No. 24A396

In the Supreme Court of the United States

ERIC DEAN SHEPPARD, APPLICANT

v.

UNITED STATES OF AMERICA

RESPONSE IN OPPOSITION TO THE APPLICATION FOR BAIL PENDING APPEAL

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RESPONSE IN OPPOSITION TO THE APPLICATION FOR BAIL PENDING APPEAL

The Solicitor General respectfully files this response in opposition to the application for release on bail pending further appellate proceedings. Following a jury trial, applicant was convicted on four counts of wire fraud, in violation of 18 U.S.C. 1343, stemming from his scheme to obtain a series of government-backed pandemic-era loans by lying about his businesses' eligibility for the loans—in particular, by claiming that he needed the loans to cover employee payroll expenses when in fact his businesses had no qualifying employees whatsoever. All told, applicant fraudulently obtained nearly $900,000 in pandemic-relief loans and used more than $700,000 of those funds to pay off credit-card expenses, including personal expenses like a mortgage, a Mercedes, a BMW, and private-school tuition for his children. He also falsely claimed to have spent hundreds of thousands of dollars on employee payroll expenses—even though his businesses had no qualifying employees—and, as a result, successfully obtained more than $148,000 in loan forgiveness, paid for out of the public fisc.

Applicant now seeks release on bail or bond pending appellate proceedings,

arguing (Appl. 1) that his conduct did not violate the federal fraud statutes on the theory that the victims "neither suffered nor stood to suffer any harm to any traditional property interest," since the government promised to back eligible loans and the banks were ultimately reimbursed for the funds that applicant obtained under false pretenses. The lower courts declined to grant that extraordinary relief, and this Court should follow suit.

As applicant recognizes, he is entitled to release on bail only if, among other things, his challenge to his fraud convictions "raises a substantial question of law or fact likely to result in" a reversal of his convictions or a new trial. 18 U.S.C. 3143(b)(1)(B). Applicant contends (Appl. 1-2, 10-16) that his challenge necessarily raises such a question because this Court has granted certiorari in *Kousisis* v. *United States*, No. 23-909 (oral argument scheduled for Dec. 9, 2024), to address whether the federal fraud statutes apply to a scheme to fraudulently induce a transaction if the scheme does not (or is not intended to) impose a net economic or pecuniary loss on the victim. But as a general rule, a convicted and sentenced defendant "shall * * * be detained" pending appeal, 18 U.S.C. 3143(b)(1)—and not every defendant who argues that his conduct is not fraud is entitled to bail or bond pending the Court's disposition of *Kousisis*.

Applicant, in particular, is not so entitled because his scheme was designed to inflict harm to a traditional property interest and impose a net economic or pecuniary loss on the victims, and thus would satisfy even the *Kousisis* defendants' unduly narrow reading of the federal fraud statutes. The district court expressly instructed the jury that it could not find applicant guilty without finding that he had "the intent to cause loss or injury." D. Ct. Doc. 187, at 6 (Jan. 16, 2024). The guilty verdict thus necessarily reflects a finding that applicant had such an intent when he carried out

his fraudulent scheme, and the evidence amply supports that finding. As the court observed, "the object of [applicant's] scheme was economic harm on the banks or the SBA: to deprive banks (temporarily) or the SBA (if there was a default on the loans) of money." D. Ct. Doc. 288, at 8 (Aug. 19, 2024). By falsely obtaining loans to which his businesses were not entitled, applicant deprived the banks of funds that they would otherwise have retained or put to other uses—like making loans to businesses that were actually eligible. As this Court previously recognized in *Shaw* v. *United States*, 580 U.S. 63 (2016), that is a harm to a traditional property interest under the federal fraud statutes. See Pet. Br. at 35, *Kousisis*, *supra* (No. 23-909) (acknowledging that "[t]he bank in *Shaw* sustained injury to its 'property rights in the targeted bank account,' including its 'right to use the funds'") (brackets and citation omitted). In addition, applicant's fraudulent scheme was designed to inflict actual monetary harm on the government, which backed the loans. Indeed, applicant went on to inflict such harm, obtaining forgiveness for more than $148,000 in loans at taxpayer expense.

For those and other reasons set forth below, applicant cannot show that his challenge to his wire-fraud convictions presents a substantial question that is "likely to result" in a reversal of those convictions or a new trial, regardless of the outcome in *Kousisis*. 18 U.S.C. 3143(b)(1)(B). Accordingly, this Court should deny his motion for release on bail or bond pending appellate proceedings.

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Florida, applicant was convicted on four counts of wire fraud, in violation of 18 U.S.C. 1343. Amended Judgment 1. He was sentenced to 18 months of imprisonment, to be followed by three years of supervised release. *Id.* at 2-3. The district

court and the court of appeals denied applicant's motions for release pending appeal. D. Ct. Doc. 251, at 41-43 (June 3, 2024); D. Ct. Doc. 288, at 4-9; C.A. Doc. 24-2, at 1-2 (Aug. 23, 2024); C.A. Doc. 33-2, at 1-2 (Oct. 9, 2024).

1. In 2020, Congress created the Paycheck Protection Program (PPP) to help small businesses meet payroll and other expenses during the COVID-19 pandemic. CARES Act, Pub. L. No. 116-136, § 1102(a)(2), 134 Stat. 286; see 85 Fed. Reg. 20,811, 20,811 (Apr. 15, 2020). The Small Business Administration (SBA) administered the PPP through its existing "Section 7(a)" loan program, see 15 U.S.C. 636(a), under which it generally works with partner banks to guarantee loans to eligible borrowers. See *In re Gateway Radiology Consultants, P.A.*, 983 F.3d 1239, 1247-1249 (11th Cir. 2020).

The PPP modified certain preexisting Section 7(a) requirements, including to specify that if an eligible business used PPP funds to cover certain expenses—most notably, employee payroll—the SBA would forgive that portion of the loan and reimburse the lending institution for it. See CARES Act § 1106, 134 Stat. 297; *Gateway Radiology*, 983 F.3d at 1247. In addition, the SBA would hold lending banks harmless if borrowers failed to comply with program requirements. 85 Fed. Reg. at 20,812. As a result, whether through loan forgiveness or otherwise, the SBA was potentially on the hook for all of the money disbursed through the PPP—initially $349 billion, and ultimately reaching more than $800 billion. See *ibid.*; 86 Fed. Reg. 3692, 3707 (Jan. 14, 2021).

As a general matter, the amount an eligible business could obtain under the PPP was pegged to its average monthly payroll costs. 85 Fed. Reg. at 20,812-20,813. Authorized payroll costs, however, included only payments to U.S.-based employees—not to independent contractors, who could "apply for a PPP loan on their own." *Id.* at

20,813. The SBA warned that anyone who "knowingly use[d] the funds for unauthorized purposes" would "be subject to additional liability such as charges for fraud." *Id.* at 20,814.

2. Applicant runs several commercial real-estate companies, including Alafaya Trails and HM Management. Presentence Investigation Report (PSR) ¶¶ 11-13. Both were ineligible for PPP loans for multiple reasons, including that neither had any employees at all. See PSR ¶ 15. Nevertheless, applicant fraudulently sought and obtained hundreds of thousands of dollars in PPP loans for those companies by lying about their eligibility. For example, in April 2020, applicant obtained a $146,457 PPP loan for Alafaya Trails by falsely stating that it had 80 employees and an average monthly employee payroll of more than $58,000. PSR ¶¶ 17-18. Applicant later obtained forgiveness for that loan by falsely claiming that Alafaya Trails had spent the money on qualifying employee payroll expenses, causing SBA to reimburse the bank more than $148,000 in principal and interest. PSR ¶ 20.

In March 2021, applicant obtained a second PPP loan for Alafaya Trails for $148,397 by falsely asserting that the company had experienced a 25% revenue decline (a requirement for a second PPP loan), and obtained a $148,591 PPP loan for HM Management by falsely claiming that it had the same employee payroll expenses as Alafaya Trails, plus $92,000 in employee benefits expenses. PSR ¶¶ 41-50. Each of the loan applications included tax forms containing many false statements—including the forged signatures of applicant's accountant (falsely indicating that the accountant had prepared the returns). PSR ¶¶ 37-38, 42-49.

Those are just a few of the many fraudulent statements applicant made and the many pandemic-relief loans that applicant fraudulently sought (not always successfully) in 2020 and 2021. See PSR ¶¶ 15-55 (describing applicant's scheme). Tes-

timony at trial established that by keeping each fraudulent loan application under $150,000, applicant avoided triggering higher scrutiny of his applications. Trial Day 5 Rough Tr. 90-91.

All told, applicant received more than $893,000 in pandemic-relief loans, and "used those funds to pay $735,571 in credit card charges, which included his own personal expenses, as well as his wife's and his son's expenses." PSR ¶ 56; see, *e.g.*, Gov't Ex. 41-5, at 1-2; Gov't Ex. 41-10, at 1-4; Trial Day 12 Rough Tr. 15-78. Applicant began repaying the March 2021 loans only after he was indicted. See D. Ct. Doc. 291-2, at 1 (Aug. 21, 2024) (first payment on Alafaya Trails loan in November 2022); D. Ct. Doc. 291-3, at 2 (Aug. 21, 2024) (first payment on HM Management loan in October 2022).

3. Applicant was indicted on nine counts of wire fraud, in violation of 18 U.S.C. 1343, and five counts of aggravated identity theft, in violation of 18 U.S.C. 1028A. See D. Ct. Doc. 288, at 1-2. The jury found applicant guilty on four counts of wire fraud and two counts of aggravated identity theft, all related to the March 2021 loan applications and forged tax forms, and not guilty on the remaining counts. See *id.* at 2-3. The district court granted applicant's postverdict motion for a judgment of acquittal on the aggravated-identity-theft counts, concluding that under *Dubin* v. *United States*, 599 U.S. 110 (2023), applicant's use of the accountant's identity on the forged tax forms was not at the "crux" of the fraud offenses. See D. Ct. Doc. 251, at 6-25.

The district court denied applicant's motion for a judgment of acquittal on the wire-fraud counts. D. Ct. Doc. 251, at 25-35. The wire-fraud statute, like the similarly worded mail- and bank-fraud statutes, criminalizes traditional forms of property fraud that implicate federal jurisdiction. See *Kelly* v. *United States*, 590 U.S.

391, 398 (2020). Applicant argued that his scheme did not target a traditional property interest on the theory that the lending banks "had no financial exposure," since the loans were guaranteed by the SBA, and that any harm to the SBA was to a "purely 'regulatory'" interest. D. Ct. Doc. 251, at 26 (citation omitted). The court rejected that argument. Focusing on victimization of the banks, the court explained that the statute prohibits schemes to defraud even if no actual harm results, see *id.* at 27-30, and that obtaining loans from the banks falls within the text of the statute, which "covers 'obtaining money or property,'" *id.* at 30 (quoting 18 U.S.C. 1343). And the court further explained that applicant's belated repayment of the loans did not negate his intent to harm the banks when he executed his scheme. *Ibid.*

The district court also rejected applicant's reliance on the Eleventh Circuit's decision in *United States* v. *Takhalov*, 827 F.3d 1307 (2016), which held that "schemes that do no more than cause their victims to enter into transactions that they would otherwise avoid * * * do not violate the mail or wire fraud statutes" unless they "depend for their completion on a misrepresentation of an essential element of the bargain." *Id.* at 1314. The court explained that applicant's lies about his businesses' eligibility for PPP loans concerned an essential element of the bargain, observing that "banks are not willing to provide loans to anyone and everyone, or for every purpose." D. Ct. Doc. 251, at 31 (quoting *United States* v. *Watkins*, 42 F.4th 1278, 1286-1287 (11th Cir. 2022), cert. denied, 143 S. Ct. 1754 (2023)) (brackets omitted). Because the court found that applicant's scheme targeted the lending banks' property interests, it did not reach the question whether the convictions could also be upheld because the scheme also targeted the SBA's property interests. *Ibid.*

The district court sentenced applicant to 18 months of imprisonment on the wire-fraud counts, to be followed by three years of supervised release. Amended

Judgment 2-3. Applicant appealed his convictions and the government cross-appealed the judgment of acquittal on the two aggravated-identity-theft counts.

4. The district court denied applicant's requests under 18 U.S.C. 3143(b) for release on bail or bond pending appellate proceedings. D. Ct. Doc. 251, at 41-43; D. Ct. Doc. 288, at 4-9. The court observed that 18 U.S.C. 3143(b) requires, among other things, that a defendant seeking such relief raise a "substantial question of law or fact" that "is likely to result in reversal." D. Ct. Doc. 251, at 41 (citation omitted). The court further observed that applicant's challenge to his wire-fraud convictions was "foreclosed by Eleventh Circuit precedent" (namely, *Takhalov* and *Watkins*, see p. 7, *supra*) and thus did not present a substantial question. *Id.* at 43. And the court explained that this Court's grant of certiorari in *Kousisis* v. *United States*, No. 23-909 (oral argument scheduled for Dec. 9, 2024), did not make the issue a substantial question of law. D. Ct. Doc. 288, at 4-9.

The district court observed that the only question in *Kousisis* potentially relevant to this case is "[w]hether deception to induce a commercial exchange can constitute mail or wire fraud, even if inflicting economic harm on the alleged victim was not the object of the scheme." D. Ct. Doc. 288, at 7 (quoting Pet. at i, *Kousisis*, *supra* (No. 23-909)). The court stated that "[i]n *Kousisis*, there is a colorable argument that inflicting economic harm was not the object of [the] defendants' scheme," in which a government contractor misrepresented the role of a subcontractor to induce the government to award the contract. *Id.* at 8. But the court observed that here, in contrast, "the object of [applicant's] scheme was economic harm on the banks or the SBA: to deprive banks (temporarily) or the SBA (if there was a default on the loans) of money." *Ibid.* The court thus recognized that the outcome in *Kousisis* "would have no impact on this loan fraud case." *Ibid.*

5. The court of appeals denied applicant's motion for release on bail or bond pending appeal in a single-judge order, C.A. Doc. 24-2, at 1-2, and denied applicant's subsequent motion to review that order, C.A. Doc. 33-2, at 1-2. Applicant began serving his sentence on August 23, 2024.

ARGUMENT

Applicant cannot satisfy the demanding showing for release pending further appellate proceedings. "The statutory standard for determining whether a convicted defendant is entitled to be released pending a certiorari petition is clearly set out in 18 U.S.C. § 3143(b)." *Morison* v. *United States*, 486 U.S. 1306, 1306 (1988) (Rehnquist, C.J., in chambers). Courts have applied the same standard to requests for release pending appeal. See, *e.g.*, *United States* v. *Bilanzich*, 771 F.2d 292, 298 (7th Cir. 1985). Accordingly, applicant accepts (Appl. 8-9) that his application for release pending appellate proceedings should be evaluated using the standard prescribed in Section 3143(b).

Section 3143(b), enacted in the Bail Reform Act of 1984, Pub. L. No. 98-473, Tit. II, Ch. I, 98 Stat. 1976, imposes stringent restrictions on the availability of release on bail or bond pending appellate review. See Stephen M. Shapiro et al., *Supreme Court Practice* §§ 17.15-17.17, at 17-47 to 17-54 (11th ed. 2019); see also, *e.g.*, *Bilanzich*, 771 F.2d at 298. As an initial matter, a convicted defendant who has been sentenced to imprisonment must be detained pending appeal and certiorari unless he establishes by clear and convincing evidence that he is not likely to flee or to pose a danger if released and further demonstrates that his appeal is not for the purpose of delay. 18 U.S.C. 3143(b)(1). Those prerequisites are not at issue here.

In addition, a convicted defendant is ineligible for release unless he shows "a substantial question of law or fact likely to result in" a reversal of his convictions or

a new trial. 18 U.S.C. 3143(b)(1)(B). Because the relief sought is release pending appeal, he must make a showing applicable to "all the counts for which imprisonment was imposed." *Morison*, 486 U.S. at 1306 (Rehnquist, C.J., in chambers). And when a defendant seeks relief from this Court, demonstrating a "likel[ihood]" of reversal or a new trial, 18 U.S.C. 3143(b)(1)(B), necessarily requires showing a likelihood both that this Court would grant certiorari and that it would reverse any judgment of the court of appeals affirming applicant's convictions. See pp. 14-16, *infra*; *Julian* v. *United States*, 463 U.S. 1308, 1309 (1983) (Rehnquist, J., in chambers) ("At a minimum, a bail applicant must demonstrate a reasonable probability that four Justices are likely to vote to grant certiorari."); cf. *Labrador* v. *Poe*, 144 S. Ct. 921, 931 (2024) (Kavanaugh, J., concurring in the grant of stay); *Does 1-3* v. *Mills*, 142 S. Ct. 17, 18 (2021) (Barrett, J., concurring in the denial of application for injunctive relief).

As Justices of this Court explained even before enactment of the Bail Reform Act, "[a]pplications for bail to this Court are granted only in extraordinary circumstances, especially where, as here, 'the lower court refused to stay its order pending appeal.'" *Julian*, 463 U.S. at 1309 (Rehnquist, J., in chambers) (quoting *Graves* v. *Barnes*, 405 U.S. 1201, 1203 (1972) (Powell, J., in chambers)); accord *McGee* v. *Alaska*, 463 U.S. 1339 (1983) (Rehnquist, J., in chambers). Applicant falls well short of meeting the "extraordinary" standard for obtaining release pending appellate proceedings, *Julian*, 463 U.S. at 1309 (Rehnquist, J., in chambers), because he cannot establish that the Court would be likely to grant a writ of certiorari and either reverse any judgment affirming his convictions or order a new trial based on the challenge he raises to his wire-fraud convictions.[1]

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[1] Section 3143(b) requires the applicant to identify "a substantial question of law or fact." 18 U.S.C. 3143(b)(1)(B). Most lower courts have stated that "a substantial question is 'a "close" question or one that very well could be decided the other

A. Applicant Has Not Raised A Question Likely To Result In Reversal Of Or A New Trial On His Wire-Fraud Convictions

Applicant's conduct satisfies all of the elements of wire fraud, and he is therefore unlikely to succeed on his challenge to his convictions. The federal wire-fraud statute generally requires proof of a scheme to defraud by means of material misrepresentations made with an intent to defraud. See *Neder* v. *United States*, 527 U.S. 1, 20, 22-23, 25 (1999). Applicant's scheme satisfies each of those elements.

Applicant concocted and executed an elaborate scheme to obtain multiple PPP and other pandemic-relief loans that he knew his businesses were ineligible to receive. See PSR ¶¶ 15-55. He submitted multiple loan applications, even resubmitting them when initially unsuccessful, and secured the loans only by making multiple knowingly false statements, such as by claiming that his businesses had dozens of employees and incurred tens of thousands of dollars in monthly payroll expenses for those fictitious employees, and by forging the name of his accountant on tax forms accompanying the loan applications to lend them a veneer of credibility. See *ibid.* Those lies were obviously material; indeed, a bank official testified that the bank "[d]efinitely" "wouldn't have funded the loan" had it known that the "tax return was falsified as to the business code and the wages, and the gross rents and that the tax preparer name was forged on that document." Trial Day 5 Rough Tr. 108. And applicant plainly intended to defraud the banks and the SBA, as evidenced not just by his repeated lies but also by his strategically keeping each application under $150,000 to avoid closer scrutiny. See *id.* at 90-91. Viewed in the light most favorable to the

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way.'" *United States* v. *Perholtz*, 836 F.2d 554, 555 (D.C. Cir. 1987) (citation omitted); see *id.* at 555 n.1 (collecting cases). This Court need not resolve what is required to establish substantiality because the identified question also must be "likely to result" in reversal or a new trial, 18 U.S.C. 3143(b)(1)(B), which itself is a demanding standard that applicant has not satisfied. See pp. 14-16, *infra*.

verdict, that evidence is more than sufficient to satisfy each element of the statute.

Applicant nonetheless contends that he has raised a substantial question of law likely to result in reversal because this Court has granted review in *Kousisis* v. *United States*, No. 23-909 (oral argument scheduled for Dec. 9, 2024), to address whether the federal property-fraud statutes encompass a fraudulent scheme to induce a transaction if the scheme does not (or was not intended to) result in a net pecuniary loss to the victim. See Pet. at i, *Kousisis*, *supra* (No. 23-909) (asking "[w]hether deception to induce a commercial exchange can constitute mail or wire fraud, even if inflicting economic harm on the alleged victim was not the object of the scheme"); see also Pet. Br. at 14-49, *Kousisis*, *supra* (No. 23-909); U.S. Br. at 12-48, *Kousisis*, *supra* (No. 23-909). Applicant errs in asserting (Appl. 14) that "the outcome here would be different under the petitioners' rule in *Kousisis*." A decision in favor of the defendants in *Kousisis* would not likely affect the outcome here because applicant's scheme *did* intend to inflict economic harm. See D. Ct. Doc. 288, at 8-9.

As the district court observed, applicant intended "to deprive banks (temporarily) or the SBA (if there was a default on the loans) of money." D. Ct. Doc. 288, at 8. The whole point of his scheme was to "obtain[] money," 18 U.S.C. 1343, from the banks to which he knew he was not entitled. By using deceit to obtain PPP loans from banks that would not have extended those loans absent the falsehoods, applicant deprived the banks of their property (money), which they otherwise would have retained and used in other ways (presumably, to make PPP loans to eligible businesses).

That is a harm to a traditional property interest, even if the banks ultimately did not suffer a net pecuniary loss. Applicant cannot excuse the harm, or portray his conduct as innocent, simply because he ultimately repaid the loans after he was indicted. As this Court recognized in the analogous context of bank fraud in *Shaw* v.

United States, 580 U.S. 63 (2016), for purposes of the federal property-fraud statutes, the Court has "held it 'sufficient' that the victim (here, the bank) be 'deprived of its right' to use of the property, even if it ultimately did not suffer unreimbursed loss." *Id.* at 67-68 (citation omitted); see *ibid.* (citing mail-fraud precedent); *Pasquantino* v. *United States*, 544 U.S. 349, 355 n.2 (2005) ("[W]e have construed identical language in the wire and mail fraud statutes *in pari materia*."). That principle applies with equal force here.

In addition, independent of the harm to the banks, applicant's scheme was aimed at inflicting an economic loss on the SBA, which was on the hook for PPP loans as a guarantor or in the event of loan forgiveness. Applicant successfully obtained forgiveness on one of his fraudulently obtained PPP loans—thus requiring the SBA to pay more than $148,000—by falsely claiming to have spent the funds on legitimate employee payroll expenses when in fact the company had no qualifying employees at all. PSR ¶ 20.[2] And applicant did not make any payments on the March 2021 PPP loans until after he was indicted. See D. Ct. Doc. 291-2, at 1; D. Ct. Doc. 291-3, at 2.

Accordingly, and contrary to applicant's contention (Appl. 6), the evidence in this case shows that applicant's scheme was intended to inflict a net pecuniary loss on the government—and that he likely would have fraudulently sought forgiveness for his other PPP loans (with a concomitant pecuniary loss to the public fisc) had he not been caught. And the district court here expressly instructed the jury that "[t]o act with 'intent to defraud' means to do something with the specific intent to deceive or cheat someone," and that "[p]roving intent to deceive alone, without the intent to

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[2] At trial, applicant claimed that he did not know the difference between employees and independent contractors, but that claim was belied by his own testimony in a February 2019 deposition, when he acknowledged knowing the difference between the two, including for purposes of payroll taxes. PSR ¶ 58. And the jury necessarily rejected applicant's claim in finding that he had the intent to defraud.

cause loss or injury, is not sufficient to prove intent to defraud." D. Ct. Doc. 187, at 6. The jury's guilty verdict thus necessarily reflects a finding that applicant had "the intent to cause loss or injury." *Ibid.*

Indeed, the Eleventh Circuit rejected applicant's request for bail even though the defendants in *Kousisis* have consistently invoked the Eleventh Circuit's decision in *United States* v. *Takhalov*, 827 F.3d 1307 (2016), as supporting their position on the question presented in that case. See Pet. at 22, *Kousisis*, *supra* (No. 23-909) (identifying *Takhalov* as having "reject[ed] the fraudulent inducement theory" that the *Kousisis* defendants oppose); see also Pet. Br. at 11, *Kousisis*, *supra* (No. 23-909). Applicant asserts (Appl. 13) that "[i]f petitioners' position in *Kousisis* is already the law in the Eleventh Circuit, then [applicant] was entitled to bail under Section 3143(b) even before this Court granted certiorari." But that question-begging assertion misses the point: applicant is not entitled to bail because, among other things, he is guilty of wire fraud *even under* the Eleventh Circuit's defendant-favorable reading of the wire-fraud statute—as the district court expressly observed, see D. Ct. Doc. 288, at 9, and as the Eleventh Circuit effectively confirmed when it denied his motions for release pending appeal.

B. Applicant's Attempt To Lower The Standard For Release Pending Appeal Should Be Rejected

1. Applicant incorrectly contends that the "only disputed question" is whether his appeal "presents a 'substantial' question" under the Bail Reform Act. Appl. 1 (citation omitted). That contention ignores the separate statutory requirement that the question also be "likely to result" in reversal. 18 U.S.C. 3143(b)(1)(B). Applicant attempts to sidestep that independent requirement by arguing that it merely requires the defendant to show "that the substantial question, *if resolved in*

the defendant's favor, is 'likely to result in' a reversal." Appl. 9 (emphasis added). But the extraordinary relief of release pending appeal does not incorporate an assumption that a defendant's arguments will prevail. Instead, the plain meaning of "likely to result" in reversal (or the other favorable outcomes listed in 18 U.S.C. 3143(b)(1)(B)) is that the defendant must show a likelihood of success on the merits of the question he raises.

Federal courts routinely evaluate a litigant's future likelihood of success on the merits when addressing requests for stays or preliminary equitable relief. See *Nken* v. *Holder*, 556 U.S. 418, 434 (2009); *Munaf* v. *Geren*, 553 U.S. 674, 690 (2008). Applicant provides no sound basis to treat a request for release pending appeal as requiring a lesser showing, much less to read the unexceptional language of the Bail Reform Act ("likely to result in") as sharply deviating from the longstanding principle that extraordinary relief—a category that includes requests for release pending appeal, see *Julian*, 463 U.S. at 1309 (Rehnquist, J., in chambers)—requires showing a likelihood of success on the merits. Such an approach would be inconsistent with the default rule that a convicted and sentenced defendant "shall * * * be detained," 18 U.S.C. 3143(b); with the general standard for grants of extraordinary relief by this Court, see, *e.g.*, *Nken*, 556 U.S. at 434; and with previous approaches to requests for this Court to grant the "extraordinary" relief of bail pending appeal, *Julian*, 463 U.S. at 1309 (Rehnquist, J., in chambers); see, *e.g.*, *Morison*, 486 U.S. at 1306 (Rehnquist, C.J., in chambers). Instead, applicant's failure to establish an actual likelihood of relief in his case, see pp. 11-14, *supra,* precludes the extraordinary relief that he seeks, irrespective of whether the question he raises is "substantial," see p. 10 n.1, *supra*.

The untenability of applicant's contrary position is easily shown by imagining

that the adjective "substantial" were deleted from the statute. The plain meaning of a hypothetical statute requiring a defendant to raise a "question likely to result in reversal or a new trial" obviously would be that the defendant must show a likelihood of success on the merits. Otherwise, the statute would require the defendant merely to show that he *raised* arguments that—if accepted—would likely result in reversal or a new trial. That is no standard at all; any defendant could easily satisfy it simply by arguing that all adverse precedent (including on harmless error) should be overruled.

The default rule that a convicted and sentenced defendant "shall * * * be detained," 18 U.S.C. 3143(b), cannot so easily be circumvented. If "likely to result in reversal" means a likelihood of success on the merits in the hypothetical statute, it must mean the same thing in Section 3143(b). Indeed, the actual statute, which requires a "substantial" question, is even more stringent than the hypothetical one. Section 3143(b) cannot be read, as applicant would read it, to allow relief based simply on having raised a particular "substantial" argument, irrespective of whether it is likely to ultimately result in relief in a defendant's case.

2. As explained above, applicant has failed to show a likelihood of ultimate success in this case, even if *Kousisis* were decided in the way that he prefers. Applicant notes (Appl. 15) that "this Court is currently holding petitions for certiorari in other cases raising the question presented in *Kousisis* on quite different facts." But a "hold" simply delays consideration of a petition for a writ of certiorari, akin to holding an appeal in abeyance in the lower courts. And even if all of the held petitions are granted, the judgments vacated, and the cases remanded for further consideration in light of the eventual decision in *Kousisis*, that would not itself mean that all—or even any—of the defendants in those cases are likely to succeed on the merits,

which is the relevant question here. Instead, evaluating a likelihood of success would require analyzing the "quite different facts" in each case.

Thus, to establish his entitlement to the extraordinary remedy of release pending appeal, as opposed to merely a delay in the disposition of some potential future certiorari petition, applicant cannot merely piggyback on the defendants' legal position in *Kousisis*. Such relief requires more than just the identification of a legal argument that this Court could possibly adopt. Instead, applicant must show a "substantial question of law or fact likely to result" in "reversal" or a "new trial" in his *own* case. 18 U.S.C. 3143(b)(1)(B). He has failed to do so. See pp. 11-14, *supra*.

C. The Duration Of Applicant's Sentence Does Not Militate In Favor Of The Extraordinary Relief That He Seeks

Applicant notes (Appl. 17) that because his sentence is relatively short, he might serve all of it before appellate proceedings have concluded. But under the Bail Reform Act, the duration of a defendant's sentence relative to the duration of appellate proceedings is a relevant factor only when the defendant raises a sentencing claim that, among other things, is likely to result in "a reduced sentence to a term of imprisonment less than the total of the time already served plus the expected duration of the appeal process." 18 U.S.C. 3143(b)(1)(B)(iv).

That makes sense. A pure sentencing claim could potentially become moot if the defendant serves out the longer sentence before appellate proceedings have concluded, and Congress might have wanted to avoid that prospect where the defendant's claim was likely to succeed on the merits (and the other statutory factors were satisfied). See *Lane* v. *Williams*, 455 U.S. 624, 631 (1982) ("Since respondents elected only to attack their sentences, and since those sentences expired during the course of these proceedings, this case is moot."). In contrast, claims seeking to vacate or reverse a

conviction generally would remain live even after the defendant serves his sentence. See *Spencer* v. *Kemna*, 523 U.S. 1, 9 (1998) (explaining that courts "have been willing to presume that a wrongful criminal conviction has continuing collateral consequences"). As a result, even a relatively short sentence would provide no sound basis to deviate from the default rule that a convicted and sentenced defendant "shall * * * be detained," 18 U.S.C. 3143(b)(1).

Applicant has not raised a pure sentencing claim in this Court; instead, he has raised only a claim that, if it succeeded, could result in "reversal" or a "new trial." Although he raised a sentencing claim related to the intended-loss calculation in his motion for bail pending appeal in the court of appeals, he has not renewed that claim in his application to this Court. His reliance on the length of his sentence as a reason for granting him release on bail or bond is therefore contrary to the statute, which instead presumes that a defendant in his position will begin his prison term unless he can establish the statutory requirements for such extraordinary relief. See 18 U.S.C. 3143(b)(1).

D. Relief Is Unwarranted In Any Event Because Any Error Was Harmless

Even if applicant had demonstrated a sufficient likelihood that this Court in *Kousisis* would adopt a reading of the federal property-fraud statutes that is narrower than the Eleventh Circuit's, he still would not be entitled to release pending appeal because any error the district court might have committed in his case would be harmless, making "reversal" or a "new trial" unlikely. 18 U.S.C. 3143(b)(1)(B). Applicant's argument focuses on the asserted absence of property harm to the banks, on the theory that his ultimate repayment wipes away his prior misconduct. But even if that were so, he still could not show an entitlement to relief because his scheme plainly

involved economic harm to the SBA.

The jury necessarily found that applicant acted with "intent to cause loss or injury." D. Ct. Doc. 187, at 6. And the evidence in this case demonstrates that applicant's fraudulent scheme was designed to inflict economic harm on the SBA by depriving it of a classic property interest: money. Applicant obtained forgiveness on one of his fraudulently obtained PPP loans by falsely claiming that he used the funds on employee payroll when in fact the company had no employees at all. PSR ¶ 20. Those actions enriched applicant—at the expense of the American taxpayers—by more than $148,000.

Applicant does not meaningfully contest the contours, or implication, of his scheme to obtain taxpayer money. Nor is it likely that the jury viewed this case solely to concern the temporary deprivation of bank property: the jury had before it evidence that applicant's scheme resulted in his obtaining more than $893,000 in pandemic-relief loans, some $735,000 of which he used to pay off credit-card expenses, including personal expenses like a mortgage, a Mercedes, a BMW, and private-school tuition for his children. PSR ¶ 56. Even under the *Kousisis* defendants' unduly narrow reading of the fraud statutes, that is a classic case of "fraud in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other." *Skilling* v. *United States*, 561 U.S. 358, 400 (2010).

CONCLUSION

The application should be denied.

Respectfully submitted.

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NOVEMBER 2024