No. 17-____

IN THE

Supreme Court of the United States

MOHSIN RAZA, *et al.*,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The federal mail, wire, and bank fraud statutes proscribe *material* misrepresentations. The circuits are intractably divided over the standard for proving materiality in federal fraud prosecutions involving a private, as opposed to a government, victim. For private victims, some circuits have held that a misrepresentation is material only if it could influence the decision of the actual decisionmaker to which the misrepresentation was addressed. Other circuits, by contrast, have held that a misrepresentation is material as long as it could influence the decision of a hypothetical "reasonable person."

The question presented is whether, in a federal fraud prosecution involving a private victim, materiality turns on the misrepresentation's ability to influence the actual decisionmaker to which it was addressed (as three circuits have held), or instead on its ability to influence a hypothetical "reasonable person" (as six circuits have held).

PARTIES TO THE PROCEEDING

Petitioners in this Court, who were Appellants in the Fourth Circuit, are Mohsin Raza, Mohammad Ali Haider, Farukh Iqbal, and Humaira Iqbal. Respondent is the United States of America, which was Appellee in the court of appeals.

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The opinion of the Fourth Circuit (App. 1a), is reported at 876 F.3d 604. The district court judgments and instructions are at App. 48a-89a.

JURISDICTION

The Fourth Circuit issued its decision on November 20, 2017. App. 1a. The court denied rehearing en banc on December 18, 2017. App. 43a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The federal wire fraud statute, 18 U.S.C. § 1343, provides in pertinent part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

The conspiracy statute, 18 U.S.C. § 1349, provides as follows:

> Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

INTRODUCTION

The federal mail, wire, and bank fraud statutes underlie thousands of prosecutions every year. Despite the necessity of a uniform standard for applying these ubiquitous laws, the circuits are deeply divided on a fundamental question: the standard for determining the materiality of a misrepresentation made to a private victim.

In a fraud case involving a government victim, materiality depends on whether the statement at issue has a natural tendency to influence, or is capable of influencing, the actual decisionmaker to which the misrepresentation was addressed. That much is clear from this Court's precedent, as the decision below acknowledged. But the courts of appeals are divided over whether, in a fraud prosecution involving a private victim, materiality is judged from the perspective of the actual decisionmaker, or from the perspective of a hypothetical "reasonable person."

The Fourth Circuit below acknowledged that the actual-decisionmaker standard applies in prosecutions for fraud targeting the government, App. 25a, but held that this standard "does not apply to a fraud scheme that targets a private lender," App. 26a. Thus, according to the Fourth Circuit, the materiality test in a fraud scheme targeting the government "verges toward the subjective," but "[a] fraud scheme targeting a private lender, on the other hand, is measured by an objective standard." App. 24a.

Under the Fourth Circuit's approach, therefore, if a defendant makes a misrepresentation in a loan application to a private bank, materiality is measured by asking whether the misrepresentation could have influenced the decision of a hypothetical reasonable lender. And a jury should convict even if the govern-

ment agrees that the misrepresentation was not capable of influencing the decision of the actual bank that made the loan. In other words, the defendant would go to jail for making a statement that was immaterial to the victim in the defendant's case.

The Fourth Circuit's decision deepens an existing split between the circuits over the standard for proving materiality in federal mail, wire, and bank fraud prosecutions involving private victims. Three circuits have applied an actual-decisionmaker standard regardless whether the victim is a public or private entity. By contrast, six circuits—now including the Fourth Circuit—have applied some form of a reasonable-person standard when a fraud prosecution involves a private victim. Other circuits have taken different, conflicting approaches: one has alternated between the two standards, one finds materiality met under either standard, and one has held that the standards are substantially the same.

Only this Court can resolve this entrenched split and restore uniformity to this important area of criminal law. This Court should grant certiorari to resolve the circuit conflict and hold that the same actual-decisionmaker standard applies in all prosecutions.

STATEMENT

A. Background and District Court Proceedings

Petitioners Mohsin Raza, his wife Humaira Iqbal, and her brothers Farukh Iqbal and Ali Haider worked at a SunTrust Mortgage branch in Annandale, Virginia for just over one year in 2006-07. App. 4a-5a. Their brief tenure at SunTrust corresponded with historically aggressive practices by mortgage lenders across the country—especially at SunTrust. App. 15a-16a.

During this period, SunTrust's goal was to originate as many mortgage loans as possible and then immediately "flip," or resell, the loans into the secondary mortgage market. App. 15a-16a. In doing so, SunTrust ignored traditional underwriting standards, instead focusing exclusively on the two criteria used by Wall Street banks to purchase the loans: loan-to-value ratios and borrowers' FICO credit scores. SunTrust approved nearly every mortgage loan application it processed during this period. App. 15a-16a; CA4 Joint Appendix ("JA") 1120-21, 1144, 1165-66.

In 2015—nine years after the conduct at issue—Petitioners were indicted for wire fraud and conspiracy to commit wire fraud affecting a financial institution under 18 U.S.C. §§ 1343 and 1349. App. 4a. The government alleged that Petitioners prepared, and submitted to SunTrust for approval, applications for financing for 13 properties containing false information regarding borrowers' income and assets, and that SunTrust approved those applications. App. 5a. Each substantive count of wire fraud corresponded with a particular loan application alleged to contain false statements for the borrowers.

At trial, Petitioners argued that the information regarding the borrowers' income and assets was not "material" to SunTrust because, given SunTrust's business model at the time, these statements were not capable of influencing SunTrust's ultimate decisions to approve and fund the loans. App. 15a-17a. A former SunTrust underwriter—the only witness with direct knowledge of SunTrust's lending policies during the relevant time period—testified: "we approved just about everything that came in." JA 1144. It was "common knowledge," she testified, that borrowers were misrepresenting their income and assets in loan

applications, but SunTrust management, pursuing a "don't ask/don't tell" policy, insisted that the loans be approved anyway so SunTrust could flip them into the secondary market. JA 1117, 1124; *see also* App. 15a-16a. Petitioners also called an expert in the secondary mortgage market who testified that SunTrust's mid-Atlantic region approved a staggering 98.7% of all mortgage applications, compared with an industry average at the time of about 80 percent. App. 16a; JA 1165-66.[1]

In light of extensive trial evidence demonstrating SunTrust's policy of intentionally disregarding traditional indicia of creditworthiness, Petitioners sought an instruction defining materiality as a statement that would have "a natural tendency to influence or be capable of influencing a decision of the particular decisionmaker to whom it is addressed—here, the decision of SunTrust to approve and fund mortgages for the properties named in the indictment." JA 191; App. 126a. Petitioners sought this instruction based on *Neder v. United States*, 527 U.S. 1, 16 (1999), in which this Court defined a material misrepresentation as one that has "a natural tendency to influence, or was capable of influencing, the decision of the decisionmaking body to which it was addressed." 527 U.S. at 16. Petitioners' instruction was also supported

[1] The government itself has condemned SunTrust's reckless mortgage-lending practices during the relevant time period. In 2014, SunTrust agreed to pay nearly $1 billion to the Department of Justice and 49 state attorneys general and the District of Columbia as part of a settlement for SunTrust's "abusive" practices arising out of its mortgage loan business, servicing, and foreclosures. U.S. Dep't of Justice, Federal Government and State Attorneys General Reach Nearly $1 Billion Agreement with SunTrust to Address Mortgage Loan Origination as Well as Servicing and Foreclosure Abuses (June 17, 2014), available at http://goo.gl/nEjZKU.

by a leading treatise on federal jury instructions, which defines materiality—without any distinction between public and private victims—as follows: "A statement or representation is 'material' if it has a natural tendency to influence or is capable of influencing a decision or action *of* ___." 1A Fed. Jury Prac. & Instr. § 16:11 (6th ed.) (emphasis added).

Over Petitioners' objection, the district court instructed that a "material fact" is one which "may be of importance to a reasonable person in making a decision about a particular matter or transaction." App. 87a; *see also* App. 17a, JA 1331. The court also instructed the jury that a statement is material if it "would reasonably influence a person to part with money or property," App. 87a, or "has a natural tendency to influence or is capable of influencing a decision or action," App. 88a.

The jury convicted Petitioners on counts of wire fraud and conspiracy to commit wire fraud. After denying Petitioners' post-trial motions, the district court sentenced Petitioners to prison terms ranging from 12 months and one day to 24 months, and ordered restitution. App. 17a-18a.

B. Decision Below

On appeal, Petitioners argued that the district court erroneously instructed the jury as to materiality by stating that a misrepresentation is material if it could influence a hypothetical "reasonable person," rather than the actual "decisionmaking body" to which the misrepresentation was addressed—here, SunTrust. The Fourth Circuit granted Petitioners' motions for release pending appeal. App. 46a.

The Fourth Circuit affirmed the convictions. The court held that this Court's decision in *Neder* establishes two separate materiality standards for federal

mail, wire, and bank fraud prosecutions. For cases in which the victim of the alleged fraud is a government entity or official, the Fourth Circuit held, the materiality inquiry "verges toward the subjective," App. 24a, asking whether the misrepresentation was capable of influencing the actual decisionmaker to which it was addressed. But "a fraud scheme targeting a private lender, on the other hand, is measured by an objective standard," App. 24a—whether the misrepresentation could have influenced a hypothetical reasonable person in the victim's position. In such cases, materiality is not judged by a misrepresentation's ability to influence the actual decisionmaker—here, "a renegade lender with a demonstrated habit of disregarding materially false information"—but rather by its capacity to influence "an objective 'reasonable lender.'" App. 34a.

The Fourth Circuit denied rehearing en banc. App. 43a. After the Fourth Circuit and this Court denied requests to stay the mandate, the district court granted Petitioners' motions to delay their reporting dates until June 2018.

REASONS FOR GRANTING THE PETITION

This case presents an ideal opportunity for this Court to resolve an entrenched circuit conflict over the materiality element of the federal mail, wire, and bank fraud statutes in cases involving private victims. The Fourth Circuit's ruling deepens an existing conflict among the circuits as to whether materiality is judged from the perspective of the actual victim of a fraud or instead a hypothetical reasonable person. And the issue was outcome determinative here: if Petitioners had been prosecuted in a circuit that applied the actual-decisionmaker standard, they would have been acquitted.

Only this Court can bring much needed clarity on an issue that affects countless prosecutions every year. The Court should grant review and reverse.

I. The Decision Below Deepens a Circuit Split Over the Standard for Proving Materiality in Prosecutions Under the Federal Fraud Statutes

Three circuits—the Second, Third, and Fifth Circuits—have applied an actual-decisionmaker standard in federal fraud prosecutions involving, as here, private victims. By contrast, six circuits—the First, Fourth, Seventh, Ninth, Tenth, and D.C. Circuits—have applied a "reasonable person" standard when the fraud victim is a private party. Other circuits take yet different approaches to materiality.

Actual-Decisionmaker Circuits. In a bank fraud prosecution, the Second Circuit held that, for the defendant's "misstatements to be material," "they had to be capable of influencing a decision that *the bank* was able to make." *United States v. Rigas*, 490 F.3d 208, 235 (2d Cir. 2007) (emphasis added) (internal quotation marks omitted). The court reversed a bank fraud conviction on the ground that the statements at issue were "immaterial, *i.e.*, incapable of influencing *the intended victim*." *Id.* at 234 (emphasis added) (internal quotation marks omitted). Similarly, in *United States v. Rodriguez*, 140 F.3d 163, 168 (2d Cir. 1998), the court reversed bank fraud convictions when there was "no evidence adduced at trial that the misrepresentation could have, or did influence

Chemical Bank's decision to allow [the defendant] to reach the funds at issue." *Id.* at 168.[2]

Likewise, in a mail fraud prosecution where the victim was a private building owner, the Third Circuit held that the misstatements at issue were material because they "might have changed the [building owner's] mind about the building's value." *United States v. Wright*, 665 F.3d 560, 575 (3d Cir. 2012); *accord id.* at 574-75 (misstatements "would have been material to him as, in effect, [the building's] purchaser"); *United States v. Fallon*, 470 F.3d 542 (3d Cir. 2006) (same in mail and wire fraud prosecution involving private victim).

The Fifth Circuit acknowledged that, while "one formulation" of materiality may involve a "reasonable man," "in [the] bank fraud context, a statement is material if it has a natural tendency to influence, or was capable of influencing the decision of *the lending institution*." *United States v. Holmes*, 406 F.3d 337, 355 n.27 (5th Cir. 2005) (citing *United States v. Heath*, 970 F.2d 1397, 1403 (5th Cir. 1992)) (emphasis added) (internal quotation marks omitted). Thus, in finding misstatements material, the court in *United States v. Curtis*, 635 F.3d 704 (5th Cir. 2011), reasoned that "[r]epresentatives from each of the lending institutions that funded the straw buyers' loans testified that had they known these representations in the loan

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[2] While the Second Circuit more recently set forth both the "decisionmaker" standard and a "reasonable person" standard (further illustrating the confusion among the lower courts), the court ultimately held that the misstatements in that case were material because they "had the natural tendency to influence the decisionmakers to whom they were addressed—potential Vendstar customers." *United States v. Weaver*, 860 F.3d 90, 95, 96 (2d Cir. 2017).

documents were false, *they* would not have approved the loans." *Id.* at 719 n.51 (emphasis added); *accord id.* at 719 (statements were "material to the lenders' decisions to fund the loans"); *United States v. Lucas*, 516 F.3d 316, 339 (5th Cir. 2008) (same in mail fraud prosecution involving private home-buyer victims); *United States v. Morganfield*, 501 F.3d 453, 463 n.34 (5th Cir. 2007) (same in bank fraud prosecution).[3]

Key here, Petitioners would have prevailed in a circuit that applies the actual-decisionmaker standard, because the evidence established that the alleged misrepresentations were not capable of influencing *SunTrust*'s decisions to fund the mortgage loans at issue.

Reasonable-Person Circuits. In this case, by contrast, the Fourth Circuit held that the actual-decisionmaker standard "*does not apply* to a fraud scheme that targets a private lender such as SunTrust," and that materiality instead must be judged from the perspective of a hypothetical "reasonable lender in SunTrust's position—not necessarily SunTrust itself." App. 26a, 33a (emphasis added).

The Seventh Circuit also recently held, in a bank fraud prosecution where the victim was a private lender, that "whether a statement is material depends on its effect on 'a reasonable person'—or, in this case, a reasonable lender." *United States v. Betts-Gaston*, 860 F.3d 525, 532 (7th Cir. 2017).

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[3] Adding to the confusion created by the division among circuits, the Fifth Circuit in one case conflated the two standards, describing the decisionmaker test as asking whether a misrepresentation would be important to a reasonable person. *United States v. Valencia*, 600 F.3d 389, 426 (5th Cir. 2010).

The Tenth Circuit likewise held that a misrepresentation is material if it "had the 'capability' or 'natural tendency' to influence a reasonable bank's decision of whether to provide a loan." *United States v. Williams*, 865 F.3d 1302, 1312 (10th Cir. 2017).

And the Ninth Circuit held that "materiality is an objective element, and an absence of reliance does not affect its presence . . . a victim's intentional disregard of relevant information is not a defense to wire fraud and thus evidence of such disregard is not admissible as a defense to mortgage fraud." *United States v. Lindsey*, 850 F.3d 1009, 1015-16 (9th Cir. 2017). Compounding the confusion, the Ninth Circuit cited the "decisionmaking body" standard, *id*. at 1013-14, and also held that a defendant can "attack materiality through industry practice," *id.* at 1016.

The D.C. Circuit held—in a civil RICO case with U.S. consumer victims—that a statement is material under the wire or mail fraud statutes "if the matter at issue is of importance to a reasonable person in making a decision about a particular matter or transaction," *United States v. Philip Morris USA Inc.*, 566 F.3d 1095, 1122 (D.C. Cir. 2009) (internal quotation marks omitted).

The First Circuit pays lip service to the actual-decisionmaker standard, but in effect applies a reasonable-person standard. Initially, the court acknowledged cases defining "a matter as 'material' if 'a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.'" *United States v. Benjamin*, 252 F.3d 1, 9-10 (1st Cir. 2001) (quoting *Neder*, 527 U.S. at 22 n.5) (quoting Restatement (Second) of Torts § 538 (1976)). But the First Circuit later applied the actual-decisionmaker standard,

including in cases involving private victims. *United States v. Appolon*, 715 F.3d 362, 368 (1st Cir. 2013). In the context of a recent mortgage-fraud case, the First Circuit in practice sided with the Fourth, Seventh, Ninth, Tenth, and D.C. Circuits, finding it "fair to presume" that an applicant's stated income "would have a 'natural tendency' to influence a lender's decision." *United States v. Prieto*, 812 F.3d 6, 14 (1st Cir. 2016).

Remaining Circuits. Other circuits have taken different approaches to materiality in federal fraud prosecutions involving private victims.

Significantly, on remand from this Court in *Neder*, the Eleventh Circuit held that the actual-decisionmaker materiality standard applies in a bank fraud case. *United States v. Neder*, 197 F.3d 1122, 1128 (11th Cir. 1999) (quoting *Neder*, 527 U.S. at 16). The court thus assessed whether the misstatements at issue were capable of influencing "the lenders' decisions." *Id.* at 1130; *id.* at 1131 ("lenders' decisions"), 1132, 1133 ("Amerifirst and Security's decisions"); 1134 ("Central Bank's decisions"). But the en banc Eleventh Circuit later held, in a case involving an idiosyncratic victim, that a misrepresentation would be material if it could influence *either* a hypothetical reasonable person *or* the actual decisionmaker to which the misrepresentation was directed. *United States v. Svete*, 556 F.3d 1157, 1164-65 (11th Cir. 2009) (en banc).

In some cases, the Sixth Circuit has defined materiality under a hypothetical reasonable-person standard. *United States v. Daniel*, 329 F.3d 480, 487 (6th Cir. 2003). In others, the court has applied *Neder*'s actual-decisionmaker standard. *United States v. McAuliffe*, 490 F.3d 526, 531 (6th Cir. 2007) (quoting *Neder*, 527 U.S. at 16).

Lastly, in conflict with the Fourth Circuit ruling distinguishing between the actual-decisionmaker and reasonable-person standards, the Eighth Circuit held that these two formulations are "consistent," *Preston v. United States*, 312 F.3d 959, 961 n.3 (8th Cir. 2002), or "substantially similar," *United States v. Heppner*, 519 F.3d 744, 749 (8th Cir. 2008).

II. The Decision Below Is Inconsistent With this Court's Precedents Addressing Materiality

The Fourth Circuit's holding and that of five other circuits—that materiality is judged from the perspective of a reasonable person in fraud prosecutions involving a private victim—is inconsistent with this Court's precedent. Indeed, the Fourth Circuit adopted the starkest manifestation of the lower courts' confusion over this element—a per se rule that materiality has a different meaning depending upon whether the fraud targeted a governmental or private party. This Court's precedent instead supports the instruction Petitioners sought at trial—one applying the actual-decisionmaker standard regardless of the identity of the alleged victim.

1. No decision of this Court suggests that the materiality standard would be different based on the identity of the victim. Indeed, in *United States v. Wells*, 519 U.S. 482, 494-95 (1997), this Court applied an actual-decisionmaker standard in a fraud prosecution involving a private victim. In *Wells*, the defendants were charged under 18 U.S.C. § 1014 with making false statements to private banks—the same type of victim here. This Court "consider[ed] whether materiality of falsehood is an element under § 1014, understanding the term in question to mean 'having a natural tendency to influence, or being capable of

influencing, the decision of the decisionmaking body to which it was addressed.'" *Wells*, 519 U.S. at 489-90 (alterations omitted) (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988); citing *United States v. Gaudin*, 515 U.S. 506, 509 (1995)). In seeking certiorari in *Wells*, the government argued that materiality was not an element of the offense, but recognized that, if it were, it would be the same "legal standard that focuses inquiry on whether the false statement had 'a natural tendency to influence' a decision of *the financial institution*.'" Pet. for a Writ of Certiorari, 517 U.S. 1154 (1996), 1996 WL 33413829, at *15 (U.S. 1996) (emphasis added) (quoting *Gaudin*, 515 U.S. at 509).

This Court agreed, holding that § 1014 did not include a materiality element. But the Court also characterized the "decisionmaker" standard as "the limit that a materiality requirement would impose" upon that statute, if materiality had been an element of the offense. *Wells*, 519 U.S. at 499.

2. This Court's decision in *Neder v. United States*, 527 U.S. 1 (1999), confirms that the "decisionmaker" standard applies in cases with a private victim. There, the defendant was charged with both tax fraud (involving a government victim) and mail, wire, and bank fraud (involving a private bank victim). In its discussion of the tax-fraud charges, this Court held that materiality turns on a misrepresentation's "natural tendency to influence, or [ ] capability of influencing, the decision of the decisionmaking body to which it was addressed." *Neder*, 527 U.S. at 16. Likewise, in its discussion of mail, wire, and bank fraud, the Court stated that the term "immaterial" means "incapable of influencing *the intended victim*"—mirroring the

materiality standard the Court applied in the tax-fraud context. *Id*. at 24 (emphasis added).

For its contrary conclusion, the Fourth Circuit relied on a single footnote in *Neder* that set forth the text of Section 538 of the Restatement (Second) of Torts, which describes a partially objective, "reasonable man" materiality standard. But nothing in that footnote suggests that *Neder* adopted the Restatement of Torts standard for criminal fraud prosecutions involving private victims.

Indeed, the petitioner in *Neder* cited Section 538 for the proposition that in the common law the term "defraud" included materiality as an element. Br. for Petitioner, 1998 WL 828332, at *33 (U.S. 1998) ("[a]t common law in 1872, it was, as it remains today, impossible to 'defraud' without a *material* misrepresentation or omission") (citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 579 (1996) (citing Restatement (Second) of Torts § 538 (1977))). This Court simply cited Section 538 for the same purpose. *Neder*, 527 U.S. at 22 ("the common law could not have conceived of 'fraud' without proof of materiality" (citing *BMW of N. Am., Inc.*, 517 U.S. at 579 (citing Restatement (Second) of Torts § 538)). The fact that this Court cited Section 538 and its "reasonable person" standard in the context of describing the petitioner's argument, *see* 527 U.S. at 22 & n.5 (emphasis added), was no adoption of that standard for federal criminal cases.[4]

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[4] *See Svete*, 556 F.3d at 1172 (Tjoflat, J., specially concurring) ("The Court's citation to the *Restatement (Second) of Torts* has limited precedential value because it was merely a regurgitation of Neder's argument."); *see also United States v. Johnson*, 297 F.3d 845, 866 n.21 (9th Cir. 2002) ("At no point in the relevant passage in *Neder* did the Court indicate that it was abandoning

3. This Court's decision in *Escobar* further demonstrates that materiality—a "demanding" standard to meet—depends on the statement's ability to affect the victim. *Univ. Health Servs., Inc. v. United States ex rel Escobar*, 136 S. Ct. 1989, 2003 (2016). This Court explained how the behavior of the recipient factored into the materiality inquiry. On the one hand, "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those statements are not material"; on the other hand, if the government "consistently refuses to pay claims in the mine run of cases based on non-compliance with the particular statutory, regulatory, or contractual requirement," that would be evidence of materiality. *Id.* While this Court applied that concept of materiality in the False Claims Act context, it also emphasized that "*[u]nder any understanding of the concept*, materiality 'look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation.'" *Id*. at 2002 (alteration in original) (emphasis added) (quoting 26 R. Lord, Williston on Contracts § 69:12, p. 549 (4th ed. 2003)).

The decision of the Fourth Circuit (and of five other circuits) to create a separate materiality definition in private victim fraud cases is inconsistent with this line of precedent and merits this Court's review. As the Fourth Circuit's decision demonstrates, the circuits are straying increasingly farther from *Neder* and its definition of materiality.

Gaudin or adopting the Restatement's view as the exclusive definition of materiality.").

III. The Question Presented Is Recurring and Exceptionally Important to All Federal Fraud Prosecutions

If not corrected, the decision below would impact countless future federal fraud prosecutions. The federal fraud statutes form the backbone of thousands of criminal prosecutions annually. In 2016, there were over 6,500 federal criminal fraud cases in the United States, accounting for nearly 10 percent of the combined caseload in the federal courts. U.S. Sentencing Comm'n, *Overview of Federal Criminal Cases: Fiscal Year 2016*, at 2, http://goo.gl/BHGB7C. The average loss from a fraud case last year was about $2,376,500, and the largest loss last year was $800 million. *Id*. at 9. These figures have remained relatively constant over the past few years, measuring a slight decline in fraud cases—in 2015, there were 7,420 fraud cases and in 2014, there were 7,614 fraud cases. U.S. Sentencing Comm'n, *Overview of Federal Criminal Cases: Fiscal Year 2015*, at 3, http://goo.gl/GTnGbP; U.S. Sentencing Comm'n, *Overview of Federal Criminal Cases: Fiscal Year 2014*, at 2, http://goo.gl/CFYiyC.

The Fourth Circuit's decision (joining five other circuits) allows criminal defendants in fraud prosecutions involving private victims to face conviction for misrepresentations even when all parties agree that the misrepresentation was entirely immaterial to the intended victim. This effectively reads materiality out of the statute. Where, as here, the evidence shows that the intended victim was behaving unreasonably, the difference between an actual-decisionmaker instruction and a reasonable-person instruction will be outcome determinative: defendants charged in such cases will be acquitted in the Second, Third, and Fifth

Circuits, and convicted in the First, Fourth, Seventh, Ninth, Tenth, and D.C. Circuits.

Moreover, by adopting a blanket rule bifurcating the definition of materiality for public and private victims, the ruling below goes even further than other circuits in ensuring fraud cases lead to bizarre and inequitable results. Consider just a few examples. In the case of a misrepresentation in a proposal to supply computers to the University of Maryland, a public school, materiality asks whether the lie could influence the actual decisionmaker. But the same lie in an identical proposal addressed to Georgetown University, a private school, need only influence a hypothetical "reasonable person" to result in criminal liability. Similarly, the standard for a misrepresentation in the value of insured products being sent by a mail carrier turns on whether the carrier is the U.S. Postal Service (if so, actual decisionmaker), or FedEx (hypothetical reasonable person).

The ruling below could also substantially disrupt ongoing and future fraud cases. In prosecutions involving both public and private victims, the government will have to meet different materiality standards, with different proof. For the private victim, the government will have to present evidence about whether a reasonable person would have been influenced. By contrast, for the public victim, the government will have to present evidence related to the actual decisionmaker.

For example, mortgage fraud cases often include misrepresentations made to private victims, such as potential homebuyers or investors, as well as those made to a public entity that offers homebuyers federal assistance, like the Federal Housing Authority (FHA). *See, e.g.*, *United States v. Weiss*, 630 F.3d 1263 (10th

Cir. 2010) (wire fraud involving FHA loans). In such a case, the prosecution would have to show and the fact-finder would ascertain materiality based upon a "reasonable person" standard for the private victim (homeowner or investor), whereas what was material for the government agency would depend upon how that actual decisionmaker viewed the representation.

There is no basis in the federal fraud statutes or this Court's precedent to justify these distinctions.

IV. This Case Is an Ideal Vehicle to Resolve the Circuit Conflict

This case presents an ideal vehicle to resolve the circuit conflict and eliminate the confusion among lower courts regarding a key element of the federal mail, wire, and bank fraud offenses. Petitioners preserved the issue at trial, and the Fourth Circuit squarely decided the definition of materiality in a published opinion, after full briefing and argument.

The Fourth Circuit in a footnote stated that any instructional error "would be entirely harmless." App. 34a n.9. That is no obstacle to this Court's review. The court's harmless-error analysis purported to view materiality from SunTrust's perspective. App. 34a-35a n.9. Yet it incorporated a mistaken view of materiality similar to that which plagued the panel's decision on the merits, effectively viewing events through the lens of a reasonable person in concluding that Petitioners would not have made the alleged misrepresentations if they did not matter, and that "obvious[ly]" "SunTrust would not have funded the loans had [Petitioners] painted an accurate picture of the applicants' qualifications." App. 35a. That explanation does not withstand scrutiny. Indeed,

immediately before its harmless-error footnote, the court described SunTrust as a "renegade lender with a demonstrated habit of disregarding materially false information," App. 34a, a statement that incoherently combines the actual-decisionmaker and reasonable-person concepts.

The Fourth Circuit's harmless-error analysis is also wrong. Where the district court's instructions misstated an element of the offense, as here, reversal is required unless "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Neder*, 527 U.S. at 15 (internal quotation marks omitted). The Fourth Circuit's footnote did not acknowledge or apply that standard. Instead, it relied on Petitioners' wrongful *intent*. App. 35a. But intent and materiality are distinct elements of wire fraud, and the government must prove both. *See Neder*, 527 U.S. at 24 (rejecting government's contention that fraud liability "would exist so long as the defendant *intended* to deceive the victim, even if the particular means chosen turn out to be immaterial"). And there was more than ample evidence from which the jury could find the alleged misrepresentations immaterial, including testimony from a former SunTrust underwriter that "what a borrower wrote down on a loan application didn't matter at all to SunTrust," JA 309, and from a secondary mortgage market expert who testified that SunTrust's mid-Atlantic region approved 98.7 percent of all mortgage applications, JA 1165-66; App. 15a-16a. The Fourth Circuit's analysis did not address whether there was evidence in the record "sufficient to support a contrary finding" by the jury. *Neder*, 527 U.S. at 19. There clearly was, and therefore the error could not have been harmless.

This Court has not hesitated to grant certiorari even when there is an alternative holding that supported the decision below. *See, e.g.*, *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) (granting certiorari despite alternative court of appeals holdings striking down regulation under APA and Medicare Act); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 246 & n.12 (1981) (granting certiorari on proper application of *forum non conveniens* doctrine where court of appeals ruled with respect to the balancing of private and public interests, even though "[i]n any event, it appears that the Court of Appeals would have reversed even if the District Court had properly balanced the public and private interests").

In *County of Los Angeles v. Mendez*, 137 S. Ct. 1539 (2017), for example, the Ninth Circuit concluded that police officers were liable for excessive force both as a matter of the circuit's "provocation rule" and separately as a matter of proximate cause. This Court granted certiorari and remanded, notwithstanding the Ninth Circuit's "alternative rationale for its judgment" on proximate cause, because that alternative rationale too was "tainted by the same errors" as the court's primary rationale. *Id*. at 1546, 1549. Similar considerations motivated this Court's decision in *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 629 (2009) ("We take the trouble to address that alternative ground, since if the Court of Appeals is correct on the merits point we will have awarded petitioners a remarkably hollow victory").

Accordingly, if Petitioners were to prevail on the merits, reversal and remand of the Fourth Circuit's decision, including the harmless-error finding, would also be appropriate.

CONCLUSION

The petition for a writ of certiorari should be granted.

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