No. 23-832

In the Supreme Court of the United States

MOSHE PORAT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether sufficient evidence supported petitioner's convictions for conspiring to commit wire fraud, in violation of 18 U.S.C. 371, and wire fraud, in violation of 18 U.S.C. 1343, where he touted fraudulent rankings as an inducement to attend his business school.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is published at 76 F.4th 213. The memorandum of the district court is not published in the Federal Supplement but is available at 2022 WL 685686.

JURISDICTION

The judgment of the court of appeals was entered on August 7, 2023. A petition for rehearing was denied on October 3, 2023 (Pet. App. 33a). On November 15, 2023, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including January 31, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted on one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 371, and one count of wire fraud, in violation of 18 U.S.C. 1343. Judgment 1. He was sentenced to 14 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-32a.

1. From 1996 to 2018, petitioner served as the dean of the Fox School of Business at Temple University. See Pet. App. 1a-3a. By 2014, petitioner and other Fox employees had begun submitting false data to U.S. News and World Report in order to manipulate the magazine's rankings of business-school programs. *Id.* at 3a. For example, they falsified data relating to offers of admission, student debt, grade point average, standardized tests, and average work experience of admitted students. See *id.* at 4a. As a result, Fox's online program rose from 9th to 1st in the U.S. News rankings, and its part-time program rose from 53rd to 7th. See *ibid.*

With petitioner's knowledge and involvement, Fox marketed its inflated rankings to prospective students. See Pet. App. 5a. The school advertised the rankings on its website, social media, billboards, and signs. See *ibid.* Petitioner also sent or approved e-mails touting the rankings to students and student recruiters. See *ibid.* In a speech to students, petitioner compared a Fox degree to "a share of stock in an enterprise," and, citing the U.S. News rankings, announced that the "stock indeed ha[d] been appreciating in value." *Ibid.* (citation omitted).

Many students relied on Fox's rankings in deciding to enroll. See Pet. App. 6a. For example, one former student testified that he chose Fox's online program "because of [its] Number 1 ranking," and another testified that its ranking "was the only factor in [his] decision making." *Ibid.* (citation omitted). Between the 2014-2015 academic year and the 2017-2018 academic year, enrollment in Fox's online program rose from 133 to 336 students, and enrollment in its part-time program rose from 88 to 194 students. See *ibid.* The school collected almost $40 million in tuition because of those additional enrollments. See *ibid.*

Petitioner's scheme was exposed in January 2018. See Pet. App. 7a. An article discussing Fox's rankings stated that the school had reported that 100% of its online and part-time students had taken the Graduate Management Admission Test. See *ibid.* Other school administrators knew that the figure was false and had informed U.S. News of the discrepancy. See *ibid.*

U.S. News later announced that Fox's "misreported data resulted in the school's numerical rank being higher than it otherwise would have been." Pet. App. 7a (citation omitted). Following that announcement, U.S. News initially declined to rank Fox's online program, and Fox withdrew its part-time program from consideration for the rankings for that year. See *id.* at 7a-8a. In later years, when U.S. News resumed ranking Fox, the online and part-time programs fell to 41st place, and Fox's enrollment numbers plummeted. See *id.* at 8a.

2. A federal grand jury indicted petitioner on one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 371, and one count of wire fraud, in violation

of 18 U.S.C. 1343. See Pet. App. 8a. Following a trial, a jury found him guilty on both counts. See *id.* at 9a.

The district court denied petitioner's post-verdict motion for judgment of acquittal. See 2022 WL 685686. The court rejected petitioner's contention that he did not commit wire fraud "because any students deceived by the school's fraudulent ranking got what they paid for." *Id.* at *22. It accepted that some other courts had concluded that the wire-fraud statute does not cover cases in which "the purported victim received the full economic benefit of its bargain." *Ibid.* (citation omitted). It assumed for the sake of argument that those courts had correctly interpreted the statute, but sustained petitioner's convictions even under that standard. See *ibid.* The court discussed trial evidence showing that a program's ranking "influences the value of a degree" and that students had decided to attend Fox "'specifically because of the rankings.'" *Ibid.* (citation omitted). It accordingly found sufficient evidence that the students "did not get what they paid for." *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-32a.

The court of appeals, like the district court, rejected petitioner's contention that his conduct did not constitute wire fraud, which was premised on the assertion that the students "received the 'essential benefit of the bargain,' an education." Pet. App. 12a. The court of appeals similarly accepted that some other courts of appeals had concluded that the wire-fraud statute applies only "when the false representation affects the very nature or value of the bargain," but found that petitioner's convictions would stand even under that interpretation. See *id.* at 13a-14a.

The court of appeals observed, *inter alia*, that "the evidence at trial reflected that the nature of the bargain

between Fox and the students included not only the actual education afforded them, but also the * * * value of a highly ranked program." Pet. App. 14a. And it accordingly determined that "a rational jury could find beyond a reasonable doubt that the students did not receive the full benefit of their bargain," and that petitioner "'lied about the nature of the bargain itself.'" *Id.* at 15a (brackets and citation omitted).

Judge Krause issued a concurring opinion. Pet. App. 20a-32a. She agreed with the proposition that, "'even if a defendant lies, and even if the victim made a purchase because of that lie, a wire-fraud case must end in an acquittal if the jury nevertheless believes that the alleged victims received exactly what they paid for.'" *Id.* at 26a (citation omitted). But she determined that petitioner's convictions were consistent with that proposition. See *id.* at 32a. She observed that a "rational jury could conclude on this record" that petitioner's falsehoods "affected the students' understanding of the present and future value of their business degree" and "induce[d] them to pay for something that was less valuable in the employment market than they were led to believe." *Ibid.*

ARGUMENT

Petitioner renews his contention (Pet. 11-33) that his conduct did not constitute wire fraud under 18 U.S.C. 1343. The lower courts correctly rejected that contention, and the court of appeals' fact-bound decision does not conflict with any decision of this Court or of any other court of appeals. No further review is warranted.

1. A person commits wire fraud if he uses the wires to execute a "scheme or artifice to defraud" or to obtain "money or property by means of false or fraudulent pretenses." 18 U.S.C. 1343. A scheme to defraud is a

scheme to deprive a person of money or property by means of deceit. See *McNally* v. *United States*, 483 U.S. 350, 358-359 (1987). Petitioner's scheme falls within the scope of that statute. Petitioner touted Fox's "false, inflated rankings" for the purpose of "enticing [students] to pay tuition." Pet. App. 10a. Petitioner thereby engaged in a scheme to deprive students of money by means of deceit—the type of conduct that the statute prohibits.

Contrary to petitioner's suggestion (Pet. 19), the wire-fraud statute does not require proof that the victim suffered a "loss or harm." The wire-fraud statute, like the other federal fraud statutes, prohibits "the 'scheme to defraud,' rather than the completed fraud." *Neder* v. *United States*, 527 U.S. 1, 25 (1999). Because even a failed scheme violates the statute, the government need not prove that the victim relied on the false representations, much less that the victim suffered loss or harm as a result of such reliance. *Id.* at 24-25; see *Carpenter* v. *United States*, 484 U.S. 19, 26 (1987) ("Petitioners cannot successfully contend * * * that a scheme to defraud requires a monetary loss."). Nor is such a requirement a necessary feature of "obtain[ing]" money or property. 18 U.S.C. 1343. Providing a good or service in exchange for money does not alter the fact that the money was "obtained."

Petitioner also errs in arguing (Pet. 19) that the wire-fraud statute requires proof that the scheme "contemplated" loss or harm to the victim. This Court has rejected such a requirement in interpreting the similarly worded bank-fraud statute, which prohibits a scheme "to defraud a financial institution" or "to obtain any of the moneys * * * or other property owned by * * * a financial institution, by means of false or fraud-

ulent pretenses." 18 U.S.C. 1344. The Court has explained that the statute "demands neither a showing of ultimate financial loss nor a showing of intent to cause financial loss." *Shaw* v. *United States*, 580 U.S. 63, 67 (2016); see *Loughrin* v. *United States*, 573 U.S. 351, 366 n.9 (2014) (rejecting the argument that the bank-fraud statute "requires the Government to prove that the defendant's scheme created a risk of financial loss to the bank"). The Court has instead endorsed Judge Learned Hand's observation that "'a man is none the less cheated out of his property, when he is induced to part with it by fraud,' even if 'he gets a quid pro quo of equal value.'" *Shaw*, 580 U.S. at 67 (brackets and citation omitted); see, *e.g.*, *State* v. *Mills*, 17 Me. (5 Shep.) 211, 216 (1840) (recognizing that a horse buyer could be defrauded through substitution of a different horse of equal value); 3 Dan B. Dobbs et al., *The Law of Torts* § 664 n.6 (2d ed. 2011) (explaining that a person who "bargained for a Titian but got a Giorgione of equal value" may bring a civil action for fraud).

2. Courts of appeals have used different verbal formulations to describe the fraud statutes' applicability to cases where the defendant uses falsehoods to induce a victim to enter into a transaction. Some courts have stated that the statutes require proof of a lie "about the nature of the bargain" or that they do not apply where the alleged victims "'received exactly what they paid for.'" *United States* v. *Takhalov*, 827 F.3d 1307, 1313-1315 (citation omitted), modified on denial of reh'g, 838 F.3d 1168 (11th Cir. 2016); see *United States* v. *Shellef*, 507 F.3d 82, 108 (2d Cir. 2007); *United States* v. *Sadler*, 750 F.3d 585, 590 (6th Cir. 2014); *United States* v. *Bruchhausen*, 977 F.2d 464, 470 (9th Cir. 1992); *United States* v. *Guertin*, 67 F.4th 445, 451 (D.C. Cir. 2023).

Other courts have stated that the fraud statutes "reach a seller's or buyer's deliberate misrepresentation of facts * * * that [is] likely to affect the decisions of a party on the other side of the deal." *United States* v. *Weimert*, 819 F.3d 351, 357 (7th Cir. 2016); see *United States* v. *Richter*, 796 F.3d 1173, 1192 (10th Cir. 2015), cert. denied, 578 U.S. 978 (2016); *United States* v. *Granberry*, 908 F.2d 278, 280 (8th Cir. 1990), cert. denied, 500 U.S. 921 (1991); see also *United States* v. *Bunn*, 26 Fed. Appx. 139, 142-143 (4th Cir. 2001) (per curiam).*

Petitioner, however, overstates the significance of those terminological distinctions. Courts on both sides of the asserted circuit conflict agree that a defendant commits wire fraud if he induces a victim to enter into a transaction by lying about an "essential element of the bargain." Compare *Guertin*, 67 F.4th at 451; *Takhalov*, 827 F.3d at 1314; *Shellef*, 507 F.3d at 108, with *United States* v. *Kelerchian*, 937 F.3d 895, 913 (7th Cir. 2019), cert. denied, 140 S. Ct. 2825 (2020). Petitioner endorsed the same test in the court of appeals, see Pet. App. 12a, and does so again in this Court, see Pet. 2. Courts have reached different outcomes in different cases largely because they have confronted different fact patterns, not because they have applied different legal principles. Compare, *e.g.*, *Shellef*, 507 F.3d at 108-109 (concluding that a buyer's lie about the disposition of items it was

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* Petitioner also cites (Pet. 21) the Fifth Circuit's decision in *United States* v. *Fagan*, 821 F.2d 1002 (1987), cert. denied, 484 U.S. 1005 (1988). *Fagan*, however, reasoned that a scheme violated the mail-fraud statute because it sought to deprive an entity of "its control over its money." *Id.* at 1011 n.6. This Court has since rejected that "right-to-control" theory of fraud, see *Ciminelli* v. *United States*, 598 U.S. 306, 317 (2023), and petitioner provides no basis for concluding that the Fifth Circuit would nonetheless adhere to *Fagan*'s reasoning.

purchasing did not constitute fraud, where the government failed to allege that the lie affected the legality of the sale), with, *e.g.*, *Kelerchian*, 937 F.3d at 913 (concluding that a similar lie did constitute fraud, where the government proved that the lie did affect the legality of the sale). Petitioner thus fails to demonstrate a square circuit conflict that might warrant this Court's review.

3. In any event, this case does not implicate the circuit conflict that petitioner alleges. Contrary to petitioner's suggestion (Pet. 22), the court of appeals did not reject the interpretation of the fraud statutes adopted by the Second, Sixth, Ninth, and Eleventh Circuits. Instead, the court assumed without deciding that those courts had correctly interpreted the fraud statutes and then sustained petitioner's convictions under that standard. See Pet. App. 12a-15a.

a. The court of appeals observed that, under "the cases [petitioner] relies upon," a defendant commits fraud by lying about the "nature or value of the bargain" in order to induce a victim to enter into a transaction. Pet. App. 13a, 15a. And the court found sufficient evidence that petitioner did so here: by "trumpet[ing] Fox's knowingly false, inflated rankings to students," he misled students about the nature and value of the degree for which they were paying. *Id.* at 10a; see *id.* at 15a (finding sufficient evidence that petitioner "lied about the nature of the bargain itself") (brackets and citation omitted). Adopting petitioner's preferred interpretation of the wire-fraud statute thus would have no practical effect on his convictions. See *Supervisors* v. *Stanley*, 105 U.S. 305, 311 (1882) (explaining that this Court does not sit to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties).

Judge Krause's concurrence and the district court's opinion confirm that petitioner's convictions should stand even under petitioner's preferred legal standard. Judge Krause agreed with petitioner that the wire-fraud statute requires proof that the defendant "intend[ed] some economic harm from the lies." Pet. App. 31a (Krause, J., concurring). She explained, however, that a rational jury could find that petitioner acted with such intent: the trial evidence supported a finding that petitioner "intended to induce [students] to pay for something that was less valuable in the employment market than they were led to believe." *Id.* at 32a. The district court, for its part, assumed for the sake of argument that the wire-fraud statute does not apply where the alleged victims received "the full economic benefit of the bargain." 2022 WL 685686, at *22 (citation omitted). But it found sufficient evidence that the students whom petitioner had misled had not received the full economic benefit of the bargain, because a school's ranking "influences the value of a degree" from that school. *Ibid.*

b. Petitioner asserts (Pet. 8) that the affected students "received exactly what they paid for—namely an education and a degree." The trial evidence, however, allowed the jury to find that the affected students paid, not just for a degree, but specifically for a degree from a highly ranked school. See Pet. App. 14a ("While [petitioner] asserts that the bargain only encompassed an exchange of tuition for education, the jury was free to come to a different conclusion.").

For example, one student testified that he "chose Fox over his second-choice business school 'specifically because of the rankings.'" 2022 WL 685686, at *22 (citation omitted). He believed that "the 'prestige' of

graduating from the top ranked program" would help his career, but he ultimately "'didn't get the brand and the prestige that he was promised.'" *Ibid.* (citation omitted).

Another student testified that he "chose to attend Fox because of the online MBA's number one ranking," and that, "if he were choosing among generic programs, there were 'plenty of other cheaper MBA programs [he] could have gone to.'" 2022 WL 685686, at *22 (citation omitted). And the trial record also included "expert testimony that rankings are crucial to many students' decisions about where to spend their tuition dollars." Pet. App. 10a.

Although petitioner previously told students that the school's ranking indicated the degree's "value," Pet. App. 10a, the petition for a writ of certiorari deprecates (at 29-30) the rankings as "vapid," "arbitrary," and "unscientific." The relevant question, however, is whether Fox's rankings *were* an essential element of the bargain, not whether they *should* have been. Cf. *Bleistein* v. *Donaldson Lithographing Co.*, 188 U.S. 239, 252 (1903) (Holmes, J.) ("[T]he taste of any public is not to be treated with contempt. It is an ultimate fact for the moment, whatever may be our hopes for a change."). Even petitioner acknowledges (Pet. 29) that school rankings have "unfortunately been influential," whether or not they should have been.

c. At bottom, petitioner's argument boils down to a fact-bound claim that the court of appeals misapplied his preferred standard. Compare, *e.g.*, Pet. 16 ("As it stands in the Second Circuit today, * * * to constitute fraud, deceptions must * * * affect the very 'nature of the bargain.'") (citation omitted), with Pet. App. 14a ("[T]he evidence at trial reflected that the nature of the

bargain between Fox and the students include not only the actual education afforded them, but also the current value of a highly ranked program."). That claim does not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."); Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

This Court's review is particularly unwarranted because the court of appeals and the district court both upheld petitioner's conviction under that standard. Under "the 'two-court rule,' the policy [in *Johnston*] has been applied with particular rigor when [the] district court and court of appeals are in agreement as to what conclusion the record requires." *Kyles* v. *Whitley*, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) (citing *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)). That is the case here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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