No. 19-7361

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

Reply Brief for the Petitioner

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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".

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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 often prosecuted offenses in the United States Code. The government does not dispute that the materiality element is vital and underlies between 6,000 and 7,000 federal fraud prosecutions every year.

On the merits of the question presented, the Government misreads this Court's and circuit court precedent by trying to portray it as consistently describing materiality as either an objective or a subjective standard. And the Government does not dispute that under this expansive view of the federal fraud statutes, a defendant could be imprisoned even if everyone agrees the statement in question was immaterial to the actual victim.

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The Government's "either / or" approach also conflicts with the decision below, as well as subsequent Ninth Circuit decisions describing the circuit's view of materiality as an objective test.

The Government's position is also unsupported by this Court's decisions in *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989 (2016) or *Neder v. United States*, 527 U.S. 1 (1999).

Nor does the Government's limited discussion of circuit precedent persuasively addresses petitioner's argument about a deep circuit split about the nature of the materiality requirement or whether differing materiality tests apply based on the nature of the decision-maker (Government vs. private party).

Finally, the Government's attempt to describe this case as not a suitable vehicle fails to address the substance of petitioner's argument that grounds on which the Ninth

Circuit rejected this appeal are not obstacles to review. (Petition for a Writ of Certiorari ("Pet.") at 33-39).

Argument

I.

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

As discussed in the petition, there is a deep circuit conflict about whether to judge materiality from the actual decisionmaker's perspective (subjective standard) or from that of a reasonable decision-maker (objective standard). Petition for Writ of Certiorari ("Pet.") at 15-23. If petitioner had been prosecuted in the Second, the Third, or the Fifth Circuits, the excluded expert testimony on materiality would have been admissible and the jury would have likely acquitted him.

The Government's attempt to describe these differing approaches as a single consistent one cannot withstand reasonable scrutiny. As explained in the petition, the

Second, the Third, and the Fifth Circuits apply a subjective materiality standard.

The Government's attempt to describe the Second Circuit's view as not subjective is not apt. Contrary to the Government's reading of *United States v. Rigas*, 490 F.3d 208 (2d Cir. 2007), that court held that a misrepresentation was not material because the prosecution failed to prove it "could influence the bank's decisions." *Id.* at 231-32. *Rigas* focused on "the degree to which a misrepresentation would be capable of influencing the decision of the [decision-making body]." *Id* at 235. A fraud conviction cannot stand if a statement was "immaterial, *i.e.*, incapable of influencing *the intended victim*." *Id.* at 234, emphasis added. So *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.

Similarly, the Government is mistaken in trying to compare the facts of *United States v. Rodriguez*, 140 F.3d

163 (2d Cir. 1998) to this case. The relevance of *Rodriguez* is that it is another example of a 2nd Circuit case applying a subjective materiality standard to find the evidence insufficient to support a bank fraud conviction. Pet. at 16.

And *United States v. Weaver*, 860 F.3d 90 (2d Cir. 2017) reinforces the level of confusion in the circuit courts because *Weaver*, citing *Universal Health Services, Inc.*, appears to conflate the "reasonable person" and the "actual decisionmaker" standards. (*Id.* at 95, 96). Bottom line – the Second Circuit is one of the three circuits that views the materiality as from the "actual decisionmaker" perspective.

The Government's discussion of the Third Circuit and Fifth Circuit precedent – the two other circuits to apply the subjective standard - is similarly inaccurate. Opp. at 23. In *United States v. Wright*, 665 F.3d 560, 575 (3d Cir. 2012), the Third Circuit held that the misstatements were material because they "might have changed the building owner's mind about the building's value." Similarly, in *United States v.*

Holmes, 406 F.3d 337, 355, n. 27 (5th Cir. 2005), the court held that while

one formulation of materiality may involve a "reasonable man," in the bank fraud context, a statement is material if it has a natural tendency to influence or was capable of influencing the decision of the lending institution

At bottom, the Third and the Fifth Circuits, just like the Second Circuit, apply the subjective "actual decisionmaker" standard. And the Government does not appear to contest this premise. (Opp. at 23).

The Government's description of the approaches to the materiality issue by the remaining circuits is also inaccurate. Though the Government quibbles with the petition's description of the Sixth Circuit's approach (Opp. at 25-26), in *United States v. McAuliffe*, 490 F.3d 526 (6th Cir. 2007), the court applied the actual-decision maker standard. ["A misrepresentation is material if it has a natural tendency to influence, or is capable of influencing, the

decision of the decision-making body to which it was addressed"]. Under that standard, *McAuliffe* held that the indictment sufficiently alleged that the defendant's statement had a tendency to influence that particular decisionmaker. *Id.* at 532. Yet in an earlier decision – *United States v. Daniel*, 329 F.3d 480, 486–87 (6th Cir. 2003) – the Sixth Circuit had used a "reasonable decisionmaker" standard. The inconsistency in application of the standard in that Circuit is more evidence of circuit split and the need for the Court to grant review to resolve it.

The Government is also mistaken in claiming that materiality can be satisfied under either objective or subjective standard. Opp. at 15-16, citing *Neder v. United States*, 527 U.S. 1, 22 (1999). But that footnote in *Neder* merely summarized a party's argument.[1] *United States v. Svete*, 556 F.3d 1157, 1172 (11th Cir. 2009) (en banc) (Tjoflat,

[1] We will address that argument in more detail in the next section of this reply brief.

J., specially concurring) [footnote in *Neder* was "merely a regurgitation of a party's argument"]. It was not an adoption or endorsement of the objective materiality standard or any disjunctive test that includes an objective component. If anything, *Neder* and (especially) *Universal Health Services, Inc.*, support the opposite view – that materiality is a subjective standard that looks to the effect of the alleged misrepresentation on the actual decisionmaker. *Universal Health Services, Inc.*, 136 S. Ct. at 2022; *Neder*, 527 U.S. at 23.

Plus, the subjective standard used by the Second, the Third, and the Fifth Circuit is in sharp conflict with those circuits applying materiality from the objective, "reasonable decisionmaker" perspective. Pet. 18-22 [describing the views of the Fourths, the Seventh, the Ninth, the Tenth, and the D.C. Circuit's views on the matter]. Indeed, the Ninth Circuit has recently described its materiality standard – the very same standard applied by the court below – as

objective. *Shin v. United States*, 782 F. App'x 595, 596–97 (9th Cir. 2019), citing *Universal Health Services, Inc.*, 136 S. Ct. at 2002-04, n. 6 and *United States v. Lindsey*, 850 F.3d at 1013-14. And the Fourth Circuit has recently held that objective standard of materiality applies to fraud cases involving private victims. *United States v. Raza*, 876 F.3d 604, 617–18 (4th Cir. 2017).

At bottom, there is a deep circuit split about what standard of materiality applies in fraud prosecutions, and whether that standard varies depending on the nature of the victim. And if some circuits – like the Sixth – have taken conflicting positions on the issue – this only underscores the need for this Court's review and clarification of the materiality standard.

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II.

There is a Conflict Between the Ninth Circuit's Objective Materiality Standard and This Court's Precedent on Materiality

As discussed in the petition, this Court should also grant review because the opinion of the Ninth Circuit – an example of the "reasonable decisionmaker" approach to materiality – conflicts with *Universal Health Services, Inc.* and *Neder*. Pet. at 24-30. And the Ninth Circuit's gloss on the "reasonable decisionmaker" standard – allowing evidence of lending industry standards, but not evidence of individual lender behavior – contradicts *Universal Health Services, Inc.* Pet at 26-29.

The Government's proposed reading of *Universal Health Services, Inc.,* as establishing a disjunctive standard is not tenable. Opp. at 17-18. *Universal Health Services, Inc.,* held 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." *Universal Health Services, Inc.*, 136 S. Ct. at 2022 (emphasis added).

Universal Health Services, Inc.'s citation of the tort treatises describing a disjunctive standard was not an adoption of those standards. *Universal Health Services, Inc.*, 136 S. Ct. at 2022. This much is clear from *Universal Health Services, Inc.*'s holding that evidence of the actual decisionmaker's behavior in a particular case can lead to a finding of immateriality:

> [I]f 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.

Universal Health Services, Inc., 136 S. Ct. at 2003.

Thus, the Government's position that an objective "reasonable person" or a disjunctive standard is somehow consistent with *Universal Health Services, Inc.,* is meritless. It cannot be reconciled even with circuit precedent adopting the "reasonable person" person test. Compare *Lindsey*, 850 F.3d at 1016 [*Escobar* "suggests" that the defendants be

allowed to probe lender behavior to some extent]; *Raza*, 876 F.3d at 621 [recognizing *Universal Health Services, Inc's* altered the materiality standard, but only for civil fraud actions involving government decision-makers]. While these decisions misread *Universal Health Services, Inc.* in their own ways and that shows the need for review, but they also show that the Government's creative reading of *Universal Health Services, Inc.* is without foundation.

Similarly, the Government is mistaken in arguing that its proposed disjunctive standard is supported by *Neder*. Opp. at 18-19. In holding that criminal fraud requires proof of materiality of misrepresentation, *Neder* held that the common law meaning of materiality applied. *Neder*, 527 U.S. at 23. *Neder* also 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."

The above alone counsels against reading *Neder* as supporting a "reasonable person" standard or a disjunctive standard that includes a "reasonable person" standard. And the Government's reading of *Neder* is even more dubious when one considers that in *Universal Health Services, Inc.,* (a later decision), this Court held that under any understanding of materiality (including common law meaning), "it looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation. *Universal Health Services, Inc.*, 136 S. Ct. at 2002.

In sum, there is (at minimum), a significant tension between the "reasonable decisionmaker" line of circuit precedent and this Court's precedent. That tension shows the need for this Court's review.

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Conclusion

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

Respectfully submitted,

DATE: May 6, 2020

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