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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF FOR PETITIONER

Pursuant to this Court's Rule 15.8, Petitioner Moshe Porat submits this supplemental brief in order to call this Court's attention to the Ninth Circuit's recent decision in *United States v. Milheiser*, 98 F.4th 935 (9th Cir. 2024). In *Milheiser*, the Ninth Circuit reaffirmed its prior holdings rejecting the fraudulent-inducement doctrine. It again held that fraud requires "contemplated harm," and that there is no fraud when the putative victims "receive[] exactly what they paid for." *Id.* at 940.

The defendants in *Milheiser* were charged with property fraud for their deceptive practices in selling printer toner. Acting as sales representatives, they called business customers and falsely represented that they were the customers' regular supplier of toner, that the price of toner was increasing, and that the customers could lock in a lower price by placing an immediate order. *Id.* at 938. On the basis of those lies, the customers placed orders.

The evidence demonstrated that the defendants made materially false statements and that the customers would not have placed the orders but for the deception. "Some purchasers testified that they would not have placed orders with the sales companies if they had realized they were not dealing with their regular supplier." *Id.* at 939. One customer also testified that he would not have placed the order if he had known the price of toner was not, in fact, increasing. *Id.* On the other hand, it was also undisputed that the purchasers did receive the toner as promised. "There was no evidence presented at trial suggesting that any

businesses did not receive the toner or that any of the toner had defects." *Id.*

The defendants requested jury instructions stating, inter alia, that misrepresentation "must be coupled with a contemplated harm to the person that affects the very nature of the bargain itself." *Id.* at 940. The proposed instructions further stated: "When the person receives exactly what they paid for, there is no fraud even if the person made the purchase because of the misrepresentation." *Id.*

The government objected to the defendants' proposed instructions. It argued that "a mail fraud conviction can be sustained based on a material misrepresentation that induces a victim to part with money, even though the misrepresentation concerns something other than price or quality." *Id.* at 940 (quoting government's trial court argument). The district court agreed with the government and rejected the defendant's proposed instructions.

* * * *

The Ninth Circuit reversed, holding that the defendants' proposed instruction was an accurate statement of the law and that the government had "presented an overbroad theory of fraud to the jury." *Id.* at 941. The Ninth Circuit reaffirmed its prior cases rejecting the fraudulent-inducement doctrine: "we have made clear that even if misrepresentations result in money or property changing hands, they still may not necessarily constitute fraud." *Id.* at 942 (citing *United States v. Bruchhausen*, 977 F.2d 464 (9th Cir. 1992)). It held that a completed fraud requires "the loss of 'something of value.'" *Id.* (quoting *United*

States v. Yates, 16 F.4th 256, 265 (9th Cir. 2021)). It held that a scheme to defraud means a scheme to deceive *and* to deprive the victim of something of value.

The *Milheiser* court relied on decisions by other circuits that have also rejected the fraudulent-inducement doctrine. It cited *United States v. Regent Office Supply Co.*, 421 F.2d 1174 (2d Cir. 1970), *United States v. Takhalov*, 827 F.3d 1307 (11th Cir. 2016), and *United States v. Guertin*, 67 F.4th 445 (D.C. Cir. 2023). *See Milheiser*, 98 F.4th at 943-44.

Those cases, like the Ninth Circuit's prior holding in *Bruchhausen*, all stand for the same fundamental propositions. First, "deception does not amount to fraud simply because it results in money changing hands." *Milheiser*, 98 F.4th at 944. Second, federal fraud statutes do not reach "cases in which a defendant's misrepresentations about collateral matters may have led to the transaction but the buyer still got the product that she expected at the price she expected." *Id.*

If those principles were faithfully applied to Petitioner's case, his conviction could not stand. Deception about a school's U.S. News ranking is precisely the sort of collateral matter that cannot, without more, give rise to a federal fraud liability. Even if the deception resulted in money changing hands—in the form of students' tuition payments—there was no fraud because the students still got the product they purchased at the promised price. The students received a high-quality education and an accredited degree. Unlike the educational services the school provided in exchange for the students' tuition money, its

ranking by third party publications like U.S. News was not something the school could guarantee, and was plainly collateral to the transaction.

In short, if Petitioner's case had been tried in the Ninth Circuit, his convictions would have been reversed. Indeed, contrary to the government's argument opposing certiorari, the Ninth Circuit's opinion in *Milheiser* confirms that the circuits are divided on this question. *See* 98 F.4th at 944 ("We agree with the Second, Eleventh, and D.C. Circuits that not just any lie that secures a sale constitutes fraud, and that the lie must instead go to the nature of the bargain.").

More importantly, and again contrary to the government's argument opposing certiorari, this dispute is not merely a terminological difference. The dispute goes to the very meaning of fraud, and the difference is outcome-determinative in cases like *Milheiser* and this one. The conviction in *Milheiser* was obtained on the basis of instructions and government arguments that endorsed the invalid fraudulent-inducement doctrine, and as a result, the Ninth Circuit held that the convictions were fundamentally flawed. *Id.* at 946.

The same is true here. Just as in *Milheiser*, Petitioner's convictions were obtained on the basis of the invalid fraudulent-inducement doctrine. This Court should grant certiorari to address the validity of that doctrine and resolve the circuit split.

Respectfully submitted,

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