No. 23-832

IN THE
Supreme Court of the United States

MOSHE PORAT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF FOR PETITIONER

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March 15, 2024

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INTRODUCTION

The fraudulent-inducement doctrine holds that a defendant commits fraud if he uses deception to induce a victim to enter a transaction, even if the victim receives exactly what he paid for. Some circuits have endorsed this doctrine as an accurate statement of liability under the federal mail and wire fraud statutes. Others have rejected it. Yet this Court has never addressed this important question, which arises in many federal fraud prosecutions. It should do so now and provide much-needed guidance to the lower courts.

The government oddly denies the existence of a circuit split. But numerous lower courts have recognized the split—and so has the government, in lower-court arguments in this case and others.

The government also suggests that this case is a poor vehicle. But regardless of ambiguity or alternate grounds in the opinion below, the fact remains that Petitioner was tried and convicted on a fraudulent-inducement theory, and the Third Circuit affirmed the validity of that theory. Accordingly, the question is squarely presented.

If anything, this case is an ideal vehicle, because it epitomizes how prosecutors can abuse the inducement doctrine to "make[] a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law." *Ciminelli v. United States*, 598 U.S. 306, 315 (2023). Petitioner is serving a 14-month prison sentence for supposedly inducing

students to attend an excellent business school by inflating U.S. News rankings the government's own witnesses called "stupid," "dishonest," "meaningless," and "pernicious." Unless the Court grants review now, the government will continue deploying the inducement theory to target all sorts of similar conduct that Congress plainly did not intend the federal fraud statutes to cover.

I. THE GOVERNMENT'S ATTEMPT TO DENY THE CIRCUIT SPLIT FAILS

The government claims, implausibly, that all circuits agree that intended loss is not an element of the offense, and that any apparent differences between the circuits are mere "terminological distinctions." BIO.8. That is demonstrably false.

1. The government begins by suggesting that this Court has at least implicitly endorsed the fraudulent-inducement doctrine. It starts with the usual red herring—that because the fraud statutes punish schemes and attempts, loss is irrelevant. BIO.6. That argument is fatuous. To say that an attempted crime need not succeed in causing a result says nothing about what result must be intended or what result a completed offense must cause. To be guilty of *attempted* theft, for example, a defendant need not *succeed* in taking property that isn't his. But he must *intend* that result, and a *completed* offense requires that result. The same is true of wire fraud. The defendant's intended result—the object of the scheme—must be causing *loss*—even though he could be guilty if the scheme did not succeed and did not cause any actual loss. *See* Pet.16.

The government next suggests this Court already endorsed the fraudulent-inducement doctrine in *Shaw v. United States*, 580 U.S. 63, 67 (2016). It is true that in *Shaw*, this Court quoted Judge Learned Hand's dictum in *United States v. Rowe*, 56 F.2d 747, 749 (2d Cir. 1932). But as discussed in the Petition, *Shaw* applied the bank fraud statute to the defendant's theft of funds from another customer's account to himself. *See* Pet.14. The government ignores this point. Moreover, in *Shaw*, the defendant deprived the bank of its "right to use the funds" and the "bailee's right in a bailment." 580 U.S. at 66-67 (citing 2 William Blackstone, *Commentaries* *452-54). *Shaw* merely held that in that context, the government need not prove the additional property harm of "ultimate financial loss." *Id.* at 67.

Shaw did *not* endorse the broad fraudulent-inducement theory, much less hold that the theory applies to all federal fraud statutes. This Court has never faced the question.

2. The Circuits are divided on the question. The Second Circuit itself has held that Judge Hand's dictum is not a correct statement of mail and wire fraud liability. It has held that a fraud scheme, "if . . . successful," must "result in some tangible harm." *United States v. Mittelstaedt*, 31 F.3d 1208, 1217 (2d Cir. 1994). It has held that the loose language in *Rowe* has been repudiated by subsequent cases. *United States v. Starr*, 816 F.2d 94, 101 (2d Cir. 1987). It has held that there is no fraud "where the alleged victims 'received exactly what they paid for,'" because in such a case, there is no loss or injury to a property right.

United States v. Shellef, 507 F.3d 82, 108 (2d Cir. 2007) (quoting *Starr*, 816 F.2d at 98).

Four other circuits—the Sixth, Ninth, Eleventh, and D.C. Circuits—have followed the Second. Pet.17-19; *see United States v. Takhalov*, 827 F.3d 1307, 1310 (11th Cir. 2016) (holding that there is no fraud where the defendant "merely induced the victim to enter into a transaction that he otherwise would have avoided") (cleaned up).

Six others have adopted the fraudulent-inducement doctrine, holding that even for a successful and completed scheme to defraud, loss is immaterial. Pet.20-25; *e.g.*, *United States v. Leahy*, 464 F.3d 773 (7th Cir. 2006).

These varying holdings are not, as the government implausibly claims, mere "terminological distinctions." BIO.8. The Eleventh Circuit, for example, has codified its holding in *Takhalov* into a pattern jury instruction for all fraud cases, which states: "Proving intent to deceive alone, without the intent to cause loss or injury, is not sufficient to prove intent to defraud." Pattern Crim. Jury Instr. 11th Cir. OI O50.1 (2022). That pattern jury instruction is inconsistent with the fraudulent-inducement doctrine, and it is inconsistent with the government's position. It is precisely the element that was neither presented to the jury nor proven in this case.

The dispute on this point continues to rage in the lower courts. For example, now-Chief Judge Pryor wrote a lengthy concurrence arguing that *Takhalov*

was wrongly decided. *United States v. Feldman*, 931 F.3d 1245, 1265-74 (11th Cir. 2019) (Pryor, J., concurring). Judge Pryor recognized that *Takhalov* had adopted the logic of Second Circuit cases including *Starr* and *Shellef*, but he argued that those cases were wrong. *Id.* at 1268-69. Relying on Judge Hand's older statement in *Rowe*, he argued in favor of the broader fraudulent-inducement theory. *Id.* at 1271. It is difficult to understand why Judge Pryor would have gone to such lengths attacking a mere difference in terminology.

Judge Pryor recognized the truth: Several circuits have rejected the fraudulent-inducement doctrine, and they have thereby placed a significant limitation on fraud prosecutions. The question is whether that limitation is correct, as Petitioner argues, or not, as the government argues.

3. Cases presenting this question continue to arise. In a recent case before Judge Moss, for example, a defendant convicted of fraud argued that he was not guilty because he had not intended any loss. *United States v. Venkata*, --- F. Supp. 3d ---, 2024 WL 86287, at *6 (D.D.C. Jan. 3, 2024). The defendant relied on *Takhalov* and *Starr*. The government relied on the other side of the split, citing the Seventh Circuit's decision in *Leahy*. Judge Moss noted that the defendant's argument—"that there was no intent to harm, and thus no fraud, because the [victim] would have received precisely what it bargained for"—required him to "wade[] into a circuit split." *Id.*

In such cases, prosecutors never characterize the dispute as a mere "terminological distinction." Rather, they argue that cases like *Shellef* and *Takhalov* are wrongly decided. In *Venkata*, for example, the government argued that such holdings have "no basis in either the statutory text or the common law," and that they could not be "square[d] with the fraudulent inducement cases" such as *Rowe*. Gov't's Supplemental Brief at 7-8, *Venkata*, --- F. Supp. 3d ---, 2024 WL 86287 (No. 20-CR-66-RDM), Dkt.209. Indeed, in Petitioner's case below, the government argued that *Takhalov* was wrongly decided, that it had been overruled by *Shaw*, and that as a result, it is irrelevant "whether [the victims] get the benefit of the bargain." C.A.Dkt.72 at 34-35.

As the government previously recognized in this case and others, this dispute is not about a difference of "terminology." The dispute is about a core question of law—namely, whether a victim is still defrauded when she receives the benefit of the bargain and therefore suffers no loss. According to the fraudulent-inducement doctrine, as defined in cases following *Rowe*, the answer is yes. According to cases like *Takhalov*, *Starr*, and *Shellef*, the answer is no.

Put differently, the question is whether a completed fraud must cause the victim a *loss* of money or property. The government's position is that "the wire-fraud statute does not require proof that the victim suffered a 'loss or harm.'" BIO.6. Several circuits, however, disagree. They hold that there is no fraud "where the alleged victims received exactly what they paid for." *Shellef*, 507 F.3d at 108; *accord Takhalov*,

827 F.3d at 1314. This Court should determine which position is correct.

II. THE GOVERNMENT'S ATTEMPT TO NARROW THE THIRD CIRCUIT'S HOLDING FAILS

The government argues that even if there is a circuit split, "this case does not implicate the circuit conflict" and is a poor vehicle to resolve it. BIO.9. The government suggests that Petitioner's conviction was (or could have been) obtained or affirmed under the *Shellef-Takhalov* standard anyway—because the victims suffered a loss. That is false for two reasons.

First, Petitioner was tried and convicted on a fraudulent-inducement theory. The indictment alleged a completed fraud (not a failed or attempted fraud), and it did not allege that students suffered a loss of money or property beyond the tuition money they had paid, for which they received an education and a degree. The jury instructions similarly contained no requirement that the student "victims" had lost money or property, nor did they contain any statement that the jury should acquit if it concluded the students received the full benefit of the bargain. The jury never found that the completed fraud caused any loss or injury to the students—it simply found that they had been fraudulently induced to enroll at Fox.

On appeal, Petitioner's lead argument was based on *Shellef*, *Takhalov*, and like cases. Petitioner argued that the students had received "exactly what they paid for"—namely, a high-quality education and a degree—and had therefore received the benefit of

the bargain. He argued that they suffered no cognizable loss. The government responded, as noted above, that cases like *Shellef* and *Takhalov* were incorrect. It argued that under the fraudulent-inducement doctrine, it did not "matter[] whether they" got "the benefit of the bargain." C.A.Dkt.72 at 35.

The Third Circuit began its opinion by stating that Porat was validly convicted on the simple grounds of fraudulent inducement: "Porat was not convicted on the theory that he deprived students of rankings; he was convicted for depriving them of *tuition money*." Pet.App.12a. It held that students' tuition dollars were "an object of his scheme," and that was enough to affirm. *Id.* That the panel then went on to suggest, in highly ambiguous fashion, a possible alternate ground for affirmance does not render this case a poor vehicle.

The fact remains that the government indicted Porat, obtained the conviction, and prevailed on appeal based on the fraudulent-inducement theory. *See Ciminelli*, 598 U.S. at 316 (rejecting government's contention that "[d]espite indicting, obtaining convictions, and prevailing on appeal based solely on the right-to-control theory," reversal was not required because the conviction would have been validly obtained on alternate grounds anyway). The validity of the fraudulent-inducement doctrine goes to the heart of this case: It was the legal theory on which Petitioner was tried and convicted.

Second, the government's alternate factual argument that U.S. News rankings are an essential element of the bargain does not withstand scrutiny. The government appears to admit that while it might be unfortunate that students care so much about rankings, it remains true that they do care, so therefore the rankings are essential. BIO.11. In other words, the government argues that whatever an alleged victim says was important to him is necessarily an essential component of the bargain for the purposes of property fraud.

That cannot be the law. If something as ephemeral as online prestige rankings could count as an "essential benefit of the bargain," then there would be no limits to fraud whatsoever. In part for that reason, in the educational context itself, courts have consistently recognized that "the essence of the transaction" between students and their school is "a semester of education in exchange for a semester of tuition." *Squeri v. Mt. Ida College*, 954 F.3d 56, 71 (1st Cir. 2020).

Moreover, most courts have rejected the claim that admitted students have *any* property interest in enrolling at and attending higher education programs. *See, e.g.*, *Unger v. Nat'l Residents Matching Program*, 928 F.2d 1392, 1397 (3d Cir. 1991) (rejecting the argument that a student has "a property interest in the pursuit and continuance of her" graduate education). Courts have generally reached the same conclusion even with respect to students that have *already enrolled*. *See, e.g.*, *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 229 (1985) (Powell, J., concurring) (stu-

dent's "claim to a property right [in continued enrollment] is dubious at best."); *Doe v. Purdue Univ.*, 928 F.3d 652, 660 (7th Cir. 2019) (student lacked "property interest in his continued enrollment" absent "specific contractual promise"); *Hennessy v. City of Melrose*, 194 F.3d 237, 249 (1st Cir. 1999) (observing that claim to "property interest in continued enrollment" was "dubious"). If students lack a property interest in admission and continued enrollment, how can they have a property interest in how some third party ranks their school?

This Court has held that fraud requires a scheme that, if completed, will result in "injuring one in his property rights." *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924). It requires "an economic injury." *Pasquantino v. United States*, 544 U.S. 349, 356 (2005). Students do not have a property right in the rankings, and when a school's ranking falls, its students do not suffer any economic injury. In other words, rejecting the fraudulent-inducement doctrine involves requiring that the intended or completed fraud "cause loss or injury" to the victim. Pattern Crim. Jury Instr. 11th Cir. OI O50.1 (2022). The relevant loss or injury cannot be something as amorphous and subjective as fictive and invented prestige.

Hurt feelings are not enough. Rather, the relevant loss or injury must be a loss of money or property, for that is what the federal fraud statutes protect. Even assuming the truth of all the allegations against Petitioner, students at Fox did not suffer any loss of money or property. Petitioner was convicted on an invalid

theory of fraud—namely, the theory that mere fraudulent inducement is sufficient.

III. THIS COURT'S REVIEW SHOULD NOT BE DELAYED

The irony of the government's opposition is that it is only a matter of time before the government seeks certiorari on the same question. Eventually the government will lose a case in a circuit like the Second or Eleventh or Sixth that rejects fraudulent inducement. It will then seek this Court's intervention to resolve the conflict. In the meantime, however, the government is content to continue to rack up fraudulent-inducement convictions in circuits like the Third.

At oral argument in *Ciminelli*, Justice Kavanaugh noted that it was "problematic" and troubling that the government had been "pushing" the right-to-control theory "for several decades" and that "lots of people have been convicted under it"—only for the government to abandon the theory before this Court. Transcript of Oral Argument at 61, *Ciminelli*, 598 U.S. 306 (No. 21-1170). Moreover, throughout that time, the government had repeatedly opposed certiorari. In case after case, it argued that there was no need for this Court to intervene, either because the right-to-control theory was arguably valid, or because it was never squarely presented in any individual case, or for some other technical reason.

In *Ciminelli* itself, the government opposed certiorari, using many of the same arguments raised here. It also argued that there was no conflict among the lower courts regarding the right-to-control doctrine.

Brief for the United States in Opposition at 26-27, *Ciminelli*, 598 U.S. 306 (No. 21-1170). In addition, it argued that there were fact-bound issues that made the case "a particularly poor vehicle for reviewing" right-to-control. *Id.* at 28. And, citing nearly a dozen prior cases where it had successfully opposed certiorari on the same question, it noted that "this Court has recently and repeatedly denied certiorari petitions raising similar claims." *Id.* at 21.

The strategy was cynical, as Justice Kavanaugh suggested. Everyone knew the right-to-control doctrine was highly problematic, yet the government sought to evade this Court's review for years so it could continue to obtain convictions. In that time hundreds of convictions caused enormous collateral damage upon those wrongfully convicted as well as their loved ones. The government should not be allowed to repeat the same strategy with the fraudulent-inducement doctrine.

Petitioner was tried and convicted based on the fraudulent-inducement theory, and he is now incarcerated as a result. This Court should grant certiorari to resolve the circuit split and determine whether that theory is valid.

IV. ALTERNATIVELY, THIS COURT SHOULD HOLD THE PETITION PENDING THE OUTCOME IN *KOUSISIS*

On February 20, 2024, the defendants in *United States v. Kousisis*, 82 F.4th 230 (3d Cir. 2023), filed a petition for certiorari. Their first question presented raises the same fundamental question as the Petition

in this case. *See Kousisis v. United States*, No. 23-909 (U.S. Feb. 20, 2024). On March 7, this Court granted the government's request to extend the time for its response up to April 24. Porat's case provides an ideal vehicle to address the validity of the fraudulent-inducement doctrine. At a minimum, however, and in the alternative, Porat requests that if this Court does not grant his Petition outright, it hold his Petition pending the resolution of the petition in *Kousisis*.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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