

No. 25-7515

IN THE SUPREME COURT
OF THE UNITED STATES

ROBERT J. JESENİK,

Petitioner,

v.

UNITED STATES,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

It is common ground that a victim's negligence is no defense to fraud, BIO 13, 17, and that materiality is an objective standard, BIO 14, 18. Petitioner also accepts, as the Ninth Circuit holds, that the government can attempt to prove materiality with evidence that the alleged victims actually relied on the misrepresentations. *See United States v. Lindsey*, 850 F.3d 1009, 1018 (9th Cir. 2017); Pet. App. 37. The government, in fact, did so here. Pet. App. 37.

The question presented is whether defendants are entitled to do the same thing in reverse—that is, dispute the government's evidence that the alleged victims relied on the misrepresentation or introduce their own evidence indicating that the alleged victims did *not* rely on the misrepresentations at issue. The Ninth Circuit says no; it has adopted a “bright-line,” “prophylactic” rule barring defendants from using any evidence of victim behavior to disprove materiality (or any other element of fraud). *Lindsey*, 850 F.3d at 1017–18; Pet. App. 38–39.

The government does not seriously defend that rule. Instead, the government argues that the Ninth Circuit's rule is not *really* “categorical” or lacks practical effect. BIO 15–16. *Lindsey*'s own words demonstrate otherwise. So do the proceedings below, as well as nine years of other criminal fraud trials within the Ninth Circuit.

The government's remaining arguments founder as well. The Ninth Circuit's prophylactic rule cannot be squared with this Court's precedent or fundamental legal principles. No other court has followed the Ninth Circuit's lead, and many courts have departed from it. Finally, this case is an ideal vehicle. This Court should reject the

Ninth Circuit’s prophylactic rule and remand for the Ninth Circuit to consider in the first instance the government’s various attempts to defend petitioner’s conviction without relying on the very rule it invoked below but is now unwilling to defend.

A. The Ninth Circuit has adopted a “bright-line,” “prophylactic” rule barring significant defense evidence.

It is telling that the government’s opening gambit is to try in various ways to obscure and soften the Ninth Circuit’s prophylactic rule. These attempts fail.

1. The government first tries to portray the Ninth Circuit’s rule as modest, suggesting it applies “only when” defense evidence of victim behavior “risks touching on victim ‘negligence, intentional disregard, or lack of reliance.’” BIO 16 (citation omitted). But *Lindsey* says no such thing. It describes its rule as “bright-line” and “prophylactic” because it applies across the board, regardless of whether those underlying concerns are present. 850 F.3d at 1017–18.

In any event, defense evidence about “lack of reliance” can be—and typically is—“relevant to a permissible defense.” BIO 16. As the Ninth Circuit openly admits, “a victim’s reliance on the defendant’s falsehoods is probative of materiality.” Pet. App. 36. “Although not dispositive” under the governing objective standard, evidence that an alleged victim relied on a misrepresentation suggests that the misrepresentation would have affected a reasonable person’s decision making. *Id.* Logic demands that the converse is just as true: Evidence that an alleged victim did *not* rely on a misrepresentation suggests that the misrepresentation would *not* have affected a reasonable person’s decision making. Yet the Ninth Circuit’s prophylactic

rule bars defendants from attempting to “disprove materiality” by offering evidence of an alleged victim’s “lack of reliance.” *Lindsey*, 850 F.3d at 1017; *see also* Pet. App. 38–39.

2. The government next emphasizes that the Ninth Circuit leaves defendants free to introduce evidence of “‘standards generally applied’ in the industry.” BIO 16 (quoting *Lindsey*, 850 F.3d at 1016). But evidence of general industry practices and evidence regarding whether the alleged victims actually relied on the misrepresentations at issue are not interchangeable. The first is abstract and typically comes from an expert. The second is concrete and is precisely what the government itself often uses to prove materiality (as it did here). *See* Pet. App. 37. What’s more, testimony from alleged victims can be visceral and moving, as jurors listen to individuals describe their own actions. Barring defendants from responding directly to that evidence and instead limiting them to an expert’s description of general practices in the industry, forces defendants to litigate with one hand tied behind their back.

3. Finally, the government suggests that the Ninth Circuit’s rule has no real effect “[i]n practice.” BIO 15. That is demonstrably untrue.

In *Lindsey* itself, the Ninth Circuit precluded the defendant from “introduc[ing] evidence that [the alleged victims] were willing to approve the loans regardless of the information included in the application forms.” 850 F.3d at 1015.

Lindsey’s “bright-line” rule likewise prevented petitioner from offering crucial evidence at trial. Contrary to the government’s suggestions, petitioner did not want

to argue that the investors were negligent. Quite the opposite: As petitioner explained over and over, he maintained that any half-truths in his sales pitches were immaterial precisely because his sophisticated counterparties were *not* negligent—they carefully reviewed the more formal disclosures he provided and thus likely discarded any misimpressions gleaned from marketing pitches.¹ Yet before trial, the government moved *in limine* to preclude “any” evidence from petitioner that the victims here behaved in that manner. 9 CA9 ER 2337–40. The district court granted the government’s motion. It simultaneously allowed the government to introduce evidence of victim reliance, explaining that *Lindsey*’s prophylactic rule “is *not* a gate that ‘swings both ways.’” 1 CA9 ER 234 (citation omitted).

During trial, the district court enforced *Lindsey* with vigor. It “preclude[d] evidence” indicating “investors did not actually rely on [petitioners’] allegedly false statements.” Pet. App. 38. And when the defense attempted to cross-examine the government’s witnesses claiming reliance, the district court stopped that in its tracks. For example, Robert Zamarripa, the government’s first investor witness, claimed that

¹ For example, petitioner explained, “[T]he defense *does not believe that the investors were negligent* in investing in Aequitas. Rather, the defense believes” that the investors actually “reviewed or were exposed to information in Aequitas’s offering material.” 7 CA9 ER 1837. Petitioner therefore sought to introduce evidence of investor behavior “for the purpose of demonstrating [the investors’] non-reliance” on any half-truths in the sales pitches. *Id.* at 1845; *see also id.* at 1842–44, 1848–52; 14 Rice ER 2707, 28 Rice ER 6191, 29 Rice ER 6406, 30 Rice ER 6445–46 (numerous other similar explanations from petitioner’s counsel). (In the Ninth Circuit, the codefendants’ appeals were consolidated. “Rice ER” refers to the excerpts of record in *United States v. Rice*, Ninth Cir. No. 23-2316.)

he made multi-million-dollar investment decisions based on oral sales pitches and a handshake, and that he did not carefully review disclosure documents. At the same time, Mr. Zamarripa had lawyers and accountants researching Aequitas for months before he invested. 17 CA9 ER 4524–25. When the defense attempted to cross-examine Mr. Zamarripa about whether, in truth, he really relied on these financial specialists he had hired instead of petitioner’s sales pitch, the court interjected, precluding the cross-examination. 11 Rice ER 1916–17. The court then categorically barred petitioner from cross-examining any future witness about whether the disclosure documents caused them to disregard any inconsistent impressions they had formed from his sales pitches—so long as those witnesses testified, however self-servingly, that they had not carefully reviewed disclosure documents. 11 Rice ER 1930–35. And the Ninth Circuit upheld these rulings, reaffirming *Lindsey*’s “bright-line rule against evidence of individual lender behavior to disprove materiality.” Pet. App. 38–39.

Lest there be any doubt about the state of affairs within the Ninth Circuit, other cases confirm that *Lindsey* means what it says: It categorically prohibits defendants from introducing alleged victim behavior evidence to disprove materiality. *See, e.g., United States v. Kuzmenko*, 775 F. Appx. 272, 274 (9th Cir. 2019) (invoking *Lindsey* to affirm exclusion of defense evidence regarding actions of the “particular victim lenders”); *United States v. Green*, 698 F. Appx. 879, 880 (9th Cir. 2017) (applying *Lindsey* to uphold the exclusion of “evidence of the lending behavior of Green’s particular lender”); *United States v. McClellon*, 2023 WL 9002865, at *5

(W.D. Wash. Dec. 28, 2023) (“Ninth Circuit authority” precludes evidence of “individual lender behavior”); *United States v. Head*, 2023 WL 6611454, at *6 (E.D. Cal. Oct. 10, 2023) (defense evidence of victim behavior “is not admissible” under *Lindsey*).

B. The Ninth Circuit’s rule is wrong.

Logic, precedent, and broader legal principles confirm that defendants should be able to disprove materiality with evidence of alleged victim behavior.

1. In *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016), the Court explained that evidence that an alleged victim disregarded false statements—there, paying certain Medicaid claims despite being aware of alleged misrepresentations—can be “strong evidence” that the misrepresentations were not material. *Id.* at 194–95.

Endorsing a notion the Ninth Circuit invented on rehearing in *Lindsey* (after initially overlooking *Universal Health*), the government asserts that *Universal Health*’s “strong evidence” holding is limited to situations where the victim is the “entire market” and thus “*ipso facto* proof of ‘industry’ practices.” BIO 19 (citation omitted). But *Universal Health*’s reasoning contains no such limitation. Nor would it make any sense to understand the decision that way. For one thing, the actual decisionmakers under the Medicaid program are individual state entities, not the federal government. On remand in *Universal Health*, therefore, the First Circuit asked whether MassHealth “continued to pay claims despite actual knowledge” of the misrepresentations. *United States ex rel. Escobar v. Universal Health Servs., Inc.*, 842

F.3d 103, 112 (1st Cir. 2016). That is akin to probing whether individual investors disregarded alleged half-truths in sales pitches after disclosure documents indisputably presented the full story.

Furthermore, the Court has since reiterated in a case where the victim was not the entire market that “materiality look[s] to the effect on the likely or *actual* behavior of the recipient of the alleged misrepresentation.” *Kousisis v. United States*, 605 U.S. 114, 131 (2025) (quoting *Universal Health*, 579 U.S. at 193) (emphasis added). Justice Thomas reinforced the point, explaining that a “party’s actions may reveal that a contract term is not material” if, for example, the party has paid little attention to that term in the past, or entered into numerous such contracts over the years despite knowing that the term is often violated. *Id.* at 139–40, 143 (Thomas, J., concurring).

2. In *Lindsey*, the Ninth Circuit itself ultimately admitted that individual disregard of alleged misrepresentations has at least some “relevance” to whether such misrepresentations “influence a decision” of a reasonable person in that position. 850 F.3d at 1015. The court of appeals thus grounded its prophylactic rule in Rule 403, which enables trial courts to exclude relevant evidence when “its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, [or] misleading the jury.” *Lindsey*, 850 F.3d at 1018 (quoting Fed. R. Evid. 403).

The government makes no attempt to defend that rationale, and for good reason. Rule 403 is “generally not amenable to broad *per se* rules.” *Sprint/United*

Mgmt. Co. v. Mendelsohn, 552 U.S. 379, 387 (2008). Rather, Rule 403 “requires a fact-intensive, context-specific inquiry” based on “the facts and arguments in a particular case.” *Id.* at 387–88. The Ninth Circuit’s bright-line, prophylactic rule is the antithesis of a context-dependent inquiry.

Really, the Ninth Circuit’s *Lindsey* decision reads much more like an exercise of some sort of implied supervisory power. But that just underscores its impropriety. Whatever the federal courts’ “supervisory power” entails, it does not permit a court of appeals to “circumvent” the Federal Rules or “supplant the district court’s broad discretion” with a prophylactic rule of its own invention. *United States v. Tsarnaev*, 595 U.S. 302, 315–17 (2022) (citing *Carlisle v. United States*, 517 U.S. 416, 426 (1996)).

Worse yet, the Ninth Circuit improperly dismissed the possibility of dispelling any potential juror confusion by using limiting instructions—that is, instructing that victim behavior “evidence be considered only for the purpose of evaluating materiality,” and not for improper reasons. *See Lindsey*, 850 F.3d at 1017.² As this Court recently reiterated, our legal tradition “credits jurors by refusing to assume that they are either ‘too ignorant to comprehend, or [are] too unmindful of their duty to respect, instructions’ of the court.” *Samia v. United States*, 599 U.S. 635, 647 (2023) (quoting *Pennsylvania Co. v. Roy*, 102 U.S. 451, 459 (1880)). The Court thus

² Mr. Jesenik requested just such a limiting instruction as an alternative to the judge’s preclusion of cross-examination at trial. 7 CA9 ER 1851. Adhering to *Lindsey*, the district court denied that request. 1 CA9 ER 107.

“presume[s] . . . that jurors will follow instructions” in a wide array of contexts involving potentially confusing or misleading evidence. *Id.* at 646–47 (collecting examples). Consequently, “there is no rule of evidence which provides that testimony admissible for one purpose and inadmissible for another purpose is thereby rendered inadmissible; quite the contrary.” *United States v. Abel*, 469 U.S. 45, 56 (1984); see Fed. R. Evid. 105 (endorsing limiting instructions in this circumstance).

3. As if the Ninth Circuit’s trampling of all these precedents and bedrock legal principles were not enough, the icing on the cake is the asymmetric nature of the Ninth Circuit’s rule. That asymmetry contravenes the black-letter principle that when one party introduces evidence to support a contention, “[c]ounterproof is admissible if it contradicts” that contention. 3 Mueller & Kirkpatrick, *Federal Evidence* § 6:89 (4th ed. & 2025 update). The Ninth Circuit’s prophylactic rule likewise impinges upon the constitutional right “to present a complete defense.” Pet. 18 (quoting *Crane v. Kentucky*, 476 U.S. 683, 690 (1986), and citing other authority). If the government can prove materiality with evidence of individual victim reliance, simple justice demands that defendants be allowed to *disprove* materiality with evidence of non-reliance. Yet again, the government offers no response.

C. Other federal courts reject the Ninth Circuit’s rule.

Try as the government might, it is impossible to portray the Ninth Circuit’s holding as in line with precedent from other courts of appeals. The government notes that decisions from other circuits hold that “a fraud victim’s negligence” or other idiosyncratic behavior “is not a defense” to wire fraud. BIO 20 (quoting *Lindsey*, 850

F.3d at 1014–15). Petitioner, however, does not challenge that part of *Lindsey*. Instead, the question presented asks whether the defense in criminal fraud prosecutions is categorically barred from introducing evidence of a victim’s “lack of reliance” on alleged misrepresentations, or other victim behavior, to disprove materiality. Pet. App. 39. On that issue, the government cites no case that agrees with the Ninth Circuit.

Furthermore, courts that have considered the issue have diverged from the Ninth Circuit’s approach. After reciting “the *Lindsey* court’s wholesale rejection” of individual lender evidence introduced by the defense to disprove materiality, the Fourth Circuit in *United States v. Raza*, 876 F.3d 604 (4th Cir. 2017), expressly declined to “go so far.” *Id.* at 621. The government responds that the Fourth Circuit “overreads *Lindsey*’s holding.” BIO 21. But as explained above, the Ninth Circuit meant what it said in *Lindsey*—as its decision here confirms. *See supra* at 2–5.

The government also asserts that “petitioners identify no particular evidence that might be excluded under the Ninth Circuit’s precedent but permissible in other circuits.” BIO 21. But in the Fourth Circuit’s *Raza* case itself, such evidence was admitted. The *Raza* defendants introduced testimony that the alleged victim “discouraged its mortgage loan underwriters from raising red flags when loan applications contained questionable information” and that the alleged victim approved “more than ninety-eight percent” of mortgage loan applications “during the period of the fraud scheme.” 876 F.3d at 612–13. That is just like the “evidence of specific prior bad loans or particular mistakes by underwriters” that *Lindsey* barred

and that the Ninth Circuit’s prophylactic rule deems inadmissible more generally. BIO 15 (quoting *Lindsey*, 850 F.3d at 1016).

Decisions from the Second Circuit—a primary locus of fraud prosecutions—demonstrate that defendants in that jurisdiction are also allowed to introduce evidence that the Ninth Circuit prohibits. As the government notes, the Second Circuit has made clear that evidence of a victim’s “idiosyncratic and unreasonable” behavior is inadmissible to prove or disprove materiality. BIO 21 (quoting *United States v. Litvak*, 889 F.3d 56, 68–69 (2d Cir. 2018)). But the government ignores the flip side of that holding: Evidence of the “individual views of a counterparty” is admissible “as to the beliefs of a reasonable investor” where, as here, there is no reason to think that the investor was idiosyncratic. *Litvak*, 889 F.3d at 69; *see also United States v. Gramins*, 939 F.3d 429, 447–50 (2d Cir. 2019) (individual “[v]iews that are *not* ‘erroneous or idiosyncratic’” are admissible) (emphasis added) (quoting *Litvak*, 889 F.3d at 69). To be sure, the quoted rulings refer to evidence offered by the prosecution. But the decisions take for granted that the same reasoning applies to defense evidence, and they discuss it with approval. *See Litvak*, 889 F.3d at 70–71 (crediting defense non-reliance evidence that managers of alleged victims “viewed statements by broker-dealers with suspicion”); *Gramins*, 939 F.3d at 445–46 (describing testimony defense elicited from “counterparty witnesses” to suggest misstatements were not material because the counterparties did not “plac[e] any significance” on them).

To the extent other courts of appeals have not squarely considered *Lindsey*'s prophylactic rule, that appears to be because the government has not advocated for such a rule—which is no surprise, since the government cannot bring itself to defend the rule in this Court. And when the government has occasionally asked district courts in other jurisdictions to exclude evidence that the Ninth Circuit's categorical rule deems inadmissible, those courts have rebuffed those requests. *See, e.g., United States v. Kistner*, 2013 WL 80255, at *7–8 (S.D. Ohio Jan. 7, 2013) (denying government's motion to exclude defense evidence of mortgage lenders' "practices and procedures at the time of the alleged conduct," holding that they were relevant to materiality); *United States v. Battles*, 2012 WL 2087397, at *1 (W.D. Okla. June 8, 2012) (admitting evidence of bank's past lending practices because they "may be relevant and should not be categorically excluded").

D. This case is an excellent vehicle.

Finally, the government's vehicle arguments are unpersuasive.

1. The government first maintains that "[t]his Court has previously denied petitions for writs of certiorari presenting similar issues." BIO 12. Not so. All of the petitions the government cites involved arguments that negligence was a defense to fraud or that the standard for materiality should be subjective. As explained above, petitioner makes neither argument. Accordingly, this is the first time the Court has had the opportunity to consider the validity of the Ninth Circuit's prophylactic rule.

2. The government also argues that any error here was harmless. BIO 22–23. The Ninth Circuit, however, did not address that argument. And this Court is "a court

of review, not of first view.” *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Consequently, this Court should simply reject the Ninth Circuit’s judicially created prophylactic rule and hold that courts in this situation must apply ordinary Rule 403 principles on a case-by-case basis. The Court should then remand, consistent with its “normal practice where the court below has not yet passed on the harmlessness of any error.” *Neder v. United States*, 527 U.S. 1, 25 (1999).

At any rate, the district court’s application of *Lindsey*’s prophylactic rule here was far from harmless. As elaborated above, petitioner maintained that reasonable investors in the industry would have disregarded any alleged half-truth misrepresentations in his sales pitches when formal, written disclosure documents provided complete and truthful information. But the district court’s *in limine* and mid-trial rulings barred petitioner from cross-examining investors who claimed they did not read those documents. *See supra* at 3–5.

Quoting a portion of the Ninth Circuit’s opinion out of context, the government suggests the district court may not have actually enforced its own rulings. The government says that “petitioners ‘were allowed to cross-examine investors about their claims that they had not read’ the documents.” BIO 23 (quoting Pet. App. 40–42). But as the government previously admitted, the court “drew a line” based on *Lindsey*, “limit[ing] defendants’ cross-examination of investors regarding whether, and with what care, they had read the PPMs and other disclosures.” Gov’t CA9 Br. 53–54. Furthermore, the district court forbade petitioner from asking whether those

disclosures caused the investors to disregard any alleged misrepresentations in his sales pitches.

Petitioner's inability to challenge Mr. Zamarripa's claims of non-reliance is one example of how the Ninth Circuit's asymmetric prophylactic rule prejudiced his defense. *See supra* at 4–5. And, contrary to the government's suggestion (BIO 17), this was not an isolated instance of prejudice. The district court's *Lindsey* rulings set the terms for the entire trial. So after Mr. Zamarripa's testimony, the district court likewise precluded petitioner from questioning other investors who disclaimed reading the disclosures, no matter how implausible such claims appeared to be. 11 Rice ER 1930–35. One RIA and investor claimed, for instance, that marketing materials were “the Bible” for her decision making. 12 Rice ER 2308. Yet the district court's rulings barred petitioner from impeaching her once she claimed she did not read the PPM. 13 Rice ER 2350–51.

The fact that certain other investors “admitted [that the written disclosures] were material to their decisions” (BIO 23 (quoting Pet. App. 40–42)) did not render the district court's rulings inconsequential either. If a few sophisticated investors found the disclosures important, then Mr. Zamarripa's and other investors' claims that they ignored those same documents and relied instead solely on sales pitches were exactly the claims the jury most needed to see tested. All the more so because, at closing argument, the prosecutor ridiculed the notion that investors could have “read between the lines of the PPM” and held it “under the moonlight” to understand Aequis' true financial condition: “That's not a defense. That's a joke.” 29 Rice ER

6398. Having leaned so hard on victim testimony petitioner was hamstrung from challenging, the government cannot now argue that, beyond a reasonable doubt, it made no difference.

* * *

This Court recently reiterated that the materiality element in fraud prosecutions is a “demanding” requirement that “substantially narrows the universe of actionable representations.” *Kousisis*, 605 U.S. at 135 (quoting *Universal Health*, 579 U.S. at 194). That is especially true in prosecutions, like this one, arising from complex financial transactions involving sophisticated and well-resourced parties on all sides. But materiality can do that work only if defendants are allowed to contest it. In the Ninth Circuit, they cannot. Fraud defendants are now categorically prohibited from offering evidence of a victim’s lack of reliance to disprove materiality—even where the government has introduced mirror-image evidence to prove it.

This Court should grant review and invalidate the Ninth Circuit’s judicially created prophylactic rule. It lacks any basis in law, facilitates injustices, and is a rule the government is not even willing seriously to defend in this forum.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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