No. 22-306

IN THE SUPREME COURT OF THE UNITED STATES

LINDSAY O'BRIEN QUARRIE,

Petitioner,

v.

STEPHEN WELLS; THE BOARD OF REGENTS OF THE NEW MEXICO INSTITUTE OF MINING AND TECHNOLOGY; LORIE LIEBROCK; ALY EL-OSERY,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether ignorance of the law can excuse racial discrimination under Title VI of the Civil Rights Act of 1964 (42 U.S.C. § 2000d *et seq.*) and therefore justify a public university's refusal to readmit a qualified minority student to a doctoral program based on his race.

2. Whether contract law, as opposed to tort law, is applicable to the resolution of a breach of contract dispute in a Title VI racial discrimination case.

3. Whether a trier of fact is entitled to treat a party's mendacity related to a material fact as evidence of culpability in a Title VI racial discrimination case.

4. Whether a public university student's admissions application fee qualifies as financial property and is therefore protected by state constitutional property rights.

PARTIES TO THE PROCEEDING

Petitioner (Plaintiff-Appellant below) is Lindsay O'Brien Quarrie, an African American and former PhD student in Materials Engineering at the New Mexico Institute of Mining and Technology ("NMT").

Respondents (Defendants-Appellees below) are Stephen Wells, current President of NMT, in his individual capacity; the Board of Regents of NMT, in their official capacities; Lorie Liebrock, former Dean of Graduate Studies at NMT, in her individual capacity; and Aly El-Osery, current Dean of Graduate Studies at NMT, in his official capacity.

RELATED PROCEEDINGS

United States District Court (D. N.M.):

Quarrie v. Wells, et al., No. 2:17-cv-00350-MV-GBW (July 7, 2021).

United States Court of Appeals (10th Cir.):

Quarrie v. Wells, et al., No. 21-2090 (June 27, 2022).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Lindsay O'Brien Quarrie, *pro se*, respectively petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW

The appellate court order and judgment (App. 1a-14a), the district court final judgment (App. 15a), the district court order (App. 16a-39a), and the district court memorandum opinion and order (App. 40a-53a) are all unpublished.

JURISDICTION

The Tenth Circuit entered judgment on June 27, 2022. Lower courts had jurisdiction under 28 U.S.C. §§ 1291, 1294, 1331, and 1391(b)(2). This Court has jurisdiction under 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment of the United States Constitution:

> No person shall be [...] shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Fourteenth Amendment of the United States Constitution, Section 1:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d - Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color or national origin:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. § 1983 - Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any

> rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, [...].

The New Mexico Constitution, Article II – Bill of Rights, Section 4:

> All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.

STATEMENT OF THE CASE

A. Factual and Legal Background

From 2004 to 2009, Petitioner Lindsay O'Brien Quarrie helped to secure over $14 million of research funding for NMT while designing and building EMRTC METTOP Laboratories on NMT's campus and supporting over a dozen students, faculty members, and regular engineers working or engaged in research there.

Petitioner started his PhD program in Materials Engineering at NMT in the summer of 2009 as a full-time student under a 3-year U.S. Air Force scholarship. For the next three years through the spring of 2012, he continued his enrollment in "good standing" at NMT without interruption, including during the summers of 2010 and 2011. *See* App. 3a.

Throughout his PhD program at NMT, Petitioner was the victim of racial discrimination and academic and administrative incompetence on the part of his academic advisors and NMT administrators. Each time Petitioner lodged a formal or informal complaint with Respondent NMT *et al.*, they retaliated against him, making his situation even worse.

Despite this, Petitioner managed to complete his coursework with a commendable 3.78 GPA, to pass his two qualifying exams ("candidacy" and "preliminary"), one of which was passed twice, to write and submit six research articles for publication in peer-reviewed academic journals (the requirement being only one article), to address competence in all subject areas by conducting independent research, and to finish his dissertation on an original topic within three years.

The quality and worthiness of Petitioner's dissertation, entitled *Damage Resistant High Transmission Optical Thin Film Coating For Diode Pumped Alkali Lasers (DPALs)*, and related published research articles have since been evaluated by Dr. Heinrich Nakotte, Physics Professor at New Mexico State University, who found Petitioner's 176-page dissertation manuscript to be of "good quality" and "worthy of a PhD". He also recognized that two of Petitioner's research articles were published in well-established scientific journals with "reasonably high impact factors" (one of the two articles having already been cited four times to date, including once in a highest-impact journal in optics).

On April 27, 2012, one week before Petitioner's

planned dissertation defense and two weeks before his anticipated graduation at NMT, Respondent Lorie Liebrock, the then-Dean of Graduate Studies, permanently terminated Petitioner from the PhD program at NMT for unsubstantiated reasons and without due process – i.e., without prior notice of the charges against him or an opportunity to defend himself against those charges. *See* App. 3a, 54a, 55a, and 68a-71a. This therefore constituted a clear violation of Petitioner's constitutionally protected rights of equal protection and due process under the Fourteenth Amendment.

In the summer of 2012, Respondent NMT entered into mediation with Petitioner for the purpose of reinstating him in the PhD program at NMT. However, Respondent NMT halted the mediation in bad faith despite the fact that Petitioner had agreed in principle to Respondent NMT's proposed terms for reinstatement.

Having been deprived of his earned doctoral degree at NMT, having incurred the loss of several years of time and tens of thousands of dollars, including over $64,000 in outstanding student loans, and having no prospects for a professorship in his field of expertise, Petitioner was left with no other option but to file a lawsuit against Respondent NMT *et al.* in federal court in April of 2013 for breach of contract and violation of his civil and constitutional rights.

Although the district court recognized that five of Petitioner's claims were valid (and granted him leave to add a sixth one), those claims were eventually dismissed with prejudice under Fed. R. Civ. P. 41(b)

due to Petitioner's objection to paying a court-ordered fine.

After the dismissal of Petitioner's claims was upheld by the court of appeals in mid 2015, but before Petitioner had time to petition this Court, Respondent NMT *et al.* offered to settle with Petitioner by offering to pay him $6,000 and to remove the derogatory language "Terminated from Graduate Program" from his NMT academic transcript. *See* App. 3a. There was no mediator present at any time during the parties' negotiations.

Immediately after Petitioner and Respondent NMT *et al.* executed the Settlement Agreement and Mutual Release ("Settlement Agreement") on October 8, 2015, Respondent NMT *et al.* violated the letter and spirit of the contract by adding the false and defamatory language "No Degree Earned" to Petitioner's NMT academic transcript. *See* App. 3a-4a.

On October 12, 2015, Petitioner notified Respondent NMT *et al.* that they were in violation of both the spirit and the letter of the Settlement Agreement and requested that they immediately remove the false and defamatory language "No Degree Earned" from his NMT academic transcript. *See* App. 4a and 60a.

In their October 14, 2015 reply, Respondent NMT and their then-attorney Christopher Saucedo of SaucedoChavez, P.C. misled Petitioner by falsely stating that "No Degree Earned" had not been added to his NMT academic transcript but rather had "always been there". App. 61a. Of course, it had not always been there, which NMT's former Registrar

Sara Grijalva would later admit to under oath in a deposition. *See* App. 62a-64a.

When Mr. Saucedo replied to Petitioner on October 14, 2015, he was fully aware that "No Degree Earned" had been added to Petitioner's NMT academic transcript after the execution of the Settlement Agreement on October 8, 2015 because Mr. Saucedo had been involved in discussions with his clients Respondent NMT *et al.* concerning the addition of said language to said transcript. *See* App. 65a and 66a.

After Respondent NMT *et al.* continued to refuse to remove the false and defamatory language "No Degree Earned" from Petitioner's NMT academic transcript, Petitioner unilaterally rescinded the Settlement Agreement on November 6, 2015. *See* App. 67a.

Then on May 26, 2016, Petitioner personally inspected his academic and administrative files at NMT and discovered for the first time indisputable evidence therein that Respondent NMT had never met the Settlement Agreement's requirement of removing any and all similar language to "Terminated from Graduate Program" from any related documents in Petitioner's academic and administrative files at NMT, thereby further rendering the Settlement Agreement void, invalid, and unenforceable. *See* App. 4a and 78a-81a.

On June 28 and August 19, 2016, New Mexico State legislators met with representatives of Respondent NMT to advocate for Petitioner's immediate reinstatement in the PhD program in Materials Engineering at NMT, but to no avail.

Instead, Respondent NMT's representatives slandered Petitioner by falsely claiming, among other things, that he had failed to meet the academic requirements of his PhD program at NMT.

On December 2, 2016, Petitioner Quarrie formally applied for readmission to the PhD program in Materials Engineering at NMT by completing and submitting the online application, which included his paying a processing fee of $45. According to the NMT admissions officer with whom Petitioner communicated by phone, Petitioner would be officially notified by NMT of its final decision on his application by no later than early February 2017.

After having never received a response to his December 2, 2016 application for readmission or a refund of his $45 application processing fee from Respondent NMT, Petitioner was forced to take legal action against Respondent NMT *et al.*

B. Procedural History

On March 20, 2017, Petitioner filed a complaint in the United States District Court for the District of New Mexico against Stephen Wells, Lorie Liebrock, Daniel Lopez, Warren Ostergren, Kevin Wedeward, Christopher Saucedo, SaucedoChavez, P.C., and the Board of Regents of the New Mexico Institute of Mining and Technology for racial discrimination, defamation, and other constitutional violations.

On December 27, 2018, the district court filed its Memorandum Opinion and Order Granting Saucedo Defendants' Motion to Dismiss & Granting in Part and Denying in Part NMT Defendants' Motion to

Dismiss (App. 40a-53a), dismissing Count I (Malicious and Conspiratorial Defamation by Slander), Count II (Malicious and Conspiratorial Defamation by Libel), Count IV (Malicious and Conspiratorial Deprivation of Financial Property Right), and part of Count V (Request for Permanent Prospective Injunctions) in Petitioner's Second Amended Complaint.

On July 7, 2021, the district court filed its Final Judgment (App. 15a) and its Order Overruling Plaintiff's Objections and Adopting Magistrate Judge's Proposed Findings and Recommended Disposition (App. 16a-39a), granting Defendants-Appellees' Motion for Summary Judgment on Count I (Intentional and Malicious Racial Discrimination Under Title VI of the Civil Rights Act of 1964) and Count II (Request for Permanent Prospective Injunction) in Petitioner's Third Amended Complaint.

Petitioner's appeal to the Tenth Circuit followed on August 3, 2021. The court of appeals affirmed the district court's rulings on all counts, impelling Petitioner to submit a petition for a writ of certiorari to this Court.

REASONS FOR GRANTING THE PETITION

A. The court of appeals' decision conflicts with this Court's precedents as well as those of the Tenth Circuit and New Mexico state law

This section will be divided into the following four subsections: (1) Respondents' ignorance of the law is no excuse, (2) application of state contract law, (3) Respondents' mendacity, and (4) financial deprivation claim.

1. *Respondents' ignorance of the law is no excuse*

In its Order and Judgment, the Tenth Circuit found that Respondents' proffered reason for refusing to readmit Petitioner to the PhD program in Materials Engineering at NMT in 2016 and thereafter – namely, that the terms of the Settlement Agreement prohibited him from applying thereto – was legitimate and nondiscriminatory because "NMT consistently maintained the settlement agreement was valid and repeatedly communicated its disagreement with Quarrie's assertions to the contrary." App. 11a. The court of appeals clearly erred in its finding since it ignores the voluminous evidence provided by Petitioner that demonstrates that he had unilaterally rescinded the Settlement Agreement *before* he applied for readmission to NMT in 2016 and that Respondents' subjective "belief" in its validity and enforceability was predicated upon their ignorance of contract law, specifically the law of rescission.

But as this Court has made emphatically clear, ignorance of the law is never an excuse: "We have long recognized the 'common maxim, familiar to all minds, that ignorance of the law will not excuse any person, either civilly or criminally.'" *Jerman v.*

Carlisle, McNellie, Rini, Kramer, 559 U.S. 573, 581 (2010) (citing *Barlow v. United States,* 7 Pet. 404, 411, 8 L.Ed. 728 (1833)). Thus, ignorance of the law cannot be used in a Title VI racial discrimination case as the basis for a public university's refusal to admit an academically qualified minority student to a PhD program.

The district court accurately stated in its Order that "[t]he parties spend more time and energy arguing about the correct *procedure* for rescinding a contract than whether Plaintiff had *grounds* to rescind." App. 29a. And the reason for this is that Respondents raised no other arguments than procedural ones in support of their subjective belief that Petitioner had supposedly failed to rescind the Settlement Agreement before applying for readmission to NMT. But those arguments are all invalid because they are predicated upon Respondents' ignorance of the law as it pertains to the unilateral rescission of contracts. Two examples will suffice to demonstrate this. The first example can is found in their Reply to Plaintiff's Response in Opposition to Motion for Summary Judgment, where they argue that a contract cannot be rescinded without judicial intervention:

> A party believing that a contract should be rescinded must pursue a claim through the courts seeking rescission and in doing so, provide evidence of the legal basis to support the remedy being sought.

App. 113a. But Respondents failed to cite any case law or other legal authorities to back up this proposition because ***none exists***. By contrast, Petitioner cited numerous authorities to support his claim that he had the right to unilaterally rescind the Settlement Agreement without first seeking a court order.

Black's Law Dictionary defines *rescission* as follows:

> 1. A party's unilateral unmaking of a contract for a legally sufficient reason, such as the other party's material breach, or a judgment rescinding the contract; VOIDANCE. Rescission is generally available as a remedy or defense for a nondefaulting party and is accompanied by restitution of any partial performance, thus restoring the parties to their precontractual conditions. – Also termed *avoidance*. 2. An agreement by contracting parties to discharge all remaining duties of performance and terminate the contract. [...] – Also termed (in sense 2) *agreement of rescission*; *mutual rescission*; *abandonment*.

Black's Law Dictionary 1499 (10th ed. 2014). As evidenced by the use of the disjunctive conjunction *or* linking the two clauses in sense 1 of *rescission* above – namely, "[a] party's unilateral unmaking of a contract for a legally sufficient reason, such as the other party's material breach, *or* a judgment rescinding the contract" (emphasis added) – Black's Law Dictionary clearly differentiates between (i)

unilateral rescission by act of one party (also known as rescission at law, out-of-court rescission, or rescission in pais) and (ii) rescission adjudged by the court (known as rescission in equity). Although both types of rescission require "restoring the parties to their precontractual conditions", *id.*, rescission at law and rescission in equity are distinctly different from one another and should therefore not be confused. In the case of rescission at law, the rescission is accomplished without the aid of a court, whereas with rescission in equity, the court does the rescinding. "Broadly speaking, rescission at law occurs when the plaintiff has a right to unilaterally avoid a contract. The rescission itself is effected when the plaintiff gives notice to the defendant that the transaction has been avoided and tenders to the defendant the benefits received by the plaintiff under the contract." *Griggs v. E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 445-446 (4th Cir. 2004). *See* Dan B. Dobbs, *Handbook on the Law of Remedies* § 4.3 at 255 (West 1973) ("The plaintiff may unilaterally rescind against the will of the defendant, assuming the plaintiff has good substantive grounds for doing so."). "The rescission at law does not require a judgment of rescission or cancellation. It would not accord with the course of procedure in the common-law courts." Joel P. Bishop, *Commentaries on the Law of Contracts* § 831 at 321 (Enlarged ed. 1887). "There can be no doubt that one having a right to rescind need not turn to the courts to have the rescission accomplished; he may effect it by his own action." *Philpott v. Superior Court*, 1 Cal. 2d 512, 524 (1934). "Rescission at law is accomplished without

the aid of a court. It is completed when, having grounds justifying rescission, one party to a contract notifies the other party that he intends to rescind the contract and returns that which he received under the contract." *Acton v. J.B. Deliran Corp.*, 737 P.2d 996, 999 n. 5 (Utah 1987). "With rescission in equity the affirmative powers of the court of equity are used to rescind, or undo, the contract. However, at law it is the return or tender of the property that effectuates the rescission and the law court merely grants restitution." *Maumelle Co. v. Eskola*, 865 SW 3d 272, 274 (Ark. 1993) (citation omitted). This bears repeating: it is *not* the court that effectuates the rescission in cases of unilateral rescission at law (a.k.a. rescission in pais or out-of-court rescission):

> Once the plaintiff has rescinded, he is entitled to recover back what he gave under the contract. If the defendant does not give it back voluntarily, the plaintiff may sue for it .... Thus the court in cases of rescission "at law" does not effect the rescission and the court's only role is to get back the plaintiff's property or its value.

Dan B. Dobbs, *Handbook on the Law of Remedies* § 4.8 at 293 (West 1973).

Because there was no transfer of monetary consideration from Petitioner to Respondent NMT under the Settlement Agreement, Petitioner did not seek restitution against Respondent NMT or any other party. Thus, he elected to unilaterally rescind the Settlement Agreement without filing a claim for rescission at law (or in equity) in either state or

federal court. And Petitioner's unilateral rescission of the Settlement Agreement was fully effectuated before he applied for readmission to the PhD program in Materials Engineering at NMT in 2016.

Thus, Respondents' argument that unilateral rescission at law (a.k.a. out-of-court rescission or rescission in pais) is not a legitimate type of rescission, and that therefore Petitioner did not have the right to rescind the Settlement Agreement without judicial intervention, is meritless and finds no support in case law or other legal authorities. It is therefore obvious that Respondents' erroneous argument is an intentional misrepresentation of the law, since the law is perfectly clear on this issue and since ignorance of the law is never an excuse. *See Jerman v. Carlisle, McNellie, Rini, Kramer*, 559 U.S. 573, 581 (2010).

Just as ignorance of the law is never an excuse, refusal to accept the law is equally inexcusable. Respondents are not above the law, including the law of rescission. As demonstrated above, unilateral rescission at law without a court order is recognized as a legitimate type of rescission by more than a century of common-law precedent and other legal authorities in this country. Thus, Respondents' repeated claim that they refused to accept Petitioner's legitimate unilateral rescission of the Settlement Agreement has no legal effect.

In light of the foregoing, Respondents' supposed "belief" that Petitioner did not have a legal right to unilaterally rescind the Settlement Agreement without a court order is legally and factually baseless. Therefore, Respondent NMT's proffered

reason for refusing to readmit Petitioner to the PhD program at NMT in 2016 and thereafter is nothing but a pretext for its ongoing racial discrimination against him as an African American.

Thus, the court of appeals' decision to affirm the district court's ruling conflicts with this Court's precedents. For this reason among others, therefore, the Court should grant the present petition for a writ of certiorari.

As part of the Settlement Agreement, Petitioner received a total of $6,000 – of which $5,000 was from the New Mexico Risk Management and the remaining $1,000 from Respondent NMT. See App. 3a. In order to restore them to their precontractual conditions, Petitioner returned the $6000 to the New Mexico Risk Management and Respondent NMT.

In their Reply to Plaintiff's Response in Opposition to Motion for Summary Judgment, Respondents argue that even though Petitioner did indeed return the $6,000, Respondent NMT and the New Mexico Risk Management's refusal to accept the monetary repayment prevented Petitioner from rescinding the Settlement Agreement and that therefore Petitioner's "effort to return the money he received as part of the Settlement Agreement can only be construed as potentially satisfying a 'condition precedent' to assert his right to rescind the Settlement Agreement." App. 113a.

This argument is meritless and finds no support in case law or other legal authorities. If the breaching party to a contract could prevent the rescission of that contract by simply refusing to accept the non-breaching party's return of monetary

consideration, then no contract could ever be rescinded. Case-law precedent and other legal authorities make perfectly clear that an offer to return suffices for purposes of rescission. One of those cases was cited by Respondents themselves: *Ledbetter v. Webb*, 1985-NMSC-112, ¶ 15, 103 N.M. 597, 601, 711 P.2d 874 ("The defrauded party must return *or offer to return* that which has been received under the contract as a condition precedent to maintaining a suit for rescission.") (emphasis added). App. 113a-114a. *See* Joel P. Bishop, *Commentaries on the Law of Contracts* § 679 at 265 (Enlarged ed. 1887) ("the one proceeding to rescind must either give back *or offer to return* whatever of any value to himself or the other he has received under the contract") (emphasis added). *See also Putney v. Schmidt,* 16 N.M. 400, 120 P. 720, 723 (1911) (stating that the rescinding party must "restore, *or offer to restore,* all that he has received under the contract") (emphasis added); *Prudential Insurance Company of America v. Anaya*, 78 NM 101, 428 P.2d 640, 645-646 (1967) ("A suit for rescission asks for the restoration of the status quo ante. [...] The restoration of the status quo means the return, *or offer to return,* of that which has been received.") (emphasis added). However, the rule of returning, or offering to return, any and all consideration of value as a precondition for rescission is not iron-clad and is therefore not applied rigidly by the courts. Rather, it is applied according to equitable principles. *See Robison v. Katz,* 94 N.M. 314, 319, 610 P.2d 201, 206 (Ct.App.1980); *Wilburn v. Stewart*, 110 N.M. 268, 794 P.2d 1197, 1200 (1990). Additionally, this rule is

waived when the offeree would have refused the offer anyway:

> The plaintiff need not tender back what he got in the transaction [...] if the defendant would have refused it anyway. [...] [In this situation] any effort by the plaintiff to make restitution to the defendant would have been utterly useless and the law does not penalize the plaintiff for failure to commit a useless act.

Dan B. Dobbs, *Handbook on the Law of Remedies* § 4.8 at 295 (West 1973). Thus, because Respondent NMT and the New Mexico Risk Management not only would have refused but actually did refuse to accept the return of the $6,000, Petitioner was excused from tendering back the monetary consideration that he had received under the Settlement Agreement, which he unilaterally rescinded before applying for readmission to the PhD program at NMT in 2016.

Therefore, even if one accepts Respondents' tortured reasoning based on their ignorance of contract law that Petitioner's act of sending checks to Respondent NMT and the New Mexico Risk Management does not qualify as returning the $6,000 to them, since they refused to cash the checks and ultimately sent them back, Petitioner still met the requirement of *offering to return* the monetary consideration to them that he had received pursuant to the Settlement Agreement. And this offer to return the $6,000 unilaterally effectuated the rescission of the Settlement Agreement.

Again, because ignorance of the law is never an excuse, *see Jerman v. Carlisle, McNellie, Rini, Kramer*, 559 US 573, 581 (2010), and because the law is perfectly clear on this issue, Respondents' erroneous argument regarding Petitioner's return of the $6,000 is an intentional misrepresentation of the law. Thus, Respondents' supposed "belief" that Petitioner did not have a legal right to unilaterally rescind the Settlement Agreement is dishonest, which in turn renders their proffered reason for refusing to readmit Petitioner to the PhD program at NMT in 2016 unworthy of credence. For this reason among others, therefore, the Court should grant the present petition for a writ of certiorari.

2. *Application of state contract law*

Petitioner had already unilaterally rescinded the Settlement Agreement on the substantive grounds of Respondent NMT's fraudulent and material misrepresentation, fraudulent inducement, material breach of contract, and violation of public policy before applying for readmission to the PhD program in Materials Engineering at NMT in 2016. Thus, Respondent NMT's proffered reason for refusing to readmit Petitioner to NMT in 2016 is nothing but a pretext for its ongoing racial discrimination against him as an African American.

In its Order, the district court disagreed with Petitioner's position, finding that he did not have substantive grounds for rescinding the Settlement Agreement because Respondent NMT *et al.* did not have a duty pursuant to the Settlement Agreement

to disclose their addition of the phrase "No Degree Earned" to Petitioner's NMT academic transcript and because the addition of said phrase thereto did not materially breach the terms of the Settlement Agreement. More specifically, the district court found that § 551 of the *Restatement (Second) of Torts* did not require Respondent NMT *et al.* to disclose their addition of the phrase "No Degree Earned" to Petitioner's NMT academic transcript because his objection to said language was not a "basic fact" of the Settlement Agreement, App. 33a-35a, and that the addition of "No Degree Earned" to Petitioner's NMT academic transcript did not materially breach the terms of the Settlement Agreement because "nothing in the Settlement Agreement expressly prohibited [that] language" and because the connotation of "No Degree Earned" was "more neutral" than that of "Terminated from Graduate Program". App. 31a. And the court of appeals affirmed the district court's findings in its Order and Judgment. App. 12a and 12a n. 4.

The lower courts' findings are clearly erroneous as a matter of law and fact. By having failed to apply contract law in its analysis of the validity and enforceability of the Settlement Agreement and by having failed to take all of the relevant facts into account, including Respondent NMT's mendacity as related to the Settlement Agreement, the district court and court of appeals erred by failing to recognize that "No Degree Earned" is indeed both false and defamatory, that its addition to Petitioner's NMT academic transcript was a material breach of contract, that Respondent NMT *et al.* had a duty

under § 161 of the *Restatement (Second) of Contracts* (as well as under § 551 of the *Restatement (Second) of Torts*) to disclose their addition of said language to Petitioner's NMT academic transcript, that their failure to do so constituted fraudulent and material misrepresentation and fraudulent inducement, and that therefore Petitioner had substantive grounds to unilaterally rescind the Settlement Agreement, which he did before applying for readmission to NMT in 2016.

The New Mexico Court of Appeals has held that "[a]ll settlement agreements are contracts and therefore are subject to contract law[.]" *Herrera v. Herrera*, 1999-NMCA-034, ¶ 9, 126 N.M. 705, 974 P.2d 675. *See U.S. v. McCall*, 235 F.3d 1211, 1215 (10th Cir. 2000) ("Issues involving the formation, construction and enforceability of a settlement agreement are resolved by applying state contract law."). Thus, only the application of New Mexico contract law can resolve the issue of the validity and enforceability of the Settlement Agreement.

In its Order, the district court rejected the application of contract law but then proceeded to apply tort law to the issue of whether Petitioner had substantive grounds for rescinding the Settlement Agreement. *See* App. 33a. The district court's application of only tort law in this instance is problematic for several reasons. First, Petitioner did not bring a claim against Respondents under tort law because he is not seeking damages for pecuniary loss due to their misrepresentation. Nor did Respondents raise any defenses under tort law to Petitioner's Title VI racial discrimination claim. By contrast, they did

raise a defense to it under contract law. Second, tort law cannot address the issue of whether Respondent NMT *et al.* materially breached the Settlement Agreement. Only contract law can do that. Third, although there is some overlap between tort law and contract law, they differ from one another in important respects. For example, the *Restatement (Second) of Torts* states that fraudulent misrepresentation is actionable only if the recipient's reliance on that misrepresentation was justifiable, and in order for the reliance on it to be justifiable the fraudulent misrepresentation must also be material. *See Restatement (Second) of Torts* §§ 537(a) and 538(1) (1977). Whereas the *Restatement (Second) of Contracts* states that the misrepresentation need only be fraudulent or material in order to render the contract voidable. *See Restatement (Second) of Contracts* § 164(1) and § 161, cmt. b. (1981). Also, "[i]n contrast to the rule applicable to liability in tort for misrepresentation, it is not enough, where disclosure is expected, merely to make reasonable efforts to disclose the relevant facts. Actual disclosure is required. Compare Restatement, Second, Torts § 551, Comment d." *Restatement (Second) of Contracts* § 161, cmt. a. (1981). And tort law and contract law have different legal standards for determining when there is a duty to disclose and when nondisclosure is equivalent to an assertion. *Cf.* § 551(e) of the *Restatement (Second) of Torts* to its counterpart § 161(b) in the *Restatement (Second) of Contracts*. The latter relies on the covenant of good faith and fair dealing, whereas the former disregards it. And fourth, the *Restatement (Second) of Torts*

provides no guidance on rescission, whereas the *Restatement (Second) of Contracts* provides extensive guidance on it.

In its Order, the district court stated that "New Mexico follows the Second Restatement of Torts in assessing the duty to disclose. *McElhannon v. Ford*, 73 P.3d 827, 831 (N.M. Ct. App. 2003)." App. 33a. However, the New Mexico Court of Appeals in *McElhannon v. Ford* also relied on the *Restatement (Second) of Contracts*, specifically §§ 161 and 164, for the proposition that "rescission may be allowed in certain cases of non-fraudulent, but material, nondisclosure." *McElhannon* at 832. Therefore, in light of the facts of the instant case, it is clear that contract law must be applied to the issue of the validity and enforceability of the Settlement Agreement in order to determine if Petitioner had substantive grounds for unilaterally rescinding said agreement before he applied for readmission to the PhD program at NMT in 2016.

In its Order and Judgment, the court of appeals rejected Petitioner's argument and found that the district court did not need to objectively analyze whether or not Petitioner had successfully rescinded the Settlement Agreement. *See* App. 11a. But this conclusion ignores the fact that the district court *did* carry out an objective analysis of the validity and enforceability – but by applying the wrong law! Again, the correct law to apply to any analysis of the Settlement Agreement is contract law, not tort law. And the application of contract law thereto demonstrates that Petitioner had the right to unilaterally rescind the agreement.

Section 164 on "When a Misrepresentation Makes a Contract Voidable" in the *Restatement (Second) of Contracts* states the following:

> If a party's manifestation of assent is induced by either a fraudulent or a material misrepresentation by the other party upon which the recipient is justified in relying, the contract is voidable by the recipient.

Restatement (Second) of Contracts § 164(1) (1981). As to when "[a] person's non-disclosure of a fact known to him is equivalent to an assertion that the fact does not exist", the *Restatement (Second) of Contracts* includes the following case:

> (b) where he knows that disclosure of the fact would correct a mistake of the other party as to a basic assumption on which that party is making the contract and if non-disclosure of the fact amounts to a failure to act in good faith and in accordance with reasonable standards of fair dealing.

Restatement (Second) of Contracts § 161(b) (1981). This clearly applies to Petitioner's case because Respondent NMT *et al.* knew that the disclosure of their addition of "No Degree Earned" to Petitioner's NMT academic transcript would have corrected a basic assumption on which he was making the Settlement Agreement – namely, that no such contentious language would be added to his NMT academic transcript in place of the removed

derogatory language "Terminated from Graduate Program".

There is ample evidence in the record below that Respondents were fully aware at the time of executing the Settlement Agreement on October 8, 2015 that Petitioner consistently contended that he had earned a PhD degree from NMT and therefore would never have agreed to the addition of "No Degree Earned" to his NMT academic transcript as part of the Settlement Agreement or any other contract. As the district court found in its Order, "[Petitioner's] asserted completion of any academic program at NMT was a sore point of contention between the parties." App. 35a n. 6. It was therefore precisely because this issue "was a sore point of contention between the parties" that not adding such contentious language as "No Degree Earned" to Petitioner's NMT academic transcript was a "basic assumption" on which he made the Settlement Agreement even if he did not explicitly bargain for it.

Thus, because Respondent NMT *et al.* knew that the disclosure of their addition of "No Degree Earned" to Petitioner's NMT academic transcript would have corrected a basic assumption on which he was making the Settlement Agreement, Respondents had a duty to disclose that information under § 161(b) of the *Restatement (Second) of Contracts* (or under its counterpart § 551(e) of the *Restatement (Second) of Torts*). And their failure to do so constituted a fraudulent and material misrepresentation under § 164(1) of the *Restatement (Second) of Contracts* that rendered the Settlement Agreement voidable.

Respondent NMT's misrepresentation was fraudulent because they clearly intended their nondisclosure (which equals an assertion) to induce Petitioner to manifest his assent to the Settlement Agreement. *See Restatement (Second) of Contracts* § 162(1). Respondent NMT *et al.* knew full well that if they corrected Petitioner's mistake as to his basic assumption by disclosing their addition of "No Degree Earned" to his NMT academic transcript, Petitioner would never agree to sign the Settlement Agreement. And Respondent NMT's misrepresentation was material because it was likely to induce a reasonable person to manifest his assent and because they knew that it would be likely to do so in Petitioner's case. *See Restatement (Second) of Contracts* § 162(2).

In its Order, the district court found that "the addition of the phrase 'No Degree Earned' was material to Petitioner based on his avowal that he was induced into the Settlement Agreement by an expectation that such language would not be added. App. 32a. More crucially, the objective materiality of Respondent NMT's misrepresentation is satisfied by its meeting either of the two requirements under § 162(2) of the *Restatement (Second) of Contracts*:

> The requirement of materiality may be met in either of two ways. First, a misrepresentation is material if it would be likely to induce a reasonable person to manifest his assent. Second, it is material if the maker knows that for some special reason it is likely to induce the particular recipient to manifest his assent.

Restatement (Second) of Contracts § 162(2) cmt. c (1981). Respondent NMT *et al.* knew that because Petitioner contended that he did in fact earn a PhD degree from NMT, their nondisclosure of the addition of "No Degree Earned" to his NMT academic transcript would induce Petitioner to manifest his assent, which it indeed did. Thus, Petitioner had substantive grounds for unilaterally rescinding the Settlement Agreement, which he did before applying for readmission to the PhD program at NMT in 2016, and Respondents' contrary "belief" that he did not rescind it is factually and legally baseless.

The language "No Degree Earned" added to Petitioner's NMT academic transcript is more than just contentious. It is also false and defamatory – false because Petitioner earned two degrees (a Master's and PhD) from NMT, and defamatory because it is in effect calling Petitioner a liar for his having stated both privately and publicly that he did in fact earn a PhD degree from NMT. And calling one a liar is an attack on one's integrity and harms one's reputation. Respondent NMT admitted under oath in a deposition that Petitioner earned a Master's degree from NMT while studying there between 2009 and 2012. *See* App. 57a-59a. Also, because Respondent NMT admitted under oath in a deposition that Petitioner was terminated from the PhD program at NMT in 2012 without due process – i.e., without being given prior notice of the charges against him and without being afforded the opportunity to defend himself against those charges before being permanently terminated, which is a violation of Petitioner's civil and constitutional rights

and protections – Respondents are legally estopped from claiming that Petitioner failed to earn his PhD degree from NMT. *See* App. 68a-71a.

Under New Mexico contract law, the nonbreaching party is excused from performing his or her contractual obligations and has the right to rescind the contract if there has been a material breach that remains uncured:

> We agree that if Famiglietta committed a material breach of the contract which remained uncured, Buyer was not required to perform its remaining obligations under the contract. *See generally Farnsworth on Contracts, supra,* § 8.18; *see also Horton v. Horton,* 487 S.E.2d 200, 204 (Va. 1997) (material breach excuses nonbreaching party from performing his contractual obligations); *Ervin Constr. Co. v. Van Orden,* 125 Idaho 695, 874 P.2d 506, 511 (Idaho 1993) (rescission available when party commits material breach which destroys purpose of contract).

Famiglietta v. Ivie-Miller Enters., Inc., 1998-NMCA-155, 126 N.M. 69, 966 P.2d 777, 781-782. *See Armijo v. Nuchols,* 57 N.M. 30, 35, 253 P.2d 317, 320 (1953) (stating that "[t]he principle is well established that voidable contracts may be rescinded at the election of an injured party").

Respondents' failure to comply with the Settlement Agreement's requirement of permanently removing the words "'Terminated from Graduate Program' (or any similar language)" from "any other

related documents in [Petitioner's] academic and/or administrative files at [NMT]" "within five (5) business days from the execution of this Settlement Agreement" destroyed the purpose of the Settlement Agreement and therefore constituted a material failure of performance that prevented Petitioner's performance duties from becoming due. And because Respondents' material breach remained uncured (and continues to remain uncured to this day), it discharged Petitioner's contractual obligations altogether. *See* App. 78a-111a. *See Restatement (Second) of Contracts* § 237 cmt. a and § 242 cmt. a. Petitioner was subsequently free to apply for readmission to NMT without being in violation of the Settlement Agreement. And he also had the right to unilaterally rescind the Settlement Agreement, since unilateral rescission is an available remedy for material breach of contract. *See Famiglietta v. Ivie-Miller Enters., Inc.,* 1998-NMCA-155, 126 N.M. 69, 966 P.2d 777, 781-782.

Because Petitioner rescinded the Settlement Agreement on the substantive grounds of Respondent NMT's fraudulent and material misrepresentation, fraudulent inducement, material breach of contract, and violation of public policy before he applied for readmission to the PhD program at NMT in 2016, Respondents' contrary "belief" is based on a falsification of the facts and a misrepresentation of the law as it applies to those facts in the instant case. Thus, Respondent NMT's proffered reason for refusing to readmit Petitioner to NMT in 2016 is unworthy of credence. For this reason among others, therefore, the Court should grant the present petition

for a writ of certiorari.

3. *Respondents' mendacity is material*

The lower courts erred by not recognizing that Respondents' mendacity is material because it is directly related to the negotiation, execution, and rescission of the Settlement Agreement.

In *St. Mary's Honor Ctr. v. Hicks*, this Court recognized that mendacity is one means of demonstrating pretext in a racial discrimination case:

> The defendant's "production" (whatever its persuasive effect) having been made, the trier of fact proceeds to decide the ultimate question: whether plaintiff has proved "that the defendant intentionally discriminated against [him]" because of his race. The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of *mendacity*) may, together with the elements of the prima facie case, suffice to show intentional discrimination.

St. Mary's Honor Ctr. v. Hicks, 509 US 502, 511, (1993) (emphasis added). *See Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 154 (2000) ("[I]t is a principle of evidence law that the jury is entitled to treat a party's dishonesty about a material fact as evidence of culpability.").

Petitioner has already demonstrated above that Respondent NMT's proffered reason for refusing to

readmit him to the PhD program at NMT in 2016 is unworthy of credence because it is predicated on their ignorance of the law, which is never an excuse. Petitioner will now demonstrate below that the disbelief in Respondent NMT's proffered reason is accompanied by overwhelming evidence of their mendacity as related to the Settlement Agreement and therefore shows, together with Petitioner's prima facie case of racial discrimination, that Respondent NMT intentionally discriminated against him as an African American.

Of the many examples of Respondents' mendacity that Petitioner discussed at length in his briefing before the lower courts, one will suffice here: Respondent NMT's and their attorney's falsification of the facts as related to the addition of "No Degree Earned" to Petitioner's NMT academic transcript.

In their October 14, 2015 reply, Respondent NMT and their then-attorney Mr. Saucedo intentionally misled Petitioner by falsely stating that "No Degree Earned" had not been added to his NMT academic transcript but rather had "always been there". App. 61a. Of course, it had not always been there, which NMT's former Registrar Sara Grijalva would later admit to under oath in a deposition. *See* App. 62a-64a. When Mr. Saucedo replied to Petitioner on October 14, 2015, he was fully aware that "No Degree Earned" had been added to Petitioner's NMT academic transcript after the execution of the Settlement Agreement on October 8, 2015 because Mr. Saucedo had been involved in discussions with his clients Respondent NMT *et al.* concerning the addition of said language to said transcript. *See* App.

65a and 66a.

In its Order, the district court found that this instance of Respondent NMT's mendacity is not material because it is supposedly not related to Respondent NMT's proffered reason for refusing to readmit Petitioner to the PhD program at NMT in 2016 and thereafter: "Any alleged mendacity must be related to the defendant's proffered reasons in order to undermine those reasons." App. 36a. And the court of appeals agreed with the district court's finding. *See* App. 13a and 14a.

But if this instance of Respondent NMT's mendacity is not related to their proffered reason for refusing to readmit Petitioner to the PhD program at NMT – namely, that the Settlement Agreement was valid and enforceable – then what would be?

The lower courts' findings are clearly erroneous because this instance of Respondent NMT's mendacity is material to the issue of the validity and enforceability of the Settlement Agreement, being directly related to the contract's execution and rescission. It gives the trier of fact critical evidence that Respondent NMT *et al.* were fully aware that their failure to disclose the addition of the false and defamatory language "No Degree Earned" to Petitioner's NMT academic transcript constituted fraudulent misrepresentation and that Petitioner did indeed rescind the Settlement Agreement. In turn, the trier of fact can reasonably infer that Respondents' "belief" that the Settlement Agreement was not rescinded is dishonest and that Respondent NMT's proffered reason is therefore unworthy of credence.

Because Respondent NMT's mendacity is relevant and material, the district court and court of appeals erred by failing to take it into account when analyzing the believability of Respondent NMT's proffered reason. For this reason among others, therefore, the Court should grant the present petition for a writ of certiorari.

4. *Financial deprivation claim*

The lower courts erred by failing to recognize that the deprivation of Petitioner's $45 application fee that he paid to NMT when applying thereto for readmission in 2016 constitutes a violation of his financial property right.

The New Mexico Constitution states the following:

> All persons are born equally free, and have certain natural, *inherent and inalienable rights*, among which are the rights of enjoying and defending life and liberty, of acquiring, *possessing and protecting property*, and of seeking and obtaining safety and happiness.

N.M. Constitution, Article II – Bill of Rights, Section 4 (emphases added). By all legal definitions, money is property. Thus, Petitioner has an "inherent and inalienable" right to possess and protect his financial property.

Petitioner was deprived by Respondents Wells and Liebrock of his $45 application fee, which qualifies as financial property, without their having

processed Petitioner's admissions application in exchange for the fee and without affording Petitioner any due process to recover the fee. Thus, Petitioner's financial property right was violated by Respondents Wells and Liebrock under the Fourteenth Amendment, and because Petitioner was not afforded due process as concerns recovering that fee, Petitioner has in fact raised a valid due process claim that is enforceable by 42 U.S.C. § 1983.

In its Memorandum Opinion and Order, the district court found that "while the New Mexico Constitution does establish a general right to *possess property*, it does not establish a right to receive a response to one's application in exchange for one's application fees." App. 52a. But Article II, Section 4 of the New Mexico Constitution also says nothing about a million other types of property, such as computers and smartphones. Does this mean that the state government can deprive its residents of those possessions as well simply because they are not explicitly mentioned in the above context as types of protected property?

Article II, Section 4 of the New Mexico Constitution also does not establish a right to take a university course for which one has paid tuition. Does this mean that if the state university were to keep the student's tuition without providing the course paid for by the student that the student would have no recourse to receive a refund? Because New Mexico state courts do not recognize that there is an implied-in-fact contract between student and school in higher education, whether for purposes of applying for admission or taking courses after being

admitted, and because New Mexico universities as a general rule avoid entering into written contracts with students for academic purposes, the only protection left for a student who has paid an admissions application fee without the application being processed in exchange for the fee is to sue the university for violating his constitutionally protected financial property right. If that right is stripped away, then what recourse would the student have?

Surely a state entity such as a university does not have the right to deprive a student of his or her money without providing the student with the goods or services in exchange for that money. Petitioner sees no difference between the deprivation of one's monetary property without due process and the deprivation of one's computer or smartphone without due process. Both types of deprivation of property without due process violate one's constitutionally protected right to possess and protect property. And the contrary findings by the district court and the court of appeals are erroneous.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

September 2022

/s/ Lindsay O'Brien Quarrie
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