No. 23-909

In the Supreme Court of the United States

STAMATIOS KOUSISIS AND ALPHA PAINTING AND CONSTRUCTION CO., INC., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether sufficient evidence supported petitioners' convictions for conspiring to commit wire fraud, in violation of 18 U.S.C. 1349, and wire fraud, in violation of 18 U.S.C. 1343 and 1349, where they falsely certified compliance with a requirement that they subcontract to a disadvantaged business and, as a result, overcharged the government entity with which they contracted.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-41) is reported at 82 F.4th 230. A subsequent opinion of the court of appeals (Pet. App. 42-53) is not published in the Federal Reporter but is available at 2023 WL 6294144. A prior opinion and an order of the court of appeals are reported at 66 F.4th 406 and 81 F.4th 1260. A prior order of the court of appeals is not published in the Federal Reporter but is reprinted at 821 Fed. Appx. 81. The memorandum opinion of the district court (Pet. App. 76-129) is not published in the Federal Supplement but is available at 2019 WL 4126484.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2023. On December 12, 2023, Justice Alito extended the time within which to file a petition

for a writ of certiorari to and including January 19, 2024. On January 18, 2024, Justice Alito further extended the time to and including February 19, 2024. The petition was filed on February 20, 2024 (Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioners were convicted on one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 1349; three counts of wire fraud, in violation of 18 U.S.C. 1343 and 1349; and seven counts of causing a false statement to a government agency, in violation of 18 U.S.C. 1001. Pet. App. 54, 63. Petitioner Kousisis was sentenced to 70 months of imprisonment, to be followed by three years of supervised release. *Id.* at 64-66. Petitioner Alpha Painting and Construction Company, Inc., was sentenced to five years of probation. *Id.* at 56. The court of appeals affirmed. *Id.* at 1-41.

1. Petitioners fraudulently participated in a disadvantaged-business-enterprise (DBE) program put in place as a condition on the receipt of federal funds.

a. The United States Department of Transportation (DOT) awarded federal grants to the Pennsylvania Department of Transportation (PennDOT) for construction projects to repair a Philadelphia bridge and train station. Pet. App. 3-4, 6. Those funds were conditioned on PennDOT setting DBE participation goals for the projects. *Id.* at 4. PennDOT, in turn, required that at least six percent of the contract amount for the bridge project, and at least seven percent of the contract amount for the train-station project, go to DBEs. *Id.* at 6.

To be certified as a DBE, a business must be "at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged," and must have its "management and daily business operations controlled by one or more of the socially and economically disadvantaged individuals who own it." Pet. App. 4 (quoting 49 C.F.R. 26.5). Once hired for a project, a DBE must perform a "commercially useful function," such as being "responsible for execution of the work of the contract and * * * actually performing, managing, and supervising the work involved." *Id.* at 5 (quoting 49 C.F.R. 26.55(c)(1)). "A DBE whose 'role is limited to that of an extra participant in a transaction, contract, or project through which funds are passed in order to obtain the appearance of DBE participation' does not perform a commercially useful function." *Ibid.* (quoting 49 C.F.R. 26.55(c)(2)).

b. The terms of the contracts for the bridge and train-station projects stated that failure to comply with the DBE regulations would constitute a material breach of the contracts. Pet. App. 6-7. To obtain the contracts for the bridge and train-station projects, petitioners submitted bids in which they committed to working with Markias, Inc., a prequalified DBE in Pennsylvania. *Id.* at 6. Specifically, petitioners' bids stated that they would obtain a total of $6.4 million in paint supplies from Markias for the two projects. *Ibid.*

Petitioners (or entities with which they were associated) were awarded the contracts. Pet. App. 6. But contrary to petitioners' bids, the regulations, and "the explicit terms of the contracts," Markias served "merely as a pass-through," and did not do any work on the projects or supply any of the materials for them. *Id.* at 7. To conceal the truth, petitioners had the actual paint

suppliers send invoices to Markias. *Ibid.* Markias then issued its own invoices, added a 2.25% fee, and forwarded the pass-through invoices to petitioner Alpha, which then forwarded the invoices to PennDOT. *Id.* at 7-8. Kousisis detailed those procedures in a letter to Markias. *Id.* at 8; see *ibid.* (detailing the scheme).

Petitioners then "periodically submitted false documentation regarding Markias' role" in the projects. Pet. App. 7. Petitioners had to submit that documentation "to obtain[] credit towards the DBE goals and, therefore, to comply[] with the contracts' terms." *Ibid.* "As established at trial, failure to certify compliance with the DBE requirements could have led to debarment, financial penalties, or withholding of progress payments." *Ibid.*

Petitioners' submissions "falsely certified that Markias acted as a 'regular dealer' in supplying products." Pet. App. 7. In reliance on those misrepresentations, PennDOT awarded petitioners DBE credits and paid petitioners based on their asserted compliance with the projects' DBE requirements. *Ibid.* And on receiving funds from PennDOT, petitioners would pay the actual paint suppliers and give the 2.25% additional fee to Markias for acting as a pass-through. *Id.* at 8.

2. A federal grand jury indicted petitioners on one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 1349, five counts of wire fraud, in violation of 18 U.S.C. 1343 and 1349, and ten counts of causing a false statement to a government agency, in violation of 18 U.S.C. 1001. Pet. App. 82-83. Following a trial, a jury found petitioners guilty on all but two wire-fraud counts. *Id.* at 86-87.

The district court granted in part and denied in part petitioner's post-verdict motion for a judgment of ac-

quittal. Pet. App. 76-126, 130-131. The court dismissed three false-statement counts on statute-of-limitations grounds. *Id.* at 117-126. The court rejected, however, petitioners' claim that they did not "defraud the government of 'money or property' within the meaning of the wire fraud statute" because "they completed the construction project[s]" and "PennDOT and DOT * * * received the full benefit of their bargain." *Id.* at 106. The court instead recognized that petitioners "deprived PennDOT of a property right" because "the agency paid for services—construction performed with materials supplied by a DBE—which it did not receive." *Id.* at 109.

The district court observed that petitioners "sought to be awarded money through a lucrative contract based on false representations about Markias's role." Pet. App. 109. And the court found that the DBE requirements were "a fundamental basis of the bargain" because PennDOT awarded the contracts to petitioners "based on the representation that a certain amount of supplies would be obtained from Markias, and the contracts included compliance with the DBE regulations as an explicit term of the agreement." *Ibid.* (brackets and citation omitted).

3. The court of appeals affirmed. Pet. App. 1-41.

The court of appeals observed that "[t]he federal wire fraud statute, 18 U.S.C. § 1343, criminalizes 'any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises,' that uses wires." Pet. App. 9. The court acknowledged that it is "well established that the federal wire fraud provision *only* extends to property rights." *Ibid.* And the court acknowledged that "for the government to establish wire fraud, the

property involved 'must play more than some bit part in a scheme: It must be an "object of the fraud."'" *Ibid.* (quoting *Kelly* v. *United States*, 590 U.S. 391, 402 (2020)). But it found that the facts of this case satisfied the property requirement. *Id.* at 9-24.

Like the district court, the court of appeals rejected petitioners' theory that "the government was not deprived of any property," which was premised on the assertions that "they fully discharged their painting and repair obligations in the Philadelphia Projects." Pet. App. 10 (emphasis omitted). The court explained that petitioners' scheme had in fact "secured PennDOT's money using false pretenses and the value PennDOT received from [petitioners'] partial performance of th[e] painting and repair services is no defense to criminal prosecution for fraud." *Id.* at 23-24.

The court observed that petitioners "set out to obtain millions of dollars that they would not have received but for their fraudulent misrepresentations." Pet. App. 18. The court further observed that "DBE participation was an essential component of the contract" and that, "[w]ithout it, the nature of the [p]arties' bargain would have been different." *Id.* at 22. And the court observed that PennDOT had paid an additional 2.25% fee in exchange for Markias's involvement in the project. *Id.* at 21.

ARGUMENT

Petitioners renew their contention (Pet. 21-33) that their conduct did not constitute wire fraud under 18 U.S.C. 1343. The lower courts correctly rejected that contention, and the court of appeals' fact-bound decision does not conflict with any decision of this Court or of

any other court of appeals. No further review is warranted.[1]

1. A person commits wire fraud if he uses the wires to execute a "scheme or artifice to defraud" or to obtain "money or property by means of false or fraudulent pretenses." 18 U.S.C. 1343. A scheme to defraud is a scheme to deprive a person of money or property by means of deceit. See *McNally* v. *United States*, 483 U.S. 350, 358-359 (1987). Petitioners' scheme falls within the scope of that statute. "DBE participation was an essential component of the contract" between petitioners and PennDOT and petitioners' representations about their DBE compliance "fraudulently caused PennDOT to pay" them "millions of dollars." Pet. App. 22. Petitioners thereby "schemed to have PennDOT pay them millions of dollars that they were clearly not entitled to," *ibid.*—the type of conduct that the statute plainly prohibits.

Contrary to petitioners' suggestion (Pet. 25), the wire-fraud statute does not require proof "of harm to [the victim's] economic interests." The wire-fraud statute, like the other federal fraud statutes, prohibits "the 'scheme to defraud,' rather than the completed fraud." *Neder* v. *United States*, 527 U.S. 1, 25 (1999). Because even a failed scheme violates the statute, the government need not prove that the victim relied on the false representations, much less that the victim suffered loss or harm as a result of such reliance. *Id.* at 24-25; see *Carpenter* v. *United States*, 484 U.S. 19, 26 (1987) ("Petitioners cannot successfully contend * * * that a scheme to defraud requires a monetary loss."). Nor is such a requirement a necessary feature of "obtain[ing]"

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[1] The question presented in this case is also presented in *Porat* v. *United States*, No. 23-832 (filed Jan. 31, 2024).

money or property. 18 U.S.C. 1343. Providing a good or service in exchange for money does not alter the fact that the money was "obtained."

Petitioners also err in arguing (Pet. 3) that the wire-fraud statute requires proof of the defendant's "intent to harm the victim's economic interests." See Pet. 21. This Court has rejected such a requirement in interpreting the similarly worded bank-fraud statute, which prohibits a scheme "to defraud a financial institution" or "to obtain any of the moneys * * * or other property owned by * * * a financial institution, by means of false or fraudulent pretenses." 18 U.S.C. 1344. The Court has explained that the statute "demands neither a showing of ultimate financial loss nor a showing of intent to cause financial loss." *Shaw* v. *United States*, 580 U.S. 63, 67 (2016); see *Loughrin* v. *United States*, 573 U.S. 351, 366 n.9 (2014) (rejecting the argument that the bank-fraud statute "requires the Government to prove that the defendant's scheme created a risk of financial loss to the bank"). The Court has instead endorsed Judge Learned Hand's observation, consistent with the history of prohibitions on fraud, that "'a man is none the less cheated out of his property, when he is induced to part with it by fraud,' even if 'he gets a quid pro quo of equal value.'" *Shaw*, 580 U.S. at 67 (brackets and citation omitted); see, *e.g.*, *State* v. *Mills*, 17 Me. (5 Shep.) 211, 216 (1840) (recognizing that a horse buyer could be defrauded through substitution of a different horse of equal value); 3 Dan B. Dobbs et al., *The Law of Torts* § 664 n.6 (2d ed. 2011) (explaining that a person who "bargained for a Titian but got a Giorgione of equal value" may bring a civil action for fraud).

2. Courts of appeals have used different verbal formulations to describe the fraud statutes' applicability to

cases where the defendant uses falsehoods to induce a victim to enter into a transaction. Some courts have stated that the statutes require proof of a lie "about the nature of the bargain" or that the statutes do not apply where the alleged victims "'received exactly what they paid for.'" *United States* v. *Takhalov*, 827 F.3d 1307, 1313-1315 (11th Cir. 2016) (citation omitted), modified on denial of reh'g, 838 F.3d 1168 (11th Cir. 2016); see *United States* v. *Shellef*, 507 F.3d 82, 108 (2d Cir. 2007); *United States* v. *Sadler*, 750 F.3d 585, 590 (6th Cir. 2014); *United States* v. *Bruchhausen*, 977 F.2d 464, 470 (9th Cir. 1992) (Fernandez, J., concurring); *United States* v. *Guertin*, 67 F.4th 445, 451 (D.C. Cir. 2023). Other courts have stated that the fraud statutes "reach a seller's or buyer's deliberate misrepresentation of facts * * * that [is] likely to affect the decisions of a party on the other side of the deal." *United States* v. *Weimert*, 819 F.3d 351, 357 (7th Cir. 2016); see *United States* v. *Richter*, 796 F.3d 1173, 1192 (10th Cir. 2015), cert. dismissed, 578 U.S. 902, and cert. denied, 578 U.S. 978 (2016); *United States* v. *Granberry*, 908 F.2d 278, 280 (8th Cir. 1990), cert. denied, 500 U.S. 921 (1991); see also *United States* v. *Bunn*, 26 Fed. Appx. 139, 142-143 (4th Cir. 2001) (per curiam).[2]

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[2] Petitioners also cite (Pet. 23) the Fifth Circuit's decisions in *United States* v. *Fagan*, 821 F.2d 1002 (1987), cert. denied, 484 U.S. 1005 (1988), and *Walker* v. *Galt*, 171 F.2d 613 (1948), cert. denied, 336 U.S. 925 (1949). Neither implicates the question presented. *Fagan* reasoned that a scheme violated the mail-fraud statute because it sought to deprive an entity of "its control over its money." 821 F.2d at 1010 n.6. This Court has since rejected that "right-to-control" theory of fraud, see *Ciminelli* v. *United States*, 598 U.S. 306, 317 (2023), and petitioners provide no basis for concluding that the Fifth Circuit would nonetheless adhere to *Fagan*'s reasoning.

Petitioners, however, overstate the significance of those terminological distinctions. Courts on both sides of the asserted circuit conflict agree that a defendant commits wire fraud if he induces a victim to enter into a transaction by lying about an "essential element of the bargain." Compare *Guertin*, 67 F.4th at 451; *Takhalov*, 827 F.3d at 1314; *Shellef*, 507 F.3d at 108, with *United States* v. *Kelerchian*, 937 F.3d 895, 913 (7th Cir. 2019), cert. denied, 140 S. Ct. 2825 (2020). Courts have reached different outcomes in different cases largely because they have confronted different fact patterns, not because they have applied different legal principles. Compare, *e.g.*, *Shellef*, 507 F.3d at 108-109 (concluding that a buyer's lie about the disposition of items it was purchasing did not constitute fraud, where the government failed to allege that the lie affected the legality of the sale), with, *e.g.*, *Kelerchian*, 937 F.3d at 913 (concluding that a similar lie did constitute fraud, where the government proved that the lie did affect the legality of the sale). Petitioners thus fail to demonstrate a square circuit conflict that might warrant this Court's review.

3. In any event, this case does not implicate the circuit conflict that petitioners allege.

Contrary to petitioner's suggestion (Pet. 23), the court of appeals did not reject the interpretation of the fraud statutes adopted by the Second, Sixth, Ninth, and Eleventh Circuits. The court of appeals instead referenced the Eleventh Circuit's formulation—finding fraud where the "misrepresentations involve[] 'essential characteristics of the [property] that would alter the nature of the bargain'"—in affirming petitioners' con-

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Walker addressed a state-law civil suit within the federal court's diversity jurisdiction, rather than a federal fraud statute. See 171 F.2d at 614.

victions. Pet. App. 22 (quoting *United States* v. *Wheeler*, 16 F.4th 805, 820 (11th Cir. 2021) (per curiam), cert. denied, 142 S. Ct. 2794, and 142 S. Ct. 2847 (2022)). And the Eleventh Circuit has previously affirmed a defendant's mail- and wire-fraud convictions based on a materially identical scheme. See *United States* v. *Maxwell*, 579 F.3d 1282, 1303 (2009) (affirming convictions where defendant's company "obtained construction contracts and substantial payments from the County and the United States for which it was not eligible" under contracts requiring DBE and small-business participation). Adopting petitioners' preferred interpretation of the wire-fraud statute thus would have no practical effect on their convictions. See *Supervisors* v. *Stanley*, 105 U.S. 305, 311 (1882) (explaining that this Court does not sit to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties).

This case would also be a poor vehicle for reviewing the question presented because the court of appeals' decision rests on a second and independent ground. Specifically, the court alternatively recognized that PennDOT suffered "economic harm sufficient to sustain [petitioners'] wire fraud convictions" based on the 2.25% fee that Markias charged PennDOT for acting as a pass-through DBE. Pet. App. 21. That "fee * * * was the government's money" and it "was not an amount PennDOT would have paid" absent petitioners' false certification of DBE participation. *Ibid.* Thus, irrespective of the question presented, petitioners "violated § 1343" because they "misrepresent[ed] DBE status to secure a contract for which [they] were not eligible" and "commit[ted] PennDOT to paying a premium under th[e] contract." *United States* v. *Porat*, 76 F.4th 213, 228 n.6 (3d Cir. 2023) (Krause, J., concurring), petition for cert.

pending, No. 23-832 (filed Jan. 31, 2024); see *id.* at 228 (explaining that "PennDOT had not received the benefit of the bargain" because it "paid a premium for a specific service—DBE involvement—that [petitioners] did not actually deliver") (brackets, citation, and internal quotation marks omitted).

Petitioners dispute (Pet. 32) that PennDOT expended additional costs as a result of their fraudulent conduct, but that argument boils down to a fact-bound disagreement with the court of appeals' interpretation of the trial evidence. See Pet. 18 (objecting that the court of appeals, "[e]ntirely on its own, * * * decided Markias's 2.25% markup was a 'kickback' "). It does not warrant this Court's review, or otherwise suggest that their petition should be granted. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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