No. _____

In The

Supreme Court of the United States

MICHAEL JAY STEWART,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

1. There is widespread conflict regarding the meaning of the federal criminal fraud statutes. While the confusion existed long before *Neder v. United States*, 527 U.S. 1 (1999), it has persisted as courts have struggled to interpret footnote five of that opinion, which cited the definition of materiality set forth in the Restatement (Second) of Torts. Some lower courts declare that the materiality standard is objective and mail fraud is determined by a reasonably prudent victim, while others insist that the criminal fraud statutes were designed to protect the naive and careless. The first question presented is:

Whether, when the government relies on an omissions theory of criminal mail fraud, a jury may also be instructed that "it is immaterial" that "only the most gullible or negligent would have been deceived by the defendant's scheme" because the "mail fraud statute is designed to protect the naive and careless as well as the experienced and careful."

2. In *Kokesh v. S.E.C.*, 137 S. Ct. 1635 (2017), this Court recently held that disgorgement is a "penalty" that cannot be imposed for fraud losses beyond the statute of limitations. The second question presented is:

Whether conduct outside the statute of limitations can increase a fraud defendant's loss calculation under the United States Sentencing Guidelines.

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OPINION BELOW

The Ninth Circuit's decision can be found at *United States v. Stewart*, 728 Fed. Appx. 651 (9th Cir. March 27, 2018).

JURISDICTION

The court of appeals filed its decision on March 27, 2018 and denied rehearing and rehearing *en banc* on June 5, 2018. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment states:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

18 U.S.C. § 1341 states:

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 . . . for the purpose of executing such scheme or artifice or attempting to do so, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service . . . shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 3828(a) states:

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

STATEMENT OF THE CASE

In 2014, a federal grand jury in the Central District of California returned an indictment charging petitioner and his business partner with eleven counts of mail fraud in violation of 18 U.S.C. § 1341. The indictment alleged that the two defendants were equal partners in various corporate entities that generally did business as Pacific Property Assets ("PPA"), including PPA Holdings, LLC. PPA primarily purchased and renovated residential apartment complexes in southern California and Arizona. Typically, PPA would borrow money from a bank to buy the properties and then would borrow money from individual investors to do the renovations by conducting an offering of promissory notes memorialized through a private placement memorandum ("PPM"). PPA would manage the properties and collect rent and eventually when the properties increased in value, PPA would either sell them or refinance them with a larger bank loan.

As the real estate market flourished in the early 2000's, PPA was heralded as an extremely successful real estate investment outfit. Indeed, the government conceded as much, stating in its opening statement: "From 1999 through most of 2007, PPA was successful. The market was strong. Real estate prices were going up, and the business model worked." The government also agreed that "prior to 2007 PPA was a very financially lucrative business. It was a very good business." But the government contended that, when the real estate market collapsed in the late 2000's, PPA turned into a quasi-"Ponzi scheme" where individual investor

funds were used to pay earlier investors. PPA ultimately was forced to file for bankruptcy in June of 2009, with tens of millions of dollars in outstanding loans.

The indictment alleged that, sometime in the 2008-09 time period, petitioner and his partner made generalized false statements that PPA's financial position was "strong" and they were having "success" in arranging bank financing. The indictment also alleged that they falsely claimed that, during the first six months of 2008, PPA obtained over $15 million in " 'refinancing proceeds,' defined as 'net proceeds from institutional and private refinancing of real property.' " The indictment also emphasized an *omissions* theory of fraud, asserting that the defendants failed to tell investors that after November 2007: (1) PPA was unable to raise funds through bank financing; (2) PPA was dependent on new loans from individual investors to pay its outstanding debts and continue operating; (3) payments of interest that individual investors were receiving came from new investor loans rather than operating profits; and (4) PPA had difficulty paying monthly expenses.

The eleven mail fraud counts were based on mailings related to PPA's last offering to investors, called the "Opportunity Fund," which raised approximately $9 million from January through April 2009. The terms of the investment were memorialized in a PPM, which defined the "Company" as PPA Holdings, LLC, and the "Ownership Entity" as PPA Opportunity Fund, LLC. The PPM stated that the Ownership Entity would be

a newly formed company to acquire apartment complexes. But the PPM stated that the proceeds would be invested by the *Company* and that the investors will "be fixed-rate lenders to the *Company* with individual Notes secured by Assignments and Pledges that proportionately encumber the sole Membership Certificate of the Ownership Entity."

The PPM repeated that the *Company* was the "borrower of the funds[,]" had "absolute right to receive and distribute the funds from this Offering[,]" and "since the Company is borrowing money from the Purchasers there is the possibility of potential conflicts between the parties." Thus, the PPM warned investors that they needed to consider the risks inherent in the Company, which had numerous properties that were subject to both senior institutional loans and junior private money loans, and "[c]onsequently, while the multiple assets of the Company may provide some potential economic stability to the Company and possibly some safety to the Purchasers herein, the multiplicity of other properties similarly financed also adds a component of risk."

The PPM advised that, consistent with PPA's business model, the Company would need to obtain bank financing in order to purchase the properties and the bank's loan would be senior and secured by a first trust deed. But the PPM warned that there was a "credit crisis" that had "spread to virtually every type of credit facility including commercial property loans. . . ." The PPM warned that no properties had been acquired nor were there "any firm purchase contracts for any

properties." The PPM also reminded investors that any future expectations or "forward-looking" statements came with risk and that "actual results" could "differ materially from those contained in any forward-looking statement."

The investment was a high-risk and high-reward proposition, and the PPM made that clear. Investors could receive annual returns of 12-17%. Given the "credit crisis," the PPM warned in all capital letters: "THE NOTES OFFERED HEREBY ARE HIGHLY SPECULATIVE. AN INVESTMENT IN THE NOTES INVOLVES SUBSTANTIAL INVESTMENT RISKS AND CONFLICTS OF INTEREST."

Similarly, due to the high level of risk, the PPM stated that only accredited investors could invest. The PPM stated: **"THE PURCHASE OF NOTES INVOLVES SIGNIFICANT RISKS. . . . PURCHASE OF THE NOTES IS SUITABLE ONLY FOR PERSONS OF SUBSTANTIAL MEANS. . . ."** The PPM further set forth "Purchaser Suitability Requirements" that required the investors to represent in writing that they understood the "substantial risks" in the investment and they could "bear, and [are] willing to accept the economic risk of losing the . . . entire investment. . . ." Investors needed to represent that they had a net worth over $1 million or had earned over $200,000 per year in the preceding two years.

The PPM also included numerous provisions making it clear that PPA was not acting in a fiduciary relationship with the investors and that there were

actually conflicts of interests between the Company and the investors. The PPM stated that "IN MAKING AN INVESTMENT DECISION, INVESTORS MUST RELY ON THEIR OWN EXAMINATION OF THE ENTITY CREATING THE NOTES AND THE TERMS OF THE OFFERING, INCLUDING THE RISKS INVOLVED" and encouraged investors "TO CONSULT WITH THE INVESTOR'S OWN INDEPENDENT LEGAL COUNSEL, ACCOUNTANT, AND OTHER APPROPRIATE PROFESSIONALS. . . ." As a substantial risk factor, the PPM stated that there were "conflicts of interest between the Company and the Purchasers. . . ."

The PPM included an income statement for the PPA entities. For the first six months of 2008, the statement listed approximately $15 million and 75% of the income as generated by refinancing proceedings. The statement defined these proceeds as being generated from institutional and private refinancing. The PPM was clear that "SHOULD ONLY STRICT GENERALLY ACCEPTED ACCOUNTING PRINCIPALS [sic] BE APPLIED . . . THE INCOME ASSOCIATED WITH THE REFINANCINGS WOULD BE ELIMINATED."

The investors in the Opportunity Fund signed a "subscription agreement" representing that they were experienced in financial and business matters and that they recognized that their investments were speculative, high-risk, and were not suitable for investors without adequate net worth or income. They declared that they were able to bear the risk of the investment and a complete loss. The investors also represented

that they relied solely on the PPM and their own independent advisers. They agreed that they were "accredited investors" with a net worth of over $1 million or had earned at least $200,000 in the prior two years. The investments were made payable to PPA.

Several investors in the Opportunity Fund testified at the trial. In support of the government's omissions theory of fraud, they generally stated that nobody at PPA told them that the company was losing money, had cash flow problems, had difficulty obtaining bank financing, was "relying on investor money to stay afloat," or that the money invested in the Opportunity Fund would be used for purposes not related to buying new properties. But the investors also admitted that they were aware based on the plain language in the PPM that they were making a risky investment and that there were no promises that property would ever even be acquired.

Most of the investors in the Opportunity Fund had invested in several prior offerings with PPA. They admitted that until PPA started having trouble in the spring of 2009, they received every return on their investments on time. Although investors testified on direct examination that they thought their investments were low-risk and that their losses were devastating to them, they also admitted that they signed documents specifically asserting that they understood they were making high-risk investments and that they had the financial means to withstand complete losses. Furthermore, with respect to the alleged false representation in the income statement attached to the PPM,

investors admitted that they knew that the $15 million figure listed as income included money received from private investors. Indeed, the single biggest investor in the Opportunity Fund, who was a certified public accountant, admitted as much.

In summations, the government agreed that petitioner did not "set out to steal people's money," but argued that he "rel[ied] on the investors to put the company on their back, to keep it alive while [he] sought some kind of a bailout or some solution or while [he] waited and hoped for the market to turn around and go back to the way things used to be." The government led with an omissions theory of fraud, contending that petitioner "didn't tell the investors" about the financial condition of the company. "Omissions, you can defraud people by what you don't say as well as what you do say."

The district court instructed the jury with respect to the materiality element that it had to find that "the statements made or facts omitted as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property. . . ." Over petitioner's objection, the district court also gave the jury the following charge: "In determining whether the defendant knowingly participated in or devised a scheme or plan to defraud, or a scheme or plan for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, it is immaterial whether only the most gullible or negligent would have been deceived by the defendant's scheme. The mail fraud

statute is designed to protect the naive and careless as well as the experienced and careful."

The jury convicted petitioner on all counts, and the district court imposed a 14-year sentence and approximately $9.2 million in restitution. In determining petitioner's offense level under the United States Sentencing Guidelines, the district court applied a 20-level increase for loss of more than $13 million, *see* U.S.S.G. § 2B1.1(b)(1), and arrived at this amount by including loss for conduct outside the statute of limitations period. The district court overruled petitioner's objection to the loss amount, explaining: "[M]y understanding of Ninth Circuit authority on point is that I can consider as relevant conduct actions that may be barred from prosecution by the applicable statute of limitations."

On appeal, petitioner challenged the jury instructions and the loss calculation. The Ninth Circuit held that the district court did not err in giving the "gullible or negligent" instruction, explaining that the government was "not required to prove that a 'scheme to defraud was reasonably calculated to deceive persons of ordinary prudence and comprehension.' " App. 2. The Ninth Circuit also explained that "the reasonable-investor standard under the civil 'bespeaks caution' doctrine" did not apply "because that doctrine is inapplicable in the criminal context as the criminal fraud statutes do not require the Government to prove reliance." App. 2 (citing *Neder v. United States*, 527 U.S. 1, 24-25 (1999)). The Ninth Circuit rejected petitioner's sentencing challenge, holding that a "district court

may consider as relevant conduct for sentencing purposes actions which may be barred from prosecution by the applicable statute of limitations." App. 6.

ARGUMENT

This petition presents two questions worthy of review. *First*, there has been longstanding and widespread confusion in the lower courts regarding the materiality standard for mail fraud and whether the statute otherwise requires a reasonably prudent victim requirement. There was conflict before this Court decided *Neder v. United States*, 527 U.S. 1 (1999), and the lower courts have continued to struggle with the question even after the guidance offered in that opinion. The federal fraud statutes are among the most frequently prosecuted federal offenses, and this case presents an excellent vehicle for resolving fundamental questions concerning the basic elements of those offenses.

Second, in *Kokesh v. S.E.C.*, 137 S. Ct. 1635 (2017), this Court recently held that disgorgement is a "penalty" that cannot be imposed for fraud losses beyond the statute of limitations. Despite this Court's analysis in *Kokesh*, the Ninth Circuit held that the district court did not err in relying on time-barred conduct to determine petitioner's loss calculation under the Sentencing Guidelines, and the lower courts have consistently held that time-barred conduct can be used in determining a defendant's guidelines calculations. Not only does

the view of the lower courts conflict with *Kokesh*, but it also raises significant constitutional questions under the Fifth and Sixth Amendments. This Court should grant review to correct the firmly established and flawed view of the lower courts.

I. This Court should grant this petition to resolve the confusion in the lower courts regarding the materiality standard and whether the federal criminal fraud statutes otherwise maintain a reasonably prudent victim requirement.

The district court's materiality instruction did not include an objective or reasonableness standard and simply required that "the statements made or facts omitted as part of the scheme were material; that is, they had a natural tendency to influence, or were capable of influencing, a person to part with money or property. . . ." Over objection, the district court also instructed the jury: "[I]t is immaterial whether only the most gullible or negligent would have been deceived by the defendant's scheme. The mail fraud statute is designed to protect the naive and careless as well as the experienced and careful." The Ninth Circuit held that the district court did not err in giving this instruction, relying on its own precedent, *United States v. Ciccone*, 219 F.3d 1078, 1083 (9th Cir. 2000), and this Court's opinion in *Neder v. United States*, 527 U.S. 1, 24-25 (1999). The Ninth Circuit misinterpreted *Neder*, and its conclusion conflicts with the precedent of other circuits and is yet another example of the widespread

confusion regarding the meaning of the federal criminal fraud statutes that has persisted for decades. This case presents an excellent vehicle to clarify critical elements of the criminal fraud statutes, which are among the most frequently prosecuted federal offenses.

A. There is longstanding and widespread confusion

Confusion regarding the meaning of the federal criminal fraud statutes existed long before *Neder* and is exemplified by the pre-*Neder* opinions in *United States v. Brown*, 79 F.3d 1550 (11th Cir. 1996) and *United States v. Coffman*, 94 F.3d 330 (7th Cir. 1996). In *Brown*, the Eleventh Circuit reversed mail fraud convictions for a business targeting home purchasers, finding that "insufficient evidence was presented that a scheme reasonably calculated to deceive persons of ordinary prudence and comprehension was devised." *Brown*, 79 F.3d at 1553. The Eleventh Circuit explained that "[t]he 'person of ordinary prudence' standard is an *objective standard* not directly tied to the experiences of a specific person or persons." *Id.* at 1557.

Although not explicitly rooting its analysis in the materiality element of fraud, the Eleventh Circuit similarly explained that "mail fraud requires an objective inquiry; a scheme to defraud – that is, a violation of the mail fraud statute – exists only where a reasonable person 'would have acted on the misrepresentations: were the misrepresentations reasonably calculated to

deceive persons of ordinary prudence and comprehension.'" *Id.* at 1558. The Eleventh Circuit did note, however, that "[w]here a relationship 'fiduciary in nature' exists between a defendant and his intended victims, the federal fraud statutes are broadly interpreted and were intended by Congress to 'protect the careless and the naive from lupine predators.'" *Id.* at 1557. In reversing the convictions, the *Brown* court concluded that there was no such fiduciary relationship involved and that reasonable home buyers would have conducted their own investigation regarding whether they were purchasing homes at a reasonable price. *Id.* at 1559-62.

That same year, Judge Posner wrote *Coffman* for the Seventh Circuit. He explained that there was tension in the case law, as some opinions, like *Brown*, stated that a defendant commits mail fraud only if "a reasonable person would be deceived by the defendants' misrepresentations[,]" while others explained that the federal fraud statutes were meant to "protect the gullible" who may be the most in need of protection. *Coffman*, 94 F.3d at 334. He felt that it was "hard to believe" that the language used in cases like *Brown* was "intended to be understood literally. . . ." *Id.* Thus, he "doubt[ed] that there is real inconsistency" and attempted to harmonize the precedent. *Id.* He claimed that the "reasonable person" language was merely to guide the jury in evaluating a defendant's fraudulent intent and was designed to cover "the indistinct border zone between real fraud and sharp dealing[,]" such as "puffing." *Id.* In doing so, however, Judge Posner

erroneously suggested that a jury need not be specifically instructed on the element of materiality, *id.* at 335, a position this Court rejected three years later in *Neder*.

In its 1999 opinion in *Neder*, 527 U.S. at 20-25, this Court held that it was error not to instruct the jury on materiality in a mail fraud case. In doing so, this Court included a footnote that cited the definition of materiality in the Restatement (Second) of Torts, which "instructs that a matter is material if: (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it." *Id*. at 22 n.5. In the wake of *Neder*, the confusion has persisted, if not intensified.

Often relying on *Neder*, several circuits have explained that the materiality element for federal criminal fraud is based on an objective, reasonable person standard. *See United States v. Litvak*, 889 F.3d 56, 68-70 (2d Cir. 2018); *United States v. Raza*, 876 F.3d 604, 616-21 (4th Cir. 2017); *United States v. Williams*, 865 F.3d 1302, 1310-11 (10th Cir. 2017); *United States v. Betts-Gaston*, 860 F.3d 525, 532 (7th Cir. 2017); *United States v. Jamieson*, 427 F.3d 394, 415-16 (6th Cir. 2005). On the other hand, like the Ninth Circuit in this case, other circuits have held that materiality does not require a reasonable person standard, and some have

even held that it is permissible to give a jury instruction similar to the "gullible or negligent" one given in this case. *See*, *e.g.*, *United States v. Davis*, 226 F.3d 346, 358-59 (5th Cir. 2000).

As Judge Posner did in *Coffman*, these latter cases tend to shift the inquiry away from the materiality element and declare that the "ordinary prudence" standard is only "a tool the jury may utilize to gauge the defendant's intent and is helpful in situations in which the defendant's intent to deceive may be unclear[,]" such as when statements "were merely sharp business dealing. . . ." *United States v. Thomas*, 377 F.3d 232, 243 (2d Cir. 2004); *see United States v. Colton*, 231 F.3d 890, 903 (4th Cir. 2000); *United States v. Maxwell*, 920 F.2d 1028, 1036 (D.C. Cir. 1990); *United States v. Brien*, 617 F.2d 299, 311 (1st Cir. 1980). Thus, some circuits, including the Ninth Circuit, seemingly have inconsistent lines of precedent, on the one hand stating that materiality is a reasonable person standard and articulating an "ordinary prudence" requirement, but on the other hand declaring that the unreasonableness of the victim is irrelevant. *See United States v. Lindsey*, 850 F.3d 1009, 1014-17 (9th Cir. 2017); *compare United States v. McNeil*, 320 F.3d 1034, 1039 (9th Cir. 2003); *with Ciccone*, 219 F.3d at 1083.

The multiple opinions in the *en banc* decision in *United States v. Svete*, 556 F.3d 1157, 1166-69 (11th Cir. 2009 (*en banc*) reflect the confusion. In *Svete*, a majority of the Eleventh Circuit, relying on *Neder*, retreated from its earlier *Brown* opinion. *Id.* at 1165-68;

id. at 1173 (Kravitch, J., concurring). Relying on the second definition of materiality (the (b) definition) contained in the Restatement and cited in *Neder*, 527 U.S. at 22 n.5, the lead opinion in *Svete* held that "[t]he objective reliability of a misrepresentation is sufficient to establish its materiality, but proof of objective reliability is not necessary to establish materiality if the defendant knows or should know that the victim is likely to regard the misrepresented facts as important." *Svete*, 556 F.3d at 1164-65.

Chief Judge Edmonson, who wrote *Brown*, concurred in *Svete* because he believed that any error was likely harmless. *Id.* at 1171. However, he continued to maintain that the "mail-fraud statute requires the government ordinarily to show that the pertinent scheme or misrepresentation was *capable* of inducing reliance on the part of a reasonable person exercising ordinary prudence for the protection of his own interests." *Id.* at 1170 (footnote omitted). Chief Judge Edmonson explained that "[o]ur – and some other Circuits' – case law has set out this kind of objective standard for decades" and "[t]his objective standard was part of the common law of fraud . . . when the statute was written (1872) and last amended (1909) on point." *Id.*

Meanwhile, Judge Tjoflat wrote his own concurrence, questioning whether footnote five in *Neder* was intended to adopt a standard for materiality. *Id.* at 1172 ("As I read *Neder*, the Court only cited the Restatement (Second) of Torts because Neder, himself, relied on it to support his argument that materiality is an element of the mail fraud statute."). Judge Tjoflat

did not believe that "the meaning of words in a statute enacted in 1872 can be identified by reference to a modern restatement of the law" and that "it would be preferable to define materiality as it was understood at common law at the time the statute was enacted." *Id.* at 1172-73.

Adding yet other layers of confusion, courts have held that materiality is only evaluated under a reasonably prudent investor standard in the *omissions* context. *See In re Donald J. Trump Casino Securities Litigation – Taj Mahal Litigation*, 7 F.3d 357, 374-77 (3d Cir. 1993) (finding no materiality in the context of real estate investment offering). Similarly, courts have held that offerings containing cautionary language trigger the "bespeaks caution doctrine," *id.* at 371-72, which also requires a reasonable investor standard. *See*, *e.g.*, *Rombach v. Chang*, 355 F.3d 164, 173-74 (2d Cir. 2004). The Ninth Circuit below briefly stated that the doctrine does not apply to criminal fraud, App. 2, but other courts have assumed that it does apply in the criminal context. *See United States v. Morris*, 80 F.3d 1151, 1167 (7th Cir. 1996). While the federal criminal fraud statutes do not require proof of damages or reliance, *see Neder*, 527 U.S. at 24-25, that does not mean they have also abandoned a reasonably prudent investor standard. *See Jamieson*, 427 F.3d at 415-16 ("We do not read *Neder* to indicate that we must change the requirement in this circuit that a mail fraud scheme be credible enough to 'deceive persons of ordinary prudence and comprehension.' ").

In sum, there is significant confusion regarding the meaning of the criminal fraud statutes, which are among the most important weapons in the federal prosecutor's arsenal. "As one future judge put it during his tenure as a prosecutor, these statutes are our Stradivarius, our Colt 45, our Louisville Slugger, our Cuisinart – and our true love." *United States v. Weimert*, 819 F.3d 351, 356 (7th Cir. 2016) (quoting Jed S. Rakoff, *The Federal Mail Fraud Statute (Part I)*, 18 Duq. L. Rev. 771, 771 (1980)). This Court should grant this petition to provide guidance on these important statutes, which have "been invoked to impose criminal penalties upon a staggeringly broad swath of behavior, creating uncertainty in business negotiations and challenges to due process and federalism." *Id.* at 356 (quoting *Sorich v. United States*, 129 S. Ct. 1308, 1308-11 (2009) (Scalia, J., dissenting from denial of certiorari)).

B. This case is an excellent vehicle for review, and the Ninth Circuit erred

This case is an excellent vehicle for resolving this confusion. The government heavily relied on a omissions theory of fraud, while petitioner provided a written memorandum containing repeated warnings and advising that he had conflicts of interest with the investors. Moreover, the jury instructions in this case were extreme, setting forth an extraordinarily broad definition of fraud. The instructions: (1) included an omissions theory of fraud; (2) did not include an objective or reasonable person standard in defining

materiality; (3) did not require a fiduciary relationship between petitioner and the victims; and (4) included the "negligent" victim language.

Under the unprecedented view of criminal fraud conveyed by the jury instructions in this case, a defendant can be incarcerated for up to 20 years if, even without a fiduciary relationship, he fails to disclose a fact that any reasonable investor would have investigated on his own. This is precisely the type of expansive view of federal criminal fraud that has troubled respected jurists as ensnaring a large segment of common, arms-length transactions. *See Svete*, 556 F.3d at 1171 n.6 (Edmonson, C.J., concurring); *Brown*, 79 F.3d at 1560-62. It is therefore not surprising that the instructions were erroneous even under the Restatement's definition of materiality set forth in footnote five in *Neder*.

As mentioned, the Restatement "instructs that a matter is material if: (a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; or (b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it." *Neder*, 527 U.S. at 22 n.5. Thus, the Restatement offers two potential definitions of materiality, and their applicability depends on the circumstances of the case.

First, a matter is always material if it satisfies the reasonable person standard. In other words, the

reasonable person standard will "ordinarily" apply to mail fraud cases. *Svete*, 556 F.3d at 1170 (Edmonson, C.J., concurring). If the government can show that a fact would be important to a reasonable person, it has proved the element in all fraud cases. This definition does not require a representation and includes the "nonexistence" of a fact, demonstrating that it applies to both misrepresentation and omission theories of fraud.

Second, the government can seek to prove materiality by way of an alternative method, but only in certain circumstances. As the alternative definition in the Restatement explains, if a defendant makes a false *representation* and knows or has reason to know that the victim considers that fact important, then materiality has been shown even if a reasonable person would not regard it as important. This definition does not apply to an omissions theory of fraud because it requires a representation. The "seminal" case articulating an "ordinary prudence" requirement, *Silverman v. United States*, 213 F.2d 405, 407 (5th Cir. 1954), has been interpreted as requiring such a standard when the theory of fraud is not based on a misrepresentation. *See Thomas*, 377 F.3d at 242-43.[1]

Even under the Restatement's definition, the jury instructions given in this case were erroneous in

[1] A negligent or unreasonable victim definition could potentially apply to an omissions theory of fraud if the defendant maintained a fiduciary relationship with the victim. *See Brown*, 79 F.3d at 1557. Here, however, the instructions did not require the jury to find such a fiduciary relationship.

multiple respects. Because the government relied on an omissions theory of fraud, only the reasonable person standard in the first Restatement definition was applicable. The materiality instruction given in this case did not include a reasonable person standard, and it was error to instruct the jury that it was immaterial whether only the most negligent would be deceived. At the very least, the instructions should have clarified that the negligent or careless investor standard could only apply to misrepresentations, not omissions. Furthermore, if a negligent investor instruction is given, it must at least require that the defendant know or have reason to know that a particular fact was important to the unreasonable victim. The instructions in this case had no such requirement.

Finally, as to this particular instructional error, the government did not argue below that the error was harmless, thereby waiving such an argument. *See United States v. Rodriguez*, 880 F.3d 1151, 1163-65 (9th Cir. 2018); *see also Burrage v. United States*, 571 U.S. 204, 219 (2014). In any event, because the jury was allowed to convict under an incorrect theory, this Court "cannot conclude that the errors in the jury instructions were 'harmless beyond a reasonable doubt.'" *McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016). This Court should grant review to resolve the confusion and to correct the prejudicial instructional error in this case.

II. The Court should grant this petition to resolve the important question of whether conduct beyond the statute of limitations can be used to increase a defendant's Sentencing Guidelines range.

Relying on its earlier holding in *United States v. Williams*, 217 F.3d 751, 753-54 (9th Cir. 2000), the Ninth Circuit held that the district court did not err in considering time-barred conduct in increasing petitioner's offense level for the amount of loss under the Sentencing Guidelines. *See* U.S.S.G. § 2B1.1(b)(1). All of the circuits to address the issue agree with the Ninth Circuit that time-barred conduct can be used to increase a defendant's guidelines calculations. *See*, *e.g.*, *United States v. Stephens*, 198 F.3d 389, 391 (3d Cir. 1999); *United States v. Matthews*, 116 F.3d 305, 307 (7th Cir. 1997); *United States v. Behr*, 93 F.3d 764, 765-66 (11th Cir. 1996); *United States v. Neighbors*, 23 F.3d 306, 311 (10th Cir. 1994); *United States v. Silkowski*, 32 F.3d 682, 688 (2d Cir. 1994); *United States v. Pierce*, 17 F.3d 146, 150 (6th Cir. 1994); *United States v. Wishnefsky*, 7 F.3d 254, 256-57 (D.C. Cir. 1993); *United States v. Lokey*, 945 F.2d 825, 840 (5th Cir. 1991). The approach taken by the lower courts is inconsistent with this Court's precedent and the Fifth and Sixth Amendments. Accordingly, this Court should grant review on this important sentencing issue to correct the flawed and entrenched view of the lower courts.

"[N]o person shall be prosecuted, tried, or *punished* for any offense, not capital, unless the indictment is found or the information is instituted within five

years next after such offense shall have been committed." 18 U.S.C. § 3282(a) (emphasis added). The purpose of a statute of limitations is to create an "amnesty" and to protect a defendant from "punishment." *See Stogner v. California*, 539 U.S. 607, 611-13 (2003).

In *Kokesh v. S.E.C.*, 137 S. Ct. 1635 (2017), this Court recently held that a government enforcement action for disgorgement is a "penalty" that cannot be imposed for losses beyond the statute of limitations. There, the defendant engaged in a continuing scheme where he fraudulently misappropriated $34.9 million from 1995 to 2009. The government successfully commenced an enforcement action in 2009, and the district court ordered disgorgement for the entire amount of the losses, including $29.9 million which resulted from violations outside the 5-year limitations period. *Id.* at 1641. This Court reversed, holding that disgorgement was a penalty or punishment, *id.* at 1642, and therefore disgorgement could only be ordered for losses within the 5-year limitations period. If disgorgement of losses outside the limitations period is a time-barred penalty, adding prison time under the Sentencing Guidelines for losses outside the limitations period is certainly a time-barred penalty.

This Court has also noted that "Chief Justice Marshall used particularly forceful language in emphasizing the importance of time limits on penalty actions, stating that it 'would be utterly repugnant to the genius of our laws' if actions for penalties could 'be brought at any distance of time.'" *Gabelli v. S.E.C.*, 568 U.S. 442, 452 (2013) (quoting *Adams v. Woods*, 2

Cranch 336, 342 (1805)). Increasing petitioner's sentencing range under the guidelines for time-barred conduct is repugnant to the genius of our laws.

Despite the plain language in § 3282 and these basic principles, the Ninth Circuit relied on 18 U.S.C. § 3661, which provides that a court may consider all information when imposing a sentence, in determining that conduct outside the statute of limitations can be used to increase a defendant's guidelines range. *See Williams*, 217 F.3d at 753-54. Section 3661 is meant to govern the information that a court can consider when determining a sentence *within* a guidelines range, not the information that a court can consider in calculating the range. *See* U.S.S.G. § 1B1.4. The commentary to the guidelines twice notes this distinction. *See* U.S.S.G. § 1B1.4 comment. ("This section distinguishes between factors that determine the applicable guidelines sentencing range (§1B1.3) and information a court may consider in imposing the sentence within that range."); U.S.S.G. § 1B1.3 comment. Background. Nothing in § 3661 or the relevant conduct provision of the guidelines should cause this Court to authorize the consideration of time-barred conduct when calculating the appropriate guidelines range.

Moreover, the lower courts have ignored cases like *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Blakely v. Washington*, 542 U.S. 296, 303 (2004), and *Alleyne v. United States*, 570 U.S. 99 (2013). There is a serious constitutional question as to whether conduct for which a jury would be required to *acquit* under the statute of limitations can be used to increase a

defendant's guidelines range. *See Jones v. United States*, 135 S. Ct. 8 (2014) (Scalia, J., joined by Thomas and Ginsburg, JJ., dissenting from the denial of *certiorari*); *United States v. Brown*, 892 F.3d 385, 408-09 (D.C. Cir. 2018) (Millett, J., concurring); *United States v. Bell*, 808 F.3d 926, 927-32 (D.C. Cir. 2015) (Kavanaugh and Millett, JJ., concurring in the denial of rehearing *en banc*). While petitioner contends that a guidelines increase for time-barred conduct violates the Fifth and Sixth Amendments for reasons similar to those stated in *Jones* and *Bell*, this Court can also avoid the constitutional question by interpreting the guidelines as prohibiting the use of such conduct. *See*, *e.g.*, *Jones v. United States*, 526 U.S. 227, 239 (1999). This interpretation is also consistent with the Rule of Lenity. *See*, *e.g.*, *Castillo v. United States*, 530 U.S. 120, 131 (2000).

Finally, this Court should alternatively hold pursuant to its supervisory powers that time-barred conduct cannot be used to increase a defendant's guidelines calculations. *See United States v. Booker*, 543 U.S. 220, 246-48 (2005). Judge Kavanaugh has endorsed a similar view, both in *Bell*, 808 F.3d at 927-28 (Kavanaugh, J., concurring in the denial of rehearing *en banc*), and more recently in *Brown*. *See Brown*, 892 F.3d at 415 (Kavanaugh, J., dissenting) ("[i]f th[e] system seems unsound – and there are good reasons to be concerned about the use of acquitted conduct at sentencing, both as a matter of appearance and as a matter of fairness – Congress and the Supreme Court may fix it"). As Judge Kavanaugh has noted, only this Court

can correct the flawed path taken by the lower courts. The Court should therefore grant this petition to resolve this important question of sentencing law.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of *certiorari*.

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Respectfully submitted,

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