inducement theory is the order of the clauses used to describe them—even though the Third Circuit and others built their fraudulent-inducement precedent on right-to-control cases, at the government's urging.

The government's tactic for discrediting this case as a vehicle is even more troubling: it claims Petitioners "overcharged" PennDOT as a result of the scheme—quoting the "premium" and "kickback" points the Third Circuit *excised from its opinion on rehearing*, after Petitioners pointed out that the "premium" theory contradicted the district court's findings and the prosecution's unwavering trial theory, and that the circuit was the first participant to suggest a "kickback" theory of the case. Because the *Kousisis* panel corrected the inaccuracies the government relies on, the government cites instead the description of *Kousisis* in the *Porat* concurrence, which was issued pre-rehearing and quotes the vacated opinion. BIO.(I), 11-12 (quoting *United States v. Porat*, 76 F.4th 213, 228 n.6 (3d Cir. 2023) (concurrence), Pet. for Cert. pending (No. 23-832)); Pet.20 & n.9 (explaining sequence).

In truth this case is an ideal vehicle for delivering much-needed clarity to lower courts, law enforcement, and—most importantly—people facing prosecution for offenses whose outer boundaries remain ambiguous.

ARGUMENT

I. The Validity Of The Fraudulent-Inducement Theory Is An Open Question On Which This Court's Guidance Is Essential.

The circuits are intractably divided at the heart of the first Question Presented: whether deception to induce a commercial transaction is property fraud absent proof that inflicting economic harm was the

defendant's objective. The government's effort to deny the circuit split is unavailing.

1. The government begins with the straw-person it deploys in virtually every fraud case: that because a scheme is criminal even if it fails, "economic harm" is irrelevant. BIO.7. It hardly bears stating that even when proving an inchoate offense, the government must prove its object—here, that a completed scheme would harm the victim's property interests. The diversion is particularly inapt on this record: the government acknowledged below that it charged a completed scheme, so this rule is not at issue. D.Ct.Dkt.57, at 76 (jointly proposed jury instructions).

2. Next, the government summarizes its proposed answer to Petitioners' first Question Presented: it believes the fraudulent-inducement theory is valid and obviates proof that the scheme contemplated harming the victim's property interests. In another familiar argument, it suggests the Court already resolved that issue in *Shaw v. United States*, 580 U.S. 63, 67 (2016), a bank fraud case that quotes Judge Learned Hand's dictum in *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932). BIO.8; Pet.3. But *Shaw* did not decide the issue. It rejected the defense that a scheme to steal funds from a customer's account was not "bank fraud" because it targeted the individual, holding that a bank also has a property interest in an account. *Id.* 65-67. It quotes *Rowe* only to observe that if the government proves a scheme to harm that property interest, it need not prove *in addition* that

the scheme contemplated "ultimate financial loss." *Id.* 67-68.

3. The lower courts, and the government when not opposing certiorari, acknowledge that the circuits are split on the substance of the fraudulent-inducement theory. The Second, Sixth, Ninth, Eleventh, and D.C. Circuits say that inducement is not enough; they require proof that the scheme contemplated harm to property interests. Pet.21-22. The Seventh Circuit "respectfully disagrees," holding that a scheme to influence how the victim uses its property suffices. *United States v. Kelerchian*, 937 F.3d 895, 913-14 (7th Cir. 2019) (disapproving *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992)). The Fourth, Fifth, Eighth, and Tenth Circuits—and now the Third—align with the Seventh. Pet.22-23.

The government incorrectly attributes "different outcomes in different cases" to "different facts." BIO.10. *Kelerchian* rejected the holding in *Bruchhausen* even though both addressed deceit that affected the legality of a sale. *Compare* 937 F.3d at 913 *with* 977 F.2d at 468. And as discussed below, even in the context of contracting preferences the fraudulent-inducement theory is outcome-determinative.

Because *Ciminelli* leaves the government without another ready means for prosecuting schemes that target intangible interests, the government is now pressing the point in lower courts nationwide. Pet.4-5. And because *Ciminelli* expressly leaves the fraudulent-inducement question open, some district

courts are bypassing circuit precedent to decide it. A recent addition is *United States v. An*, 2024 WL 2010017, *8 (E.D.N.Y. May 7, 2024), which emphasizes that "*Ciminelli* simply rejected the notion that *information itself can be property*." The court deems "persuasive" *United States v. Venkata*, 2024 WL 86287 (D.D.C. Jan. 3, 2024), accepts the government's view of *Shaw*, and holds that "depriving a victim of information in order to induce the victim to part with traditional property" is property fraud—all without acknowledging contrary Second Circuit precedent. *An*, 2024 WL 2010017 *7-*8.

The disarray will deepen until this Court steps in.

II. The "Benefit of the Bargain" Concept Only Underscores The Circuit Split And Its Threat To Neuter *Ciminelli*.

The government's Brief in Opposition includes an Argument section nearly identical to the one it submitted in *Porat*. That allows it to try to obscure the circuit split by conclusorily invoking the phrase "benefit of the bargain,"[1] which Porat proffered on appeal to distinguish fraudulent inducement from traditional property fraud. BIO.10; *Porat*, 76 F.4th at 220. It does not address Petitioners' points about the *substance* of the circuit split.

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[1] For concision Petitioners use "benefit of the bargain" to encompass its variants, except as to "value" where pertinent below.

1. To be sure, many circuits that reject the fraudulent-inducement theory use "benefit of the bargain" when distinguishing schemes that are not property fraud from schemes that are. Recently, for example, the Ninth Circuit incorporated the phrase into an opinion reaffirming its longstanding recognition that property fraud reaches schemes that will, if completed, deprive the victim of a traditionally recognized form of property—not schemes that harm other interests, "even if [the] misrepresentations result in money or property changing hands." *United States v. Milheiser*, 98 F.4th 935, 942-43 (9th Cir. 2024). The "benefit of the bargain," in those circuits, is the property interest the victim expects from the transaction. *Id.* When the victim of a completed scheme will get the benefit of its bargain—that is, suffer no harm to a property interest—the scheme is not property fraud.

Other courts use "benefit of the bargain" to *approve* the fraudulent-inducement theory, as the government points out. BIO.10. But that does not mean there is no circuit split, as the government contends, any more than multiple circuits' use of any given phrase means they define it the same way.

Indeed, the meaning of "benefit of the bargain" is so unsettled that two paths to the fraudulent-inducement theory define the phrase differently. The government embraces both. One path accepts that "benefit of the bargain" describes property interests, and thus deems it irrelevant: fraudulently inducing a transaction in property suffices, with or without intended harm to property interests. The government took that

approach in *Milheiser* and the Ninth Circuit rejected it. 98 F.4th at 945. The government took the same approach in *Porat* and the Third Circuit accepted it, blessing the fraudulent-inducement theory and discussing a "value" version of "benefit of the bargain" only in the alternative. *Porat*.Oral.Arg.Tr. (C.A.3.Dkt.72), at 34-35; 76 F.4th at 219-21.

The same U.S. Attorney's Office that prosecuted *Porat* took a different tack in *Kousisis*. Here it defined the phrase to encompass *non-economic* interests that influence a victim's decision about getting or using property. The Third Circuit endorsed that approach too, holding that the benefit of the bargain includes any promise a victim's contracting decision was "based on," and any "material term in a contract." Pet.App.26. And it held that depriving the victim of *any* benefit of its bargain—even one as intangible as a sovereign's interest in its affirmative-action program—is equivalent to depriving it of the affected property, even assuming the fraud made no difference in "pecuniary value." Pet.App.26-27.

That different definitions of "benefit of the bargain" lead some circuits to reject the fraudulent-inducement theory and others to endorse it—or, as the Third Circuit did, to endorse it based on inconsistent rationales—underscores the fracture in the case law. The fracture is outcome-determinative in every scheme that targets non-economic interests only, including schemes to evade minority (or other) participation requirements while doing the contracted work at the same price or better. Courts that reject a

property-centric definition of "benefit of the bargain" uphold property-fraud convictions for those schemes—as in *Kousisis*. Pet.28; Pet.App.21-22; *United States v. Leahy*, 464 F.3d 773, 793-94 (7th Cir. 2006); *United States v. Bunn*, 26 F. App'x 139, 142 (4th Cir. 2001). Courts that limit "benefit of the bargain" to property interests vacate them. *E.g.*, *United States v. Davis*, 2017 WL 3328240, *16-*17 (S.D.N.Y. Aug. 3, 2017)(applying Second Circuit doctrine).

The government inadvertently exposes these layers of ambiguity when it contends that the Third Circuit's quotation of *United States v. Wheeler*, 16 F.4th 805 (11th Cir. 2021), shows that *Kousisis* does not implicate the circuit split. BIO.10-11. The quotation actually highlights the inter- and intra-circuit confusion. *Wheeler* uses "nature of the bargain" to mean economic "value," as *Porat* does. 16 F.4th at 819-20; 76 F.4th at 219-21. Thus *Wheeler* held that among various lies the defendants told investors when pitching a stock, misrepresenting the defendants' identities and status would not support a property-fraud conviction—but falsely claiming, *e.g.*, support from industry heavy-hitters addressed "the value of the stock," and would. 16 F.4th at 819-20. When *Kousisis* equated a state's goal of supporting diverse businesses with investors' interest in *the economic value of stock*, it revealed its error: it thought that "any" misrepresentation that induces a transaction supports a property-fraud prosecution, no matter the interests it targets. Pet.17; Pet.App.22-23.

2. The Court already knows the government hopes to stretch “benefit of the bargain” to ensure it may prosecute as property fraud any misrepresentation that affects a decision about property. In *Ciminelli* the government argued that the right-to-control doctrine’s only real flaw was tying the “bargain” concept to the property element instead of materiality, where it yields the fraudulent-inducement theory. *Ciminelli*.Oral.Arg.Tr.33-37. Allowing materiality to obviate harm to property expands the mail- and wire-fraud statutes to protect any interest a victim considers important enough to influence—“material to”—his decision about property. That is a limitless list—which includes, the government urges, idiosyncratic “victim-specific considerations that are obviously of special importance to him.” *Ciminelli.*Gov’t.Br.18-19; *see Porat*.BIO.11 (“[T]he taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change.” (citation omitted)).

Recognizing that the Court may question whether Congress authorized federal criminal wire-fraud prosecutions of (and/or civil RICO suits against), say, car dealerships that sell red cars while insisting they are blue (*Ciminelli.*Gov’t.Br.38-39), the government contemporaneously proposed cabining its sweeping theory with the “demanding” materiality standard “essence of the bargain,” as defined in the False Claims Act case *Universal Health Services, Inc. v. United States*, 579

U.S. 176, 193-94 (2013). *Ciminelli*.Gov't.Br.18.[2] Ironically, that standard would require acquittal in *Kousisis*—and most procurement fraud cases in which a contractor falsely promised to advance the customer's non-economic goals in the course of performance.

The government insisted in *Universal Health* that there is no difference between, on the one hand, a health-services provider's false promise to supply personnel qualified to provide health services, and, on the other, its false promise to buy American-made supplies. *Id.* 195-96; *see* Pet.30-31. The Court disagreed. The ability to do the contracted work is "central" to a contract; advancing the government's laudable goal of supporting domestic manufacturing, while doing the contracted work, is not. 579 U.S. at 195-96.

The relevance to *Kousisis* is clear in the government's rebuttal summation to the trial jury: it equated Petitioners' promise to buy supplies from a legitimate DBE with its promise to buy American-made supplies under the Buy America Act, also written into PennDOT's contracts—calling both "non-financial obligations" unconnected to price or quality, but "something special" PennDOT wanted in addition. Pet.Supp.App.2-3;[3] C.A.3.App.3434-3435. The Third Circuit deems that criminal property fraud. Pet.30.

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[2] Never mind that the government has for years persuaded the circuits *not* to apply that demanding standard in criminal fraud cases. *E.g.*, *United States v. Melgen*, 967 F.3d 1250, 1259 (11th Cir. 2020).

[3] The excerpt is attached here for the Court's convenience.

3. With *Kousisis*, the Third Circuit joined others that relieve the government of its concession, in *Ciminelli*, that the fraudulent-inducement theory requires higher guardrails than a broad interpretation of "benefit of the bargain" supplies.

But the government's admission in *Ciminelli* that fraudulent inducement *is* the right-to-control with a linguistic shift shows why this Court's prompt examination of the government's new workhorse is essential. All circuits that endorse the fraudulent-inducement theory today came to it from right-to-control precedent. Pet.23-29 (discussing 3d Cir.); *Bunn*, 26 F. App'x at 142; *United States v. Fagan*, 821 F.2d 1002, 1010 & n.6 (5th Cir. 1987); *Kelerchian*, 937 F.3d at 912-13; *United States v. Granberry*, 908 F.2d 278, 280 (8th Cir. 1990); *United States v. Richter*, 796 F.3d 1173, 1192 (10th Cir. 2015). All now equate fraud affecting a victim's decision about transacting in property with a scheme to injure property rights. Until the Court addresses the validity of that theory, courts in those circuits and others will relegate *Ciminelli* to a footnote. Pet.App.20n.63.

Kousisis embodies the problem. The government invoked right-to-control precedent to defend the convictions post-trial and through appeal. D.Ct.Dkt.146 at 33; C.A.3.Reply(Dkt.94).2-3. When alerting the circuit post-argument to then-new *United States v. Percoco*, 13 F.4th 158 (2d Cir. 2021) (*rev'd sub nom. Ciminelli*), the government insisted that what *Percoco* and *United States v. Binday*, 804 F.3d 558 (2d Cir. 2015)(abrogated in *Ciminelli*), labeled a right-to-

control scheme is "precisely what happened" in *Kousisis*. C.A.3.Dkt.110, at 2. It called the "basis of its bargain" as used in *Kousisis* "a classic statement of the loss of control theory." *Id.* n.2; Pet.App.24-25.

In that the government was correct. But neither *Percoco* nor *Binday* is good law now—yet Mr. Kousisis served a lengthy prison term, Alpha was forced out of business facing a massive forfeiture, and their convictions survive. Many preceded theirs, and many will follow until the Court steps in.

III. This Case Is The Ideal Vehicle, Alone Or In Combination With *Porat*.

Content to continue notching fraudulent-inducement convictions for as long as it can, the government now claims the Court need not scrutinize an issue the government called "critically important" in November 2022. *Ciminelli.*Oral.Arg.Tr.39; *see* Porat.Cert.Reply.11-12. The Court should not be lulled. And it is unlikely to see another record that presents the issues as cleanly as this one. Pet.32-33.

Yet the government manufactures a vehicle challenge with inaccuracies the Third Circuit corrected on rehearing: the new-on-appeal theory that the scheme increased by $170,000 the $120,000,000 lump-sum bids. Reply.2, supra. That flatly contradicts the district court's factual findings, the government's trial and sentencing positions, the rest of its circuit brief, *and* its representations to the *Porat* panel. Pet.12-19; C.A.3.Reply(Dkt.94).31-34; C.A.3.Reh.Pet.(Dkt.126)5-8.

The remaining references to the pass-through fee go directly to the Questions Presented: whether property fraud protects intangible interests, and whether all "contract rights are property rights"—such that violating a contractual promise to use earnings as the counterparty wishes deprives it of "property." Pet.App.21; Pet.App.24 (jury instruction); C.A.3.Appx.3302; C.A.3.Reh.Pet.(Dkt.126).28-29. All agree that PennDOT paid only a lump-sum per-project fee, fixed by low-bid *before* the contractors proposed a DBE-compliance plan. Pet.10.

The fraudulent-inducement and contract-rights issues alone are compelling reasons to grant certiorari. Pet.29-31. But this case is a particularly attractive vehicle for additional reasons. With administrative-agency victims and regulatory underpinnings, it would allow the Court to address the interaction of 18 U.S.C. §371's "defraud" clause with the property-fraud statutes (Pet.6), the relevance of Congress's choice to leave enforcement to the states, and agencies' ability to criminalize new conduct via non-legislative processes (including 1000+-page contracts). The specter of agency policy choices that may not win legislative support, or may not survive judicial review, supporting federal property-fraud prosecutions is grave.

At the same time, any protection a state gets from the wire-fraud statute is limited to property rights it holds as any person could. Bringing clarity to the disarray would benefit a wide range of salutary commercial activity. Amici.Br.14-21.

After decades in the shadow of the right-to-control theory, fraudulent inducement theory is already rendering *Ciminelli* a footnote. Pet.App.20n.63. The Court's prompt review is essential.

CONCLUSION

The Court should grant the petition. In the alternative, Petitioners respectfully request that, at a minimum, the Court hold the petition pending the resolution of the *Porat* petition.

Respectfully submitted,

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APPENDIX

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Trial Transcript, United States District Court for the Eastern District of Pennsylvania, *United States v. Kousisis, et al.*, No. 18-CR-130 (Aug. 24, 2018) (excerpt) ....Supp.App. 1

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	)	18-CR-130
	)	
vs.	)	
	)	
STAMATIOS KOUSISIS, ET AL.	)	Philadelphia, PA
	)	August 24, 2018
Defendant	)	1:42 p.m.

TRIAL – AFTERNOON SESSION
BEFORE THE
HONORABLE WENDY BEETLESTONE
UNITED STATES DISTRICT JUDGE

REBUTTAL ARGUMENT BY MR. SHAPIRO

[20] But, you know, there are non-financial obligations in that contract too. We just talked about them, one of them the DBE requirement. Ms. Cinquanto brought up the Buy American. Remember she said something about they're buying American? Well, there's a classic case of a non-financial obligation. Imagine that you have a Buy American obligation that requires you to buy American steel, and you go out and you get steel from, say, China. It's just as good. It's equally as good as the American steel, and you use it in the bridge.

Now, PennDOT has paid exactly what it always expected to pay. It got certified steel, as it was expecting to get. The bridge will probably last as long as it ever would. But [21] that's not all that PennDOT wanted.

PennDOT wanted something special. It wanted not just any steel. It wanted the American steel for reasons that had nothing to do with dollars and cents, for reasons that had to do with its own program, its own desires. And, look, it's its bridge. It has the right to ask for what it wants, and when someone says I'm giving you what you want, they have a right to take them at their word.

And PennDOT didn't only want American steel. They wanted DBEs working on their job. And they got a promise from these guys that DBEs would be working on their job, and it was a promise that was broke.