

No. 25-7522

IN THE SUPREME COURT
OF THE UNITED STATES

ANDREW N. MACRITCHIE, AKA ANDREW MACRITCHIE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

The Ninth Circuit’s blanket ban on individual behavior evidence in criminal fraud cases—that is, all evidence of a witness’s past acts or practices—creates a split among the Courts of Appeals, is inconsistent with Federal Rule of Evidence 403’s balancing test, and creates an avoidable constitutional conflict with defendants’ Sixth Amendment right to confront witnesses. This Court should grant review.

ARGUMENT

I. The Government Mischaracterizes the Court of Appeals’ Decision and the Record Below in an Effort to Pretend No Circuit Split Exists

Unable to defend a *per se* ban on individual behavior evidence, the government instead mischaracterizes the Ninth Circuit’s rule and the record below in an effort to persuade this Court no circuit split exists. Opp. 15–17, 20–22.

First, the government misleadingly suggests the Ninth Circuit bans only *some* types of individual behavior evidence in fraud cases. It claims the Circuit bars such evidence “only when it risks touching on victim ‘negligence, intentional disregard, or lack of reliance.’” Opp. 16. Not so. The Ninth Circuit’s bar, both in the opinion below and in its prior decision on this issue, is absolute and explicit; it is, in its own words, a “bright-line rule” barring all individual behavior evidence in fraud cases for any purpose. *See* Pet. App. 37–38; *United States v. Lindsey*, 850 F.3d 1009, 1017 (9th Cir. 2017). The Circuit, moreover, chose its “prophylactic rule against *all* evidence of individual lender behavior” after expressly considering, and rejecting, a more moderate “alternative possible rule” to “allow evidence of past behavior by individual lenders, but require a jury instruction.” *Id.* at 1017–18 (emphasis added).

The decision below explicitly clarified that the Circuit bans all individual behavior evidence in *any* criminal fraud prosecution, regardless of context or industry. Before *Jesenik*, the Ninth Circuit based its “bright-line rule” on its assessment that “[a] single lender represents only some small part of the market for issuing mortgages.” *Id.* at 1017. Individual lender behavior, it reasoned, was “poor evidence” in that context, such that a “prophylactic rule” barring it under Federal Rule of Evidence 403 was appropriate. *Id.* at 1018. Flawed as that reasoning was, *Lindsey* at least left open the possibility that the Circuit’s prohibition was limited to the mortgage lending context. No longer. In *Jesenik*, the Ninth Circuit imported *Lindsey*’s *per se* rule into a different market without any further balancing or analysis. See Pet. App. 38 (“We find no reason to adopt a different rule in this case, simply because the loans gave rise to promissory notes instead of mortgages.”). The government’s reliance on decisions involving the same mortgage lending market as *Lindsey* is therefore unavailing; those decisions did not involve the same unqualified evidentiary ban as the one at issue here. See Opp. 12 (citing *Palamarchuck v. United States*, 590 U.S. 980 (2020); *New v. United States*, 590 U.S. 971 (2020); *Kuzmenko v. United States*, 590 U.S. 971 (2020); *Shevtsov v. United States*, 590 U.S. 971 (2020)).

Second, the government obfuscates by pointing out that industry-wide behavior evidence is still permitted in the Ninth Circuit. Opp. 16. True, but irrelevant, because the evidence Mr. MacRitchie sought to introduce concerned *individual* investor behavior. See, e.g., Pet. 8 (discussing only “individual investor behavior”). Evidence about a specific witness’s past behavior serves distinct

evidentiary purposes from evidence about how an entire market responds to information—particularly when it comes to, for example, impeaching that witness’s credibility. *See infra* pp. 9–12. The government cannot moderate the Ninth Circuit’s extreme bar by eliding the distinction between the two types of evidence.

Third, the government cites the undisputed standard for materiality to claim no circuit split exists. Opp. 20. The standard for materiality is not at issue here.

The Ninth Circuit created a circuit split by imposing a *per se* ban on all evidence of an investor witness’s past behavior, without exception or case-specific analysis. Other circuits permit such evidence for targeted purposes—even in cases involving the same mortgage lender market as *Lindsey*. *See United States v. Raza*, 876 F.3d 604, 621 (4th Cir. 2017) (declining to “go so far” as *Lindsey*’s “wholesale rejection” of individual lender evidence); *see also United States v. Litvak*, 889 F.3d 56, 65 (2d Cir. 2018) (permitting individual behavior evidence to establish materiality, but requiring “evidence of a nexus between a particular trader’s viewpoint and that of the mainstream thinking of investors in that market”). Thus, defendants in other parts of the country may still use a specific witness’s behavior to rebut intent or materiality, or to challenge that witness’s credibility, even over the government’s objection. *See, e.g., United States v. Carroll, et al.*, No. 3:23-cr-50020, ECF No. 143 at 4–5 (N.D. Ill. Mar. 31, 2026) (barring evidence of victims’ alleged negligence, but permitting evidence as to “what the alleged victims or Defendants thought the agreements and their terms meant”); *United States v. Lloyd*, No. 9:25-cr-80015-DMM, ECF No. 148 at 2 (S.D. Fla. Nov. 3, 2025) (permitting, over government objection,

evidence regarding how the Centers for Medicare & Medicaid Services actually responded because “actions of the victim may inform and contextualize a defendant’s intent, which is what [defendants] seek to do here”); *United States v. Salzano*, 2:22-cr-00690-EP, ECF No. 83 at 30–31 (D.N.J. Feb. 26, 2024) (denying government motion *in limine* to bar all argument or evidence that “investors were negligent, gullible, or insufficiently vigilant” because defense may cross victims about their due diligence for “other purposes,” including to challenge credibility); *United States v. Coscia*, No. 14 CR 551, 2015 WL 6153602, at *2 (N.D. Ill. Oct. 19, 2015) (permitting, over government objection, cross-examination of victim in commodities fraud case on “whether they were actually ‘misled or defrauded’ or ‘got the benefit of their bargains,’” if the government elicited victim testimony to prove defendant’s intent); *see also United States v. Demos*, No. 3:16-cr-00220-AWT, ECF No. 254 (D. Conn. Mar. 20, 2018) (permitting, over government objection, defense evidence “regarding the profits eventually earned by victims on RMBS bonds purchased in fraudulent trades” because showing “that modeling and analytics were so heavily relied upon” because they increased profitability was “a proper purpose”). Unless this Court intervenes, a defendant’s evidentiary rights will continue to depend on a fluke of geography.

II. The Ninth Circuit’s *Per Se* Ban on Individual Behavior Evidence is Contrary to Federal Rule of Evidence 403

The Ninth Circuit’s blanket ban on all individual behavior evidence usurps trial courts’ role and ignores the balancing test at the heart of Federal Rule of Evidence 403. When confronted with nearly identical facts to *Lindsey*, the Fourth Circuit rejected the Ninth Circuit’s conclusion. Although it agreed with *Lindsey* that

materiality is an objective test, it preserved the balancing test of Rule 403 and refused to “go so far” as a wholesale banning of individual behavior evidence, even only as to the private lender market. *Raza*, 876 F.3d at 619–21 (resolving whether materiality was a subjective test after *Universal Health Services, Inc. v. United States ex rel. Escobar*, 579 U.S. 176 (2016)). In *United States v. Litvak*, meanwhile, the Second Circuit vacated the conviction where the government elicited testimony from its witness about his individual views, but those views were “indisputably idiosyncratic and unreasonable” and “had a high probability of confusing the jury by asking it to consider as relevant the perception of a counterparty representative that was entirely wrong.” 889 F.3d at 69. Although “the individual views of a [witness] may usually be relevant to the nature of the market involved and . . . the beliefs of a reasonable investor,” *id.* the Circuit explained, there had to be some case-specific “evidence of a nexus between” its witnesses’ viewpoints “and the mainstream thinking of investors in that market,” *id.* at 65; *see also United States v. Miller*, 800 F. App’x 39, 41 (2d Cir. 2020) (affirming the exclusion of Wells Fargo’s past settlement, offered to show misstatements were not material, after conducting a case-specific Rule 403 analysis).

In *Lindsey* and *Jesenik*, by contrast, the Ninth Circuit eliminated any case-specific inquiry. In *Lindsey*, it based its “bright-line rule” on its judgment that, under Rule 403, the risk of prejudice or confusion from individual lender behavior evidence would substantially outweigh such evidence’s probity in *every* mortgage lending fraud case. *See Lindsey*, 850 F.3d at 1017–18. In *Jesenik*, it applied its Rule 403 rule to an entirely new market—accredited investors, ninety percent of whom were represented

by Registered Investment Advisors (“RIAs”)—without *any* case-specific analysis whatsoever. Pet. App. 38.

As a general matter, appellate courts may not substitute their evidentiary decisions for trial courts’ in the first instance. *See Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 386–87 (2008) (reversing and remanding for district court to clarify its reasoning because “improper” for appellate court to “assess the relevance of the evidence itself and conduct its own balancing of its probative value and potential prejudicial effect”). That is because “[r]elevance and prejudice under Rules 401 and 403 are determined in the context of the facts and arguments in a particular case.” *Id.* at 387. Appellate courts should therefore be particularly “deferent[tial] to a district court’s familiarity with the details of the case and its greater experience in evidentiary matters” when it comes to Rule 403 determinations. *Id.* at 384 (noting discretion is particularly broad for Rule 403 rulings because it requires “on-the-spot balancing of probative value and prejudice”). The Ninth Circuit, instead, disregards trial courts’ gatekeeping function entirely and preempts their Rule 403 analyses in every fraud case, as to an entire category of evidence.

The Circuit’s blanket usurpation of Rule 403’s balancing test goes against this Court’s jurisprudence. Because of their fact-intensive nature, Rule 403 decisions “are generally not amenable to broad *per se* rules.” *Id.* at 387; *United States v. Gomez*, 763 F.3d 845, 857 (7th Cir. 2014) (“Rule 403 balancing is a highly context-specific inquiry; there are few categorical rules.”). Exceptions are few and distinguishable. *See, e.g., Old Chief v. United States*, 519 U.S. 172, 192 (1997) (finding a “general rule” that

government could not introduce defendant’s prior felony conviction where defendant asked to stipulate to it, because stipulation largely negated probative value of prior conviction and left only substantial risk of unfair prejudice). Indeed, other Rules of Evidence—such as Rule 105, which requires limiting instructions—reinforce courts should tailor their evidentiary rulings to the case. *See* Fed. R. Evid 105, advisory committee note (noting the “close relationship . . . between this rule and Rule 403” and need to consider “[t]he availability and effectiveness of [limiting instructions]” when deciding “whether to exclude for unfair prejudice under Rule 403”).

The Ninth Circuit’s own reasoning shows why its *per se* application of Rule 403 cannot stand. In *Lindsey*, the Circuit assumed the mortgage lending market was large and diffuse, such that “[a] single lender represents only some small part of [it].” 850 F.3d at 1017. In such a market, it reasoned, how that lender “previously treated a statement says little or nothing about that statement’s inherent ability to affect decision making” for an objective market participant. *Id.* Even if the Circuit’s assumptions about the mortgage lending market were justified—it cites to nothing in the record supporting such assumptions—not all markets are the same. In a highly consolidated market, for instance, the way a single participant historically treated a type of statement could be highly probative of how the market, as a whole, treats such statements—and would weigh far more heavily in a Rule 403 balancing. That analysis cannot be conducted in the abstract; it is inherently fact-intensive.

The audience for the statements here—the few hundred accredited investors who received the company’s private note disclosures, Tr. 267—was far smaller than the audience of approximately 11,125 mortgage lenders in *Lindsey*.¹

The highly discretionary nature of investment decisions also made witnesses’ past behavior more probative here than in *Lindsey*, a factor the Ninth Circuit’s ban took out of the trial judge’s consideration. “Misrepresentations that are ‘material’ in the context of ‘an objective decisionmaking process’ would tend to be quite different from misrepresentations that are material in subjective decisions such as ‘the decision to enter a contract or to do some act in detrimental reliance on the assertion of another.’” *United States v. Rigas*, 490 F.3d 208, 234 (2d Cir. 2008) (quoting *Kungys v. United States*, 485 U.S. 759, 787 (1988) (Stevens, J., concurring in the judgment, joined by Marshall & Blackmun, JJ.)). In the context of an objective decision-making process, where the decision-maker’s discretion is limited, only those statements that could “conceal disqualifying facts or that prevent or hinder the discovery of disqualifying facts” may be material. *Kungys*, 485 U.S. at 787. Assessing mortgage lending applications is such a process. *See Lindsey*, 850 F.3d at 1011 (discussing statements regarding applicants’ financial eligibility). Investment decisions, by contrast, depend on a given investors’ risk tolerance—at some basic level, on “hunches or intuitions.” *Kungys*, 485 U.S. at 787. In that context, cross-examination regarding an individual’s investing practices could be far more significant.

¹ See Robert B. Avery et al., “The 2006 HMDA Data,” Fed. Res. Bulletin (Dec. 2007) (stating 8,900 lenders represented only eighty percent of home lending nationwide).

A district judge could, of course, find such arguments unavailing and exclude individual behavior evidence entirely in a particular case. But the Ninth Circuit’s blanket rule leaves no room for a trial judge to consider the specific facts that might make such evidence admissible, for whatever limited purpose, under Rule 403.

III. The Ninth Circuit’s Blanket Application of Rule 403 Presents a Constitutional Problem That This Court Could Avoid

The Ninth Circuit’s blanket application of Rule 403 requires intervention for the separate reason that it creates an avoidable constitutional problem. The Circuit’s rule bars all questioning regarding individual behavior evidence in fraud cases, even where necessary to impeach witnesses’ credibility. Its ban therefore runs headlong into defendants’ right, under the Confrontation Clause, to ensure the jury knows of evidence “relevant to [a witness’s] credibility,” where a witness’s credibility is “an important issue in the case.” *Giglio v. United States*, 405 U.S. 150, 154–55 (1972).

If this Court adopts the approach of other circuits—and requires case-by-base assessments of individual behavior evidence under Rule 403—it will avoid the constitutional problem the Ninth Circuit’s *per se* rule creates. This Court has previously construed evidentiary rules to avoid constitutional conflicts. *See, e.g., Williamson v. United States*, 512 U.S. 594 (1994) (construing Rule 804(b)(3) to avoid Confrontation Clause problem); *Pena-Rodriguez v. Colorado*, 580 U.S. 206 (2017) (reading Rule 609(b) to allow juror questioning when clear reliance on racial stereotypes or animus to avoid Fourteenth Amendment conflict). It should do so here.

Outside the Ninth Circuit, juries may still learn how witnesses’ past behavior undermines their credibility, including in fraud cases, and the constitutional

problems of a blanket Rule 403 application are avoided. *See supra* pp. 3–4 (collecting cases). The same is true for juries within the Ninth Circuit—if the case involves non-fraud charges. *See, e.g., United States v. Wilmore*, 381 F.3d 868, 873 (9th Cir. 2004) (reversing felon-in-possession conviction where defense barred from questioning government witness about credibility of her grand jury testimony); *see also United States v. Kohring*, 637 F.3d 895 (9th Cir. 2011) (vacating extortion and bribery convictions where defense forbidden from cross examining government witness about police investigation into his sexual misconduct and efforts to suborn perjury).

When it comes to fraud cases, however, the Ninth Circuit prohibits all questions regarding a witness’s past actions, even where they go directly to credibility. Because of the government’s legal theory at trial, the Ninth Circuit’s “bright-line rule” was particularly prejudicial to Mr. MacRitchie’s ability to challenge the witnesses’ credibility. The government’s case against Mr. MacRitchie rose or fell on the accuracy of its witnesses’ testimony as to their own behavior. The government advanced a “misleading half-truths” theory, where it claimed statements in the company’s one-page tear sheets were actionable because they were incomplete. *See* Pet. App. 15, 21–24. But unlike a typical “half-truths” case—where one would expect actual non-disclosure of the qualifying facts—the written documents that accompanied the tear sheets contained the very information they purportedly omitted. To prove the tear sheets contained “half-truths,” then, the government had to convince the jury to ignore the written disclosures and view the tear sheets in artificial isolation. To that end, the government elicited testimony from its witnesses

that, when deciding to invest, they did not consider the company's written disclosures and relied on its tear sheets only. As one RIA put it, she invested \$60 million of her clients' funds based on her subjective opinion—against her legal and fiduciary due diligence obligations—that the tear sheet “is the bible of our industry.” Tr. 1899.

The government now claims Mr. MacRitchie, if permitted, would have introduced “misleading” individual behavior evidence to sway the jury's perception of industry-wide due diligence practices. *See* Opp. 17. Not so. As Mr. MacRitchie repeatedly made clear, he sought to use evidence of witnesses' past behavior to discredit their testimony and show they, in fact, conducted robust due diligence before investing—and did not rely exclusively on the tear sheets, as they claimed at trial. Tr. 5768–69 (Mr. MacRitchie's counsel: “The Government elicited testimony . . . from Ms. Ronnasi that the tear sheet is the bible. That position by an RIA principal contravenes federal law. . . . the Department of Justice [is] implicitly endorsing a position from a witness—their own witness—that was contrary to federal law” so “to box us out of being able to direct the jury's attention to the credibility issues with some of the testimony about what RIA witnesses in particular did and didn't do with the information they got, would be prejudicial.”).

The government witnesses had real credibility issues. But because of the Ninth Circuit's *per se* rule, the district court could not permit Mr. MacRitchie to use individual behavior evidence to cross-examine those witnesses. Mr. MacRitchie could not, for instance, ask witnesses about their standard due diligence practices to discredit their claims that they ignored all written disclosures and invested based

only on one-page marketing flyers. Nor, once they disclaimed review, could he question them about the documents' substance, so as to undermine their claim that they had not understood them. Permitting Mr. MacRitchie to discuss the disclosures through non-investor witnesses was not an adequate substitute; such evidence says nothing about the investor witnesses' believability, or lack thereof, and cannot refute testimony that investor witnesses ignored the disclosures entirely.

By barring defendants from challenging witnesses' credibility as to their past behavior, the Ninth Circuit's ban on all individual behavior evidence in fraud cases robs defendants of their right to effective cross-examination. This Court should grant review to avoid the constitutional problems the Ninth Circuit's rule creates.

IV. This Case is an Appropriate Vehicle to Correct the Ninth Circuit's Blanket Ban

This case is an appropriate vehicle to correct the Ninth Circuit's "bright-line rule." Mr. MacRitchie was, in fact, barred from using individual behavior evidence to challenge witnesses' credibility. He was therefore prevented from contesting fully the government's misleading materiality and intent evidence. *Contra* Opp. 15.

The district court began enforcing the Ninth Circuit's blanket ban before trial through *in limine* decisions that prevented Mr. MacRitchie from even attempting certain cross-examination. Citing *Lindsey*, the Court denied Mr. MacRitchie's requests to elicit evidence of witnesses' sophistication and accreditation, *see* D. Ct. Doc. 484, "in limited contexts, and not with respect to victim blaming," but only to explain "his understanding of the relevant industry and the defining characteristics of the investors to whom the alleged misstatements and 'half truths' were directed,"

see D. Ct. Doc. 478 at 1, 3. Such evidence would have undermined witnesses' claims that they did not conduct even basic due diligence. Because the court precluded the entire line of questioning before trial, the transcript does not come close to capturing the full scope of credibility-related questions Mr. MacRitchie would have asked.

During trial, the district court further restricted Mr. MacRitchie's challenge to witness credibility. When one investor-witness claimed he never reviewed the company's disclosures "in detail," for instance, the district court accepted his testimony as truthful. Tr. 1488. Based on its own assessment of that witness's credibility, the court barred further questioning about the written disclosures he received—including questions designed to challenge his testimony that he had not, in fact, read or understood them. Tr. 1527. The court did so over the defense objection that, "if these witnesses' testimony that they didn't read the [written disclosures] is allowed to go unchallenged," and "we can't even ask them whether they read it and understood it, because they have testified to the Court that they didn't read it," then the defense could not undermine the witnesses' credibility or refute the government's intent evidence. *Id.*; see Tr. 1526 ("[T]he defendants should be able to argue that these people should not be believed when it comes to them not[] reading the PPMs.").

Nor, contrary to the government's claim, did the district court apply *Lindsey* only as to a single witness. See Opp. 17. It also barred defense counsel from challenging the credibility of another witness—the RIA who testified the tear sheet was the "bible"—by asking about her investment advisor firm's due diligence practices. See Tr. 2295–96 (Defense counsel, memorializing an off-the-record sidebar:

“[M]y goal in that testimony was to impeach her. . . .”). The Court also prevented the defense from challenging this second witness’s testimony by other means. It prohibited the defense from asking a senior member of the company’s compliance team and former Chief Compliance Officer of a large asset manager and SEC compliance manager about what information she expected RIAs to share with clients regarding an investment’s risk. *See* Tr. 2263–64; Tr. 2296 (objecting that precluded questions were designed to elicit testimony about the “type of communications that Ms. Ronnasi was giving her clients and ask[] if they were proper”).

The Court compounded the prejudice to Mr. MacRitchie by permitting the government to mislead the jury as to the defense’s theory. It allowed the government to tell the jury that truthful information in the company’s written disclosures was “not a defense” and the defense’s theory, “a joke,” *because* investors and their RIAs ignored them. Tr. 5973. Then, when Mr. MacRitchie’s counsel tried to attack the credibility of those witnesses’ testimony—arguing, “[i]t’s just not credible that Ms. Ronnasi,” an RIA, “believed the one-pager, the tear sheet was a ‘bible,’ and made decisions about investing millions of dollars based on that”—the Court sustained the government’s objection, and told the jury it was “not a defense” to wire fraud “that an investor or [RIA] intentionally disregarded information,” even if truthful. Tr. 6068.

The district court’s enforcement of the Ninth Circuit’s ban robbed Mr. MacRitchie of his right to effective cross examination. The government chose to base its “half-truths” theory on its own witnesses’ claims about their past behavior. Permitting Mr. MacRitchie to ask if witnesses had in fact reviewed those disclosures,

but then barring him from testing the veracity of their responses, prevented him from cross-examining them effectively. *See Davis v. Alaska*, 415 U.S. 308, 318 (1974) (permitting defense to ask witness if he was biased, but barring questions about fact of probationary status, was inadequate; “[T]o make such an inquiry effective, defense counsel should have been permitted to expose to the jury to the facts from which the jurors, as the sole triers of fact and credibility, could appropriately draw inferences relating to the reliability of the witness”).

Worse still, the district court told the jury questions about witness behavior were inappropriate victim-blaming and therefore irrelevant as a matter of law. After sustaining the government’s objections, the Court paused to “explain to the jury a little bit about why I’m sustaining the objections.” Tr. 1508. “[W]e don’t blame the victim,” it continued, suggesting defense counsel was doing so, before adding that the defense’s questions were legally “irrelevant.” *Id.* at 1509. Accordingly, “on the basis of the limited cross-examination that was permitted,” and the district court’s response to it, “the jury might well have thought that defense counsel was engaged in a speculative and baseless line of attack on the credibility of an apparently blameless witness.” *Davis*, 415 U.S. at 318.

CONCLUSION

For the foregoing reasons, and for the reasons stated in codefendant Robert Jesenik’s petition, the Court should grant review.

Dated this 7th day of October, 2026.

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