No. 23-909

In the
Supreme Court of the United States

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

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR MOSHE PORAT AS AMICUS CURIAE SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Moshe Porat was born in Poland to parents who survived the Holocaust. After emigrating first to Israel and then to the United States, Porat devoted himself to education. He earned a Ph.D. at Temple University's business school, which was later named Fox School of Business, then became a professor and department chair there. He ultimately became Dean of Fox in 1996. He held that position for nearly twenty-two years. During that time, he devoted himself to making Fox one of the very best business schools, both nationally and internationally—even though Temple was regarded as more of a working-class institution than traditional elite powerhouses like Harvard, Stanford, and Wharton. Fox succeeded at providing excellent training and a path into business careers for students of varied backgrounds.

At age 75, however, he was sentenced to 14 months in prison for wire fraud. The case was based on allegations that Porat directed a subordinate to give false answers to rankings surveys by publishers such as U.S. News & World Report. The answers were on topics like how many Fox MBA students had taken the GMAT. These answers were irrelevant to the underlying quality of the education, but they affected the school's rankings.

The government contended that submitting the false answers constituted fraud because they somehow deprived Fox students of money or property. It

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[1] Rule 37.6 statement: No part of this brief was authored by any party's counsel, and no person or entity other than *amicus curiae* funded its preparation or submission.

argued at trial and on appeal that Porat was guilty of federal property fraud because some students chose to attend Fox based on its U.S. News rankings and paid tuition—even though the students received the education and degree for which they paid.

Porat has an acute interest in this case because the Third Circuit affirmed his conviction under the same rationale it applied here. In both cases, the convictions were affirmed on the theory that the use of deception to induce a monetary transaction is sufficient to prove a scheme to defraud, even if economic harm is not an object of the scheme.

On January 31, 2024, Porat filed a petition for certiorari, which remains pending under docket number 23-832. The question presented in Porat's petition is "Whether deception to induce a commercial exchange can constitute mail or wire fraud under 18 U.S.C. §§1341 and 1343, even if the defendant does not intend to cause economic harm and the alleged victim receives the goods or services for which it paid." That question is virtually identical to the question presented in this case. Consequently, if this Court rules that the answer is no, Porat's conviction would have to be reversed.

SUMMARY OF ARGUMENT

The dispute in this case centers on whether fraud requires economic harm. Petitioners' position and Porat's is that a successful, completed fraud must cause economic harm to the victim, and that a defendant must intend that harm. The government's position—commonly known as the fraudulent-inducement doctrine—is that a defendant is guilty of fraud when his deception induces any economic exchange—even if the victim suffers no harm and receives exactly what she paid for.

The fraudulent-inducement doctrine is inconsistent with the common law, and it is vastly overbroad. If adopted, the government's position would render many of this Court's prior decisions a dead letter. This Court should reaffirm that a completed fraud requires actual and intended economic harm.

BACKGROUND

A. Porat's Criminal Case

In 2021, Porat was charged with wire fraud (18 U.S.C. §1343) and wire fraud conspiracy (18 U.S.C. §371). The core allegation was that Porat, along with two other Temple employees, conspired "to deceive readers of U.S. News by providing false and misleading information to U.S. News...in order to fraudulently inflate Fox's rankings in the U.S. News surveys" of top online and part-time business school programs.

None of the false survey responses had anything to do with the quality of a Fox education or the value of the Fox degree. Instead, the alleged misstatements

targeted the arbitrary metrics that matter to the arcane algorithm used by U.S. News to create its rankings. For example, in its survey responses, Fox claimed 100% of its students had taken the GMAT, when in fact only a portion of them had. Similarly, Fox provided false information about how many students were enrolled in its various MBA programs (*i.e.*, traditional, part-time, online, executive). In part—but only in part—as a result of these survey responses, Fox rose in the rankings for online and part-time MBA programs. When the scandal came to light in early 2018, Fox was initially removed from the rankings. It was subsequently re-listed with a lower rank.

At trial, the government's own witnesses characterized the U.S. News rankings as "stupid," "dishonest," "statistically meaningless," "arbitrary," "pernicious," "motivated by money," and "made by people that don't know anything about education." Temple's then-Provost bemoaned that the rankings were an undeserved "bragging right" that hurt working-class schools like Temple because the only thing the rankings *truly* measured was institutional wealth. She testified that "schools that are highly ranked had more money than we did," and "we didn't have enough money to spend on all the things that U.S. News counts." The evidence at trial proved what everyone in higher education has long known: The rankings simply serve to cement the position of elite institutions at the expense of everyone else. And the rankings force all schools to spend money chasing arbitrary metrics rather than improving the quality of education.

Nonetheless, the government was able to call two former Fox students who claimed they were victims of the alleged fraud. One testified that he did not receive "the prestige that was promised to me." The other said "I was kind of promised one thing and then delivered another."

Both students, however, agreed Fox had "a great MBA program" that provided an "intense" and comprehensive business training. And both students obtained excellent jobs after receiving their Fox MBA's. One got a job at Facebook, and even after the rankings scandal, still advertised his Fox degree prominently on his LinkedIn page and his personal website. The other student was promoted to a position as Manager of Capital Investments after earning his Fox degree.

Moreover, the cost of Fox tuition did not rise when the school rose in the rankings, and Fox was substantially less expensive than the other schools the student-witnesses said they had considered. One of the student-witnesses attended Fox instead of two other schools that were significantly more expensive, and the other likewise chose Fox over a school with higher tuition.

The defense also called witnesses who had attended Fox. They disagreed with the government's student-witnesses about the importance of the U.S. News rankings but agreed Fox had an excellent MBA program. The defense also called Fox professors. One—a successful businessman—began teaching at Fox after meeting Porat. He praised the educational program that Porat had created as "topnotch" and geared toward aspiring businesspeople who "came from families that couldn't afford" more blue-blooded

programs. Another Fox professor testified that while prior deans had done little, Porat was a "forward thinker" who worked tirelessly to improve the school.

In sum, the government presented no evidence at Porat's trial that the underlying quality of the educational program at Fox was anything less than excellent. Nor was there any evidence that the U.S. News rankings were an accurate proxy for educational quality or the value of a degree. And at the same time, the evidence showed that tuition at Fox was substantially lower than at other comparable institutions, and that it was not increased when Fox rose in the rankings. The government's theory was that students were nonetheless defrauded because the rankings were inaccurate, and the rankings had induced at least some students to pay tuition.

Porat was convicted and is serving a 14-month prison sentence.

B. Third Circuit Decision In Porat's Case

On appeal, Porat argued, as he had in the district court, that the government had not proved money or property fraud. He admitted, of course, that the students had paid tuition dollars to the university. But he argued that mere payment of tuition money, even if induced by deception, is not sufficient to prove fraud because the students had received a quality education and a degree in exchange for their money. They received, in other words, exactly what they had paid for. After all, federal courts have recognized that the contract between students and their school is "a semester of education in exchange for a semester of tuition." *Squeri v. Mount Ida Coll.*, 954 F.3d 56, 71 (1st Cir.

2020). When a school falls in the rankings—which happens frequently, for a variety of reasons—students do not suffer any "loss" that is cognizable under the fraud statutes. They do not suffer harm to their *property* rights. At most, the Fox students had lost a sense of prestige when the rankings scandal came to light. Prestige is not a property interest protected by the fraud statutes.

The government argued that this was a simple case of "false advertising," and that false advertising constitutes fraud. It argued that the object of the fraud was students' tuition money, which obviously satisfies the fraud statutes' "money or property" requirement.

The Third Circuit agreed with the government and affirmed the conviction. It held the government had sufficiently proven "that Porat engaged in the kind of scheme the wire fraud statute criminalizes: that is, that Porat trumpeted Fox's knowingly false, inflated rankings to students for the purpose of enticing his victims to pay tuition money." *United States v. Porat*, 76 F.4th 213, 219 (3d Cir. 2023). In other words, according to the court, "Porat was not convicted on the theory that he deprived students of rankings; he was convicted for depriving them of *tuition money*." *Id.*

By finding that use of the purportedly "false, inflated rankings" to induce students to pay tuition to Fox was sufficient to support the fraud conviction, the court held that fraudulent inducement is sufficient to support a wire fraud conviction. But it also suggested, in the alternative, "that the nature of the bargain between Fox and the students included not only the actual education afforded them," but also the "value" of

the school's place in the rankings. *Id.* at 220. The court reached this alternative holding based on its assumption that "an MBA is a costly, debt-inducing, once-in-a-lifetime 'purchase' expected to have long-term effects on employment and earnings. Thus, in making a cost-benefit analysis, a student-buyer would be prudent to assess the degree's effect on future earnings." *Id.* at 220 n.6.

Judge Krause separately concurred. Unlike the panel majority, she purported to reject the fraudulent-inducement doctrine: "[I]f a putative victim of wire fraud got exactly what he paid for, how exactly is he a victim at all? What property did he lose?" *Id.* at 227. But she went on to cite the Third Circuit's decision in *Kousisis* as an example of a case in which the victim "had not received the benefit of the bargain." *Id.* at 228. Relying on *Kousisis*, Judge Krause concluded third-party rankings are an essential part of the educational bargain and can therefore support a fraud conviction *Id.* at 229-30.

ARGUMENT

The Third Circuit's decision in both *Kousisis* and *Porat* are premised on the fraudulent-inducement theory. Under that theory, it doesn't matter whether the defendant intends to *cheat* the purported "victim"—a lie just to get someone in the door is a federal felony (as long as some wire is involved, which is impossible to avoid in commercial transactions these days).

As Petitioners explain, that expansive reading cannot be squared with the text, structure, or history of the federal fraud statutes, "which are 'limited in scope to the protection of property rights.'" *Ciminelli v.*

United States, 598 U.S. 306, 314 (2023) (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)). The federal fraud statutes codify "common-law fraud," except where common-law rules are "clearly…inconsistent with the statutes Congress enacted." *Neder v. United States*, 527 U.S. 1, 25 (1999). And at common law, economic injury was an essential element of fraud. Accordingly, an essential element of a scheme to defraud is proof that, if the scheme succeeds, it will cause financial harm to the victim. The wire fraud statute covers mere attempts, but the government must prove that the object of the scheme is causing *loss* to the victim.

The fraudulent-inducement doctrine would vastly expand the scope of federal mail and wire fraud. Porat's case epitomizes the federalism and due process problems with excising any economic injury requirement from the statute. It shows how the fraudulent-inducement doctrine can convert virtually any deceit into a federal felony, no matter how trivial and subjective the harm it would cause. The inevitable result is that the statute will supplant lesser state, local, administrative, and civil remedies better tailored to deter deceitful conduct not devised to cause economic harm. And it will create serious fair notice problems, because whether a person has committed a federal crime will depend on whether, after the fact, the putative victim says the deception was important to them, even if their money or property was not harmed.

The object of a fraud scheme must be more than inducing a fair exchange—it must be to cheat the victim out of what he is paying for. The test should be whether, if the fraud is completed, the putative victim

would be left with less than she paid for—*i.e.*, whether the scheme will cause economic harm if it comes to fruition. And regardless of whether his scheme succeeds, a defendant must intend that harm. That standard is consistent with the common-law understanding of fraud and avoids the subjectivity and vagueness inherent in other formulations that permit prosecutors, juries, and courts to define the scope of the "bargain" in hindsight. Again, Porat's case illustrates the dangers in approaches purporting to divine the "essence" of the bargain; those dangers can be avoided by an objective standard focused on whether the scheme would, if completed, cause economic loss.

I. THE OBJECT OF FRAUD MUST BE CAUSING LOSS OR HARM TO PROPERTY

1. As Petitioners' brief persuasively explains, a deceptive scheme that contemplates no economic or other property harm is *not* a "scheme to defraud" under the federal mail and wire fraud statutes. Rather, the "text, statutory history, statutory structure, statutory punishments, federalism, and fair notice" all indicate that the fraud statutes are confined to schemes that, if completed, would inflict a property loss to the victim. *Snyder v. United States*, 144 S. Ct. 1947, 1954 (2024). If someone receives what he paid for in a transaction, how can that "victim" have suffered property loss?

The theory that a defendant is guilty of fraud even if the victim gets full and fair value in the exchange is not only inconsistent with this Court's precedents. It is also inconsistent with historical notions of fraud. At early common law, there was no crime of fraud or false pretenses. The law of fraud was initially developed in

tort law. And in tort, "there can be no recovery if the plaintiff is none the worse off for the misrepresentation, however flagrant it may have been, as where for example he receives all the value that he has been promised and has paid for…." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* §110, at 765 (5th ed. 1984).

It was hornbook law that no damages action would lie where the plaintiff received full and fair value in the exchange. *See id.* ("Since the modern action of deceit is a descendant of the older action on the case, it carries over the requirement that the plaintiff must have suffered substantial damage before the cause of action can arise."). That requirement was deeply rooted in the common law.

And it remains hornbook law today that, in an action for misrepresentation and deceit, a defendant is only "subject to liability for *economic* loss caused by the other's justifiable reliance on the misrepresentation." Restatement (Third) of Torts: Liab. For Econ. Harm §9 (Am. L. Inst. 2020) (emphasis added). Damage is measured primarily by "the difference between the value of what the plaintiff paid and received" *Id.* §9 cmt b.(3). Where the deceived party receives the full value of what she was promised, there is no action for fraudulent misrepresentation. That is and has always been a limit on the tort action.

2. Those principles, borrowed from tort law, have also animated criminal fraud doctrine. The first English statute defining the offense of false pretenses required obtaining money or property "with intent to cheat or defraud any person or persons of the same."

30 Geo. II, ch. 24 (1757); *see* 3 Wayne R. LaFave, *Substantive Criminal Law* §19.7(a) (3d ed. 2018).

These words carried with them a well-understood meaning borrowed from tort. The first edition of Black's Law Dictionary—published shortly after the earliest enactment of the federal mail fraud statute—defined "defraud" as "To practice fraud; to cheat or trick; to deprive a person of property or any interest, estate, or right by fraud, deceit, or artifice." Black's Law Dictionary 347 (1st ed. 1891). That definition reflected the traditional, common-law understanding: Fraud requires the *deprivation* of a property interest.

Moreover, the crime of fraud was and is closely related to the older common-law offense of larceny. When the first false pretenses statute was passed by Parliament, the intent was to fill a "gap" that had been created by judicial development of common-law larceny. *See* Model Penal Code §223.1, cmt. at 128-29 (Am. L. Inst. 1980). Larceny is theft accomplished by stealth, whereas fraud is theft accomplished by deception. *See United States v. Turley*, 352 U.S. 407, 412 (1957).

Indeed, in most American jurisdictions today, larceny and fraud are not even distinct offenses—fraud is merely one species of larceny, one means of committing the offense. *E.g.*, Cal. Penal Code §484(a); Minn. Stat. §609.52, subd.2(a)(3); N.Y. Penal Law §155.05; *see Solem v. Heim*, 463 U.S. 277, 280 & n.3 (1983); *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942); *see also* Model Penal Code §223.1(1) ("Conduct denominated theft in this Article [including 'theft by deception'] constitutes a single offense.").

Larceny has always required an intent to permanently deprive the victim of property. *Morisette v. United States*, 342 U.S. 246, 266 n.28 (1952); 4 W. Blackstone, *Commentaries on the Laws of England* 232 (1765). That was true in the eighteenth century, and it is true under state statutes today. A completed larceny offense requires loss of property, and all larceny (including attempted larceny) requires an intent to cause loss of property. Fraud, as an offshoot or species of larceny, should not be interpreted differently. Indeed, it would be odd for this Court's interpretation of the federal fraud statutes to depart so far from both the common law and the law of fraud as defined by modern state statutes.

3. This Court has long defined fraud consistent with the traditional understanding, explaining that mail fraud requires the "wrongful purpose of injuring one in his property rights." *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924). Indeed, in *Hammerschmidt*, this Court distinguished the broader scope of 18 U.S.C. §371, which punishes conspiracies to defraud the federal government, from the narrower scope of mail fraud. The former covers "interfer[ing] with or obstruct[ing]…lawful governmental functions by deceit, craft or trickery." 265 U.S. at 188. By contrast, the latter covers only traditional fraud—"cheat[ing] the [victim] out of property or money." *Id.* As the Court put it in *Durland v. United States*, the mail fraud statute was designed to combat "intentional efforts to despoil." 161 U.S. 306, 314 (1896). Exchanging fair consideration with another neither cheats the counterparty nor injures its property.

This understanding runs through the Court's modern fraud cases too. *McNally*, for example, "read § 1341 as limited in scope to the protection of property rights" and held that fraud ordinarily requires property "deprivation." 483 U.S. at 358-60. And it reversed the convictions because "the jury was not required to find that the [victim] was defrauded of any money or property." *Id*. at 360.

In dissent, Justice Stevens argued that §1341 and §371 should be interpreted the same way, such that proof of fraud does not require "any evidence that [the victim] has suffered any property or pecuniary loss." *Id.* at 369; *see also id.* at 370 ("Congress' use of the term showed no intent to limit the statute to property loss."). He argued that receipt of salary for work performed under deceptive pretenses should satisfy the property element. *Id.* at 377 n.10. If that view had carried the day the convictions would have been affirmed. After all, the defendants in *McNally* included a state official, and it was undisputed that all of them had received consideration—hundreds of thousands of dollars of kickbacks and salary—through the scheme. *Id.* at 352-53. The fraudulent-inducement theory would therefore resurrect the arguments in Justice Stevens's dissent that this Court has already rejected.

The Court's reasoning in *Pasquantino v. United States*, 544 U.S. 349 (2005), further confirms that the object of a property fraud scheme must be causing economic loss. The Court held that a smuggling scheme to evade Canadian liquor taxes could constitute mail fraud, in part because the scheme "deprived Canada of money, *inflicting an economic injury* no less than

had they embezzled funds from the Canadian treasury." *Id.* at 356 (emphasis added).

In *Skilling v. United States*, 561 U.S. 358 (2010), this Court again reaffirmed that a fraud scheme's object must be causing loss. It explained that ordinary property fraud involves a situation where "the victim's *loss* of money or property supplied the defendant's gain, with one the mirror image of the other." *Id.* at 400 (emphasis added).

Most recently, in *Kelly v. United States*, this Court reiterated that actual or intended *loss* is an essential component of fraud. It held that "a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme." 590 U.S. 391, 402 (2020). If a fraud conviction cannot stand when loss is a mere byproduct, then it cannot stand when there is no loss (or contemplated loss) *at all*. Quoting Judge Easterbrook, this Court reaffirmed a central tenet of fraud liability: "[T]he victim's loss must be an objective of the [deceitful] scheme…." *Id.* at 1573 n.2 (quoting *United States v. Walters*, 997 F.2d 1219, 1226 (7th Cir. 1993)).

All these cases hewed to the traditional understanding that the object of a fraud must be harming the victim in its property rights by causing some loss. The Third Circuit's decisions below and in *Porat* would abandon that understanding entirely, replacing

it with an understanding of fraud premised on inducement alone.[2]

4. Of course, a defendant need not *succeed* in causing loss, but that is because the statutes cover inchoate liability. They punish schemes to defraud, regardless of whether those schemes are successful. But the object of the scheme must be to cheat, harm, and cause loss. Just as attempted murder requires intent to cause death and attempted larceny requires intent to permanently deprive, a scheme to defraud requires intent to cause economic loss—even though it needn't succeed. The government's arguments for the fraudulent-inducement doctrine repeatedly conflate this distinction.

Many lower courts, including the Second Circuit, have recognized that loss is not irrelevant even though the statute creates inchoate liability. "Although the government is not required to prove actual injury, it must, at a minimum, prove that defendants *contemplated* some actual harm or injury to their victims." *United States v. Starr*, 816 F.2d 94, 98 (2d Cir. 1987); *see also, e.g.*, *United States v. Turner*, 465 F.3d 667, 680-81 (6th Cir. 2006) ("[T]he mail fraud statute does not require an actual loss of property because

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[2] In its brief in *Ciminelli*, the government erroneously claimed this Court had "recognized" mere "fraudulent inducement" as a basis for property fraud. *See* Brief for the United States at 40, 598 U.S. 306 (No. 21-1170). Neither of the cases it cited used that phrase, and both involved classic pecuniary harm. *See Durland*, 161 U.S. at 314 (sale of worthless bonds); *United States v. Sampson*, 371 U.S. 75, 77 (1962) (defendants made false promises about loans and services they "did not intend to and in fact did not" provide).

success of the scheme is not an element of the offense.... But if the scheme is successful, its effect must be to deprive the victim of money or property."). Consequently, fraudulent inducement in an otherwise fair exchange is insufficient, because the scheme, if completed, will not harm property interests.[3]

In sum, although the fraud statutes criminalize inchoate schemes, they still require proof that the scheme, if completed, would injure a traditionally protected property interest. A DBE requirement is not such an interest; nor is a business school's U.S. News ranking. PennDot suffered no economic harm from the deceit in this case, just as the students suffered no economic harm due to the Fox rankings scandal. Whatever else one may say about the conduct in either case, it simply did not amount to wire fraud.

II. THE FRAUDULENT-INDUCEMENT DOCTRINE RAISES SERIOUS FEDERALISM AND DUE PROCESS CONCERNS

This Court has consistently eschewed interpretations of the federal fraud statutes that "vastly expand[] federal jurisdiction" such that "almost any deceptive act could be criminal." *Ciminelli*, 598 U.S. at 315. It has commanded courts to interpret the mail and wire fraud statutes narrowly, to avoid "mak[ing]

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[3] As Petitioners explain (Br.35-36), Judge Learned Hand's dicta in *United States v. Rowe*, 56 F.2d 747 (2d Cir. 1932), did not expand the ambit of federal fraud to mere fraudulent inducement. Moreover, in *Starr*, the Second Circuit disavowed Judge Hand's dictum and held that a fraud scheme, if completed, must cause "a corresponding loss or injury to the victim of the fraud." 816 F.2d at 101. And in *Skilling* this Court cited that very portion of *Starr* with approval. *See* 561 U.S. at 400.

a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law." *Id.* In short, the fraud statutes must not be read "to place under federal superintendence a vast array of conduct traditionally policed by the States." *Id.* at 316 (quoting *Cleveland v. United States*, 531 U.S. 12, 27 (2000)).

Contrary to that edict, the fraudulent-inducement theory radically expands the potential ambit of federal property fraud into areas traditionally policed by the States, or through civil and regulatory enforcement mechanisms. Porat's case is a paradigmatic example of this problem. It epitomizes how the doctrine allows the government to prosecute people for "fraud" even where the purported victims suffer (at most) subjective, non-economic "harm."

A. The Doctrine Would Criminalize A Breathtakingly Broad Swath of Conduct

1. The only harm suffered by the purported student victims in Porat's case was the loss of the amorphous notion of prestige value associated with a degree from a highly ranked school. There was no evidence this injury was anything but a purely psychic harm: (1) Fox tuition remained the same when the school climbed in the rankings; (2) the students themselves admitted the education they received was excellent; and (3) the students got good new jobs after completing their degrees.

Moreover, educational rankings have been a persistent target of criticism in recent years. They have been aptly characterized as a "farce," based on "faux-

precise formulas" that are "riven with statistical misconceptions."[4] Since Porat's trial, it has become clear that deception to inflate schools' rankings—the exact conduct for which Porat is serving a substantial prison term—is so widespread as to practically be the norm.[5]

Even more recently, dozens of top medical and law schools boycotted the rankings as counterproductive to the schools' educational missions. The schools were particularly concerned that chasing rankings created perverse incentives, resulting in the admission of fewer working-class students and deterring programs that support public interest careers.[6]

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[4] Colin Diver, *The Rankings Farce*, Chron. of Higher Educ. (Apr. 15, 2022), https://www.chronicle.com/article/the-rankings-farce; *see also* Alia Wong, *The Commodification of Higher Education*, Atlantic (Mar. 30, 2016), https://www.theatlantic.com/education/archive/2016/03/the-commodification-of-higher-education/475947/; Malcolm Gladwell, *The Order of Things*, New Yorker (Feb. 6, 2011), https://www.newyorker.com/magazine/2011/02/14/the-order-of-things.

[5] *See, e.g.*, Anemona Hartocollis, *U.S. News Dropped Columbia's Ranking, but Its Own Methods Are Now Questioned*, N.Y. Times (Sept. 12, 2022), https://www.nytimes.com/2022/09/12/us/columbia-university-us-news-ranking.html; Susan Snyder & Craig R. McCoy, *Rutgers business school accused of rankings fraud, hiring own grads in temp jobs to boost its scores*, Phila. Inquirer (Apr. 22, 2022), https://www.inquirer.com/news/rutgers-college-rankings-temple-lawsuits-20220422.html; Scott Jaschik, *Blame the Deans*, Inside Higher Ed (May 1, 2022), https://www.insidehighered.com/admissions/article/2022/05/02/report-blames-deans-incorrect-data-submitted-us-news.

[6] *See, e.g.*, Miles J. Herszenhorn & Nia L. Orakwue, *Rejecting the Rankings: Why Harvard and Yale Led a Widespread Boycott of U.S. News After Decades-Long Criticism*, Harv. Crimson (May

In sum, as the government's own "expert" witness on higher education rankings made clear at Porat's trial, the rankings are essentially click-bait created to sell advertisements and subscriptions. They are "statistically meaningless," based on "arbitrary" decisions about how to weigh various factors and do not serve as a proxy for any sort of real-world monetary value. But because the government called witnesses who paid tuition and claimed the rankings mattered to them, under the fraudulent-inducement theory the property element of fraud was established.

2. And Porat's case is just the tip of the iceberg. Eliminating the requirement that a fraud scheme's object must be harming property rights would enable prosecutors to target much common conduct that is deceitful but causes no economic harm. For instance, consider a restaurant owner who solicits her friends to post numerous rave reviews on Yelp, making false claims like "I ate the carbonara last night and it was the best I ever had, five stars!" As a result of these fake reviews, the restaurant obtains a 4.7-star average rating, whereas without the fake reviews, the restaurant would only have a 4.1-star average rating. If potential customers read the reviews and decide to eat at the restaurant, has the owner committed property fraud? Under the Third Circuit's view, the answer is yes, because the customers were deceived and paid money to the restaurant—even though they received exactly what they paid for: good food at a high-quality

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25, 2023), https://www.thecrimson.com/article/2023/5/25/us-news-rankings-harvard-feature/.

restaurant. "But that draconian approach would border on the absurd" and plainly defies any reasonable reading of the statutes. *Snyder*, 144 S. Ct. at 1958.

Or closer to home, imagine an excellent but unheralded lawyer procures false nominations to be named a "Super Lawyer." A client hires the lawyer based on the honor, and the lawyer provides top-notch counsel. The lawyer's conduct is dishonest and morally questionable. Perhaps it even violates his State bar's disciplinary rules. But has the lawyer committed federal property fraud? Even if the client later learns the truth about the fake honor, and even if the client feels duped and would have hired a different lawyer had he known the truth, the client suffered no economic harm. The client got exactly what he paid for—excellent legal services. The harm he suffered is not the sort of injury targeted by the federal fraud statutes. But it would be a federal felony if this Court adopted the Third Circuit's reasoning.

3. The fraudulent-inducement doctrine, if adopted, would wreak havoc in the employment context. The government has taken the position that: "An applicant who obtains a job (and the accompanying salary) by materially misrepresenting her qualifications commits fraud even if she intends to, and does, perform the required work." Brief for the United States at 23, *Ciminelli*, 598 U.S. 306 (No. 21-1170). That is an extraordinary interpretation of the statutes. It means an applicant who merely submits an embellished résumé would be guilty of fraud even if she did not get the job (since guilt does not depend on the scheme's success). According to the government, obtaining or even attempting to obtain a salary based on deception

is federal criminal fraud—even if the employee performs all required work.

And it would not stop there. Under the government's theory of the law, an employee who deceives an employer to *maintain* her salary would also be guilty of fraud. Suppose, for example, an employee violates the employer's computer use policy, say, by using computers for personal purposes. And suppose she deceives her employer about it—including by omission, since employees owe fiduciary duties to their employers. If that deception were material to the employer in deciding which employees to keep and which to fire, then the employee would be guilty of a federal felony, punishable by years in prison. Such an interpretation would put the federal government in the position of policing employer-employee relationships to an extent heretofore unknown.

Such an interpretation would also undermine *Van Buren v. United States*, 593 U.S. 374 (2021). There, this Court limited the scope of the Computer Fraud and Abuse Act to crimes akin to hacking, in part because a broader interpretation would have swept in a "breathtaking amount of commonplace computer activity." *Id.* at 393. If the CFAA had been interpreted according to the government's wishes, then "millions of otherwise law-abiding citizens are criminals" for relatively innocuous conduct such as violating common workplace policies "stat[ing] that computers and electronic devices can be used only for business purposes." *Id.* at 394.

If the government's interpretation of §1341 and §1343 is correct, however, then *Van Buren* is a dead letter, since the same conduct is covered by the mail

and wire fraud statutes (on a salary maintenance theory) even if it is not covered by the CFAA.

The implications are manifold. A politician or judge who exaggerated her professional achievements or military record to obtain her position and her salary could be impeached on the grounds that she committed a high crime. Nearly any deception related to employment would be a federal felony. That simply cannot be the law.

4. Or consider housing. If a seller misrepresented her race or political affiliation to a buyer who only wanted to purchase a home the "right" kind of people had lived in, the seller would be guilty of fraud—even if the home was worth every penny the buyer paid. So too for innumerable other commercial exchanges. Suppose a customer pretended to be a Republican, knowing the business owner would not serve Democrats, to get served. According to the government, that's a federal felony too.

The fraudulent-inducement theory eliminates any requirement that the object of a fraud scheme must be causing injury to a property interest. It eliminates any requirement of deprivation. It eliminates any requirement of *cheating*. In so doing, the government's proposed theory extends the reach of the fraud statutes to any sort of exchange induced by deception. That is a radical departure from existing law.

B. The Doctrine Conflicts With Federalism Principles

1. The fraudulent-inducement theory threatens to subsume areas "traditionally left to state contract and

tort law." *Ciminelli*, 598 U.S. at 315; *see also Jones v. United States*, 529 U.S. 848, 858 (2000) (discussing constitutional problems created by federal statutes that "render traditionally local criminal conduct…a matter for federal enforcement") (cleaned up). As this Court reaffirmed last Term, federal criminal laws must not be construed to disrupt "carefully calibrated policy decisions that the States and local governments" have made. *Snyder*, 144 S. Ct. at 1956. In *Snyder*, this Court construed a federal bribery statute narrowly, holding it did not extend to mere gratuities. Part of the reason was that applying the statute to gratuities would have "gutted" numerous policy decisions by State and local governments, because the statute "covers virtually all state and local officials—19 million nationwide." *Id.* at 1956-57.

The Third Circuit's decision in this case and Porat's poses similar federalism problems. Its expansive construction would effectively supplant "carefully calibrated policy decisions" by States and localities about whether and how to regulate deceitful conduct that causes no economic injury. For instance, the government obtained Porat's conviction by arguing that his case was nothing more than "a case of false advertising." It claimed Fox's inflated ranking caused some students to part with tuition dollars—even if the students received the education and degree for which they had paid. The Third Circuit accepted this rationale.

But permitting prosecutors to charge any case of "false advertising" under the federal criminal laws poses serious federalism concerns. Restrictions on

false advertising and other deceptive business practices have long been governed by (largely civil) State consumer protection laws, not the federal criminal code. The fraudulent-inducement theory would allow any case of supposed "false advertising," or many breaches of contract involving the exchange of money, to be prosecuted as fraud.

Indeed, the fraudulent-inducement doctrine allows federal criminal enforcement for conduct that likely could not even sustain a state law breach of contract or tort action. For example, a student would not have a viable civil action against an educational institution if she chose to attend the school because of its U.S. News rankings, even if the school submitted false or misleading responses to the U.S. News surveys. This is because, under state law, "the essence of the bargain between student and university is as follows:…if [the student] performs the required work in a satisfactory manner and pays his fees he will receive the degree he seeks.'" *Gati v. Univ. of Pittsburgh of the Com. Sys. of Higher Educ.*, 91 A.3d 723, 731 (Pa. 2014) (quoting *Ross v. Pa. State Univ.*, 445 F. Supp. 147, 152 (M.D. Pa. 1978)); *see also Squeri*, 954 F.3d at 71 (describing the contract between students and their school as "a semester of education in exchange for a semester of tuition."). Yet in the Third Circuit the same conduct is a federal felony.

2. Porat's case also illustrates that lesser remedies exist to combat "fraudulent inducement" that does not rise to the level of criminal fraud. After the rankings scandal came to light, multiple corrective measures were taken, and both Fox and Porat suffered sanctions. For instance:

- Temple hired a law firm to conduct an investigation, resulting in a number of recommended remedial and corrective actions;

- Temple terminated Porat and other employees allegedly involved;

- Students—including the students who testified at Porat's trial—filed a class action lawsuit against Temple alleging breach of contract and consumer protection violations. Temple settled the lawsuit while its motion to dismiss all claims was pending;

- The Pennsylvania Attorney General investigated Temple for violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 P.S. §201-1 *et seq*. Temple settled the case and agreed to pay a fine and establish new scholarships for business students, as well as implement new compliance policies;

- The U.S. Department of Education investigated, resulting in a $700,000 fine and other remedies; and

- The Association to Advance Collegiate Schools of Business accelerated its accreditation review of Fox.

As Porat's case shows, there is no shortage of alternative enforcement mechanisms available to deter deceit that does not rise to the level of property fraud, especially in the context of regulated industries like

education.[7] The fraudulent-inducement doctrine threatens to displace these alternatives, which are better tailored to the nature of the harm caused by the conduct than the blunt and draconian instrument of federal criminal law.

C. The Fraudulent-Inducement Theory Is Hopelessly Vague And Indeterminate

Absent a narrowing framework, the fraudulent-inducement theory renders the precise scope of the fraud statutes "hopeless[ly] indetermina[te]," because it allows criminal prosecution in any case in which a victim claims that they subjectively "cared" about the subject matter of the alleged deceit. *Johnson v. United States*, 576 U.S. 591, 598 (2015).

That is precisely what happened in Porat's case. There was no evidence suggesting the value of a Fox degree had been inflated, that the education offered was subpar, or that the U.S. News rankings were an accurate proxy for value. Yet students testified that they cared about the "prestige" associated with the rankings.

As a practical reality, what happens at trials is that prosecutors call a victim-witness who affirms that the deception at issue mattered to them—that it influenced them, that they might not have done the

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[7] The same is true in the government procurement context, including for noncompliance with DBE participation requirements. *See, e.g.*, 49 C.F.R. §26.107(a) (DOT suspension and debarment authority); *id.* §31.1 *et seq*. (DOT civil penalties for false or fraudulent statements); *id.* §26.37 (agencies receiving federal funding required to pursue federal, state, and local "legal and contract remedies" for noncompliance).

transaction had they known. And the things an alleged victim might claim, post hoc, to care about are myriad and—as with Porat's student "victims"—potentially idiosyncratic. The lack of a clear standard leaves the outer boundaries of the fraud statutes highly unclear, leaving ordinary people to guess at what conduct is criminal. The theory would also allow overzealous prosecutors to decide what conduct should be prosecuted under the fraud statutes. No ordinary person could understand that charging the same tuition for the same high-quality education previously offered could be prosecuted as fraud simply because some students were upset that they had been deprived of the "prestige" connoted by a magazine's vacuous rankings.

III. FRAUD REQUIRES PROOF THAT THE OBJECT OF THE SCHEME IS TO CAUSE LOSS TO THE PURPORTED VICTIM

1. Courts that reject the fraudulent inducement theory sometimes state that fraud requires a scheme that would deprive the victim of "the benefit of the bargain." *See, e.g.*, *United States v. Milheiser*, 98 F.4th 935, 941-43 (9th Cir. 2024).

The "benefit of the bargain" test has, however, proved slippery. It fails to provide the ascertainable standard necessary to provide clear notice, avoid arbitrary enforcement, and satisfy due process. *See, e.g.*, *Skilling*, 561 U.S. at 412. A prosecutor (or court) applying the fraudulent-inducement theory can always claim, after the fact, that a "victim" was deprived of "the benefit of their bargain" if the person cared about the subject matter of the defendant's deception. Within this framework prosecutors, juries, and courts

are left to make subjective judgments about what sort of lies "matter" enough to merit prosecution.

That is exactly what happened in Porat's case. The Third Circuit applied its own subjective judgment to decide whether the rankings matter and concluded it was reasonable to believe they do because "an MBA is a costly, debt-inducing, once-in-a-lifetime 'purchase.'" *Porat*, 76 F.4th at 220 n.6. Thus, in the court's view, it would be "prudent" for a student to consider the rankings. Based on that judgment, the court concluded "the students did not receive the full benefit of their bargain." *Id.* at 221. Likewise, even though Judge Krause purported to reject the fraudulent-inducement doctrine, she applied an arbitrary, subjective definition of what constitutes an "essential" part of the "bargain" to conclude that this case and Porat's involved property fraud. *Id.* at 228-230 (concurring opinion).

Other cases in circuits that purport to apply a "benefit of the bargain" standard confirm that it is too malleable to provide fair notice and deter arbitrary enforcement. For instance, in one case the Second Circuit held that deceit went to "an essential element of the bargain" even though "the victim received the benefit of its bargain under the terms of the parties' contract." *United States v. Johnson*, 945 F.3d 606, 613 (2d Cir. 2019) (discussing *United States v. Binday*, 804 F.3d 558 (2d Cir. 2015)). In other words, the court simply re-wrote a contract to justify a fraud conviction, effectively nullifying the actual "bargain," not to mention the requirements of property loss and intent to cause loss. And in the same circuit, courts have even reached inconsistent conclusions about whether

the exact same type of *non*-economic term in a contract (regarding a buyer's promise to comply with export controls) could be an "essential element" of the bargain. *Compare United States v. Schwartz*, 924 F.2d 410, 421 (2d Cir. 1991), *with United States v. Shellef*, 507 F.3d 82, 109 (2d Cir. 2007).

In fact, the government itself recently argued the "benefit of the bargain" doctrine fails to provide a sufficiently clear standard. In its brief to the Ninth Circuit in *United States v. Miller*, it argued "[t]he phrase 'benefit of the bargain' was, and remains, undefined and invites unstructured jury speculation." *See* Brief for the United States at 39, No. 23-3194 (9th Cir. May 17, 2024), ECF No. 19. And it claimed that an arguably-stricter "essence of the bargain" standard was "[e]ven worse": "It is not obvious that a bargain even has an 'essence,' and there is no way to ensure that a jury would know how to identify it." *Id.* at 39.

2. As explained in Point I *supra*, what the law requires is more concrete, and creates a clearer line than "benefit of the bargain." The wire fraud statute requires proof of a scheme calculated to deprive the victim of the *economic* benefit of a commercial bargain. Put differently, a completed fraud requires a loss of money or property. Loss of prestige, or other non-property interests, is insufficient. And regardless of whether a defendant's scheme succeeds, he must intend to cause a loss of money or property. Loss to the victim must be an object of the fraud.

These requirements are not novel. They are consistent with the common law of fraud and the broader common-law principles defining larceny, and they are

consistent with this Court's case law. These requirements were not satisfied in Petitioners' case, or in Porat's case, or in the myriad other examples discussed above in which deceit merely opens the door to a transaction but is not part of a scheme to "rip off" the victim.

CONCLUSION

This Court should reject the fraudulent-inducement theory of fraud, hold that wire fraud requires a scheme devised to cause economic harm, and reverse Petitioners' convictions.

Respectfully submitted,

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