# CRIMINAL LAW – FRAUD: NEW THEORY APPLIES TO FEDERAL FRAUD PROSECUTIONS

*Kousisis v. United States*, 605 U.S. 114 (2025).


## ABSTRACT

In *Kousisis v. United States*, the United States Supreme Court expanded the applicability of the federal wire fraud statute by embracing the fraudulent-inducement theory in finding no net economic loss requirement exists. The fraudulent-inducement theory does not require a defendant to cause actual economic loss to their victims in order to secure a fraud conviction. Leading up to *Kousisis*, petitioners Kousisis and his company, Alpha Painting and Construction, received two government contracts from the Pennsylvania Department of Transportation (PennDOT) that required the use of a disadvantaged business. When entering bids, Kousisis and his company represented they would use a prequalified disadvantaged business, but instead only used this business as a pass-through entity. Once their scheme was discovered, Kousisis and his company were indicted and found guilty of three counts of wire fraud, one count of conspiracy to commit the same, and ten counts of causing false statements to a government agency by a federal jury. These convictions stood even though PennDOT received the full economic benefit of its bargain. Instead, as upheld by the United States Supreme Court, the convictions of Kousisis and his company were premised on the fraudulent-inducement theory.

The Supreme Court found the fraudulent-inducement theory was consistent with the federal wire fraud statute and under this theory, all that is required to convict under the statute is an inducement—not actual economic loss. This decision resolved a circuit split and broadened what constitutes wire fraud. The broadening of this crime will thin the line between everyday misstatements and criminal fraud, and it will be up to local practitioners to defend and define this line, especially in ensuring that prosecuted misrepresentations meet the demanding materiality requirement of fraud.

## I. FACTS

Defendant Stamatios Kousisis helped manage an industrial painting company called Alpha Painting and Construction ("Alpha").[1] Kousisis and Alpha "secured two government contracts for painting projects in Philadelphia" with PennDOT.[2] These contracts involved the restoration of two

1. Kousisis v. United States, 605 U.S. 114, 117 (2025).
2. *Id.*

Philadelphia landmarks, the Girard Point Bridge and the 30th Street Station.[3] After submitting bids, Alpha was awarded a $70.3 million joint venture contract for the Girard Point Bridge and a $15 million joint venture subcontract for work on the 30th Street Station.[4]

Because both projects were largely funded by the U.S. Department of Transportation, federal regulations applied, "requir[ing] states that receive federal transportation funds to set participation goals for disadvantaged business enterprises ('DBEs') in transportation construction projects."[5] According to 49 C.F.R. § 26.5, a DBE is "a for-profit small business . . . [t]hat is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged."[6] Additionally, the operations of the business must be "controlled by one or more of the socially and economically disadvantaged individuals who own it."[7] States have the discretion to certify businesses as DBEs and this certification must be in place before a contractor can participate in the bidding process for a contract.[8]

Furthermore, once a contract is awarded based on DBE participation, "that DBE must perform a 'commercially useful function.'"[9] A commercially useful function is performed when a DBE "is responsible for execution of the work of the contract and is carrying out its responsibilities by performing, managing, and supervising the work involved."[10] A business that amounts to "'an extra participant in a transaction, contract, or project through which funds are passed to obtain the appearance of DBE participation' does not perform a commercially useful function."[11]

Both projects' contracts "provided that failure to comply with DBE regulations would be a material breach."[12] Implying its work would comply with DBE requirements, Alpha's bids asserted that "it would obtain its materials from a qualifying supplier."[13] To do so, it represented that it would subcontract the business Markias, Inc. ("Markias"), a prequalified disadvantaged business in the state of Pennsylvania, to "obtain $4.7 million in paint supplies . . . for the Girard Point Project and $1.7 million for the 30th Street Project."[14]

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3. *Id.* at 118.
4. *Id.*
5. *See id.*; United States v. Kousisis, 82 F.4th 230, 233 (3d Cir. 2023) (footnote omitted).
6. 49 C.F.R. § 26.5 (2025).
7. *Id.*
8. *Kousisis*, 82 F.4th at 234 (quoting United States v. Nagle, 803 F.3d 167, 171 (3d Cir. 2015)).
9. *Id.* (quoting 49 C.F.R. § 26.55(c)).
10. *Id.* (quoting 49 C.F.R. § 26.55(c)(1)).
11. *Id.* (quoting 49 C.F.R. § 26.55(c)(2)).
12. *Id.*
13. Kousisis v. United States, 605 U.S. 114, 117 (2025) (citing 49 C.F.R. §§ 26.21(a), 26.5).
14. *Kousisis*, 82 F.4th at 234.

In drafting and submitting these bids, Kousisis indicated Markias would supply materials for the projects, satisfying the percentages required by the contracts (six percent for Girard Point and seven percent for 30th Street) and the requirement that a DBE performs a commercially useful function.[15]

In reality, however, Markias did not act as a supplier for the projects as represented.[16] Rather, Markias operated as a "pass-through" entity for Kousisis to receive a larger profit.[17] Despite presenting that it would obtain materials from Markias, Alpha would instead do business with other paint suppliers, who then forwarded the invoices to Markias.[18] Upon receipt, Markias would add a "few-percent fee" to the invoices before sending them to Kousisis.[19] Kousisis then issued "two checks: one paid Markias for its mark up, and the other covered the actual cost of the supplies."[20] Markias then forwarded the checks for the cost of supplies to the actual suppliers of the paint.[21] This scheme allowed Kousisis to obtain a "gross profit of over $20 million" and Markias to gain about $170,000.[22]

Only after the projects were completed did "the deception come to light."[23] Kousisis and Alpha were then charged by the U.S. Attorney's Office in Philadelphia, Pennsylvania, and later indicted by a grand jury in the United States District Court for the Eastern District of Pennsylvania ("District Court").[24] The sixteen counts with which the defendants were charged included "ten counts of causing a false statement to a government agency" under 18 U.S.C. § 1001, "five counts of wire fraud" under 18 U.S.C. § 1343, and "one count of conspiring to commit wire fraud" under 18 U.S.C. § 1349.[25]

Following trial, a jury convicted Kousisis and Alpha of ten counts of causing false statements to a government agency, "three counts of wire fraud and one count of conspiracy to commit the same."[26] The defendants then "moved for a judgment of acquittal," in the District Court based on PennDOT

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15. *See Kousisis*, 605 U.S. at 120.
16. *See id.*
17. *See id.*
18. *See id.*
19. *Id.*
20. *Id.*
21. United States v. Kousisis, 82 F.4th 230, 235 (3d Cir. 2023).
22. *See Kousisis*, 605 U.S. at 120.
23. *See id.*
24. *See id.* at 118, 120. *See generally* United States v. Kousisis, No. 18-cr-00130, 2019 WL 4126484, at *1 (E.D. Pa. June 17, 2019), *aff'd in part, rev'd in part*, 82 F.4th 230 (3d Cir. 2023), *aff'd*, 605 U.S. 114 (2025).
25. Brief for the United States, Kousisis v. United States, 605 U.S. 114 (2025) (No. 23-909), 2024 WL 4405280, at *6-7.
26. *See id.* at *7; *see also Kousisis*, 605 U.S. at 120.

receiving "the full economic benefit of its bargain."[27] The District Court denied the motion and the Third Circuit Court of Appeals later affirmed the convictions.[28]

The lower courts both found that the primary objective of Kousisis's fraudulent scheme was to obtain PennDOT's money and the economic benefit was not incidental to their ploy.[29] By holding that proof of economic loss is not required under the federal wire fraud statute, the Third Circuit became the latest to issue a decision in the circuit split regarding the existence of an economic loss element.[30] Affirming this decision, the Supreme Court in this case *held* the wire fraud statute, 18 U.S.C. § 1343, does not require economic loss.[31] In doing so, the Court resolved the circuit split and broadened the charging power of federal wire fraud by making the Government's fraudulent-inducement theory applicable to the statute.[32]

## II. LEGAL BACKGROUND

The mail and wire fraud statutes have developed in tandem, with courts interpreting them together over time.[33] Their evolution has given rise to a circuit split over whether the federal fraud statutes require proof of economic loss.[34] The Second, Sixth, Ninth, Eleventh, and D.C. Circuits have continuously held economic loss is required.[35] In contrast, the Third, Seventh, Eighth, and Tenth Circuits have held that economic loss is not required.[36]

### A. FEDERAL FRAUD PRINCIPLES AND 18 U.S.C. § 1343

The federal wire fraud statute was enacted in 1952 under the Communications Act Amendments and codified as 18 U.S.C. § 1343 following reports

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27. *Kousisis*, 605 U.S. at 120.

28. *Id.*

29. *See id.*

30. *See generally id.* at 120-21 ("The circuits are divided over the validity of a federal fraud conviction when the defendant did not seek to cause the victim net pecuniary loss.").

31. *See id.* at 114, 121-23.

32. *See generally id.* at 121, 123.

33. Brief for the United States, *supra* note 25, at *13 (stating the statutes are interpreted "*in pari materia*" due to the similar language).

34. *See Kousisis*, 605 U.S. at 120-121.

35. *See generally id.* at 121 (first citing United States v. Shellef, 507 F.3d 82, 108-09 (2d Cir. 2007); then citing United States v. Sadler, 750 F.3d 585, 590-92 (6th Cir. 2014); then citing United States v. Bruchhausen, 977 F.2d 464, 467-68 (9th Cir. 1992); then citing United States v. Takhalov, 827 F.3d 1307, 1312-14 (11th Cir. 2016); and then citing United States v. Guertin, 67 F.4th 445, 450-52 (D.C. Cir. 2023)).

36. *See generally id.* (first citing United States v. Kousisis, 82 F.4th 230, 240-44 (3d Cir. 2023); then citing United States v. Leahy, 464 F.3d 773, 787-89 (7th Cir. 2006); then citing United States v. Granberry, 908 F.2d 278, 280 (8th Cir. 1990); and then citing United States v. Richter, 796 F.3d 1173, 1192 (10th Cir. 2015)).

of false advertising by way of radio.[37] The statute was drafted to largely mimic the previously enacted mail fraud statute, 18 U.S.C. § 1341, except for its jurisdictional hook in regard to what media is used to commit the fraud.[38] The wire fraud statute defines wire fraud as "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," using "wire, radio, or television communication in interstate or foreign commerce."[39] While the mail fraud statute targets frauds using mail services, by similarly using the language "scheme or artifice to defraud, or for obtaining money or property."[40] The Supreme Court has interpreted this shared language in the statutes together and under the "'common understanding' of the words 'to defraud.'"[41] In *Neder v. United States*, the Court interpreted "to defraud" to include the common law element of materiality, even though this element is not explicitly mentioned in the statutes.[42] Furthermore, in *Hammerschmidt v. United States*, the Court found the words "to defraud" refer to "wronging one in his property rights by dishonest methods or schemes."[43]

However, the mail fraud statute did not always contain the now shared money or property language.[44] The federal mail fraud statute, as enacted in 1872, originally only contained the phrase "[a]ny scheme or artifice to defraud" which the Court interpreted, in *Durland v. United States* in 1896, broadly to include "everything designed to defraud by representations as to the past or present, or suggestions and promises as to the future."[45] This interpretation stemmed from the defendant in *Durland* arguing the mail fraud statute only encompassed "false pretenses" requiring "a misrepresentation as to some existing fact and not a mere promise to the future."[46] Thus, the Court's interpretation expanded the mail fraud statute away from solely

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37. *See* Grant Delaune, Comment, *Deciphering the "Traditional Property Interests" Test for Property-Based Mail and Wire Fraud*, 91 U. CHI. L. REV. 1155, 1165 (2024); Communications Act Amendments, 1952, Pub. L. No. 82-554, 66 Stat. 711 (codified as amended at 18 U.S.C. § 1343).

38. *See* Delaune, *supra* note 37, at 1165.

39. 18 U.S.C. § 1343.

40. 18 U.S.C. § 1341 (stating "[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises" using the post office or Postal service will be guilty of federal mail fraud).

41. *See* Ciminelli v. United States, 598 U.S. 306, 312 (2023).

42. *See* 527 U.S. 1, 24 (1999).

43. 265 U.S. 182, 188 (1924).

44. Delaune, *supra* note 37, at 1162-63.

45. 161 U.S. 306, 313 (1896); *see also* Delaune, *supra* note 37, at 1163 (noting the mail fraud statute "[a]s originally enacted . . . did not include the modern money or property clause").

46. *Durland*, 161 U.S. at 312.

criminalizing "misrepresentation[s] as to some existing fact" to include future promises.[47]

Congress codified the Court's holding in *Durland* by amending the mail fraud statute in 1909 to include the language "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[48] This codification not only expanded mail fraud to include future promises, but highlighted the statute's intent to protect property rights.[49] Congress did so by replacing the *Durland* Court's "everything designed to defraud" with "[any scheme or artifice] for obtaining money or property."[50]

Before the Court interjected in *McNally v. United States*, the "lower courts once interpreted the phrase 'money or property' as something of a catchall" and included several intangible rights theories in their holdings including "the right to 'honest services.'"[51] However, in *McNally*, the Court interpreted the added language as "simply ma[king] it unmistakable that the statute reached false promises and misrepresentations as to the future as well as other frauds involving money or property," and not as a way to "construe the statute in a manner that leaves its outer boundaries ambiguous."[52] This understanding limited the applicability of the statute to property rights and rejected the inclusion of intangible rights such as the right of honest-services.[53]

After the Court explicitly excluded intangible rights from the realm of federal fraud schemes, Congress passed 18 U.S.C. § 1346 which provides that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."[54] Enacting this statute created concern amongst the circuit courts regarding its "potential breadth," but the circuits "declined to throw out the statute as irremediably vague."[55] After assessing relevant caselaw leading up to the enactment of § 1346 (or "the pre-*McNally* cases"), the Court limited the statute's applicability to "fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third

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47. *Id.* at 313-14.

48. McNally v. United States, 483 U.S. 350, 357 (1987).

49. *See id.* at 357-58.

50. *Id.* at 358 (alteration in original).

51. *See generally* Kousisis v. United States, 605 U.S. 114, 121 (2025); Delaune, *supra* note 37, at 1166 (presenting the honest services theory as targeting "schemes where an offender fraudulently profited from their position of trust but the betrayed party suffered no direct loss of money of property").

52. *McNally*, 483 U.S. at 359-60.

53. *See id.* at 360.

54. *See* 18 U.S.C. § 1346.

55. *See* Skilling v. United States, 561 U.S. 358, 403, 464 n.36 (2010) (noting the circuit courts were split as to whether a prosecution of § 1346 "must be based on a violation of state law").

party who had not been deceived."[56] Fearing any broader interpretation would indeed create a vagueness issue, the Court established a very narrow exception to the traditional property right requirement.[57]

Thus, the Court again conveyed that, for the most part, the money or property element of federal mail and wire fraud only encompassed "traditional property interests."[58] However, these property rights need not be tangible themselves.[59] Regardless, this element is still not a catchall and does not include schemes concerning "the exercise of the Government's regulatory power" or "intangible interests unconnected to property."[60] The Court has further asserted that the money or property targeted must be the main objective of a defendant's scheme and not an "incidental byproduct."[61] Also, in 2023 in *Ciminelli v. United States*, the Court rejected a proposed right-to-control theory which would allow federal fraud charges based on schemes concerning "potentially valuable economic information" as this is not a traditional property interest.[62] Alternatively, the Government in *Ciminelli* argued the fraudulent-inducement theory, but the Court declined to comment as the theory had not been presented to the jury.[63] Again, these decisions reaffirm the Court's reluctance to expand "the federal fraud statutes beyond property fraud as defined at common law."[64]

### B. FRAUDULENT-INDUCEMENT THEORY AND ECONOMIC LOSS REQUIREMENT CIRCUIT SPLIT

After the Court's silence regarding the fraudulent-inducement theory, but explicit rejection of the right-to-control theory, a conviction under the fraudulent-inducement theory was ripe for review.[65] Under the fraudulent-inducement theory, fraud occurs when "a defendant (1) 'devise[s]' a 'scheme' (2) to induce the victim into a contract to 'obtain[n]' her 'money or

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56. *Id.* at 404.

57. *See id.* at 408-09.

58. Kousisis v. United States, 605 U.S. 114, 121-22 (2025) (quoting Ciminelli v. United States, 598 U.S. 306, 316 (2023)).

59. Carpenter v. United States, 484 U.S. 19, 25 (1987) ("*McNally* did not limit the scope of § 1341 to tangible as distinguished from intangible property rights.").

60. *Kousisis*, 605 U.S. at 122 (quoting *Ciminelli*, 598 U.S. at 315) (first citing Kelly v. United States, 590 U.S. 391, 400 (2020); and then citing Cleveland v. United States, 531 U.S. 12, 23-24 (2000)); *see also Cleveland*, 531 U.S. at 23 (explaining that state licenses "do[] not create a property interest").

61. *Kousisis*, 605 U.S. at 122 (citing *Kelly*, 590 U.S. at 402, 404 (holding "the mere cost of implementing" a scheme to defraud a regulatory action did not meet the elements of criminal property fraud)).

62. 598 U.S. at 309 (quoting United States v. Percoco, 13 F.4th 158, 170 (2d Cir. 2021)).

63. *See id.* at 316-17; *see also Kousisis*, 605 U.S. at 134 (citing *Ciminelli*, 598 U.S. at 317).

64. *See Ciminelli*, 598 U.S. at 315.

65. *See Kousisis*, 605 U.S. at 118.

property' (3) 'by means of false or fraudulent pretenses.'"[66] Neither the wire fraud statute nor the theory make any mention of a victim's economic loss as an element.[67] However, despite this omission, several circuit courts prior to *Kousisis* were averse to upholding a federal fraud conviction where "the defendant did not seek to cause the victim net pecuniary loss."[68]

For example, the Second Circuit had reasoned that in order to satisfy the "scheme to defraud" prong of federal fraud, an indictment must allege that "the defendant contemplated actual harm."[69] In the same case, the Second Circuit further clarified that no charge could exist where a victim "'received exactly what they paid for' and 'there was no discrepancy between benefits reasonably anticipated and actual benefits received.'"[70] Schemes simply inducing someone to enter a transaction "they would otherwise avoid" do not violate the fraud statutes.[71] In other words, the circuit court required a higher standard than pure fraudulent-inducement; lies or misrepresentations that caused a victim to enter a transaction, but resulted in the benefit of their bargain being obtained, did not result in federal wire fraud.[72]

Consistent with this analysis, the Eleventh Circuit emphasized in *United States v. Takhalov* that federal fraud statutes were meant to criminalize "schemes to defraud," not schemes to deceive or induce someone to "enter into [a] transaction that he" would otherwise avoid.[73] Thus, under the understanding of both the Second and Eleventh Circuits, only "schemes to defraud" cause injury—"deceiving does not."[74] Similarly, the Sixth Circuit explained that "[t]o be guilty of fraud, an offender's 'purpose must be to injure.'"[75]

Conversely, other circuits have consistently upheld convictions not involving actual economic loss.[76] For example, in *United States v. Leahy*, the Seventh Circuit concluded that the fraud "statutes do not require the government to prove either contemplated harm to the victim or any loss," only that

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66. *Id.* at 123 (alterations in original).

67. *See id.* at 115.

68. *See id.* at 120-21.

69. United States v. Shellef, 507 F.3d 82, 107 (2d Cir. 2007).

70. *Id.* at 108 (citing United States v. Starr, 816 F.2d 94, 98-99 (2d Cir. 1987)).

71. *Id.*

72. *See id. See generally* United States v. Guertin, 67 F.4th 445, 451-52 (D.C. Cir. 2023) (holding that a fraud indictment failed where it did not allege the loss of the benefit of a bargain).

73. *See* 827 F.3d 1307, 1310 (11th Cir. 2016) (alteration in original).

74. *Id.* at 1310, 1312-13 (explaining "that a defendant schemes to defraud only if he schemes to deprive someone of something" by way of deceit (citation modified)).

75. United States v. Sadler, 750 F.3d 585, 590 (6th Cir. 2014) (quoting Horman v. United States, 116 F. 350, 352 (6th Cir. 1902)) (overturning a wire fraud conviction where a defendant used a fake name to obtain pills but paid full price for them).

76. Kousisis v. United States, 605 U.S. 114, 121 (2025).

money or property were the object of a scheme.[77] Likewise, in *United States v. Granberry*, the Eighth Circuit held that receiving the services bargained for could still result in harm where the ability to perform the services was fraudulently obtained.[78] Furthermore, the Tenth Circuit observed that other circuits held "payments made in exchange for services provided under a contract induced by false representations, even where the services are performed, constitute a deprivation of money or property sufficient to invoke the federal fraud statutes" in accordance with the statutes' broad scope.[79] In harmony with these other circuits, the Third Circuit echoed that alleging "economic *net* loss" is not necessary.[80]

## III. ANALYSIS

Justice Amy Coney Barrett authored the 9-0 opinion of the *Kousisis* Court, holding that the federal wire fraud statute does not require economic loss, thus affirming that "conviction[s] premised on [the] fraudulent inducement" theory align with the statute.[81] This was not the first time the Court suggested that the federal wire fraud statute did not require economic loss, but it was the first time that it did so explicitly while also endorsing the fraudulent-inducement theory.[82]

### A. THE PETITIONERS' ARGUMENT

Before the Court, petitioners Kousisis and Alpha argued that a conviction of wire fraud premised under the Government's "fraudulent-inducement theory" would directly conflict with the statute and longstanding precedent.[83] To petitioners, criminal wire fraud has historically not referred to "us[ing] falsehoods to induce a victim to enter into a transaction" when no traditional harm occurs to a property interest.[84] Under this perception, the fraudulent-

77. 464 F.3d 773, 786-87 (7th Cir. 2006) (deciding a similar case to *Kousisis* where defendants misrepresented their status to obtain a government contract).

78. 908 F.2d 278, 280 (8th Cir. 1990) (holding fraud existed where the defendant lied about his first-degree murder conviction to obtain employment as a bus driver, despite his completion of services).

79. United States v. Richter, 796 F.3d 1173, 1192, 1194 (10th Cir. 2015) (first citing United States v. Leahy, 464 F.3d 773 (7th Cir. 2006); then citing United States v. Bunn, 26 F. App'x 139 (4th Cir. 2001); then citing *Grandberry*, 908 F.2d 278; and then citing United States v. Paccione, 949 F.2d 1183 (2d Cir. 1991)) (holding the federal "fraud statutes are sufficiently broad . . . to cover those schemes designed to obtain payment for services by means of materially false and misleading pretenses").

80. United States v. Kousisis, 82 F.4th 230, 241 (3d Cir. 2023).

81. *Kousisis*, 605 U.S. at 124.

82. *See id.* at 122-23.

83. *See* Brief for Petitioner, Kousisis v. United States, 605 U.S. 114 (2025) (No. 23-909), 2024 WL 3903655, at *11-12.

84. *Id.* at *2 (alteration in original).

inducement theory would "procure convictions for frustrating regulatory interests whenever they are memorialized in a contract."[85] By this understanding, the theory conflicts with the statute because it allows for convictions concerning areas outside traditional property interests.[86] Applying this logic, Kousisis and Alpha argued its conviction was premised on PennDOT's loss of having DBE participation, a regulatory interest, rather than harm to a traditional property interest.[87] Thus, placing the convictions of Kousisis and Alpha outside the scope of the statute.[88]

Petitioners also argued that longstanding Supreme Court precedent made the fraudulent-inducement theory easy to reject.[89] For example, the Court rejected the Government's previously presented "right-to-control" theory in *Ciminelli v. United States* because it targeted economic information, which was not a traditional property interest and would provide "an almost limitless variety of deceptive actions traditionally left to state contract and tort law."[90] Thus, Kousisis and Alpha argued, accepting the fraudulent-inducement theory, which petitioners suggest is broader than the right-to-control theory, would produce a similar result.[91]

### B. THE GOVERNMENT'S ARGUMENT

The Government argued that petitioners advocated for adding an economic loss element to wire fraud that was not supported by statutory or legal precedent.[92] Rather, it argued that the statute only requires the use of "wires to obtain money or property . . . , through knowing material falsehoods . . . , with the intent to defraud . . . ," which petitioners' scheme satisfied.[93] To further support this argument, the Government highlighted that, as a matter of public policy, no individual or company should be able to escape "conviction simply by substituting a different thing that the victim d[id] not want, so long as that second thing ha[d] the same (or higher) objective market value."[94]

In developing its argument, the Government emphasized that the primary objective of Kousisis's scheme was to obtain PennDOT's money.[95] To achieve this objective Kousisis, through his company, used material

85. *Id.* at *12.
86. *See id.*
87. *Id.* at *25.
88. *Id.*
89. *Id.* at *29.
90. *Id.* at *30 (quoting Ciminelli v. United States, 598 U.S. 306, 315-16 (2023)).
91. *Id.* at *31.
92. Brief for the United States, *supra* note 25, at *9.
93. *Id.* at *12.
94. *Id.* at *29.
95. *Id.* at *14.

falsehoods, as evidenced by repeatedly misrepresenting the involvement of a disadvantaged business in its work concerning the PennDOT contracts.[96] Additionally, the Government stated that Kousisis "obtained the money or property 'by means of' the misrepresentations," because they would not have been permitted to bid on the contracts without DBE representation.[97] These misrepresentations were material because Kousisis knowingly lied about an element PennDOT highlighted as material in the contracts.[98] Furthermore, the intent element was satisfied by communications between Markias and Kousisis regarding mark ups and using Markias as a "pass through."[99]

The Government alternatively asserted that even if an economic loss element existed, it was met in this case because PennDOT paid for services of a disadvantaged business that it did not receive.[100] If Kousisis and Alpha had been truthful in their bidding, PennDOT would not have put forth as much money as it did because it was willing to pay more for the participation of a disadvantaged business.[101] Thus, by the Government's understanding, PennDOT lost money due to the scheme.[102]

### C. THE COURT'S DECISION AND RATIONALE

The Supreme Court ultimately held that the fraudulent-inducement theory was compatible with the federal wire fraud statute, favoring the Government's analysis.[103] Thus, it rejected petitioners' proposed economic-loss element, affirmed the conviction under the statute, and showed its support for the fraudulent-inducement theory.[104]

#### 1. *Compatibility of Federal Wire Fraud Statute and the Fraudulent-Inducement Theory*

The Court first addressed the wire fraud statute's compatibility with the fraudulent-inducement theory. The fraudulent-inducement theory says a defendant commits wire fraud where "he uses a material misstatement to trick

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96. *Id.* at *15-16.

97. *Id.* at *18-19 (quoting 18 U.S.C. § 1343).

98. *Id.* at *17-18 ("[T]he signed documents themselves have 17 warranties, occupying less than two pages, and only one of those warranties – the DBE requirement – expressly provided that '[f]ailure by the Contractor to carry out these requirements is a material breach of this contract, which may result in termination of this contract.'" (second alteration in original)).

99. *Id.* at *19.

100. *Id.* at *47-48.

101. *Id.*

102. *Id.* at *48; *contra* Reply Brief for Petitioner, Kousisis v. United States, 605 U.S. 114 (2025) (No. 23-909), 2024 WL 4712801, at *4 (asserting that the Government waived this argument in the alternative by not presenting it at trial).

103. *See* Kousisis v. United States, 605 U.S. 114, 118, 122-23 (2025).

104. *Id.* at 118.

a victim into a contract that requires handing over her money or property—regardless of whether the fraudster . . . seeks to cause the victim *net* pecuniary loss."[105] The Court reasoned that the broad language of the federal wire fraud statute could not be interpreted to exclude the fraudulent-inducement theory because the theory "plainly satisfie[d] each . . . statutory element[]."[106] The Court concluded that the statute only calls for something to be obtained, not "to leave the victim economically worse off."[107] It explains 'obtain' as meaning "to gain or attain possession" by a fraudulent scheme, and "[a] thing is no less 'obtained' simply because something *else* is simultaneously given in return."[108] Thus, the Court ultimately held that the statute does not require economic loss.[109]

### 2. *Economic Loss is not Essential to the Common Law Understanding of Fraud*

The Court next recognized petitioners' argument "that economic loss is part and parcel of the common-law understanding of fraud" a term essential to define as it is mentioned twice within the statute.[110] However, economic loss was not a "widely accepted" element of fraud and therefore could not be read into the understanding of "fraud" as a term.[111] At common law, three potential remedies existed for PennDOT: rescinding the contract, indicting for false pretenses, or pursuing a tort action for deceit—not all of which required economic loss.[112]

A rescission would only require that a "transaction had 'prove[d] to be less advantageous than as represented' ('although there [was] no actual loss')."[113] Similarly, a false pretense crime "was complete when the property was fraudulently obtained" and did not require actual loss.[114] While common law courts required an injury be present, there was no mandate that it be economic in nature.[115] Only in tort actions for deceit was economic loss essential as the action "was designed to compensate a plaintiff for her economic

105. *Id.*
106. *Id.* at 123.
107. *Id.* at 124.
108. *Id.* at 123.
109. *Id.* at 124.
110. *See id.* (noting that when Congress supplies a term in an enacted statute "with origins in the common law" the Court "generally presume[s] that the term 'brings old soil with it'").
111. *Id.* at 124-25.
112. *Id.* at 125.
113. *Id.* at 126 (alterations in original).
114. *Id.* (quoting West v. State, 88 N.W. 503, 504 (Neb. 1901)).
115. *Id.* at 129.

loss."[116] Therefore, economic loss was not a "widely accepted" fraud element and no "well-settled rule" existed at common law and should not exist in the statute now.[117]

The Court further pointed out that petitioners' own recognized exception for instances where the objects or services delivered are "'different from what was promised'—even something of equivalent value," would swallow the proposed economic loss rule.[118] The Court reasoned this exception would defeat the rule because anything could be described as being "different" from something else, including services rendered with a disadvantaged business and services rendered with a non-disadvantaged business, offering no "principled way to draw" a line.[119]

### 3. *The Court's Decision Aligns with Precedent*

Finally, the Court responded to the argument by Kousisis and Alpha that accepting the fraudulent-inducement theory would overturn years of precedent, pointing to two precedential cases that aligned with its decision, *Carpenter v. United States* and *Shaw v. United States*.[120] In these cases, the Court previously and similarly "rejected the argument that a fraud conviction depends on economic loss."[121] Additionally, the Court points out the holding does not extend to governmental regulatory interests or other intangible rights, and still requires "money or property" to be the object of a fraudulent scheme.[122] Adherence to the "money or property" requirement is what separates the fraudulent-inducement theory from the right-to-control theory previously presented by the Government in *Ciminelli*.[123] The right-to-control theory was rejected for attempting to target "mere information," which the Court did not recognize as a traditional property interest.[124]

Furthermore, petitioners' warnings of "every intentional misrepresentation" becoming fraud were in vain; the Court assured the materiality requirement of fraud would provide a "demanding" barrier between actionable

116. *Id.* at 128.
117. *See id.* at 124, 129.
118. *Id.* at 130.
119. *See id.* at 130-31.
120. *See id.* at 116.
121. *Id.*; *see* Carpenter v. United States, 484 U.S. 19, 23 (1987) (holding a newspaper being deprived of "its right to exclusive use" was sufficient for a fraud conviction); Shaw v. United States, 580 U.S. 63, 67-68 (2016) (affirming a bank fraud conviction where no bank suffered monetary loss).
122. *Kousisis*, 605 U.S. at 116.
123. *See id.*
124. *Id.*

misrepresentations and everyday misstatements.[125] The Court however did not establish a materiality standard because Kousisis and Alpha did not contest the materiality of the misrepresentations.[126] Instead the Court assured that the fraudulent-inducement theory accepted here only "criminalizes a particular species of fraud: intentionally lying to induce a victim into a transaction that will cost her money or property."[127] The Court went on to say that if Congress so wanted, it could change the "broad" language of the federal wire fraud statute.[128]

### D. THE CONCURRENCES

Justice Clarence Thomas issued a concurring opinion, Justice Neil Gorsuch issued a concurrence in part, and Justice Sonia Sotomayor issued a concurrence in judgment.[129] Each Justice agreed with the Court's holding but presented potential questions arising from the opinion and warnings about the conflicts they could create.[130]

#### 1. *Justice Thomas on Materiality*

While Justice Thomas conceded that petitioners left the materiality of their misrepresentations uncontested, and thus not an issue before the court, he still contemplated the materiality of these misrepresentations.[131] He did not endorse a specific standard for materiality but presented four reasons that the DBE requirement would not meet the Government's proposed essence of the bargain standard.[132] First, the DBE requirement had no impact on the quality of work done under the PennDOT contract or their ability to complete the work.[133] Second, while the contract labeled the DBE requirement as material, "nothing in the contracts required PennDOT to take any action" for failure to adhere, and only expressed termination as a possibility for failing to adhere.[134] Third, evidence suggests "[f]raudulent DBE schemes" are

125. *Id.* at 135.

126. *Id.* at 136 (Thomas, J., concurring). The Court, however, recognized that Kousisis proposed "the traditional materiality test" while the Government proposed the "essence-of-the-bargain test." *Id.* at 131 (majority opinion).

127. *Id.* at 135.

128. *Id.*

129. *See id.* at 135-46 (Thomas, J., concurring); *id.* at 146-57 (Gorsuch, J., concurring in part and concurring in the judgment); *id.* at 157-64 (Sotomayor, J., concurring in the judgment).

130. *See generally id.* at 135-46 (Thomas, J., concurring); *id.* at 146-57 (Gorsuch, J., concurring in part and concurring in the judgment); *id.* at 157-64 (Sotomayor, J., concurring in the judgment).

131. *See id.* at 136 (Thomas, J., concurring).

132. *See generally id.* at 141.

133. *Id.*

134. *Id.* at 142.

common and the Government may have been aware of the likelihood of a violation.[135] Fourth, the DBE requirement may not be legal—and therefore immaterial—as the Government may have to "justify [the DBE program's] discriminatory policies."[136]

Justice Thomas also noted that the Government's argument for rejecting the proposed economic loss element was that the materiality requirement would protect "everyday misstatements" from being prosecuted.[137] In order to continue to protect "everyday misstatements" from prosecution Justice Thomas warned "lower courts should hold the Government to its word."[138]

2. *Justice Gorsuch on Traditional Injury*

Justice Gorsuch took issue with the Court's fifth footnote which he believed to unreasonably expand the traditional injury requirement.[139] The traditional injury analysis states that "a prosecutor must show that the victim did not receive what the defendant promised" in order to set a distinction between "mere lies and criminal frauds."[140] The common-law understanding of the injury requirement remains important because "obtaining money or property by means of a material misrepresentation" will not always injure a victim when the victim receives the benefit of their bargain.[141]

Instead of the traditional injury requirement being the barrier between victimless lies and federal charges, the Court suggested that the "'materiality' element supplies a more 'principled' and equally satisfactory" approach.[142] However, Justice Gorsuch argued that the Court cannot substitute materiality (argued by the majority to be a "more 'principled'" standard) for the injury requirement (the law) because materiality fails to protect lies that, while material, "do not warrant" criminal attention because they lack injury.[143] Thus,

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135. *Id.* at 143 (noting that PennDOT's potential awareness and willingness to carry on despite this awareness evidenced a lack of materiality).

136. *See id.* at 144-45 (alteration in original) ("The DBE program imposes an explicitly race-based classification system, which warrants the strictest judicial scrutiny. Thus, for the program to survive, the Government would need to prove that it addresses past governmental discrimination that is concrete and traceable to the *de jure* segregated system, and that the segregated system has 'discrete and continuing discriminatory effect." (citation modified)).

137. *See id.* at 146.

138. *See id.*

139. *See id.* at 148 (Gorsuch, J., concurring in part and concurring in the judgment); *cf. id.* at 164 n.5 ("To reject that pecuniary loss is an element of fraud is to accept—as common-law courts long have—that a fraud is complete when the defendant has induced the deprivation of money or property under materially false pretenses.").

140. *Id.* at 148 (Gorsuch, J., concurring in part and concurring in the judgment).

141. *Id.* at 149.

142. *Id.* at 154.

143. *See id.* at 154-55.

to protect everyday fibs the traditional injury element must stand, especially when "a putative victim receives the benefit of his bargain."[144]

Despite this, Justice Gorsuch concedes that the Court's disparity is irrelevant in the present case, as Kousisis "loses" either way—he both induced PennDOT to part with its money and deprived it of the benefit of its bargain.[145] Justice Gorsuch concluded, in regard to the majority's fifth footnote, that he "can only trust that future courts will recognize that aside for what it is—unsound dicta."[146]

#### 3. *Justice Sotomayor on Broader Application of the Fraudulent-Inducement Theory*

Justice Sotomayor did not agree with the majority's broader discussion of the applicability of the fraudulent-inducement theory.[147] She noted this discussion was irrelevant to the overall holding and problematically included application to cases where the benefit of the bargain was received.[148] Future cases, not the Court's comments at present, will have the job of defining "the outer limits of the federal fraud statute and to decide what satisfies its materiality element."[149]

## IV. IMPACT ON NORTH DAKOTA PRACTITIONERS

The Court's decision in *Kousisis* broadens what can be prosecuted as federal wire fraud by dismissing any requirement of actual economic loss and embracing the fraudulent-inducement theory.[150] However, the line between "everyday misstatements [and] actionable fraud" remains thin and protected by an unrefined materiality requirement, as well as a traditional injury principle called into question by the Court's fifth footnote.[151] Defining that line will be up to federal prosecutors and practitioners across the country as well as lower courts before which the cases are presented.[152] In North Dakota, this

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144. *See id.* at 153-54.

145. *Id.* at 156.

146. *Id.* at 157; *cf. id.* at 164 n.5 (stating the Court's "recognition of [the] common-law definition" of injury was "essential to [its] holding").

147. *See generally id.* at 157 (Sotomayor, J., concurring in the judgment).

148. *Id.* at 159.

149. *Id.* Justice Sotomayor also combated Justice Thomas's view of the DBE clause being immaterial and suggested Kousisis was wise to leave the issue uncontested. *See id.* at 162-63.

150. *See id.* at 135 (majority opinion).

151. *Id.* at 136 (Thomas, J., concurring); *cf. id.* at 164 n.5. *See generally* Richard Cooke, *Federal Fraud After Kousisis*, SCOTUS BLOG (July 7, 2025), https://www.scotusblog.com/2025/07/federal-fraud-after-kousisis/ [https://perma.cc/ZP2U-4F2J] (noting the materiality standard "could prove contentious if *Kousisis* ushers in a wave of weaker fraud prosecutions from the government").

152. *See* Cooke, *supra* note 151; *Kousisis*, 605 U.S. at 146 (Thomas, J., concurring).

will require practitioners to assert special focus on establishing the injury and materiality requirements to further define the outer limits of the federal wire fraud statute.[153]

### A. WHAT CAN BE PROSECUTED AS WIRE FRAUD?

After *Kousisis*, wire fraud only requires an intended scheme to obtain a victim's money or property through material misrepresentations using the wires.[154] An opportunity to broaden charges under the statute, and other fraud statutes, emerges as a result of this new understanding by making it applicable to schemes where a victim was fraudulently induced, but received the full benefit of the bargain.[155] Thus, as long as a money or property interest is targeted, inducing someone to enter a transaction they otherwise would have avoided could now be enough to constitute fraud.[156]

While prosecutors find themselves with an expanded definition of fraud, some may fear that "every intentional misrepresentation designed to induce someone to transact in property would constitute property fraud."[157] Specifically, concern exists amongst defense lawyers that this decision could "insert federal prosecutors and federal courts into every contract negotiation," turning "every scheme to deceive into a scheme to defraud" and worsening the already growing problem of overcriminalization.[158] This could be particularly problematic in the sphere of governmental contracting where regulatory requirements are frequent and "have little bearing on harm to the public fisc."[159] The extent of this potential will depend on "how the government uses *Kousisis* to inform its charging decisions in more marginal cases."[160]

This concern is particularly notable because of the statute's already broad applicability.[161] The broad nature of the statute combined with rapid

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153. *See* Cooke, *supra* note 151 (pointing out the Court "left open what materiality standard should govern federal fraud"); *Kousisis*, 605 U.S. at 146 (Thomas, J., concurring).

154. *See Kousisis*, 605 U.S. at 131-32 (majority opinion).

155. *See generally id.* at 134-35 (dismissing Kousisis's argument that no wire fraud was committed because something "of equal value" was given in return).

156. *Id.* at 135.

157. *See generally id.* at 135 (quoting Brief for Petitioner, *supra* note 83, at *40).

158. Brief of the National Association of Criminal Defense Lawyers and the Cato Institute as Amici Curiae in Support of Petitioners, Kousisis v. United States, 605 U.S. 114 (2025) (No. 23-909), 2024 WL 3994059, at *8, *12 (noting "prison populations have increased 500 percent over the past forty years" and "one in nine persons in prison is now serving a *life sentence*" (citation modified)); *see* Brief for Petitioner, *supra* note 83, at *40 ("In Fiscal Year 2022, 'the federal government committed about $694 billion on contracts.' Each of those contracts imposes innumerable conditions the breach of which could, under the inducement theory, be prosecuted as fraud.").

159. *See* Cooke, *supra* note 151.

160. *Id.*

161. *See* Yakov Malkiel, *The Wire Fraud Boom*, 75 OKLA. L. REV. 531, 539 (2023).

growth in technology has led to an increase in wire fraud prosecutions.[162] Today, people are in constant contact with each other leading to an enormous amount of potential fraud communications that were not available when the statute was enacted.[163] Furthermore, no matter how local these communications might be, when done over electronic communications they are likely to still fall within the purview of the federal statute.[164]. While recent Supreme Court cases such as *Ciminelli* and *Kelly* have imposed limits on the federal fraud statutes, *Kousisis* offers an expansion on an already broad statute.

The Government and the Court both indicated that the materiality requirement will act as the barrier to protect over-expansion of what is charged as federal wire fraud.[165] However, what constitutes a misrepresentation as material remains undefined and will likely create factually contested cases in the future.[166] It will remain the work of practitioners and lower courts to identify those fraudulent misrepresentations that are material.[167]

### B. IMPLICATIONS FOR FRAUD PROSECUTIONS

As a result of the decision in *Kousisis*, the Court created opportunities for arguments regarding the materiality and traditional injury requirements.[168] Moving forward, it will be imperative for North Dakota practitioners working on federal fraud prosecutions to use this room for argument to aid in further defining a solid materiality standard and assuring charges made satisfy that standard.[169] Moreover, recognizing where the traditional injury requirement of common-law fraud stands within the statute, and being aware of potential arguments to expand its understanding, are now essential to any federal wire fraud case.

First, the extent of federal wire fraud charges and convictions will turn on how the materiality requirement is defined.[170] In its opinion, the Court "noted the federal government's endorsement of an essence-of-the-bargain test" in terms of a materiality standard applicable to federal fraud cases.[171]

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162. *Id.* at 539-40 (noting electronic communications are classified as "wires").

163. *Id.* at 541.

164. *Id.* at 549.

165. *See* Kousisis v. United States, 605 U.S. 114, 116 (2025); Brief for the United States, *supra* note 25, at *44.

166. *See* Cooke, *supra* note 151; *Kousisis*, 605 U.S. at 131 (stating the appropriate materiality standard need not be decided in the present case).

167. *See* Cooke, *supra* note 151; *see also Kousisis*, 605 U.S. at 136 (Thomas, J., concurring).

168. *Kousisis*, 605 U.S. at 136 (majority opinion).

169. *See generally id.* 605 U.S. at 159 (Sotomayor, J., concurring in the judgment) (establishing future cases will get at "what satisfies [fraud's] materiality requirement").

170. *See* Cooke, *supra* note 151 (noting the "[C]ourt declined to resolve more specifically what qualifies as material").

171. *Id.* (citation modified); *Kousisis*, 605 U.S. at 131-32.

Thus, "what constitutes the essence of the bargain" within contracts or other potential scenarios ripe for misstatements may determine the applicability of the federal fraud statute.[172] However, the Court did not adopt a specific materiality standard, and practitioners should note the opportunity to make other arguments outside the essence of the bargain test.[173]

By looking at Justice Thomas's concurrence, practitioners may be able to make arguments based on a misrepresented provision's place within a contract, whether it had any impact on the final product, and if the contractor knew about any misrepresentations and carried on anyways, among other potential factors.[174] Especially after *Kousisis*, where no economic loss is required, how practitioners present or defend the materiality of more "peripheral" misrepresentations will be important because of materiality's largely undefined nature.[175] Practitioners will need to establish why or why not particular misrepresentations truly went to the objective of the defendant's scheme and induced another party to fall victim.[176]

Second, the fifth footnote of the Court's opinion calls into question what constitutes injury under the common-law understanding of fraud, which Justice Gorsuch calls out and admonishes.[177] Even though Justice Gorsuch dismisses this footnote as "unsound dicta," practitioners should be aware of potential arguments to be made in regards to this requirement as the Court showed its support for this understanding.[178] Consequently, traditional injury may now be satisfied by simply obtaining money or property regardless of a fully fulfilled promise.[179] Whether receiving all one bargained for is enough to preclude federal fraud charges is a question that is unsettled.[180] Therefore, practitioners advising clients contracting with government entities should emphasize assurance of what they convey to certify in a contract is what they will actually undertake. It is not enough to say that no economic loss was caused or that the full benefit of the bargain was received because the contract was completed effectively.[181]

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172. Cooke, *supra* note 151 (citation modified).

173. *Kousisis*, 605 U.S. at 132.

174. *See id.* at 141 (Thomas, J., concurring) (displaying his four reasons for why Kousisis's misrepresentations may not have been material).

175. *See* Cooke, *supra* note 151.

176. *See id.* (arguing the government is "unlikely to retreat" from its argument for the essence-of-the-bargain test).

177. *See generally Kousisis*, 605 U.S. at 152 (Gorsuch, J., concurring in part and concurring in the judgment).

178. *Id.* at 157; *see also id.* at 164 n.5 (majority opinion).

179. *Id.* at 152 (Gorsuch, J., concurring in part and concurring in the judgment).

180. *Id.*

181. *See Kousisis*, 605 U.S. at 152 (Gorsuch, J., concurring in part and concurring in the judgment); *see also Kousisis*, 605 U.S. at 122-23 (majority opinion).

As development of post-*Kousisis* practice unfolds, it remains the duty of practitioners and lower courts to make sure every charge and conviction adheres to the standards set forth by the Court.[182] As *Kousisis* may "embolden federal prosecutors to bring more cases involving a fraudulent inducement theory," local practitioners should remain up to date with further developments to better serve their clients.[183]

## V. CONCLUSION

In *Kousisis*, the United States Supreme Court held the federal wire fraud statute does not require economic loss as an element and the fraudulent-inducement theory is compatible with the statute.[184] The text of the statute reads "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," using wires constitutes federal wire fraud.[185] The Court held nowhere in the statute was economic loss mentioned or required, nor required at common-law, and therefore it should not be an element of federal wire fraud.[186] However, the Court maintained that the conviction must still meet a demanding materiality requirement but did not specifically define what standard applies to wire fraud cases.[187] Going forward, prosecutors may broaden what is charged under the statute, but must take care to ensure the materiality requirement is met and upheld to protect everyday misstatements from becoming federal crimes. Local practitioners should be aware of the ways federal fraud can be broadened and should advise clients accordingly while preparing arguments to target the questions left unanswered in the Court's opinion.

*Megan Middaugh*[*]

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182. *See id.* at 130-31; *id.* at 146 (Thomas, J., concurring); Cooke, *supra* note 151.

183. *See* William M. McSwain, *Former U.S. Attorney Who Prosecuted USA v. Kousisis Examines the Supreme Court's Decision*, DUANE MORRIS LLP (June 13, 2025), https://www.duanemorris.com/articles/former_us_attorney_who_prosecuted_usa_v_kousisis_examines_supreme_courts_decision_0625.html [https://perma.cc/8F4A-84HU].

184. *Kousisis*, 605 U.S. at 122-24.

185. 18 U.S.C. § 1343.

186. *Kousisis*, 605 U.S. at 124.

187. *Id.* at 131-32.

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