

Supreme Court Rules Wire Fraud Prosecutions Can Stand Even in Those Cases in Which the Defendant Did Not Seek to Cause Economic Loss

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On May 22, 2025, the Supreme Court issued its opinion in *Kousisis v. United States*, holding that the government need not prove an intent to cause economic loss, let alone actual economic loss, in order to sustain a conviction for wire fraud under 18 U.S.C. § 1343. The Court's opinion resolves a circuit split about whether a conviction for wire fraud can be sustained "when the defendant did not seek to cause the victim net pecuniary loss."^[1]

The petitioners in *Kousisis* were a federal contractor and its manager who were awarded two restoration contracts by the Pennsylvania Department of Transportation.^[2] Because the contracts were largely funded by federal grants, the petitioners were required to commit in their bids to subcontract a percentage of the contract value to a disadvantaged business, defined by Department of Transportation regulations as a "for-profit small business" majority owned by "one or more individuals who are both socially and economically disadvantaged."^[3] The petitioners represented in their bids that they would comply with this requirement by purchasing painting supplies from a prequalified disadvantaged business.^[4] However, the petitioners bought these goods from another supplier, using the disadvantaged business as a pass-through entity for the purchases.^[5] While the petitioners may have failed to procure the painting supplies from the disadvantaged business they identified, they otherwise successfully completed the restoration work.^[6] Because they were the lowest bidder, the government would have paid *more* for the same restoration work had the work not been awarded to the petitioners.^[7] Nevertheless, both petitioners' convictions were upheld by the Third Circuit.^[8]

Writing for the majority, Justice Barrett rejected the petitioners' argument that federal wire fraud convictions required a showing of economic loss.^[9] Justice Barrett explained that the plain text of 18 U.S.C. § 1343 requires only that the defendant obtained, or devised a scheme to obtain, money or property by false or fraudulent pretenses.^[10] This theory of prosecution is referred to as "the fraudulent-inducement theory."^[11]

The fraudulent-inducement theory has been used in a wide variety of cases in which the government has received the good or service for which it contracted but false statements were made by the person receiving payment. While the validity of the fraudulent-inducement theory has been a recurring issue in cases involving alleged disadvantaged business fraud schemes,^[12] those schemes are not the only kinds of cases in which the government relies on the fraudulent-inducement theory.^[13] *Kousisis* makes clear that the lack of an intent to cause economic loss is not a bar to prosecution.

Kousisis is particularly timely in light of the current administration's stated desire to use anti-fraud statutes to target diversity, equity, and inclusion efforts that it deems to be illegal.^[14] Such investigations would likely involve a situation similar to *Kousisis* where the services or goods for which the government contracted have been delivered but the contractor has either explicitly represented that it is in compliance with all anti-discrimination laws or *implicitly* done so by submitting a claim for payment on a contract where the contractor had agreed to comply with anti-discrimination laws. *Kousisis* makes clear that the fact that a contractor did not cause, or intend to cause, a financial loss is not a bar to such a fraud claim.

JUSTICE THOMAS'S CONCURRENCE SIGNALS THE NEXT FRONTIER OF FRAUDULENT-INDUCEMENT LITIGATION

While *Kousisis* resolved one ongoing dispute in fraudulent-inducement prosecutions, important questions remain. Because the petitioners failed to appeal whether the alleged misstatements were material, the Supreme Court did not have occasion to consider the question of whether the representations relating to the disadvantaged business were material.^[15] Justice Thomas, who concurred that an intent to cause economic loss is not an element of wire fraud, wrote separately, in part, to express his doubt that violations of disadvantaged requirements in a federal contract are material misrepresentations, and he even questioned whether such requirements are constitutional.^[16] While it appears that a majority of the Supreme Court might find that misrepresentations such as the ones made in *Kousisis* are material, the issue is far from settled and will likely continue to be litigated when the government relies on the fraudulent-inducement theory.

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[1] *Kousisis v. United States*, No. 23–909, slip op. at 4 (May 22, 2025)

[2] *Id.* at 2.

[3] *Id.* at 2; see also 49 C.F.R. §§ 26.21, 26.39(c) (requiring certain federal grant recipients to implement and maintain a disadvantaged business enterprise program); 49 C.F.R. § 26.5 (defining “disadvantaged business enterprise”).

[4] *Kousisis v. United States*, slip op. at 4.

[5] *Id.*

[6] *Id.* at 4,

[7] See *United States v. Kousisis*, 82 F.4th 230, 249 n.127 (3d Cir. 2023) (identifying petitioners as the lowest bidders).

[8] *Kousisis v. United States*, slip op. at 4.

[9] *Id.* at 6.

[10] *Id.* at 7.

[11] *Id.* at 1.

[12] *United States v. Leahy*, 464 F.3d 773 (7th Cir. 2006).

[13] See *United States v. Shellef*, 507 F.3d 82 (2d Cir. 2007) (international shipments); *United States v. Sadler*, 750 F.3d 585 (6th Cir. 2014) (pharmaceutical fraud); *United States v. Granberry*, 908 F.2d 278 (8th Cir. 1990) (school-bus-operator permitting); *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992) (international shipments); *United States v. Richman*, 796 F.3d 1173 (10th Cir. 2015) (environmental regulation); *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016) (solicitation of business through paid actors); *United States v. Guertin*, 67 F.4th 445 (D.C. Cir. 2023) (security clearance authorizations).

[14] Exec. Order 14173, “Ending Illegal Discrimination and Restoring Merit-Based Opportunity,” 90 Fed. Reg. 8633, 8634 (Jan. 21, 2025).

[15] *Kousisis v. United States*, slip op. at 16.

[16] *Id.* at 10 (Thomas, J., concurring).

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