No. 17-1314

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

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June 5, 2018

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES

INTRODUCTION

This case presents an ideal vehicle to resolve an important and intractable circuit split over the materiality element of the mail, wire, and bank fraud statutes—some of the most frequently prosecuted offenses in the United States Code. The government does not dispute that the materiality element is critically important and underlies between 6,000 and 7,000 federal fraud prosecutions every year.

The government's opposition to certiorari is most noteworthy for what it does not say. The government makes no effort to defend the Fourth Circuit's holding that different materiality standards apply depending on whether the fraud victim is a public or private entity. Nor does the government defend the Fourth Circuit's holding that, in *private*-victim cases, materiality is judged from the perspective of a reasonable person rather than the actual decisionmaker. The government's silence on these issues underscores the need for this Court's review.

Rather than defend the decision below, the government tries to have its cake and eat it too. According to the government, prosecutors can establish materiality under *either* the actual-decisionmaker standard *or* the reasonable-person standard. But the government does not dispute that, under this expansive view of the federal fraud statutes, a defendant could be imprisoned even if all agree that the statement at issue was immaterial to the actual victim. That disturbing result is apparently agreeable to the government.

The government's either/or approach conflicts with the decision below. The Fourth Circuit squarely held that "the correct test for materiality . . . is an objective one" when the victim is a private entity, App. 34a, not that "[e]ither finding is enough to prove materiality,"

Opp. 14. The government's position similarly finds no support in this Court's precedent and runs headlong into decisions like *Neder v. United States*, 527 U.S. 1 (1999), and *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016). Nor do the government's arguments mitigate the pervasive and broadly acknowledged circuit split over whether materiality is judged from the perspective of the actual decisionmaker or that of a reasonable person.

The government ultimately seeks refuge in the Fourth Circuit's perfunctory footnote on harmless error. But the government ignores the Fourth Circuit's incoherent conflating of the actual-decisionmaker and reasonable-person standards and offers no response to this Court's decisions accepting review in similar circumstances. The government is free to renew its harmless-error arguments on remand to the court of appeals following vacatur of the decision below.

This Court should grant review to resolve the circuit conflict and reverse the Fourth Circuit's erroneous decision.

ARGUMENT

I. The Circuits Are Split Over the Materiality Element of the Federal Fraud Offenses

As the petition demonstrated, the circuits are divided over whether to judge materiality from the actual decisionmaker's perspective or that of a reasonable person. Pet. 8-13. If petitioners had been prosecuted in the Second, Third, or Fifth Circuits, which have applied the actual-decisionmaker standard, they would have received their proposed materiality instruction that aligned with the defense theory of the case. The government's attempt to reconcile the circuits' conflicting approaches to materiality does not withstand scrutiny.

1. The government's attempts to distinguish the law in the Second, Third, and Fifth Circuits fail. Contrary to the government's tortured reading (at 21), *United States v. Rigas*, 490 F.3d 208, 235 (2d Cir. 2007), held that a misrepresentation was not material because the prosecution failed to prove that the misrepresentation at issue "could influence the bank's decisions." The court focused on "the degree to which a misrepresentation would be capable of influencing[ ] the decision of the decisionmaking body." *Id.* (quotation marks omitted). A fraud conviction cannot stand, the court explained, if a statement was "immaterial, *i.e.*, incapable of influencing *the intended victim*." *Id.* (quotation marks omitted) (emphasis added). Though the government argues no such case exists, Opp. 18-19, *Rigas* establishes that a fraud conviction must be overturned if the misrepresentation was immaterial to the intended victim, even if it would have been material to a reasonable person.

The government's assertion (at 22) that *United States v. Rodriguez*, 140 F.3d 163 (2d Cir. 1998), "described the materiality standard in objective terms" is simply wrong. *Rodriguez* held that a misrepresentation was immaterial because the prosecution failed to prove that the misrepresentation "could have, or did influence Chemical Bank's decision." *Id.* at 168. As support, the Second Circuit cited *United States v. Swearingen*, which stated that materiality turns on "whether the false representations were capable of influencing the Bank's actions." 858 F.2d 1555, 1558 (11th Cir. 1988). *Rodriguez* made no mention whatsoever of any "hypothetical rational bank," as the government suggests (at 22). And, contrary to the government's claim (at 21), it makes no difference that the decision in *Rodriguez* rested on multiple grounds.

The government notes that another Second Circuit decision sets forth a "reasonable person" standard for materiality. Opp. 22. That misses the point. Here, certiorari is not warranted to resolve an "intra-circuit conflict," *id.*, but rather to resolve the conflict between the Second Circuit's decisions in *Rigas* and *Rodriguez* and the decision below and decisions of multiple other circuits.

The government acknowledges that the Fifth Circuit twice held that misrepresentations were material because the government proved they could influence "the intended victim." Opp. 19-20 (citing *United States v. Curtis*, 635 F.3d 704 (5th Cir. 2011), and *United States v. Holmes*, 406 F.3d 337 (5th Cir. 2005)). The government argues that another Fifth Circuit decision adopts an either/or approach to materiality. Opp. 15, 17 (citing *United States v. Davis*, 226 F.3d 346 (5th Cir. 2000)). But again, the existence of an intra-circuit conflict, while not independently cert-worthy, does not eliminate the need for this Court to resolve a conflict *between* circuits.

The government repeats the same error yet again in discussing an unpublished Third Circuit decision that set forth a reasonable-person standard. Opp. 17 (citing *United States v. Lucas*, 709 F. App'x 119 (3d Cir. 2017)). That unpublished decision cannot alter binding Third Circuit precedent that focused on a misrepresentation's ability to influence the actual decisionmaker, *see* Pet. 9 (citing *United States v. Wright*, 665 F.3d 560 (3d Cir. 2012), and *United States v. Fallon*, 470 F.3d 542 (3d Cir. 2006)), and in any event would not affect the existence of the circuit split.

At most, the government illustrates that there is extraordinary confusion over the materiality standard in fraud prosecutions. But conflicts *within* multiple

circuits, in addition to the conflict *between* multiple circuits, only highlight the need for review.

2. The government argues that the cases cited by petitioners for the actual-decisionmaker standard did not turn on the difference between the actual-decisionmaker and reasonable-person standards. Opp. 19-20. This, too, misses the point. Those decisions held that the applicable standard is actual-decisionmaker and thus based their ruling on whether the government had satisfied that standard, regardless of how those cases might have come out under a reasonable-person standard. Further, those decisions conflict with the decision below, which holds that actual-decisionmaker is not the standard *at all* in fraud prosecutions involving private victims. Thus, the government only bolsters the need for this Court's review by collecting cases that cited the actual-decisionmaker standard and evaluated whether the government had proven that the misrepresentation mattered to the actual decisionmaker. *See id.*

Moreover, because the government does not defend the Fourth Circuit's distinction between prosecutions involving public versus private victims, the circuit split also engulfs many public-victim cases finding misstatements immaterial based on the actual-decisionmaker standard. *E.g.*, *United States v. Litvak*, 808 F.3d 160, 172-74 (2d Cir. 2015) (reversing conviction where prosecutors failed to demonstrate that misstatements could influence "a *decision* of the *Treasury*" given Treasury's chosen investment structure); *United States v. Camick*, 796 F.3d 1206, 1218-19 (10th Cir. 2015) (reversing conviction because misstatements in provisional patent application were immaterial to "the relevant decisionmaking body, in this case the PTO," given PTO's practices regarding

such applications); *United States v. Ismail*, 97 F.3d 50, 60-62 (4th Cir. 1996) (reversing conviction where, although false statements "certainly could, in a given situation, be material," the government "presented no evidence of the materiality of these statements" to the actual decisionmaker at issue) (emphasis omitted). Under the government's either/or standard, these convictions would have been affirmed.

3. Multiple commentators have acknowledged the conflict and confusion over materiality. As one explained: "some circuits may endorse" the view that "mail/wire fraud is material only if a 'reasonable person' would attach importance to the misstatement or nondisclosure," while "other circuits have abandoned the 'reasonable person' standard of materiality in favor of the broader formulation: capable of influencing the intended victim." William K.S. Wang, *Application of the Federal Mail and Wire Fraud Statutes to Criminal Liability for Stock Market Insider Trading and Tipping*, 70 U. Miami L. Rev. 220, 277-78 (2015). Another commentator likewise stated that "circuit courts are split with regard to the precise standard to use when determining if a statement was a material misrepresentation." Skye Lynn Perryman, *Mail and Wire Fraud*, 43 Am. Crim. L. Rev. 715, 720 (2006). And yet another commentator noted the "confusion prevalent in the courts" in observing that "[f]ederal courts of appeals . . . have interpreted the materiality requirement differently, creating a split in the circuits as to what federal prosecutors have to prove in order to convict a defendant of mail fraud." Lauren D. Lunsford, Note, *Fraud, Fools, and Phishing: Mail Fraud and the Person of Ordinary Prudence in the Internet Age*, 99 Ky. L.J. 379, 380-81 (2010-11).

This Court's review is needed to resolve this intractable conflict.

II. The Government's Either/Or Materiality Standard Finds No Support in This Court's Precedent

This Court in *Neder*, 527 U.S. at 16, squarely held that materiality turns on whether a misrepresentation has "a natural tendency to influence, or [was] capable of influencing, the decision of the decisionmaking body to which it was addressed" (quotation marks omitted). The government employs a crabbed and implausible reading of *Neder* that would effectively erase its "decisionmaking body" standard. *See* Opp. 11-16. But the government's reading and its either/or materiality standard run headlong into this Court's longstanding precedent.

In arguing that *Neder* supports a reasonable-person standard, the government relies on a footnote in *Neder* that referenced a civil-law treatise in connection with summarizing a party's argument. Opp. 8, 14 (citing *Neder*, 527 U.S. at 22 n.5 (quoting Restatement (Second) of Torts § 538 (1977))). It is simply not plausible that this footnote allows a reasonable-person standard, particularly when *Neder* twice set forth the actual-decisionmaker standard in the text. *Neder* held that "immaterial" means "incapable of influencing the intended victim." 527 U.S. at 24.

The government, moreover, makes no attempt to address the decisions explaining that the footnote in *Neder* was "merely a regurgitation of [a party's] argument," *United States v. Svete*, 556 F.3d 1157, 1172 (11th Cir. 2009) (en banc) (Tjoflat, J., specially concurring); *see also* Pet. 15 n.4. And the government can muster only one decision that reads

Neder as it suggests. Opp. 15, 17 (citing *Davis*, 226 F.3d at 358-59). No other court has adopted the government's convoluted reading.

Notably, the government largely ignores *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016). Contrary to the government's suggestion (at 15) that *Escobar* is limited to the False Claims Act, this Court explained that "[u]nder *any understanding* of the concept, materiality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Id*. at 2002 (quotation marks and alterations omitted) (emphasis added). Moreover, *Escobar*'s subsequent citations to treatises setting forth a "disjunctive standard" were not, as the government claims (at 15-16), an adoption of those standards. Rather, as the government acknowledges, *Escobar* held that materiality "looks to the effect on the likely or actual behavior of *the recipient* of the alleged misrepresentation." 136 S. Ct. at 2002; *see* Opp. 15 (same).

Tellingly, the government makes no attempt to address *Escobar*'s holding that the circumstances of the particular victim can lead to a finding of immateriality. *Escobar* held that "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." 136 S. Ct. at 2003. That holding establishes that the decisionmaking process of the actual decisionmaker limits the scope of a representation's materiality. The government cannot square its disjunctive standard with this holding.

The government also misconstrues *United States v. Wells*, 519 U.S. 482, 485 (1997). While *Wells* noted that there was "no controversy" between the parties as

to a jury instruction setting out a "reasonable person" materiality standard, this Court explained its "understanding [of] the term in question to mean 'ha[ving] a natural tendency to influence, or [being] capable of influencing, the decision of the decisionmaking body to which it was addressed.'" *Id.* at 489 (quoting *Kungys v. United States*, 485 U.S. 759, 770 (1988)). It is this Court's "understanding" of materiality—not some agreement of the parties in *Wells* at trial—that controls here.

Unable to marshal support for its position, the government cites cases involving the converse of the situation here: fraud prosecutions where the misrepresentation *was* material to the actual decisionmaker, but *would not* have been material to a reasonable person. *See* Opp. 14-15. But petitioners do not contest that a defendant can be liable for exploiting the infirmities of the actual decisionmaker; indeed, that approach is fully consistent with petitioners' position. The question here, however, is whether a defendant can be criminally liable for a misrepresentation that was *not* material to the actual decisionmaker, simply because it would have been material to some other reasonable person.

Even the decision below does not support the government's disjunctive, either/or standard for materiality. The Fourth Circuit held that in fraud prosecutions involving private victims, the "correct test" is "reasonable lender," and that the actual-decisionmaker standard "*does not apply* to a fraud scheme that targets a private [victim]." *See* Pet. App. 26a-28a, 34a (emphasis added). The Fourth Circuit's holding that the actual-decisionmaker standard "does not apply" is irreconcilable with the government's view that this standard does apply.

III. The Fourth Circuit's Harmless-Error Footnote Does Not Preclude This Court's Review

The government does not dispute that the question presented here was preserved at trial and addressed in the decision below. Instead, the government urges this Court to deny review because the Fourth Circuit stated in a footnote that any error was harmless. But courts of appeals cannot so easily insulate their legal rulings from review.

The government argues that the Fourth Circuit's harmless-error footnote constitutes an "alternative holding" that "precludes" review. Opp. 23. But, as the petition explained, this Court has granted certiorari when the lower court provided alternative grounds for its decision. *See* Pet. 21 (citing, *e.g.*, *County of Los Angeles v. Mendez*, 137 S. Ct. 1539, 1546, 1549 (2017); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 246 & n.12 (1981)). The government does not even acknowledge this point or attempt to distinguish these cases.

The government similarly ignores that the Fourth Circuit improperly conflated the actual-decisionmaker and reasonable-person standards in its harmless-error analysis. *See* Pet. 19-20. Nor does the government engage with the Fourth Circuit's failure to apply the correct harmless-error standard. *See* Pet. 20 (citing *Neder*, 527 U.S. at 15). This Court's precedent required the Fourth Circuit to evaluate whether, "beyond a reasonable doubt," the jury instruction misstating the materiality element "did not contribute to the verdict obtained." *Neder*, 527 U.S. at 15, 18 (quotation marks omitted). The Fourth Circuit's footnote does not mention this standard, much less conclude that a rational jury could have found that the alleged

misrepresentations at issue were not "capable of influencing" lending decisions of SunTrust. App. 34a. This omission is particularly glaring when the Fourth Circuit described SunTrust as a "renegade lender with a demonstrated habit of disregarding materially false information." *Id.*

Unable to show that the Fourth Circuit correctly stated the law of harmless error, the government seeks to mire this Court in the facts. The government can make these arguments on remand, but they bear no relation here. Anyway, the government's arguments are wrong. The government emphasizes that the vice president of SunTrust's national underwriting team testified about the "importance" of accurate information in loan applications. Opp. 24. But that witness admitted that she lacked direct knowledge of what was "capable of influencing SunTrust lending decisions at the relevant time;" she did not "know what was going on at SunTrust in 2006 and 2007," and had no "idea what SunTrust's [lending] practices were at the time." JA664, 667-68. She was not employed by SunTrust until 2010. JA648. No government witness had direct knowledge of SunTrust's lending standards during 2006-07; only the defense called such a witness, and she testified that it was "common knowledge" that borrowers were misrepresenting their income and assets but SunTrust was approving those loans anyway. JA1117, 1130.

The government's other attempts to discredit petitioners' evidence likewise fail. Its attempt to show that SunTrust's mortgage approval rate was less than 99% when accounting for withdrawn applications is based on pure speculation, as no SunTrust witness testified about withdrawn applications. Its attempt to show that misrepresentations and false documents

were material to SunTrust underwriters ignores testimony that underwriters' denials of applications were often overturned by SunTrust management as a "business decision." JA1126. And its argument that the amount of documentation affected the interest rate ignores that SunTrust approved loans without its alleged document requirements being met. Indeed, files of loans charged in this case confirm that SunTrust management approved loans even where the loan file lacked documents that had been made a requirement of approval by SunTrust underwriters. *See* JA868, 872, 873, 875, 1143-44. Accordingly, the record amply supports a rational juror's conclusion that the information at issue here as immaterial to SunTrust.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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