No. _____

In the

Supreme Court of the United States

EDWARD SHEVTSOV, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

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

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Petition for Writ of Certiorari

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Question Presented

The federal mail, wire, and bank fraud statutes proscribe *material* misrepresentations. The circuits are divided over the standard for proving materiality in federal fraud prosecutions involving a private (as opposed to a government) victim. For private victims, three circuits have held that a misrepresentation is material only if it could influence the decision of the actual decisionmaker to which the misrepresentation was made. In contrast, six circuits 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 made, or instead on its ability to influence a hypothetical "reasonable person".

Parties to the Proceedings

Petitioner is Edward Shevtsov.

Respondent is United States of America.

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The opinion of the Ninth Circuit (App-001) is reported at 775 Fed. Appx. 272, 2019 WL 2269996. The district court's exclusion of expert testimony is at App-011. The proffered expert testimony on materiality is at App-019.

Jurisdiction

The Ninth Circuit issued its decision May 28, 2019. The court denied rehearing October 24, 2019. (App-017 to 018). This Court has jurisdiction under 28 U.S.C. § 1254(1).

Statutory Provisions Involved

The federal mail fraud statute, 18 U.S.C. § 1341, provides, in relevant 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, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, 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, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both.

The federal wire fraud statute, 18 U.S.C. § 1343, provides, in relevant 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.

Introduction

The Government prosecutes thousands of cases every year under the federal mail, wire, and bank fraud statutes. Although a uniform standard is needed to apply these laws, the circuits are divided on a fundamental question: the standard for determining the materiality of a misrepresentation to a private victim of fraud. Materiality is an element of the fraud charge under these statutes.

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 made. That is the holding of *Universal Health Services v. United States ex rel. Escobar*, 136 S. Ct. 1989 (2016). But the federal circuit courts 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 Ninth Circuit's approach (exemplified by the panel's decision here) was to adopt the position analogous to the "reasonable person" standard. (App-003, citing *United States v. Lindsey*, 850 F.3d 1009, 1015-16 (9th Cir. 2017). *Lindsey*, on the one hand, acknowledges the holding of *Escobar* and, using its reasoning, allowed limited evidence of lender behavior (in the form of general industry standards). *Id.* at 1017. But on the other hand *Lindsey* still describes materiality as an objective test, reasoning that materiality measures an objective tendency to influence a decisionmaker, not whether it had actually done so. *Id.* at 1014, 1017. Viewing materiality from that perspective, *Lindsey* held individual lender behavior (unlike a Government's decision-making behavior in an FCA case) was inadmissible because it has no tendency to show whether a statement has a natural tendency to influence a

decisionmaker. In the end, this is a "reasonable person" standard.[1]

Thus, under the Ninth Circuit's approach, if a defendant makes a misrepresentation in a loan application to a private bank, materiality is measured by asking whether it could have influenced a hypothetical reasonable lender. And a jury should convict even if the government agrees that this misrepresentation could not influence the decision of the actual bank that made the loan. The practical effect of this approach is to sanction a defendant going to jail for making a statement that could not influence the actual decisionmaker.

The Ninth Circuit's approach deepens the split between the circuits about the materiality standard in fraud cases involving private victims. The Second, Third, and

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[1] This point is reinforced by the concurring opinion, which holds that a misrepresentation about "core mortgage information" would indisputably be material, regardless of industry standards. (App-008 to 009).

Fifth Circuits apply an "actual decisionmaker" standard no matter if the victim is the Government or a private lender. Yet six circuits (including the Ninth Circuit) apply at least some form of a "reasonable person" standard. 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.

For these reasons, this Court should grant certiorari to resolve this circuit conflict and hold that the same "actual decisionmaker" standard applies in all prosecutions, whether the victim is a public or a private entity.

Statement of Case and Facts

A. Background and the District Court Proceedings

In 2011, the Government charged petitioner and several other individuals with participating in a scheme to defraud private mortgage lenders. The scheme involved (1) seeking mortgage loans based on individuals ("straw"

buyers) paying inflated prices for homes, and then (2) skimming the extra money from escrow accounts to shell accounts to share between co-participants. (PSR ¶ 5).[2]

But these actions took place when the private mortgage lending industry engaged in aggressive lending practices. Many lenders (including First Franklin, Merrill Lynch, and Bank of America involved here) made loans that were almost immediately securitized and sold to private investors at a large profit to the lenders. (16 ER 3451).[3] The goal throughout the industry was to make as many loans as possible, repackage them as an investment instrument, and sell to maximize profit.

To process as many loans as possible, lenders lowered the underwriting standards. While lenders traditionally verified credit scores, employment information, and assets,

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[2] This citation is to a presentence report filed under seal in the Ninth Circuit.

[3] The ER citations are to the excerpts of record filed by petitioner and co-defendants in the Ninth Circuit.

during the relevant time, the industry standard (as shown by the lenders involved here) became to ignore the accuracy of that information on loan applications. (16 ER 3451). The industry practice became to issue "stated income" loans where the borrower only has to report how much they supposedly make and the lender does not verify that information. (16 ER 3453). Lenders instructed underwriters not to verify bank accounts or employment. (*Id*). Lenders approved loans in days, rather than weeks. (*Id*).

At trial, petitioner sought to show that the allegedly false information about income, assets, and employment included by straw buyers in the loan applications was not material because given the lending standards in the industry at the time, these statements could not possibly influence the decision to fund the loans. (App-019 to 020; 16 ER 3415-3418, 3441-3460, 3490-91). Petitioner argued that while reliance is not an element of mail or wire fraud, lender's

actual lack of reliance on the subject statements is evidence that the statements were not material. (*Ibid*).

To support that defense, petitioners sought to present expert testimony about the general practice of the lending industry. The expert was prepared to opine that *the entire lending industry* was "in fact, incentivizing its brokers, account executives, underwriters and the borrowers themselves to obtain loans that the borrowers could not repay." (App-019 to 020; 16 RT 3454, 3490-91.) The lenders (including Bank of America, First Franklin and Merrill Lynch involved here) instructed the underwriters to keep lowering the lending standards and approve virtually anything that came across their desk. (16 RT 3454). When underwriters would reject loan applications, "corporate" often overruled them. (*Id*).

Over petitioner's objection, the district court excluded the proposed expert testimony about lender behavior. The court reasoned the testimony was irrelevant because lack of

victim reliance is not an element of mail and wire fraud. (App-011 to 016).

During trial, the district court allowed the Government to present extensive testimony from individual lenders that certain information on the loan applications, such as (for example) a borrower's income, affected the lender's decision to fund the loan. (6 ER 733-738, 748, 751-52, 756-757, 763, 767-768, 772, 774-775, 803, 808, 810, 826, 833-36, 843-44, 845; 7 ER 873, 879). The defense then requested leave to cross-examine the Government's witness about the lender securitizing and selling the loan within 90 days of funding and, thus, not caring about anything beyond the appraisal value of the property securing the loan. (App-023 to 026). But the district court denied the request, stating that the earlier in limine ruling will stand and the evidence is irrelevant. (App-023 to 026).

In closing argument, the Government extensively relied on that testimony by the lenders to argue that the

statements made in the loan applications were material. (App-029 to 031). The Government emphasized that the applicable standard was whether the statements were "capable of influencing" a decision maker, not whether they were capable of influencing the particular decisionmaker. (*Id*).

The district court instructed the jury that for the purpose of mail and wire fraud, a statement is material so long as it has a natural tendency, or were capable of influencing, a person to part with money or property. (App-027 to 028). The court also refused to give a proposed defense jury instruction referencing industry lending standards during the relevant time. (App-021 to 022).

The jury convicted petitioner on multiple counts of mail and wire fraud. After the district court denied a new trial motion based on excluding the expert testimony about lending industry standards, the district court sentenced petitioner to 96 months in prison.

B. The Ninth Circuit's Decision

On appeal, petitioner argued that the district court wrongly excluded expert testimony about lending industry standards on materiality. The proposed expert testimony would have shown that at the relevant time, lending industry standards allowed regular funding of mortgage loans despite actual knowledge that statements in the loan applications were false. Approval of mortgage loan applications despite actual knowledge they contained false statements is evidence that those statements were not capable of influencing the actual decisionmakers. The district court granted petitioner's motion for release pending completion of the appeal.

The Ninth Circuit rejected the appeal. Two judges held that the district court's exclusion of the expert testimony was correct because the proposed expert testimony was about motives and complicity of individual lenders, not about general lending industry standards. They reasoned that

exclusion of the former evidence was correct because neither lender negligence nor their individual disregard of relevant information is a defense to wire or mail fraud. (App-003, citing *Lindsey*, 850 F.3d at 1015-16).

And while the concurring judge agreed the district court should have allowed petitioner to present the expert testimony, that error was harmless. The judge reasoned that misstatements in the loan were about core mortgage information (assets, income, and whether the borrower intended to live on the property). While the expert was ready to testify that the lenders did not care about the accuracy of this information, the expert did not offer to testify that the lenders were not influenced by core mortgage information, *accurate or false*, in making loan decisions. For example, the expert proposed to testify that a lender would not care if the information that the borrower intended to live on the property was true, the expert was not prepared to say the loan would still be funded if the borrower did not provide

a statement on that issue in the application. (App-008 to 009).

The Ninth Circuit denied the request for rehearing and rehearing en banc. (App-017 to 018).

Reasons for Granting the Petition

This case presents an ideal opportunity for this Court to resolve a conflict between the circuits about whether, in cases involving fraud against private victims, materiality is measure from the standpoint of the actual decision-maker or a hypothetical reasonable decision-maker.

And this issue is material to resolving the appeal. If petitioner had been prosecuted in a circuit that applies the actual decision-maker standard, the proposed expert testimony would have been allowed, and petitioner would have been likely acquitted.

Only this Court can bring much-needed clarity on an issue that affects countless criminal prosecutions every year. For these reasons, this Court should grant review.

A. The Conflict Between the Circuits About the Test for Materiality in Fraud Cases Involving Private Victims

Three circuits—the Second, the Third, and the Fifth—have applied an actual decisionmaker standard in federal fraud prosecutions involving a private victim. In contrast, six circuits—the First, Fourth, Seventh, Ninth, Tenth, and D.C. Circuits—have applied a "reasonable person" standard. The remaining circuits take yet another approach.

1. "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 (2nd Cir. 2007) (emphasis added). *Rigas* reversed a bank fraud conviction, reasoning that the statements at issue were "immaterial," i.e., incapable of influencing *the intended victim*. *Id.* at 234.

Similarly, in *United States v. Rodriguez*, 140 F.3d 163, at page 168 (2nd Cir. 1998), the court reversed bank fraud convictions when there was no evidence adduced at trial that the misrepresentation could have, or did influence a bank's decision to allow the defendant to reach the funds.[4] *Id.* at 168.

And the Third Circuit's view is analogous. In a mail fraud prosecution where the victim was a private building owner, the Third Circuit held that the misstatements 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 (3rd Cir. 2012);

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[4] While the Second Circuit more recently used both the actual decision-maker and a "reasonable person" standard (further showing confusion among circuit courts), the court ultimately held that the misstatements 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 (2nd Cir. 2017).

see also *United States v. Fallon*, 470 F.3d 542 (3rd Cir. 2006) [same in mail and wire fraud prosecution involving private victim].[5]

Plus, the Fifth Circuit also applies the actual decisionmaker standard. As the court acknowledged in *Holmes*, 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).

Hence, in finding misstatements material, *United States v. Curtis*, 635 F.3d 704 (5th Cir. 2011) reasoned that

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[5] Yet, showing the confusion among the circuits on this issue, the Third Circuit's model instructions describes an objective standard. Its Model Criminal Jury Instruction 6.18 1341-1 provides: "The false or fraudulent representation must relate to a material fact or matter. A material fact is one which would reasonably be expected to be of concern to a reasonable and prudent person in relying upon the representation or statement in making a decision."

representatives from each of the lending institutions that funded the straw buyers' loans testified that had they known the statements in the loan documents were false, *they* would not have approved the loans. *Id.* at 719, n. 51; see also *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].[6]

In sum, had petitioner been prosecuted in these jurisdictions, the expert testimony on lending industry standards would have been admitted and the jury would have likely acquitted petitioner of the charges. The issue is outcome determinative here.

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[6] Adding to the confusion, 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).

2. "Reasonable Person" Circuits

The decision below exemplifies the "reasonable person" standard. As discussed earlier, the Ninth Circuit relied on *Lindsey* to exclude the expert testimony about materiality, reasoning that it was only about actions of individual lenders, not a defense to wire or mail fraud. (App-003, citing *Lindsey*, 850 F.3d at 1015-16).

And the concurring opinion exemplifies the confusion about the materiality standard. On the one hand, it tries to apply *Lindsey*'s general lending standards rule. (App-008 to 009). But on the other hand, the opinion finds the error harmless because any statement about "core mortgage information," true or false, is material. (*Id*). This is an objective standard, as it views materiality from the standpoint of a hypothetical lender, not the actual lenders (or lending industry) during the relevant time.

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The Fourth, the Seventh, the Tenth, and the D.C. Circuit have adopted analogous approaches to materiality in fraud cases involving private victims. In *United States v. Raza*, 876 F.3d 604 (4th Cir. 2017), the Fourth Circuit held that the objective standard of materiality applies to fraud cases involving private victims. *Id.* at 617-18. Although *Raza* acknowledged that the materiality test announced by this Court in *Kungys v. United States*, 485 U.S. 759 (1988) might be subjective, that standard did not apply to cases involving private victims because it was governed by the objective materiality test in *Neder v. United States*, 527 U.S. 1 (1999).

Similarly, the Seventh Circuit held, in a bank fraud prosecution involving a private victim 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).

And the Tenth Circuit also 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).

As to the First Circuit, it appears to utilize both formulations. In *United States v. Prieto*, 812 F.3d 6, at page 13 (1st Cir. 2016), the court in a mortgage fraud case defined materiality as requiring proof that the statements "had a natural tendency to influence, or are capable of influencing, *the decision of the decisionmaking body to which they were addressed*." (emphasis added). But it then held that information about income level and plans to use the property "would have a natural tendency" to influence *a* lender's decision because "[w]hy else, after all, did the lender demand the information and [the defendant] take the risk of providing false information." *Id.* at 14.

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Finally, 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 is of importance to a reasonable person in deciding a particular matter or transaction. *United States v. Phillip Morris USA, Inc.*, 566 F.3d 1095, 1122 (D.C. Cir. 2009). There is no need to prove any particular person relied on the statement; the test is only "whether a reasonable person would consider the matter to be of importance regarding the transaction." *Id.*

3. The remaining circuits

The Eleventh Circuit's approach is unusual in that it uses both subject and objective analysis. In *United States v. Svete*, 556 F.3d 1157, at pages 1164 to 1165 (11th Cir. 2009) (en banc), the court held that materiality could be shown by evidence of objective reliability of a misrepresentation, but such proof is unnecessary if the defendant knows or should know the victim is likely to view the statement as important. *Id.*

This test does not address the situation prevalent in mortgage fraud cases in which, because of the unique practices of the lending industry, the victim is not naïve or gullible, but is sophisticated and is intentionally disregarding (or encouraging) false statements for its own gain.

And the Sixth Circuit applies both the actual decision maker and the reasonable decisionmaker tests. Compare *United States v. Daniel*, 329 F.3d 480, 487 (6th Cir. 2003) [applying a hypothetical "reasonable person" standard] with *United States v. McAuliffe*, 490 F.3d 526, 531 (6th Cir. 2007) [applying the actual decisionmaker test].

Finally, the Eighth Circuit has held that the objective materiality test tracked the "actual decisionmaker" test, or substantially similar. *United States v. Heppner*, 519 F.3d 744, 749 (8th Cir. 2008); *Preston v. United States*, 312 F.3d 959, 961, n. 3 (8th Cir. 2002).

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B. The Conflict Between the Ninth Circuit's Approached Used Here and This Court's Precedent on Materiality

The Ninth Circuit's adopting *Lindsey*, as well as the holdings of the circuits adopting a "reasonable person" materiality test—is inconsistent with this Court's precedent (including the most recent decision in *Escobar*). Instead, there is a strong argument under that precedent in support of the "the actual decisionmaker" approach, no matter if the victim is a private person or a Government entity. Under that standard, which examines the statement's ability to influence a particular decisionmaker's decision (whether that decisionmaker is a private person or the Government), the evidence petitioner offered at trial on materiality is admissible and would have reasonably likely led to an acquittal.

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1. The "reasonable decisionmaker" approach is inconsistent with *Escobar*

Escobar shows that materiality of a statement depends on the statement's ability to affect the victim. *Escobar*, 136 S. Ct. at 2003. As *Escobar* held, on the one hand, "if the Government pays a particular claim in full despite the actual knowledge that certain requirements were violated, that is very strong evidence that those statements are not material." *Id.* at 2002. 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.*

And while *Escobar* arose in the context of the False Claims Act, the court emphasized that "*under any understanding of the concept*, materiality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Escobar*, 136 S. Ct. at 2002, quoting 26

R. Lord, Williston on Contracts § 69:12, p. 549 (4th ed. 2003). Given that broad formulation of the materiality test that does not depend on the identity of the victim or the nature of the case, the differentiation in materiality test based on whether the victim is public or private is not tenable.

And not only is the "reasonable test" inconsistent with *Escobar*, but so is *Lindsey's* gloss on it—allowing evidence of lending industry standards, but not evidence of individual lender behavior. First, the distinction *Lindsey* draws with *Escobar* about the Government being *the entire market* in federal government contracts is not tenable. *Lindsey*, 850 F.3d at 1017-18. Far from being a monolith, federal Government has fifteen executive departments. (https://en.wikipedia.org/wiki/United_States_federal_executive_departments#Current_departments) (last downloaded 01/15/20). One can assume that all the departments use Government contractors in some aspect of their work. But nothing in *Lindsey* shows the Government employs a

uniform standard in evaluating claims. Nor is there anything in *Escobar* about the Government addressing all claims under a uniform standard or by a single decision-maker.

Thus, there is a substantial argument that the gloss *Lindsey* put on *Escobar*'s straightforward holding about allowing evidence of past behavior by the decisionmaker on materiality contradicts *Escobar*'s holding and reasoning.

Instead, the rule advocated by the defendant in *Lindsey*—that "*Escobar* directs that factfinders in a mortgage fraud prosecution be free to consider any evidence of lender behavior, including how an individual lender treats a particular false statement on its loan applications" –is supported by *Escobar*'s holding and reasoning.

And the distinction *Lindsey* drew between general lending standards and individual lending behavior improperly infringes on the jury's fact-finding role. The standards for general lending industry are exemplified by

behavior of individual lenders. Whether a particular lender's approach to misstatements tracks general industry standards or an outlier that has no probative value on whether a statement has the natural tendency to influence is a question for the jury.

Lindsey recognized the above and acknowledged a possible alternative rule that would allow the jury to consider evidence of past behavior of individual lenders, with a cautionary instruction that this evidence is to be considered only about materiality, not lack of reliance. *Lindsey*, 850 F.3d at 1017-18. *Lindsey* chose not to adopt this rule because (1) individual lender's standards are poor evidence of a statement's intrinsic ability to affect decision-making, and (2) a risk that the jury would consider evidence for improper purpose despite the cautionary instruction. *Id.* at 1018.

Yet this conflicts with *Escobar*, which held that about materiality, both sides could introduce evidence of past

behavior by the decisionmaker, either to prove or disprove this element. *Escobar* had no concerns about the juries' ability to properly consider such evidence (as presented by both sides). Whether the alternative rule proposed by defendants in *Lindsey* better tracks this Court's decision in *Escobar* is another reason to grant review.

2. The "reasonable decisionmaker standard contradicts *Neder*

The "'reasonable decisionmaker" approach is also inconsistent with *Neder*, 527 U.S. 1. One of the issues in *Neder* is whether materiality is an element of a "scheme to defraud" under mail, wire, and bank fraud statutes. 527 U.S. at 20. *Neder* held the statutory meaning of the term "fraud" includes the common law requirement of materiality. *Id.* at 23-25. *Neder* rejected the Government's proposed reading of the fraud statutes, which would have made them applicable "so long as the defendant *intended* to deceive the victim, even if the particular means chosen turn out to be

immaterial, i.e., incapable of influencing the intended victim." *Id.* at 23.

The "reasonable person" standard, which the decision below exemplifies, is inconsistent with *Neder*. Under this approach to materiality, a statement is material even if it is actually incapable of influencing the lenders in question so long as it is material from the view of a hypothetical reasonable lender. And under this approach, the defendant in a fraud prosecution cannot present evidence of lender behavior, which would tend to show that a particular statement was incapable of influencing the intended victim-lender.

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

If the conflict about the materiality standard in cases involving private victims is not resolved, it will continue to impact countless future federal fraud prosecutions. For example, in 2018, there were 6,620 federal criminal fraud

cases in the United States, which is almost 10 percent of the combined caseload for the federal courts. (https://www.ussc.gov/sites/default/files/pdf/research-and-publications/research-publications/2019/FY18_Overview_Federal_Criminal_Cases.pdf (last downloaded 01/15/2020)).

The Ninth Circuit's continuing use of the "reasonable person" test for materiality subjects criminal defendants in fraud cases involving private victims to a fraud conviction even when the evidence shows that the misrepresentation was immaterial to the intended victim-lender. This effectively reads materiality out of the statute and adopts the Government's approach to materiality rejected in *Neder*—applying the fraud statute so long as the defendant intends to deceive even if the statement cannot influence the intended victim. *Neder*, 527 U.S. at 23.

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Plus, continuing use of the "reasonable person" test for materiality could also substantially disrupt future fraud cases. In prosecutions involving both public and private victims, the Government would 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. But for public victims, the Government will have to present evidence about the actual decisionmaker.

For example, mortgage fraud cases often include misrepresentations made to private victims (like potential buyers or investors) and public entities offering homebuyers federal assistance (like the Federal Housing Authority). 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 decide materiality based on a "reasonable person" standard for private victims; but what was material for the

government agency would depend on how the actual decisionmaker viewed that misrepresentation.

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

D. This Case Is an Ideal Vehicle to Resolve the Question Presented

Though the Ninth Circuit decided the appeal on the issues of insufficient proffer of proposed expert testimony (majority opinion) and harmless error, that is not an obstacle to the Court's review.

As to the proffer, that issue was resolved based on the supposed distinction between general lending standards and behavior of individual lenders. (App-003 to 004). But as noted earlier, that is a distinction without a difference because it is up to a jury to decide whether this evidence exemplifies industry standards or is an outlier that has no

tendency to show the statement's capability to influence the subject lender's decision.

And in any event, the expert disclosure addressed the proposed testimony in general industry-wide terms:

- Professor Partnoy will testify why the falsified documents alleged to have been used here are not material;

- Partnoy will explain the conduct of the landing institutions as well as securitization process and what happened in the financial market during the timeframe outlined in the indictment;

- Partnoy will explain why the lending institutions would accept loans that were falsified;

- Partnoy will opine that the alleged victims in this indictment (the lending institutions) were not defrauded;

- Partnoy will opine that, in fact, the lending institutions encouraged this conduct and allowed it to occur;

- The professor will opine that without the complicity of the lending institutions, this type of conduct would not have been able to occur;

- Partnoy will also discuss the profit incentive that the top executives had at this time and how they reaped huge profits from accepting loans that were falsified;

- Partnoy will discuss the fact that the lending institutions charged premium rates for poor credit loans which increased the institutions profits and the executives' income.

(App-019 to 020; 16 ER 3492; see also 16 ER 3431-3432).

And the harmless error analysis in the concurring judge's opinion was wrong. First, it was based on "reasonable person" view of materiality. The concurring judge viewed the error as harmless because the misstatements were about "core mortgage information" and while the expert was ready to opine the lenders did not care if the information was true, the expert was not ready to say the loans would be funded without that core information (whether true or false). (App-008 to 009). As explained earlier, this is an application of the "reasonable person" test of materiality, which is contrary to this Court's precedent.

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Plus, under the correct reading of the law and record, the Government would not be able to discharge its high burden to show the erroneous exclusion of Professor Partnoy's testimony was harmless beyond reasonable doubt. *United States v. Haischer*, 780 F.3d 1277, 1284 (9th Cir. 2015), citing *United States v. Leal-Del-Carmen*, 697 F.3d 964, 975 (9th Cir. 2012).

Although not every evidentiary error violates the Constitution, "erroneous exclusion of important evidence will often rise to the level of a constitutional violation." *Haischer,* 708 F.3d at 1284. Such a violation takes place when the district court excludes the main piece of evidence supporting the primary line of defense to a critical element of the Government's case. *Id.*

Here, too, as reflected in the detailed proffer and the corresponding jury instruction requests on materiality, materiality was a critical issue for the defense. And the proposed testimony of Professor Partnoy was indispensable

evidence supporting the defense theory that false statements on the mortgage applications were not capable of influencing the lenders in question. Finally, materiality is a prima facie element of the Government's mail fraud and wire fraud case.

The concurring opinion does not address this standard or the high burden the Government faces in trying to show harmlessness of this constitutional error. Nor does the opinion attempt to apply any of the relevant factors, like the nature of the defense or the importance of the excluded evidence to it. (App-008 to 009).

Instead, the concurring opinion rests on a finding of "overwhelming" evidence that the defendants lied in their mortgage applications. (App-008 to 009). But the critical issue is not just whether there were false statements in the applications, but whether those statements were *material*—capable of affecting actual or likely behavior of lenders. On that critical issue, the record is missing key information about what the lending industry standards were at the

relevant time. Evidence that the Government paid certain claims despite actually knowing about a violation of statutory, regulatory, or contractual condition is "strong evidence that the requirements are not material." *Escobar*, 136 S. Ct. at 2003.

Here, too, the excluded evidence would have been shown that false statements on the mortgage application were not material to lenders' decision to fund the loans. Professor Partnoy would have testified that the lending industry standards at the time were such that the lenders did not care about the truth of core mortgage statements in an application and, instead, facilitated submission and approval of such applications. (App-008 to 009; 16 ER 3454, 3492).

His testimony would have served as a counter-point to the Government's portrayal of the lenders' behavior as a hypothetical reasonable lender. And if the jury had been aware of it, it is not a given that the jury would have

inferred that the evidence of materiality is "overwhelming." "By evaluating the strength of only one party's evidence, no logical conclusion can be reached regarding the strength of contrary evidence offered by the other side to rebut or cast doubt." *Holmes v. South Carolina*, 547 U.S. 319, 331 (2006).

Conclusion

For these reasons, this Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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