No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

NADIA KUZMENKO, PETITIONER

vs.

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 WRIT OF CERTIORARI

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QUESTION PRESENTED

Materiality is one of the essential elements of mail and wire fraud. *Neder v. United States*, 527 U.S. 1, 25 (1999). A false statement is "material" if it has "a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed." *United States v. Gaudin*, 515 U.S. 506, 509 (1995); *Neder*, 527 U.S. at 16. Materiality "looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Universal Health Services, Inc. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2003 (2016) ("*Escobar*").

Here, the Ninth Circuit refused to allow evidence of the behavior of decisionmaking lenders based on *United States v. Lindsey*, 850 F.3d 1009, 1012 (9th Cir. 2017). *Lindsey* was predicated on the Circuit's application of an objective standard to materiality determinations. The circuits are split on which standard applies.

The question presented is:

In mail and wire fraud cases, is materiality based on the subjective standard in *Gaudin* and *Escobar* or the objective standard in *Lindsey*?

PARTIES TO THE PROCEEDING

Petitioner, Nadia Kuzmenko, is an individual. The Respondent is the United States of America.

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NADIA KUZMENKO petitions this Court for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

On May 28, 2019, the Ninth Circuit Court of Appeals issued a Memorandum Opinion in which it affirmed Petitioner's Conviction and Sentence. (Appendix A.)

* * *

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The judgment of the Ninth Circuit Court of Appeals is dated May 28, 2019. (Appendix A.) Petitioner timely filed a Petition for Rehearing and Suggestion for Rehearing En Banc that was denied on October 24, 2019. (Appendix D.) Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. CONST. amend. V

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . .

U.S. CONST. amend. VI

> 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.

* * *

STATEMENT OF THE CASE

Jurisdiction of the Court Below

The district court had jurisdiction pursuant to 18 U.S.C. § 3231. The Court of Appeals had jurisdiction pursuant to 28 U.S.C. § 1291.

Background and District Court Proceedings

This case involves mail and wire fraud in the procurement of residential loans during the national lending frenzy of the mid-2000s. This case is related to several identically charged cases in the Eastern District of California. Petitioner and others were indicted for acquiring properties in which some of the participants made misrepresentations on loan applications.

The lenders participated in and encouraged the scheme knowing most of the representations on residential loan applications were false. Over 3,000,000 borrowers nationwide participated in similar borrowing schemes where they provided false information on loan applications. The lending industry referred to these as "liar loans" and fully expected the borrowers to lie in order to get the loans which the lenders then securitized and passed on to investors. The lenders made hundreds of millions of dollars off these loans and were not indicted

for their participation in the fraud. Instead, the government chose to cast them as "victims."

The issue in these cases was whether defendants' false representations in the loan applications were material to these "victim" lenders. Because of the lending situation, Petitioner and the defendants in each of the related cases proffered expert testimony on whether the misrepresentations were material. Petitioner asserted the lenders in this case along with other subprime lenders did not care if the answers on loan application questions were false.

Defendants sent a notice of expert testimony as follows:

> … Professor Partnoy will testify why the falsified documents alleged to have been used in this case are not material. Professor Partnoy will explain the conduct of the lending institutions as well as the securitization process and what happened in the financial market during the time frame outlined in the indictment. Further, he will explain why the lending institutions would accept loans that were clearly falsified. He will opine that the alleged victims in this indictment (the lending intuitions) were not defrauded. He will opine that, in fact, the lending institutions encouraged this conduct and allowed it to occur. He will opine that without the complicity of the lending institutions this type of conduct would not have been able to occur. He will further discuss the profit incentive that the top executives had at this time and how they reaped huge profits from accepting loans that were clearly falsified. He will discuss the fact that the lending institutions charged premium rates for poor credit loans which increased the institutions profits and the executives' income.

(ER 3492.)

The government filed several in limine motions to prevent Petitioner from presenting this evidence because it claimed the evidence was irrelevant. (ER 3478-3491, 3492-3505.)

The district court agreed and held that the testimony was "not relevant to the objective standard of materiality developed by higher courts." (ER 694, see also, ER 691-692.)

The case went to trial. The jury found Petitioner, and the other defendants in the related mail and wire fraud cases, guilty. ER 610. In a Judgment entered on October 27, 2015, Petitioner was sentenced to 96 months in prison. (Appendix E.)

Decision Below

Petitioner appealed. She argued that materiality is one of the essential elements of mail and wire fraud. *Neder v. United States*, 527 U.S. 1, 25 (1999). A false statement 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." *United States v. Gaudin*, 515 U.S. 506, 509 (1995); *Neder*, 527 U.S. at 16. Materiality "looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Universal Health Services, Inc. v.*

United States ex rel. Escobar, 136 S. Ct. 1989, 2003 (2016) ("*Escobar*"). She argued that not allowing expert testimony on the materiality element deprived her of her right to present a defense under the Due Process and Confrontation clauses of the Constitution.

The case was argued before the same panel with two other cases arising out of the same series of transactions and raising the identical the materiality expert witness issue. In this case, the panel affirmed the district court's ruling and held that "complicity and motives of the particular victim lenders" were irrelevant. (Appendix A at 3-4.) In *United States v. Markevich*, 2:11-CR-490 JAM, Ninth Circuit Case No. 15-10457, the panel held "Under *Lindsey* a defendant cannot offer expert testimony on a specific lender's behavior to disprove the materiality of a defendant's false statements." (Appendix B at 3.) In *United States v. Vera Kuzmenko*, et al., 2:11-CR-210-JAM, Ninth Circuit Case No. 16-10129 the panel held "evidence of individual lender behavior, including evidence of lender negligence and intentional disregard of relevant information, is not admissible as a defense to mortgage fraud." *Id.* at 1019." (Appendix C at 2-3.)

In all of the decisions, the panel relied on *United States v. Lindsey*, 850 F.3d 1009 (9th Cir. 2017) ("*Lindsey II"*) which held "individual lender behavior is not admissible [to disprove materiality]." *Id*. at 2012. *Lindsey II* directly contravenes this Court's holding in *Escobar* that materiality "looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Escobar*, 136 S. Ct. at 2003.

REASONS FOR GRANTING THE WRIT

I.

The Ninth Circuit Directly Contradicted this Court's Holding in *Escobar* that a Decisionmaker's Behavior Is Relevant to Determine Whether a False Statements Is Material.

The defendants were indicted for making misrepresentations about the income and property ownership in the loan applicants. These loans were known by the lenders that promoted them as "income stated" loans or "liar loans." *See e.g*., ER 193-197. The defendants' principle defense was their misrepresentations were not material to the lenders making these loans.

As mentioned above, the Ninth Circuit relied on *Lindsey II* to hold that, contrary to the statement in *Escobar*, lender behavior was inadmissible in determining whether a statement was material. To

understand *Lindsey II*, it is important to understand that the Ninth Circuit now uses an "objective test" to evaluate materiality. The notion that materiality is based on an objective standard started with an incomplete and sloppy reading of *United States v. Peterson*, 538 F.3d 1064, 1072 (9th Cir. 2008). Not only does *Peterson* not call for materiality to be based on an objective standard, it specifically reaffirms the subjective test from *Gaudin*. *Id*. at 1072-1073. *Peterson* made it clear a jury is required to determine if a "false statement could have actually resulted in a change in position of the agency." *Id*. at 1072-1073.

The issue in *Peterson* was whether a materiality instruction complied with the *Gaudin* materiality definition. At the time, the Ninth Circuit Manual of Model Criminal Jury Instructions (2003), No. 8.66 (2003), provided that that "[a] a statement is material if it could have influenced an agent's decision or activities." *Peterson*, 538 F.3d at 1070.

The defendant complained the instruction should have used the exact language from *Gaudin* that "[t]he statement must [be] capable of influencing the decision of the decisionmaking body to which was addressed." *Id*. at 1071. The defendant said the instruction was

erroneous for two reasons. First, it argued "could have" in the model instruction was not the same as "capable" in *Gaudin*. *Id*. at 1072. Second, it argued the inclusion of the word "activities" meant a statement could be deemed material even if it was completely incapable of influencing the decision the agency was trying to make. *Id*. at 1072-73. Because the two objections were not raised at trial, the court performed a plain error analysis. *Id*. at 1071-1072.

The *Peterson* court prefaced its plain error analysis by stating, "We hold that although it would be preferable for district courts to use the definition of materiality approved by the Supreme Court in *Gaudin*, in this case, the use of the Ninth Circuit Model Jury Instruction was not plain error." *Id*. at 1071. This is the actual holding of *Peterson*, but it is never quoted in opinions discussing *Peterson* and materiality. Instead, the Ninth Circuit decisions rely on only the first half of the two part plain error analysis.

First, the plain error analysis discussed whether substituting "could have" for "capable" changed the *Gaudin* materiality standard. As to this issue, the court reasoned:

> The difference between "could have influenced" and "capable of influencing," is sufficiently nebulous that our sister circuits have sometimes used the "could have" language in post-*Gaudin* opinions. Furthermore, "capable

> of influencing" is an objective test, which looks at "the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end." *United States v. Facchini*, 832 F.2d 1159, 1162 (9th Cir.1987); *see also Kungys*, 485 U.S. at 771, 108 S. Ct. 1537 (equating "predictably capable of affecting" with "ha[ving] a natural tendency to affect").

Id. at 1071 (emphasis added). *Lindsey II* relied on the underlined language three separate times to emphasize its assertion that materiality is based on an objective standard. *Lindsey II*, 850 F.3d at 1014, 1015, 1016.

Apparently, the *Lindsey II* court saw the words "objective test" and stopped reading. It clearly did not read the next section of *Peterson* dealing with the second issue regarding the addition of the word "activities." The court analyzed the defendant's second objection as follows:

> Defendants' second argument regarding the given jury instruction turns on the inclusion of the word "activities." Here, they argue that a statement could be deemed material even if it was completely incapable of influencing a decision the agency was trying to make. This argument fails because the plain language of the given instruction does not permit a finding of materiality based solely on the utterance of a false statement. Rather, under the given instruction, the jury was required to find that the false statement could have actually resulted in a change in position by the agency. Again, this is "substantially similar" to the *Gaudin* instruction.

Id. at 1072-1073 (emphasis added). When it upheld the model instruction, *Peterson* confirmed, the behavior of the decisionmaker is relevant to a materiality determination because under the model instruction "a jury was required to find that the false statement could have actually resulted in a change of position by the agency." *Ibid*. Without using the precise phrase "subjective test," *Peterson* confirmed materiality is indeed based on subjective factors.

A few years after *Peterson*, the Ninth Circuit model Jury Instructions were amended. In the Ninth Circuit Manuel of Model Criminal Jury Instructions (2010), 8.121 [Mail Fraud] and 8.124 [Wire Fraud] now state that "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." The comment states the new instruction is based on *Peterson*. The instruction relied on the same erroneous and incomplete reading of *Peterson* employed by *Lindsey II*.

As discussed above, the clear directive from *Peterson* was that the prefered model jury instruction would repeat the *Gaudin* standard of "influencing the decisionmaking body to which it was addressed." *Id*. at 1071. It is truly amazing how the objective standard in the Ninth

Circuit evolved out of a misreading of it own precedent. The erroneous and incomplete reading of *Peterson* turned materiality on its head in the Ninth Circuit.

It is also important to the understanding of *Lindsey II* is to know this was not the panel's first attempt at ruling on the materiality of answers to questions on loan applications. It issued an opinion shortly before *Escobar*. *See United States v. Lindsey*, 827 F.3d 865, 871 (9th Cir. 2016), *withdrawn*, 854 F.3d 1047 (2017) ("*Lindsey I*"). As in its later decision, *Lindsey I* cut and pasted the language from the first part of the *Peterson* plain error analysis referring to the "objective test." *Lindsey I. Id*. at, 870-871 Therefore because it believed materiality was based on an objective test, *Lindsey I* held that "as a matter of law, that when a lender requests specific information in its loan applications, false responses to those specific requests are objectively material for the purposes of proving fraud[1]." *Lindsey I*, 827 F.3d. at 871 (emphasis added).

[1] *Lindsey I* based its holding on First Circuit authorities holding that because loan applications "specifically sought information regarding the purchaser's income, assets, and intent to reside in the property, all of which were designed to assess the borrower's creditworthiness" the answers were "capable of influencing its decisions" and therefore they were material. *United States. v. Appolon*, 715 F.3d 362, 368 (1st Cir. 2013), *see also United States v. Prieto*, 812 F.3d 6, 14 (1st Cir. 2016).

It is apparent, the *Lindsey I* panel did not read the second part of the *Peterson* plain error analysis where the court upheld the disputed instruction because the instruction did not "permit a finding of materiality based solely on the utterance of a false statement." *Peterson*, 538 F.3d at 1072-1073. If the *Lindsey I* panel read that part of the opinion it would have known that it could not hold that a false statement, whether on a loan or otherwise, is never material as a matter of law. Instead, *Peterson* reaffirmed that a jury is "required to find that the false statement could have actually resulted in a change of position by the agency." *Id*. at 1073.

Before *Lindsey I* was final, this Court issued its opinion in *Escobar*. In *Escobar*, this Court confirmed materiality "looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Escobar,* 136 S. Ct. at 2003. In evaluating the materiality of conditions for payment under the False Claims Act, this Court explained, "if the Government pays a particular claim in full despite its actual knowledge that certain requirements were violated, that is very strong evidence that those requirements are not material." *Id*. 2003-04. By analogy, if a lender regularly lends money despite

actual knowledge that the information in the loan application is false, that is strong evidence the false representation was not material. After *Escobar*, this Court withdrew *Lindsey I* and abandoned its bright line holding that that false statements in loan applications are material as a matter of law.

Lindsey II could have easily reiterated this Court's holding and allowed evidence of "the likely or actual behavior of the recipient of the alleged misrepresentation" if the recipient knew the answer was false. *Escobar*, 136 S. Ct. at 2003. Instead, *Lindsey II* replaced its original opinion by attempting to reconcile what it called two "competing lines of precedent." *Lindsey II*, 850 F.3d at 1016. The alleged "competing lines" of precedent are the incomplete and erroneous reading of *Peterson* that materiality is tested by an "objective test" making a victim's behavior irrelevant, *Id*. at 1015, and what it characterizes as this Court's "suggestion" in *Escobar* that behavior is relevant. *Id*. at 1017.

To reconcile these "competing precedents," the Ninth Circuit distinguished *Escobar* because it was deciding an issue under the Fair Claims Act. *Id* at 1017. *Lindsey II* reasoned the standards would be different if applied to an individual or an entity rather than the

government as in the Fair Claims Act. Therefore, the Ninth Circuit came up with a solution that "evidence of individual lender behavior is not admissible to disprove materiality, but the evidence of general lending standards in the mortgage industry is admissible to disprove materiality." *Id*. at 1019. The problem with this analysis there is nothing in *Escobar* that limits its holding to government entities or the Fair Claims Act.

On the contrary, *Escobar* specifically recognized that the False Claims Act, 31 U.S.C. § 1329 "defines materiality using language that we have employed to define materiality in other federal fraud statutes," *Escobar*, 136 S. Ct. at 2002. It referred to *Neder*, 527 U.S., at 16, (using this definition to interpret the mail, bank, and wire fraud statutes) and *Kungys v. United States*, 485 U.S. 759, 770, 108 S. Ct. 1537, 99 L. Ed. 2d 839 (1988) (for fraudulent statements to immigration officials). *Id*. In a footnote, *Lindsey* admitted this Court uses "materiality in one context as precedent for materiality in another." *Lindsey*, 850 F.3d at 1017 n. 4.

Lindsey II, upon which the Ninth Circuit relied to affirm the denial of Petitioner's right to present a defense, is not only contrary to the Ninth Circuit authority in *Peterson*, it is contrary to this Court's

holdings in *Gaudin*, *Neder*, and *Escobar*. Under this Court's precedents, Petitioner should have been allowed to present evidence that when the subprime lenders issued loans called "liar loans" any lies on the loan applications were not material. This court could quickly and clearly state that materiality in wire and mail fraud uses a subjective standard and not the objective standard promoted by the Ninth Circuit and others.

II.

The Circuits Are Split on Whether a Subjective Standard as Described in *Gaudin* and *Escobar* should Apply to Materiality Determinations or Whether they Should Apply an Objective Standard Like the One Adopted by the Ninth Circuit.

The circuits are split on how to apply materiality in the context of mail and wire fraud. Some of the other circuits like the Ninth Circuit made it too complicated. All they needed to do was to repeat the materiality definition from *Gaudin*. Instead they added their own interpretation to the rule and the decisions and jury instructions are all over the place. A starting point to determine whether the circuits are applying *Gaudin* or something else is to look at the circuits' model jury instructions[2].

[2] The Second and Fourth Districts do not have model Instructions.

The First, Fifth, and Tenth Circuits' model instructions follow the *Gaudin* definition. The Pattern Criminal Jury Instructions for the District Court of the First Circuit (2016), 4.18.1341 [Mail Fraud] and 4.18.1343 [Wire Fraud] provides: "A 'material' fact is one that has a natural tendency to influence or be capable of influencing the decision of the decisionmaker to whom it was addressed." In practice, however, the First Circuit does not always follow *Gaudin*, for instance its holdings and analysis in *Appolon* and *Prieto* were used by *Lindsey I* to originally hold that answers on loan applications are material as a matter of law.

The Fifth Circuit Pattern Jury Instructions (Criminal Cases) (2012), 2.59 [mail fraud] and 2.60 [wire fraud] provide that "A representation is material if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed." The Fifth Circuit's case law is consistent with *Gaudin* and relies on subjective factors by focusing on the decisionmaker in lending situations. *United States v. Holmes*, 406 F.3d 337, 355 n. 27 (5th Cir. 2005) (citing *United States v. Heath*, 970 F.2d 1397, 1403 (5th Cir. 1992); *United States v. Curtis*, 635 F.3d 704 (5th Cir. 2011);

United States v. Lucas, 516 F.3d 316, 339 (5th Cir. 2008); *United States v. Morganfield*, 501 F.3d 453, 464 n. 34 (5th Cir. 2007).

The Tenth Circuit Criminal Pattern Jury Instructions (2015), 2.56 [Mail Fraud] and 2.57 [Wire Fraud] say "A false statement is 'material' if it has a natural tendency to influence, or is capable of influencing, the decision of the person or entity to which it is addressed." It looks like the Circuit's model instruction complies with *Gaudin*, but then its case law describes a reasonable lender standard. *United States v. Williams*, 865 F. 3d 1302, 1312 (10th Cir. 2017).

The Seventh Circuit relies specifically on *Gaudin* but inserts the identity of the decisionmaker. The Pattern Criminal Federal Jury Instructions for the Seventh Circuit (2012), 18 U.S.C. § 1341 and 18 U.S.C. § 1341 Definition of Material reads as follows: "a false or fraudulent pretense, representation, [or] promises [,] [omission, or concealment] is 'material' if it is capable of influencing the decision of the [person[s]] [or] [list victim] to whom it was addressed. [It is not necessary that the false or fraudulent pretense, representation, promise, omission, or concealment actually have that influence or be relied on by the alleged victim, as long as it is capable of doing so.]" However, in practice the Seventh Circuit

actually applies a reasonable person or reasonable lender standard. *United States v. Betts-Gaston*, 860 F.3d 525, 532 (7th Cir. 2017).

The Sixth, Eighth, and Eleventh Circuits acknowledge the *Gaudin* definition but add a "reasonableness" component to describe the decisionmaker and refer to a general group of decisionmakers rather than the specific decisionmaker or class of specific decisionmakers to whom the statement was made. This changes the test to an objective standard. The Sixth Circuit Pattern Criminal Jury Instructions (2015), 10.01 [Mail Fraud] and 10.02 [Wire Fraud] say "a misrepresentation of concealment is "material" if it has a natural tendency to influence or is capable of influencing the decision of a person of ordinary prudence and comprehension.

Eighth Circuit Model Jury Instructions (2014), 6.18.1341 [Mail Fraud] and 6.18.1343 [Wire Fraud] instruct that "A [fact] [falsehood] [representation] [promise] is 'material' if it has a natural tendency to influence, or is capable of influencing, the decision of a reasonable person in deciding whether to engage or not to engage in a particular transaction. [However, whether a [fact] [falsehood] [representation] [promise] is 'material' does not depend on whether the person was actually deceived."

Finally, the Eleventh Circuit Pattern Jury Instructions (Criminal Cases) (2010), 50.1 [Mail Fraud] and 51 [Wire Fraud] state that "a 'material fact' is an important fact that a reasonable person would use to decide whether to do or not do something. A fact is 'material' if it has the capacity or natural tendency to influence a person's decision. It doesn't matter whether the decision-maker actually relied on the statement or knew or should have known that the statement was false." Its case law goes both ways. It followed the *Gaudin* decisionmaker standard in *United States v. McAuliffe*, 490 F.3d 526, 531 (6th Cir. 2007) (quoting *Neder*, 527 U.S. at 16). However, in *United States v. Daniel*, 329 F.3d 480, 487 (6th Cir. 2003), it applied the objective reasonable person standard.

On the outer limit of the circuits' compliance with *Gaudin* is the Third Circuit's model instruction that does not mention *Gaudin* or *Neder*. The Third Circuit Model Criminal Jury Instruction (2018), 6.18.1341 [Mail Fraud] and 6.18.1343 [Wire Fraud] provides: "The false or fraudulent representation (*or failure to disclose*) 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 (*describe relevant decision; e.g., with respect to a proposed investment*)." However, its cases follow *Gaudin* and focuses on the decisionmaker recipient of the misrepresentations. *See*, *United States v. Wright*, 665 F.3d 560, 575 (3d Cir 2012) *accord id*. at 574-75; *United States v. Fallon*, 470 F.3d 542 (3d Cir. 2006).

The Second and Fourth Circuits do not have model instructions. The Second Circuit is more or less consistent with *Gaudin* by holding material statements "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). The Circuit was focused on the decisionmaker even before *Gaudin*. *See United States v. Rodriguez*, 140 F.3d 163, 168 (2nd Cir. 1998).

The Fourth Circuit did its own version of *Lindsey II*-type baby splitting. It held as to fraud schemes targeting the government, materiality "verges on the subjective [while] a fraud scheme targeting a private lender, on the other hand, is measured by an objective standard." *United States v. Raza*, 876 F.3d 604, 616 (4th Cir. 2017).

If Petitioner took out a liar loan in the Second, Third, and Fifth Circuits she would have been able to put on expert testimony that the subprime lenders in her case did not care whether the answers to the

loan application questions were true or false. She would probably have been acquitted. Instead, Petitioner took out her loan in the Ninth Circuit and is facing 96 months in prison because of the size of the "victim" banks' losses which it intentionally passed on to unsuspecting investors.

The split among the circuits and even within the circuits is a continuing problem. This Court knows what it meant in *Gaudin*, *Neder*, and *Escobar* and could issue a per curiam decision clarifying if materiality in mail and wire fraud cases is governed under a subjective or objective standard.

CONCLUSION

For the reasons set forth, the writ of certiorari should be granted.

Dated: January 17, 2020 Respectfully submitted,

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