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Supreme Court Poised to Address Fraudulent Inducement Theory of Mail and Wire Fraud in 2024-25 Term



White-collar criminal prosecutions frequently involve charges under the federal mail and wire fraud statutes. Those statutes criminalize using the mail system or interstate wires for "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." [18 U.S.C. § 1341](#) (mail fraud statute); [§ 1343](#) (wire fraud statute). But circuit courts are nearly evenly split on whether it is enough for an individual to fraudulently induce a fair commercial exchange or whether that individual must intend to inflict economic harm. On June 17, 2024, the U.S. Supreme Court granted the petition for writ of certiorari in [Kousisis v. United States](#) to answer that question in its upcoming term. Merits briefing is expected to be complete on October 6. (A similar [petition](#) filed by the convicted former dean of Temple University's Fox School of Business is still pending.)

The case exposes a deep divide among the federal appellate courts on a touchstone of modern white-collar criminal liability—with potential far-reaching application for the criminal prosecution of individuals and corporations.

### **Background**

The Pennsylvania Department of Transportation (PennDOT) awarded two bridge-repair contracts to Alpha Painting & Construction Co., Inc., where Stamatios Kousisis worked as project manager, and its partner businesses. The Alpha bid was several million dollars lower than other bids, but prosecutors alleged that Alpha secured its winning bid by manipulating a state program meant to assist "disadvantaged businesses enterprises" (DBEs). Specifically, prosecutors alleged that Alpha had represented to PennDOT that it would purchase significant quantities of paint supplies from a qualifying DBE. In reality, Alpha simply paid the DBE a fee to use its name in the bid, and the DBE did no actual work.

Notably, there was no evidence that Alpha ever intended to deprive PennDOT of a traditional property interest (like its money). To the contrary, Alpha supplied PennDOT with the lowest bid, and there is no dispute that it

fully and successfully completed all its contractual obligations. There was, however, substantial evidence that it used the DBE as a front to earn those contracts, and that it therefore fraudulently induced PennDOT to select it for the projects. At trial, the jury convicted Kousisis and Alpha of two wire fraud and conspiracy charges.

On appeal, the Third Circuit affirmed the convictions of Kousisis and Alpha, holding that they "set out to obtain millions of dollars that they would not have received but for their fraudulent misrepresentations." *United States v. Kousisis*, 82 F.4th 230, 240 (3d Cir. 2023). The Third Circuit conceded that PennDOT did not suffer an "economic *net* loss" (emphasis original) but reasoned that the agency's right to contract based on accurate information fit within "the historic understanding of traditional forms of 'property.'"

The Third Circuit thus joined the Fourth, Fifth, Seventh, Eighth, and Tenth Circuits in endorsing this "fraudulent inducement" theory of wire fraud. The Second, Sixth, Ninth, Eleventh, and D.C. Circuits, in contrast, have rejected the fraudulent inducement theory. As Kousisis and Alpha noted in their [petition for certiorari](#), "[w]hether deception affecting a victim's decision about who should get its property deprives the victim of the property itself is the heart of the circuit split."

The Supreme Court's decision to hear *Kousisis* in its upcoming term is poised to resolve the 6-5 split.

### **Significance for White-Collar Prosecutions**

*Kousisis* could have a significant impact on white-collar criminal prosecutions. First, it may continue the Supreme Court's recent trend of rigorously examining—and upending—previously accepted theories of criminal fraud liability. For instance, last year in [Ciminelli v. United States](#), the Supreme Court unanimously reversed a wire fraud conviction because it was predicated on the "right to control" theory of wire fraud. Under this theory, the government could show that a victim was deprived of "potentially valuable economic information ... necessary to make discretionary economic decisions." The Court repudiated the theory because it found that such "valuable economic information" was not tantamount to a "traditional property interest." The Court's logic surrounding the right to control theory in *Ciminelli* could very well be mapped onto the fraudulent inducement theory in *Kousisis*. Doing so would further limit the scope of conduct criminalized by the mail and wire fraud statutes.

Second, although the underlying misconduct in *Kousisis* is relatively straightforward, the Court's ruling could affect more complex prosecutions such as those brought under the U.S. Foreign Corrupt Practices Act (FCPA), the Racketeer Influenced and Corrupt Organizations Act (RICO), and the federal money laundering statute, [18 U.S.C. § 1956](#). That is because mail and wire fraud often serve as predicate offenses to FCPA, RICO, and money laundering prosecutions, which in turn carry the risk of significant prison terms, fines, and penalties.

Finally, the rarity of a 6-5 circuit split means that the country is more or less evenly divided on a foundational matter of federal criminal law. Resolving that split will undoubtedly influence a number of ongoing (and contemplated future) fraud prosecutions. Currently, the very same conduct that can be criminally prosecuted in, for example, Pennsylvania (which sits in the Third Circuit) cannot be prosecuted in neighboring New York and Ohio (in the Second and Sixth Circuits, respectively).

Whether fraudulent inducement can give rise to mail and wire fraud convictions is therefore ripe for clarification—and the Supreme Court is slated to provide that clarity in its 2024-2025 term.

### **Authors**

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