No. 24-119

In The
Supreme Court of the United States

♦

ALAN SAFAHI,

Petitioner,

v.

UNITED STATES,

Respondent.

♦

On Petition For A Writ Of Certiorari To The
United States Court Of Appeals
For The Ninth Circuit

♦

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

MATTHEW DIRKES
Counsel of Record
ILLOVSKY GATES & CALIA LLP
1611 Telegraph Ave.
Suite 806
Oakland, CA 94612
(415) 500-6477
matt@illovskygates.com

Counsel for Petitioner

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

INTRODUCTION

The government's opposition offers the Court no valid reasons to deny the petition for writ of certiorari. It instead advocates a position contrary to both this Court's opinion in *Evans v. United States*, 153 U.S. 584 (1894) and to common law. In his petition, Alan Safahi showed that at common law, a breach of contract could be criminal fraud only where there also was fraudulent inducement. Otherwise, in a validly entered contract, non-performance of a provision, even if intentional and masked by misleading statements, could be actionable only as a civil breach. It would likely not even be a tort, much less land the breaching party in prison.

In defending petitioner's convictions, the government espouses a novel and troubling expansion of the federal fraud statutes. The government urges this Court to sanction the application of those statutes, and their corresponding punishments, to civil contract breaches in a manner that exceeds the limitations that have existed since common law.

Petitioner's fraud convictions arise out of a contract between his company and a bank. There was no evidence that he fraudulently induced the bank to enter the contract (even though that was how the government charged the case in the indictment). Nor was there any evidence that petitioner was aware of the contract at the time his company entered into it. Instead, as the government argued and the district court held, the "scheme"

began several months *after* the contract was signed.

But the object of the fraud scheme – to deprive the bank of a fully funded prepaid card program – was the same conduct that would constitute a failure to perform the object of the contract. The contract called for a fully funded prepaid card program. The purported scheme involved providing a partially funded program instead. The objective of the scheme, and the conduct giving rise to the convictions, were precisely the same as what would be a breach, a point the government concedes.

The government offers the Court no limitation for when a breach can be criminalized. The government argues, contrary to common law, that a breach can be fraud even absent fraudulent inducement. The only support the government cites for this is an article in American Jurisprudence. The government does not cite any caselaw that affirms federal criminal fraud convictions arising out of a contract where there was no fraudulent inducement. More specifically, the government offers the Court no authority to support the idea where the purported fraud scheme is indistinguishable from a contract breach, the breach can be criminalized.

Petitioner would be entitled to relief if the Court resolved the issue in his favor. The government argues that even if fraudulent inducement is required for a breach to be federal criminal fraud, there was enough evidence to find fraudulent inducement here. No evidence at trial showed that petitioner possessed an intent to defraud at the time of contract formation, which is

why the government abandoned that theory during trial after charging that theory in the indictment. The government argues that because petitioner's *company* owed another bank money at the time the company entered into the contract at issue, petitioner himself had a personal incentive to defraud the bank. The record does not support that conclusion and, even if it did, petitioner's motive would not constitute proof beyond a reasonable doubt of an intent to defraud.

DISCUSSION

The government's opposition embraces a sweeping and unlimited application of the federal fraud statutes when the alleged fraud arises out of a contract. The government's arguments further confirm that this Court should grant certiorari and reject the erroneous legal basis upon which petitioner's convictions rest.

Not every contract breach, even when intentional and accompanied by misleading statements, is criminal fraud. As shown in the petition, common law fraud contained a "contemporaneous fraudulent intent principle" such that fraud predicated on a contract requires "proof of fraudulent intent not to perform the promise at the time of contract execution." *U.S. ex rel. O-Donnell v. Countrywide Home Loans, Inc.* ("*Countrywide*"), 822 F.3d 650, 662 (2d Cir. 2016). "Absent such proof, a subsequent breach of that promise – even where willful and

intentional – cannot transform the promise into fraud." *Id.* This is true even where the breach is accompanied by "knowingly false statements about the breach" that indicate an "intent to perform under the contract." *Bridgestone/Firestone v. Recovery Credit Servs.*, 98 F.3d 13, 20 (2nd Cir. 1996).

These limitations on criminal fraud prosecutions arising out of contracts exist so that the government cannot "convert every intentional or willful breach of contract . . . into criminal fraud" absent "proof that the promisor intended to deceive the promissee into entering the contractual relationship." *Countrywide*, 822 F.3d at 661. This Court expressed similar concerns last year when it reversed various wire fraud convictions and noted that the government's theory of fraud "vastly expands federal jurisdiction without statutory authorization" and, in so doing, "makes a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law . . . ." *Ciminelli v. United States*, 598 U.S. 306, 315 (2023).

The legal theory used to prosecute and convict petitioner flouts that authority. The fraud scheme cannot be defined without reference to the contract between petitioner's company and the bank. The object of the purported fraud – implementing a partially funded program while telling the bank it was a fully funded one – is simply another way of describing a breach of the contract. The government agrees with this. (Opp.

6) (describing the fraud as follows: "Sunrise Banks deliberately contracted for a fully funded arrangement, not a partially funded one, and petitioner's deceitful conduct thus went to the very essence of the bargain.") (internal quotation marks omitted).

The conduct underlying the fraud convictions is the same conduct that constituted a breach of the contract, a fact the government also concedes. (Opp. 7-8) (petitioner's criminal fraud scheme "also happened to constitute a breach of contract").

The bank did not have a right to a fully funded card program independent of the contract with petitioner's company. Wire fraud requires both deception and deprivation of property. *Kelly v. United States*, 590 U.S. 391, 402 (2020); *Ciminelli*, 598 U.S. at 315. But the "property" that the bank was deprived of by the alleged scheme was the bank's property only by virtue of the contract.

Nothing in the government's opposition justifies the fundamental legal error upon which petitioner's convictions rest. For instance, the government repeatedly relies on the Presentence Investigation Report (PSR) in its recitation of the facts. (Opp. 2-5). But petitioner's convictions resulted from a bench trial, where evidence was received into the record. A PSR is not evidence, or part of the trial record. *E.g.*, *United States v. Berrier*, 28 F.4th 883, 887 (8th Cir. 2022) ("PSR is

not evidence").[1]

The government describes the conduct constituting the breach – i.e., the failure to provide the fully funded program as set forth in the contract – and the misleading statements about the breach, as "illicit[]," (Opp. 3), a "scheme," (Opp. 6), a "fraudulent scheme," (Opp. 7), or a "theft," (Opp. 7). But those are just characterizations of the breaching conduct. The alleged misrepresentations all relate to performance under the contract. The government claims, for example, that petitioner "falsely underreported" to the bank the amount of funds loaded onto the prepaid cards, but the underreporting can only be defined by reference to provisions in the contract. The government even concedes that the fraud "constitute[d] a breach of contract." (Opp. 7-8). The government's repeated characterizations of the breach as fraud do not make it so. There is no way to even define the fraud absent reference to the contract, something the government is also forced to concede. (Opp. 6).

The government wrongly contends that a breach of contract can be fraud even where there is

---

[1] The government's reliance on the PSR yields factual errors. For example, the government claims that the fraud scheme caused the bank almost $3 million in losses . . . ." (Opp. 4) (citing PSR ¶¶ 13, 26). At trial, no loss amount was proved, in part because the overall figure represented only potential underfunded liability on outstanding prepaid cards. In all likelihood, the bank absorbed virtually no loss from that potential liability as the bank immediately shut down the card program after learning of the underfunding and sought no restitution at petitioner's sentencing. *E.g.*, D. Ct. Dkt. 172.

no fraudulent inducement. (Opp. 5) ("court of appeals correctly rejected [petitioner's] contention" that "the federal fraud statutes require that a defendant have the intent to defraud at the time he enters into a contract with the victim rather than at the time he undertakes his scheme to defraud."). The only support the government can muster in support of its argument is an article in American Jurisprudence. (Opp. 7). The government does not cite any cases upholding federal fraud convictions where there was no fraudulent inducement and where the alleged fraud scheme was indistinguishable from a contract breach.

The government insists that the Ninth Circuit decision below does not conflict with long-standing authority from this Court. In *Evans*, 153 U.S. at 592, the Court distinguished between someone who obtains a loan "believing that he will be able" to repay it but then cannot – not a crime – with a defendant who obtains a loan with the intent not to repay it, which is "plain fraud."

The government fails in its attempt to distinguish *Evans*. It asserts that *Evans* merely recognized that "a false statement is fraudulent if the defendant has an intent to defraud at the time he makes the statement." (Opp. 8). That cannot be reconciled with this Court's opinion, which hinged on *when* the false statements were made and when the fraudulent intent existed. As the Court noted, someone who purchases goods on credit while knowing that he will not be able to pay for them commits "plain fraud" while someone "believing that he will be able to pay for them" but then is unable to

"is guilty of no offence . . . ." *Evans*, 153 U.S. at 592. The difference turns on the person's intent *at the time he enters into the contract*, a distinction the government ignores.

The government's discussion of the Second Circuit's opinion in *Countrywide* fares no better. It relies on a single stray sentence of dicta to argue that misrepresentations made in the "course of performance or to feign performance under the contract" can support a finding of fraud. (Opp. 9) (quoting *Countrywide*, 822 F.3d at 658). But the core holding of *Countrywide* is that fraud arising out of a contract must be accompanied by fraudulent misrepresentations at the time of contract formation. The government there failed to prove that the "contractual representations at issue were executed with contemporaneous intent never to perform, and the trial record contains no evidence that [the defendants] had such fraudulent intent in the contract negotiation or execution." 822 F.3d at 666. The government's "proof shows only post-contractual intentional breach of the representations" made during the contract formation. *Id.* That was not a "legally sufficient basis on which to conclude that the misrepresentations alleged were made with contemporaneous fraudulent intent." *Id.*

Moreover, the government's reading of *Countrywide* is contradicted by *Bridgestone*, 98 F.3d at 13. In that case, the Second Circuit reversed a fraud judgment even though the defendant "knowingly and falsely represented" that it intended to perform under the contract.

98 F.3d at 19-20 (internal quotation marks omitted). Even assuming the "misrepresentations were intended to lull [the plaintiff] into a false sense of security and that they did so," the knowingly false misrepresentations about the breach did not constitute fraud as they "amount[ed] to little more than intentionally false statements . . . indicating [an] intent to perform under the contract." *Id.* False statements about one's performance under a contract (e.g., "the widgets are on their way" when they have not yet left the warehouse) are not criminally fraudulent.

The Seventh Circuit cases discussed in the petition all reach the same conclusion. (Pet. 15-16); *Perlman v. Zell*, 185 F.3d 850, 853 (7th Cir. 1999) ("Breach of contract is not fraud" unless one enters into the contract "with the intent not to keep" its promises); *Corley v. Rosewood Care Ctr.*, 388 F.3d 990, 1007 (7th Cir. 2004); *United States ex rel. Main v. Oakland City Univ.*, 426 F.3d 914, 917 (7th Cir. 2005) ("failure to honor one's promise is (just) breach of contract, but making a promise that one intends not to keep is fraud."). The government argues that none of these cases "holds that conduct otherwise satisfying the elements of fraud is immunized simply because it is also a breach." (Opp. 9).

That just begs the question of how, absent fraudulent inducement, courts can differentiate between a breach and fraud if the supposed fraudulent conduct "is also a breach." The

government offers the Court no answer to that fundamental question. The courts that have considered it have concluded that, as was the case at common law, fraud arising out of a contract requires fraudulent inducement. Otherwise, where the purported fraud cannot be distinguished from the breach, the issue belongs in civil court and resolution under contract – not criminal – law. A contrary conclusion will "criminalize traditionally civil matters and federalize traditionally state matters. *Ciminelli*, 598 U.S. at 315.

Finally, the government is wrong that petitioner would not be entitled to relief if the issue were resolved in his favor. The government argues that because petitioner's *company* owed funds to another bank, petitioner *personally* would have had a "motive" to defraud Sunrise Banks at the time of contract formation. (Opp. 10). But the mere fact that his company owed a debt to another financial institution is not proof beyond a reasonable doubt of an intent to defraud by petitioner in the absence of any other evidence. And there is no evidence in the record that petitioner intended to defraud the bank at the time the contract was entered. The government introduced no evidence that: petitioner had any involvement in or even knew about the contract negotiations; knew about the contract or its terms until months after it was signed; or had any communications with the bank until months later.

CONCLUSION

The petition for a writ of certiorari should be granted so that the Court can review this divergence between the Circuits on such a fundamental point of criminal law.

Respectfully submitted,

MATTHEW DIRKES
Counsel of Record
ILLOVSKY GATES & CALIA LLP
1611 Telegraph Ave.
Suite 806
Oakland, CA 94612
(415) 500-6477
matt@illovskygates.com

Counsel for Petitioner