No. 24-119

In the Supreme Court of the United States

ALAN SAFAHI, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's scheme to withhold funds from a financial institution and his repeated misrepresentations to facilitate and conceal that conduct was sufficient to support his convictions for bank and wire fraud, in violation of 18 U.S.C. 1343 and 1344.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-8) is available at 2024 WL 863363. The order of the district court is available at 2022 WL 2356769.

JURISDICTION

The judgment of the court of appeals was entered on February 29, 2024. A petition for rehearing was denied on May 2, 2024 (Pet. App. 9). The petition for a writ of certiorari was filed on July 31, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Northern District of California, petitioner was convicted on four counts of wire fraud, in violation of 18 U.S.C. 1343; one count of bank fraud, in violation of 18 U.S.C. 1344; and one count of money laundering,

in violation of 18 U.S.C. 1957. Amended Judgment 1. He was sentenced to 40 months of imprisonment, to be followed by three years of supervised release. *Id.* at 2-3. The court of appeals affirmed. Pet. App. 1-8.

1. Petitioner was the founder and sole owner of Card Express, Inc. (CardEx), a company that issued prepaid debit cards to businesses for use as customer, distributor, or employee incentives. 2022 WL 2356769, at *1-*2; Presentence Investigation Report (PSR) ¶ 7. CardEx's business clients would submit purchase orders specifying the number of cards they wanted and the amount of money to be loaded onto each card, and then wire the funds to CardEx, which would issue the cards. PSR ¶ 7. CardEx's "primary revenue" was the unspent value left on the cards when they expired, known as the "breakage." PSR ¶ 10.

When card recipients used the cards to purchase goods from merchants, CardEx was responsible for approving or declining the transactions. 2022 WL 2356769, at *2; PSR ¶ 8. CardEx did not itself reimburse the merchants; instead, it relied on "sponsor banks" to pay the merchants. PSR ¶¶ 8-9. CardEx's contracts with sponsor banks took one of two forms. 2022 WL 2356769, at *2. Under a "fully funded" arrangement, CardEx would prepay the bank the full value loaded onto a card at the time of the card's issuance; after the card expired, the bank would remit the breakage to CardEx. *Ibid.*; see PSR ¶ 9. Under a "partially funded" arrangement, CardEx would wire the sponsor banks only the funds needed to cover transactions as they occurred. *Ibid.*

In 2009, CardEx entered into a partially funded arrangement with KeyBank. 2022 WL 2356769, at *4-*5; PSR ¶ 13. But instead of setting aside sufficient funds to cover future transactions on the cards, petitioner

spent the money received from CardEx's clients. *Ibid.* By 2013, CardEx faced a mounting shortfall and potential liability to KeyBank of up to $2.25 million across 78,000 cards. PSR ¶ 13. Concerned about CardEx's "solvency and its ability to pay for the unfunded partial liability as the cards were swiped," KeyBank terminated its arrangement with CardEx in October 2013. *Ibid.* Although CardEx could not issue any additional cards after that date, it was still "required to continue to process and service all card transactions and make settlements on the cards to KeyBank" for which it was already responsible. *Ibid.* Petitioner thus "devised a scheme" to pay back KeyBank and solve what petitioner dubbed CardEx's "negative balance scenario." PSR ¶¶ 14-15; see 2022 WL 2356769, at *5.

In June 2013, CardEx entered into a fully funded arrangement with Sunrise Banks, requiring that "CardEx fully fund the cards by remitting all funds to Sunrise Banks" upon issuance. PSR ¶ 14; see 2022 WL 2356769, at *5-*6. "CardEx would therefore not receive any breakage funds until after the cards expired and Sunrise Banks remitted funds back to CardEx, which could have taken anywhere from six months to one year." PSR ¶ 14; see 2022 WL 2356769, at *6-*7. But because "CardEx's financial needs were more imminent," petitioner formed a plan to "withhold client money by misleading Sunrise Banks as to how much money CardEx was receiving from clients." PSR ¶¶ 14-15. Petitioner falsely underreported to Sunrise Banks the amount of money loaded onto the cards it issued, and thus the amount CardEx had to provide to Sunrise Banks under the fully funded arrangement, and then used the illicitly retained surplus to cover CardEx's ongoing liabilities to KeyBank—as well as for personal expenses, including

buying a home for himself. See PSR ¶¶ 15-19; 2022 WL 2356769, at *7-*12, *16.

That scheme kept CardEx afloat for some time, but by early 2014, Sunrise Banks had begun "noticing irregularities" and to "suspect[] underfunding." PSR ¶ 20; 2022 WL 2356769, at *12-*14. For several months, petitioner resisted Sunrise Banks' repeated attempts to get more information, "assur[ing] Sunrise Banks" that the issues would be "resolved as soon as possible." PSR ¶ 20; see PSR ¶¶ 20-22. Petitioner in fact told Sunrise Banks that "we are overfunded" rather than underfunded. 2022 WL 2356769, at *13 (citation omitted).

"Things came crashing down in late September." 2022 WL 2356769, at *14. On September 22, 2014, CardEx disclosed approximately $2.77 million in unfunded liability to Sunrise Banks. PSR ¶¶ 22-23. The day before that disclosure, petitioner had "informed all CardEx employees that CardEx was shutting down." PSR ¶ 23. Yet even "as CardEx's collapse was imminent," petitioner "withdrew $160,000 from CardEx's [bank] account for his personal use." 2022 WL 2356769, at *15. Sunrise Banks suffered nearly $3 million in losses as a result of petitioner's scheme. PSR ¶¶ 13, 26.

2. A grand jury in the Northern District of California indicted petitioner on four counts of wire fraud, in violation of 18 U.S.C. 1343; one count of bank fraud, in violation of 18 U.S.C. 1344; and one count of money laundering, in violation of 18 U.S.C. 1957. Superseding Indictment 1-4. Petitioner proceeded to a bench trial, where he was found guilty on all counts. 2022 WL 2356769, at *16-*22. Petitioner was sentenced to 40 months in prison, to be followed by three years of supervised release. Amended Judgment 2-3.

The court of appeals affirmed in an unpublished memorandum disposition. Pet. App. 1-8. Among other things, the court rejected petitioner's challenge to the sufficiency of the evidence supporting his intent to defraud. *Id.* at 2-3. Petitioner asserted on appeal that "the district court was required to—but did not—find that [he] possessed an intent to defraud at the time CardEx signed its contract with Sunrise Banks." *Id.* at 2. Citing this Court's decision in *Evans* v. *United States*, 153 U.S. 584 (1894), the court of appeals explained that "[t]he intent to defraud must have existed at the time of the alleged offense," and that the district court was therefore "required to find only that [petitioner] possessed an intent to defraud when his scheme to underreport and underfund loads began." Pet. App. 2-3. The court of appeals observed that "[t]he district court made such a finding," and found that "the evidence in the record supports the district court's conclusion." *Id.* at 3.

ARGUMENT

Petitioner renews his contention (Pet. 16-21) 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 court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or another court of appeals. This case would in any event be a poor vehicle in which to address the question presented because the evidence at trial, viewed in the light most favorable to the judgment, supports the inference that petitioner in fact had the requisite intent to defraud when he entered into the contract with Sunrise Banks. Further review is unwarranted.

1. The court of appeals correctly recognized that sufficient evidence supported petitioner's convictions. Pet. App. 2-3. The federal property-fraud statutes, including the mail-fraud statute (18 U.S.C. 1343) and bank-fraud statute (18 U.S.C. 1344), generally require proof of a scheme to obtain money or property; an intent to defraud; and material misrepresentations. See *Neder* v. *United States*, 527 U.S. 1, 20, 22-23, 25 (1999); see also *Shaw* v. *United States*, 580 U.S. 63, 72 (2016); *McNally* v. *United States*, 483 U.S. 350, 358 (1987). Petitioner's conduct satisfied each of those elements. See 2022 WL 2356769, at *6-*18.

Petitioner concocted and maintained a scheme involving near-daily lies to Sunrise Banks in order to illicitly retain approximately $2.77 million. See 2022 WL 2356769, at *7-*14. Petitioner also intended to defraud Sunrise Banks; the very point of the scheme was to deceptively obtain money to pay back KeyBank, maintain CardEx's solvency, and fund his personal expenses. See *id.* at *5, *7. And the lies he told to Sunrise Banks were material: 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," *Universal Health Services, Inc.* v. *United States ex rel. Escobar*, 579 U.S. 176, 194 n.5 (2016) (quoting *Junius Construction Co.* v. *Cohen*, 178 N.E. 672, 674 (N.Y. 1931)); see, *e.g.*, *Neder*, 527 U.S. at 22 n.5 (explaining that a misrepresentation is material if, among other things, the maker knows that the recipient "is likely to regard the matter as important") (quoting Restatement (Second) of Torts § 538 (1977)).

Petitioner nonetheless contends (Pet. 16-21) that he cannot be held accountable for his scheme to defraud so long as he did not possess an intent to defraud until af-

ter CardEx entered into its contractual agreement with Sunrise Banks. That contention lacks merit. As the court of appeals recognized (Pet. App. 2), a defendant must possess an intent to defraud at the time he commits the conduct satisfying the other elements of the offense. And here, petitioner indisputably intended to defraud Sunrise Banks while making near-daily misrepresentations in order to forestall termination of the contract and thereby continue to obtain ever greater sums of money to fund CardEx's operations and petitioner's personal expenses.

Even assuming petitioner did not have an intent to defraud at the time the contract was signed (and thus did not fraudulently induce the contract), that would not vitiate his intent to defraud at the time he made the false statements in the course of executing his fraudulent scheme. Fraudulent inducement is one type of fraud; it is not the only type. Petitioner identifies no authority or common-law principle that would preclude a finding of fraud for post-contractual deceptions of the sort he engaged in. Cf. 37 Am. Jur. 2d Fraud and Deceit § 1 (2024) (explaining that common-law fraud "embraces all the multifarious means resorted to by one individual to gain advantage over another by false suggestions or by suppression of the truth").

Contrary to petitioner's suggestion (Pet. 18-19), this is not a case of a simple breach of contract. Rather, the theory of liability presented at trial was that petitioner made repeated, deliberate, bad-faith, and material misrepresentations, each of which was intended to facilitate and prolong his theft from Sunrise Banks. Petitioner thus perpetuated his fraudulent scheme by means of those repeated falsehoods, each of which was made with the intent to defraud. That his actions also happened to

constitute a breach of contract does not immunize him from liability for fraud.

2. The decision below does not conflict with any decision of this Court or another court of appeals.

Contrary to petitioner's suggestion (Pet. 16-17), the decision below does not conflict with *Evans* v. *United States*, 153 U.S. 584 (1894). *Evans* explained that a false statement is fraudulent if the defendant has an intent to defraud at the time he makes the statement. See *id.* at 592. By way of example, the Court explained that although it would not be fraud for someone to purchase goods on credit "knowing that he is unable to pay for them at the time, but believing that he will be able to pay for them at the maturity of the bill," it *would* be fraud "if he purchases them, knowing that he will not be able to pay for them, and with an intent to cheat the vendor." *Ibid.* Here, even assuming that petitioner initially intended that CardEx would honor the fully funded arrangement at the time it entered into the contract with Sunrise Banks, petitioner did have an intent to cheat Sunrise Banks at the relevant time: the time when he made all of his false statements in the course of executing his fraudulent scheme. Under *Evans*, that constitutes fraud, as the court of appeals correctly recognized (Pet. App. 2).

Petitioner likewise errs in asserting (Pet. 12-16) that the decision below conflicts with decisions of the Second and Seventh Circuits. The Second Circuit's decision in *United States ex rel. O'Donnell* v. *Countrywide Home Loans, Inc.*, 822 F.3d 650 (2016), stated only that "the common law does not permit a fraud claim based *solely* on contractual breach"; it made clear, however, that "a contractual relationship between the parties does not wholly remove a party's conduct from the scope of

fraud"—such as when defendants make "affirmative fraudulent misrepresentations to their contractual counterparties in the course of performance or to feign performance under the contract." *Id.* at 658 (emphasis added). That is precisely what happened here. Indeed, *Countrywide* reiterated the same "contemporaneous fraudulent intent principle" that the court of appeals applied in this case. *Id.* at 662; see Pet. App. 2.

The Second Circuit's decision in *Bridgestone/Firestone, Inc.* v. *Recovery Credit Services, Inc.*, 98 F.3d 13 (1996)—which addressed New York civil fraud, not the federal criminal property-fraud statutes—is even further afield. That decision explained that although a breach of contract, standing alone, does not constitute fraud under New York law, a plaintiff *could* maintain a civil fraud claim if he "seek[s] special damages that are caused by the misrepresentation and unrecoverable as contract damages." *Id.* at 20. The New York rule thus appears to be one about remedies, not the substantive state-law fraud tort. Nothing in *Bridgestone* suggests that misrepresentations made with a contemporaneous intent to defraud are immunized from liability just because they happen also to constitute a breach of contract.

The Seventh Circuit decisions on which petitioner relies (Pet. 15-16) are similarly inapposite. Each of those decisions states only that a simple breach of contract alone is not fraud; none holds that conduct otherwise satisfying the elements of fraud is immunized simply because it also is a breach of contract. See *Perlman* v. *Zell*, 185 F.3d 850, 852-853 (1999); *Corley* v. *Rosewood Care Center, Inc.*, 388 F.3d 990, 1007 (2004); *United States ex rel. Main* v. *Oakland City University*, 426 F.3d 914, 917 (2005), cert. denied, 547 U.S. 1071 (2006).

Petitioner provides no sound basis to conclude that the Seventh Circuit would have resolved his appeal differently.

3. At all events, this case would be an unsuitable vehicle in which to consider the question presented because petitioner would not be entitled to relief even if that question were resolved in his favor. Viewed in the light most favorable to the verdict, the trial evidence established that petitioner had the intent to defraud Sunrise Banks even when CardEx signed the contract with Sunrise Banks.

CardEx's mounting debts to KeyBank supplied a compelling motive for petitioner to contract with Sunrise Banks under false pretenses, with an eye toward using the illegitimately retained funds to pay off those debts. One of petitioner's former employees testified that several months *before* CardEx entered into the sponsorship agreement with Sunrise Banks, "CardEx needed additional cash 'because the company had a fairly significant deficit in funding of KeyBank cards; and at some point in time, that would have to be corrected.'" 2022 WL 2356769, at *5 (brackets and citation omitted).

Then, after the employee was "unable to secure outside funding," CardEx finalized its agreement with Sunrise Banks—even though it would take "anywhere from six months to one year" for CardEx to receive the breakage under that fully funded arrangement. 2022 WL 2356769, at *5. A rational factfinder could therefore easily conclude that petitioner, who needed cash imminently, had no intention of fully funding the program or otherwise complying with the terms of the agreement. See *Jackson* v. *Virginia*, 443 U.S. 307, 319 (1979) ("[T]he relevant question is whether, after view-

ing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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