Nos. 19-7361, 19-7368, and 19-7729

IN THE SUPREME COURT OF THE UNITED STATES

EDWARD SHEVTSOV, PETITIONER
v.
UNITED STATES OF AMERICA

NADIA KUZMENKO, PETITIONER
v.
UNITED STATES OF AMERICA

AARON NEW, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record

BRIAN A. BENCZKOWSKI
Assistant Attorney General

FINNUALA K. TESSIER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court abused its discretion in excluding certain expert testimony proffered by petitioners regarding the negligence or complicity of the victim lending institutions in this mortgage-fraud case, on the ground that the proffered testimony was not relevant to the materiality of petitioners' misstatements.

ADDITIONAL RELATED PROCEEEDINGS

United States District Court (E.D. Cal.):

United States v. Shevtsov, No. 11-cr-210 (Oct. 28, 2015)

United States v. Kuzmenko, No. 11-cr-210 (Oct. 27, 2015)

United States v. New, No. 11-cr-210 (Oct. 27, 2015)

United States Court of Appeals (9th Cir.):

United States v. Kuzmenko, No. 15-10526 (May 28, 2019)

United States v. New, No. 15-10536 (May 28, 2019)

United States v. Shevtsov, Nos. 15-10527 and 16-10122 (May 28, 2019)

IN THE SUPREME COURT OF THE UNITED STATES

No. 19-7361

EDWARD SHEVTSOV, PETITIONER

v.

UNITED STATES OF AMERICA

No. 19-7368

NADIA KUZMENKO, PETITIONER

v.

UNITED STATES OF AMERICA

No. 19-7729

AARON NEW, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-10) is not published in the Federal Reporter but is reprinted at 775 Fed. Appx. 272.[1]

JURISDICTION

The judgment of the court of appeals was entered on May 28, 2019. Petitions for rehearing were denied on October 24, 2019 (Pet. App. 17-18). The petitions for writs of certiorari in Nos. 19-7361 and 19-7368 were filed, respectively, on January 16 and 17, 2020. The petition for a writ of certiorari in No. 19-7729 was not filed until February 18, 2020, and is out of time under Rules 13.1 and 13.3 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of California, petitioner Aaron New was convicted on 23 counts of wire fraud, in violation of 18 U.S.C. 1343 (2006); three counts of mail fraud, in violation of 18 U.S.C. 1341 (2006); and three counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i). 19-7729 Pet. App. 20-21. Petitioner Nadia Kuzmenko was convicted on 15 counts of wire fraud, in violation of 18 U.S.C. 1343 (2006); three counts of mail fraud, in

[1] Except as otherwise noted, all petition appendix citations are to the petition appendix in No. 19-7361.

violation of 18 U.S.C. 1341 (2006); and one count of witness tampering, in violation of 18 U.S.C. 1512(b)(3). 19-7368 Pet. App. E1-E2. And petitioner Edward Shevtsov was convicted on ten counts of wire fraud, in violation of 18 U.S.C. 1343 (2006); three counts of mail fraud, in violation of 18 U.S.C. 1341 (2006); and one count of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(ii). Shevtsov Judgment 1-2. New was sentenced to 135 months of imprisonment, to be followed by three years of supervised release. 19-7729 Pet. App. 22-23. Kuzmenko and Shevtsov were each sentenced to 96 months of imprisonment, to be followed by three years of supervised release. 19-7368 Pet. App. E3-E4; Shevtsov Judgment 3-4. The court of appeals affirmed. Pet. App. 1-10.

1. In 2006 and 2007, petitioners organized a large mortgage-fraud scheme based in Sacramento, California, which involved using straw buyers to purchase homes at inflated values in order to siphon money from escrow and receive large commission payments. Gov't C.A. Br. 5. New was a licensed mortgage broker. Id. at 6. Kuzmenko was a licensed real estate agent who also ran a tax preparation business with her sister. Id. at 7. Shevtsov, who was in a relationship with Kuzmenko's sister, "flipp[ed]" houses -- i.e., bought them to renovate and resell them. Id. at 8 (citation omitted).

To carry out the scheme, petitioners and their co-conspirators (who included real estate agents, escrow officers, and others) recruited people in the Sacramento area who were having difficulty selling their homes. Shevtsov Presentence Investigation Report (PSR) ¶ 15; see Gov't C.A. Br. 11, 17 & n.11. They then recruited people willing to act as straw buyers and paid them, frequently in cash, to purchase the homes. Gov't C.A. Br. 8-10. The co-conspirators then helped the straw buyers to obtain loans for hundreds of thousands of dollars more than the actual purchase prices. Shevtsov PSR ¶ 15; Gov't C.A. Br. 11-13.

In order to ensure that the straw buyers qualified for loans, the co-conspirators prepared and submitted loan applications containing misrepresentations about the straw buyers' income, employment, assets, liabilities, and intent to occupy the homes as their primary residences. Shevtsov PSR ¶ 16. The co-conspirators also created false documents in order to substantiate the misrepresentations in the loan applications. Ibid. For example, through Kuzmenko's tax preparation company, the co-conspirators created false tax documents, invoices, business licenses, and verifications of deposits, income, and employment. Ibid.; see Gov't C.A. Br. 14-17. The co-conspirators also created false bank statements, rental agreements, and verifications of rental payments. Shevtsov PSR ¶ 16; Gov't C.A. Br. 14-17.

The loan applications represented that each straw buyer intended to use the home being purchased as his or her primary residence, but most of the straw buyers never intended to move into the homes. Gov't C.A. Br. 9, 11-12. Instead, once a home was purchased, petitioners and their co-conspirators helped the straw buyer rent out the home. Id. at 9; Shevtsov PSR ¶ 19. To conceal their scheme, petitioners or the straw buyer paid the mortgage for a few months before letting the property go into foreclosure. Gov't C.A. Br. 9-10; Shevtsov PSR ¶ 17. Each of the 38 properties identified as part of the scheme either went into foreclosure, was sold to another straw buyer and then went into foreclosure, or was purchased by Shevtsov in a short sale. Gov't C.A. Br. 5, 21; Shevtsov PSR ¶ 20.

Petitioners profited from the scheme in several ways. New obtained mortgage-broker commissions for most of the properties, received payments from shell accounts, and profited as the seller of a house in the scheme. Gov't C.A. Br. 18-21; Shevtsov PSR ¶ 18. Kuzmenko obtained real-estate commissions and money from one of her co-conspirators; with the assistance of conspiring escrow officers, she also diverted money from home sales to accounts controlled by the co-conspirators, including an account controlled by Shevtsov. Gov't C.A. Br. 18-21; Shevtsov PSR ¶¶ 17-19, 23. Shevtsov structured withdrawals out of that account, taking only $10,000 out a day in order to avoid financial

institution reporting requirements. Gov't C.A. Br. 18; Shevtsov PSR ¶¶ 17-19, 23. Shevtsov also profited by selling properties he owned to straw buyers and by receiving rental payments from homes in which the straw buyers' loan applications had claimed that they would be living. Gov't C.A. Br. 21; Shevtsov PSR ¶ 19.

After federal agents began investigating their conduct, Kuzmenko told multiple co-conspirators to lie to the agents by saying that a deceased woman had prepared the buyers' loan paperwork. Gov't C.A. Br. 21-22. Kuzmenko, Shevtsov, and New all provided false, conflicting, or misleading information to federal authorities. Id. at 23-26.

2. In November 2011, a grand jury in the Eastern District of California returned a superseding indictment charging petitioners each with 23 counts of wire fraud, in violation of 18 U.S.C. 1343 (2006), and four counts of mail fraud, in violation of 18 U.S.C. 1341 (2006). Superseding Indictment 2, 12. New was also charged with three counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i), and Shevtsov was charged with one count of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(ii). Superseding Indictment 13-15. Kuzmenko was additionally charged with one count of witness tampering, in violation of 18 U.S.C. 1512(b)(3). Superseding Indictment 15.

Before trial, petitioners gave notice of their intent to call a putative expert witness to testify that "the alleged victims in

this indictment (the lending [institutions]) * * * encouraged this conduct and allowed it to occur." Pet. App. 20. The witness never submitted an expert report. Gov't C.A. Br. 51. But in a supplemental expert disclosure filed four days before trial, petitioners stated that the witness's academic work related to First Franklin -- the primary lending institution at issue -- "as well as other sub-prime lenders," and that the witness would testify that "First Franklin's practices did not vary much from other sub-prime lenders" and that "[t]he industry didn't care" about "highly risky loans." Ibid. (citation omitted).

The government moved to exclude the proposed testimony as irrelevant, and the district court granted that motion in an oral pre-trial order. See Pet. App. 11-16. The court viewed the admissibility question as turning on "whether the conduct of the lender is relevant to the element of materiality in the charges of mail and wire fraud." Id. at 12. The court explained that "a false statement is material if it has a natural tendency to influence, or was capable of influencing, the decision-making body to which it was addressed." Ibid. And the court reasoned that, because "'capable of influencing' is an objective test," whether the victim in fact relied on the misstatement "is irrelevant to the element of materiality." Ibid. Applying those principles here, the court determined that petitioners' proposed expert testimony was "evidence that the lenders were complicit in the

fraud," which the court found to be "not relevant to the objective standard of materiality." Id. at 14-15. The court also observed that, even if negligence by the victim financial institutions made "the fraud * * * a lot easier to commit," that "doesn't mean that * * * the information" that petitioners misstated "wasn't objectively material with respect to a loan application." Id. at 13-14.

The case proceeded to trial.[2] With respect to the materiality element of the mail and wire fraud counts, the district court instructed the jury that "the statements made or facts omitted as part of the scheme were material" if "they had a natural tendency to influence, or were capable of influencing, a person to part with money or property." Pet. App. 27, 28. The jury found petitioners guilty on all three counts of mail fraud. The jury found New guilty on 23 of the wire fraud counts, Kuzmenko guilty on 15, and Shevtsov guilty on ten. The jury also found New guilty on three counts of money laundering, Shevtsov guilty on one count of money laundering, and Kuzmenko guilty on one count of witness tampering. See Kuzmenko Verdict Form 1-5; Shevtsov Verdict Form 1-5; New Verdict Form 1-6. Petitioners were acquitted of the remaining charges. Ibid.

[2] Before trial, the district court granted the government's motion to dismiss one of the mail fraud counts as to each petitioner. 1/12/15 Order.

The district court sentenced Kuzmenko and Shevtsov to 96 months of imprisonment, to be followed by three years of supervised release. 19-7368 Pet. App. E3-E4; Shevtsov Judgment 3-4. The court sentenced New to 135 months of imprisonment, to be followed by three years of supervised release. 19-7729 Pet. App. 22-23. The court found that New had "lied and lied repeatedly while testifying during trial" and imposed a two-level enhancement for obstruction of justice in calculating his advisory Guidelines range. Gov't C.A. Br. 46 (citation omitted).

3. In an unpublished memorandum disposition, the court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1-10.

a. As relevant here, the court of appeals determined that "[t]he district court did not err when it precluded [petitioners] from introducing proffered expert testimony at trial." Pet. App. 3. The court of appeals explained that "'evidence of the lending standards generally applied in the mortgage industry'" can be relevant to materiality in a mortgage-fraud case, but that "neither individual victim lender negligence [n]or an individual victim lender's intentional disregard of relevant information are defenses to wire fraud." Ibid. (quoting United States v. Lindsey, 850 F.3d 1009, 1015-1016 (9th Cir. 2017)). Here, petitioners proposed to have their witness "testify about the complicity and motives of the particular victim lenders, not about the general

practices of mortgage lenders." Id. at 4. Accordingly, the court found that, "[u]nder these circumstances, the district court did not err in excluding the expert testimony." Ibid.

The court of appeals rejected petitioners' remaining challenges, with two exceptions. Pet. App. 2-3, 7. First, the court vacated New's sentence and remanded for resentencing, after determining that the district court had erred in relying on his testimony at trial "to impose a two-level obstruction of justice enhancement based on perjury, without finding that each of the elements of perjury were met." Id. at 7. Second, the district court had required Shevtsov to repay the Office of the Federal Defender for the cost of his defense, after Shevtsov disclosed that he had more than a million dollars in assets; the disclosure, however, predated the court's order by several months. Gov't C.A. Br. 131-132. Citing the lack of a "contemporaneous finding on [his] ability to pay," the court of appeals vacated the fees order and remanded for reconsideration. Pet. App. 7.

b. Judge Berzon concurred in part and concurred in the judgment. Pet. App. 8-10. In her view, petitioners "should have been able to introduce their proffered expert" testimony because she understood petitioners' proffer to indicate that the witness "would to a degree have opined on 'the lending standards generally applied in the mortgage industry.'" Id. at 8 (quoting Lindsey, 850 F.3d at 1016). But she also would have found any error to be

harmless in light of the "overwhelming evidence that [petitioners] made material misrepresentations when they sought to obtain mortgages." Ibid. She observed that petitioners had "lied about almost everything on their mortgage applications." Ibid. And she determined that, "even if the proffered testimony had been admitted, no jury could reasonably have found that [petitioners] did not make material misrepresentations as part of their scheme to defraud." Id. at 9-10.

ARGUMENT

Petitioners contend (19-7361 Pet. 14-39; 19-7368 Pet. 7-22; 19-7729 Pet. 7-22) that the district court abused its discretion in excluding their proffered expert testimony about the negligence or complicity of the main victim lending institution, First Franklin, after finding that the testimony would be irrelevant to the materiality element of mail and wire fraud. Petitioner New's petition should be denied because it is untimely and he did not seek leave to file it out of time. In any event, review of his and the other petitioners' claims is not warranted because the court of appeals' unpublished decision affirming the exclusion of the proposed expert testimony is correct and does not conflict with any decision of this Court or of any other court of appeals. This case would also be an unsuitable vehicle in which to address petitioners' materiality arguments. This Court has recently denied certiorari in a case that presented similar issues. See

Raza v. United States, 138 S. Ct. 2679 (2018). It should do the same here.[3]

1. This Court's Rules provide that a petition for a writ of certiorari "is timely when it is filed * * * within 90 days after entry of the judgment," Sup. Ct. R. 13.1, and that the time to file the petition "runs from the date of the denial of rehearing" when any party files a timely request for rehearing in the court of appeals, Sup. Ct. R. 13.3. Here, the court of appeals entered judgment on May 28, 2019, and denied petitions for rehearing on October 24, 2019. Pet. App. 1, 17-18. Accordingly, petitioners' deadline for filing a petition for a writ of certiorari was January 22, 2020. New did not file his petition until February 18, 2020.

Although this Court has discretion to consider an untimely petition for a writ of certiorari in a criminal case if "the ends of justice so require," Schacht v. United States, 398 U.S. 58, 63-65 (1970); see also Bowles v. Russell, 551 U.S. 205, 212 (2007), New offers neither explanation nor justification for the untimeliness of his petition, and none is apparent from the record. Accordingly, absent a sufficient justification by New, the Court should deny his petition as untimely.

---

[3] Similar issues are also presented in Palamarchuk v. United States, No. 19-7469 (filed Jan. 24, 2020), which arises from a criminal trial before a different district judge in the Eastern District of California.

2. The court of appeals correctly affirmed the district court's exclusion of petitioners' proposed expert witness, whose proffered testimony about the lending practices of the main victim lending institution was irrelevant to the materiality of petitioners' misstatements. Pet. App. 2-3.

a. The federal mail fraud statute prohibits using the mail for the purpose of executing a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. The federal wire fraud statute likewise prohibits using a wire to execute a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1343. In Neder v. United States, 527 U.S. 1 (1999), this Court explained that Congress intended to incorporate into the mail and wire fraud statutes the common law requirement of materiality. Id. at 20-25. The Court also observed that the Second Restatement of Torts provides 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 (quoting Restatement (Second) of Torts § 538(2), at 80 (1977)). And the Court made clear that "[t]he common-law

requirements of 'justifiable reliance' and 'damages' * * * plainly have no place in the federal fraud statutes." Id. at 24-25.

Consistent with that understanding, the Ninth Circuit explained in United States v. Lindsey, 850 F.3d 1009 (2017), in the context of a mortgage-fraud case, that a "false statement is material if it objectively had a tendency to influence, or was capable of influencing, a lender to approve a loan," even if the false statement did not in fact "'induc[e] any actual reliance.'" Id. at 1015 (citation omitted); see Neder, 527 U.S. at 25. The court further explained that "a victim's intentional disregard of relevant information is not a defense to wire fraud and thus evidence of such disregard is not admissible as a defense to mortgage fraud." Lindsey, 850 F.3d at 1016. The court emphasized, however, that defendants are not "powerless to challenge the materiality of false statements made in connection with securing mortgages," because, "[a]mong other things, defendants can disprove materiality through evidence of the lending standards generally applied in the mortgage industry." Ibid.

The district court in this case correctly precluded petitioners' proposed expert testimony -- which was offered to show that "the lenders were complicit in the fraud" and that the lenders did not actually rely on petitioners' misstatements -- as irrelevant evidence of the absence of actual reliance. Pet. App.

14-15; see Neder, 527 U.S. at 25 ("Under the mail fraud statute, the government does not have to prove actual reliance upon the defendant's misrepresentations.") (quoting United States v. Stewart, 872 F.2d 957, 960 (10th Cir. 1989)) (brackets omitted); cf. 19-7361 Pet. 8 (acknowledging that "reliance is not an element of mail or wire fraud"). The court of appeals likewise correctly explained that petitioners' putative "expert intended to testify about the complicity and motives of the particular victim lenders, not about the general practices of mortgage lenders," and that "neither individual victim lender negligence [n]or an individual victim lender's intentional disregard of relevant information are defenses to wire fraud." Pet. App. 3-4 (citing Lindsey, 850 F.3d at 1015-1016).

b. Petitioners contend that the district court abused its discretion in excluding their proffered expert testimony, asserting that the materiality of a false statement should be determined solely by its "ability to influence [the] particular decisionmaker's decision," rather than under an objective, reasonable-decisionmaker standard. 19-7361 Pet. 24; see id. at 24-30; 19-7368 Pet. 7-16; 19-7729 Pet. 7-16. But Neder makes clear that, under the materiality standard incorporated into the mail and wire fraud statutes, a statement may be material when judged in relation to its effect on the intended victim or a reasonable

decisionmaker. See 527 U.S. at 22 n.5. Because the standard is disjunctive, either form of proof suffices.

Here, petitioners' proposed expert testimony about First Franklin's lending practices was irrelevant to the objective materiality of petitioners' false statements. See Gov't C.A. Br. 57-61. As the court of appeals recognized, petitioners were effectively attempting to show, through expert testimony, that the main victim was "complicit[]" in petitioners' mortgage fraud or that it had acted "negligen[tly]." Pet. App. 3-4. The district court did not abuse its discretion in concluding that expert testimony about lender complicity or negligence would not have had any bearing on whether petitioners' misstatements objectively "had a natural tendency to influence, or were capable of influencing, a person to part with money or property." Id. at 27 (jury instructions on materiality). To the extent that petitioners contend (e.g., 19-7361 Pet. 9, 33-35) that the excluded testimony would also have addressed other factual issues, such as general practices in the lending industry, any fact-bound claim of error in the lower courts' assessment of petitioners' proffer does not warrant this Court's review. See United States v. Johnston, 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."); Kyles v. Whitley, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in Johnston]

has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing Graver Tank & Mfg. Co. v. Linde Air Prods. Co., 336 U.S. 271, 275 (1949)).

Petitioners argue (19-7361 Pet. 25-28; 19-7368 Pet. 7-16; 19-7729 Pet. 7-16) that the decision below is inconsistent with this Court's decision in Universal Health Services, Inc. v. United States ex rel. Escobar, 136 S. Ct. 1989 (2016), which addressed materiality under the False Claims Act, 31 U.S.C. 3729 et seq. The False Claims Act prohibits knowingly presenting "false or fraudulent claim[s]" to the government for payment. 31 U.S.C. 3729(a)(1)(A). That prohibition generally incorporates "the common-law meaning of fraud," Universal Health Servs., 136 S. Ct. at 1999, including a materiality requirement. See also 31 U.S.C. 3729(b)(4) (defining "'material'" as used elsewhere in the False Claims Act to mean "having a natural tendency to influence, or be capable of influencing, the payment or receipt of money or property").

In Universal Health Services, this Court stated that the False Claims Act's materiality standard "looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." 136 S. Ct. at 2002 (brackets and citation omitted). But the Court did not suggest that materiality is always a subjective standard. To the contrary, the Court noted that,

under the common law of torts, a matter is material in either of "two circumstances: (1) 'if a reasonable man would attach importance to it in determining his choice of action in the transaction'; or (2) if the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter 'in determining his choice of action,' even though a reasonable person would not." Id. at 2002-2003 (quoting Restatement (Second) of Torts § 538, at 80) (brackets omitted). A similar disjunctive standard exists in contract law. See id. at 2003 (citing Restatement (Second) of Contracts § 162(2) & cmt. c at 439, 441 (1981)). The decision below, holding that expert testimony about negligent practices by the victim lending institution was irrelevant to the objective materiality of petitioners' misstatements, is consistent with the disjunctive common law standards discussed in Universal Health Services. Cf. Lindsey, 850 F.3d at 1017 (adopting an approach to proffered testimony on lender practices designed to be "faithful to" Universal Health Services).

Petitioners similarly err in arguing (19-7361 Pet. 29-30; 19-7368 Pet. 15-16; 19-7729 Pet. 16) that the decision below conflicts with this Court's decision in Neder. In the context of tax fraud charges, the Court stated in Neder that, "[i]n general, 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.'" 527 U.S. at 16 (brackets and citation omitted). Petitioners would read that isolated statement as holding that the effect of the false statement on the particular decisionmaking body to which it was addressed is always relevant. But the tax fraud charges at issue in Neder did not involve any question of whether the defendant's misstatements were objectively material; the defendant did not even contest materiality. See ibid. And, as already explained, the Court in Neder elsewhere rejected an actual-reliance requirement for federal mail, wire, and bank fraud, see id. at 24-25, and referred to the common law's disjunctive standard for materiality, see id. at 22 n.5. Furthermore, the particular language on which petitioners focus was drawn from prior decisions that did not endorse petitioners' exclusively subjective test. See id. at 16; see also United States v. Gaudin, 515 U.S. 506, 512 (1995) (stating that "the materiality inquiry" involves "'assessments of the inferences a "reasonable decisionmaker" would draw from a given set of facts'") (brackets and citation omitted); Kungys v. United States, 485 U.S. 759, 771 (1988) (describing the "central object of the inquiry" as "whether the misrepresentation or concealment was predictably capable of affecting, i.e., had a natural tendency to affect, the official decision").

At bottom, petitioners' reading of this Court's precedent rests on a false dichotomy. Petitioners rely selectively on

language in which the Court has recognized that a misstatement may be material if it was capable of influencing the intended victim. But that is merely half of the equation. A misstatement may also be material if it is capable of influencing a reasonable decisionmaker. The Restatement of Torts, on which this Court relied in Neder and Universal Health Services, is explicit on that point. See Restatement (Second) of Torts § 538; cf. Neder, 527 U.S. at 22 n.5; Universal Health Servs., 136 S. Ct. at 2003. And petitioners present no reason to revisit the established disjunctive standard for materiality in this case.

3. Petitioners err in contending (19-7361 Pet. 15-23; 19-7368 Pet. 16-22; 19-7729 Pet. 16-22) that the decision below conflicts with the decisions of other courts of appeals on the issue of whether, in a fraud case involving a private victim, the government must establish that the defendant's misstatement or omission was capable of influencing the intended victim, as opposed to influencing a reasonable decisionmaker.

The courts of appeals have uniformly recognized, consistent with the decision below, that a false statement or omission is material if it is capable of influencing a reasonable decisionmaker. See United States v. Tum, 707 F.3d 68, 72 (1st Cir.) (wire fraud requires proof of "false or omitted statements that a reasonable person would consider important in deciding what to do"), cert. denied, 569 U.S. 1025 (2013); United States v.

Weaver, 860 F.3d 90, 94 (2d Cir. 2017) (per curiam) ("A statement is material if the 'misinformation or omission would naturally tend to lead or is capable of leading a reasonable person to change his conduct.'") (brackets and citation omitted); United States v. Raza, 876 F.3d 604, 621 (4th Cir. 2017) (materiality "measures a misrepresentation's capacity to influence an objective 'reasonable lender'"), cert. denied, 138 S. Ct. 2679 (2018); United States v. Davis, 226 F.3d 346, 358-359 (5th Cir. 2000) (misstatement is material "if a reasonable person would rely on it" or "if the maker knew or had reason to know his victim was likely so to rely"), cert. denied, 531 U.S. 1181 (2001); United States v. Daniel, 329 F.3d 480, 487 (6th Cir. 2003) (finding material misstatements where defendant "made several assertions he knew were false and that would have affected a reasonable person's actions in the situation"); United States v. Betts-Gaston, 860 F.3d 525, 532 (7th Cir. 2017) ("[W]hether a statement is material depends on its effect on 'a reasonable person' -- or, in this case, a reasonable lender.") (citation omitted), cert. denied, 138 S. Ct. 689 (2018); United States v. Heppner, 519 F.3d 744, 749 (8th Cir.) (endorsing jury instruction that "a material fact is 'a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction'") (citation omitted), cert. denied, 555 U.S. 909 (2008); United States v. Williams, 865 F.3d 1302, 1312 (10th Cir.) (misstatements to bank were

material if they "had the 'capability' or 'natural tendency' to influence a reasonable bank's decision of whether to provide a loan") (citations omitted), cert. denied, 138 S. Ct. 567 (2017); United States v. Svete, 556 F.3d 1157, 1165 (11th Cir. 2009) (en banc) ("Proof that a defendant created a scheme to deceive reasonable people is sufficient evidence that the defendant intended to deceive[.]"); United States v. Philip Morris USA Inc., 566 F.3d 1095, 1122 (D.C. Cir. 2009) (per curiam) ("This materiality requirement is met if the matter at issue is 'of importance to a reasonable person in making a decision about a particular matter or transaction.'") (citation omitted), cert. denied, 561 U.S. 1025 (2010); see also United States v. Lucas, 709 Fed. Appx. 119, 123 (3d Cir. 2017) ("[M]ateriality is an objective test, and requires showing that a defendant's misrepresentations would have been important to a reasonable person deciding whether to take the requested action, not that the victim actually relied on those misrepresentations.").

Petitioners identify no decision from any court of appeals endorsing their exclusively subjective materiality standard. Petitioners Kuzmenko and New instead invoke pattern jury instructions indicating that a misstatement is material if it is capable of influencing the decisionmaker to whom it is addressed. 19-7368 Pet. 16-22; 19-7729 Pet. 16-22. Those instructions are not inconsistent with proving materiality through evidence that

the misstatement is capable of influencing a reasonable decisionmaker. See pp. 18-19, supra. And even if a pattern jury instruction were to preclude an objective standard for materiality, pattern jury instructions are not the law and do not bind courts. See, e.g., United States v. Maury, 695 F.3d 227, 259 (3d Cir. 2012), cert. denied, 568 U.S. 1231 (2013); United States v. Dohan, 508 F.3d 989, 994 (11th Cir. 2007) (per curiam), cert. denied, 553 U.S. 1034 (2008).

Petitioners err in relying (19-7361 Pet. 15-23; 19-7368 Pet. 16-22; 19-7729 Pet. 16-22) on decisions finding sufficient evidence of materiality -- or finding that an indictment sufficiently alleged materiality -- based in part on the effect of the misstatement on the intended victim. See, e.g., United States v. Appolon, 715 F.3d 362, 368 (1st Cir.), cert. denied, 571 U.S. 929 (2013); United States v. Wright, 665 F.3d 560, 574-575 (3d Cir. 2012); United States v. Curtis, 635 F.3d 704, 719 n.51 (5th Cir.), cert. denied, 565 U.S. 857 (2011). Those decisions do not conflict with the decision below. As explained above, the "reasonable decisionmaker" and "intended victim" standards are not exclusive; a misstatement can be material if it was capable of influencing either a reasonable victim or the particular victim to which it was directed. See Neder, 527 U.S. at 22 n.5. Thus, evidence that a statement is material to a particular victim may be enough, by itself, to establish materiality. It does not

follow, however, that evidence that a particular victim did not rely on the defendant's misstatements is admissible to establish that those misstatements were not capable of influencing a reasonable decisionmaker.

The remaining cases upon which petitioners rely likewise do not demonstrate a division of authority among the courts of appeals. Contrary to petitioners' assertion (19-7361 Pet. 15; 19-7368 Pet. 21; 19-7729 Pet. 21), the Second Circuit did not conclude in United States v. Rigas, 490 F.3d 208 (2007), cert. denied, 552 U.S. 1242 (2008), that misstatements are material only if they are capable of influencing the intended victim. Rather, the court determined that the misstatements in question were material only to a particular decision and that the government had not established that the bank to which the statements were addressed actually had the ability to make that decision. See id. at 235. In other words, the government never proved that the misstatements were made to a "decisionmaker" at all. Ibid.

Nor are petitioners correct in asserting (19-7361 Pet. 16; 19-7368 Pet. 21; 19-7729 Pet. 21) that the Second Circuit reversed a conviction in United States v. Rodriguez, 140 F.3d 163 (1998), because the defendant's misrepresentations were incapable of influencing the particular victim to which they were directed. In fact, the court reversed because the defendant was charged with defrauding a bank by depositing checks that she knew had not been

authorized by the issuing company, and the court concluded that the act of "simply depositing checks into a bank account where the depositor knows that he/she is not entitled to the funds does not alone constitute false or fraudulent pretenses or representations." Id. at 168. That conclusion has no bearing on this case, where petitioners orchestrated a large-scale mortgage-fraud scheme in which they made or induced others to make numerous false representations to mortgage lenders to obtain loans. Moreover, as Shevtsov acknowledges (19-7361 Pet. 16 n.4), the Second Circuit has recognized elsewhere that a "statement is material if the 'misinformation or omission would naturally tend to lead or is capable of leading a reasonable [person] to change [his] conduct.'" Weaver, 860 F.3d at 94 (quoting United States v. Rybicki, 354 F.3d 124, 145 (2d Cir. 2003) (en banc), cert. denied, 543 U.S. 809 (2004)). And any arguable tension within the law of the Second Circuit itself would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam).

Finally, petitioners err in asserting (19-7361 Pet. 23; 19-7368 Pet. 20; 19-7729 Pet. 20) that the Sixth Circuit adopted their "intended victim" standard in United States v. McAuliffe, 490 F.3d 526, cert. denied, 552 U.S. 976 (2007). That case involved a challenge to the sufficiency of the indictment in a mail fraud prosecution. Id. at 530-531. The court found that the

indictment "more than adequately allege[d] the element[] of materiality" where it alleged that the defendant had falsely represented to his insurer that he was unaware of the cause of the fire that destroyed his home, when in fact he had deliberately caused the fire. Id. at 532. The court did not address whether materiality is an exclusively subjective standard, and the Sixth Circuit has elsewhere applied the reasonable-decisionmaker standard, see Daniel, 329 F.3d at 487.

4. In any event, this case would be an unsuitable vehicle to address petitioners' materiality questions for three reasons.

First, this case does not squarely present the question whether materiality in a mail or wire fraud prosecution should be assessed using a subjective or objective standard. Petitioners did not preserve a challenge to the jury instructions on materiality. See Pet. App. 27-28. The materiality issue arises here only indirectly, by way of the district court's determination that petitioners' proposed expert testimony about the lending practices of the main victim financial institution would be irrelevant. And the court's exclusion of proposed expert testimony is reviewed only for an abuse of discretion. See, e.g., General Elec. Co. v. Joiner, 522 U.S. 136, 141 (1997).

Second, as Judge Berzon explained in her concurrence, the trial record here contains "overwhelming evidence that [petitioners] made material misrepresentations when they sought to

obtain mortgages from First Franklin." Pet. App. 8. Indeed, petitioners "lied about almost everything on their mortgage applications, including the core information in a mortgage application: the borrower's assets, income, and intent to occupy the mortgaged property as a primary residence. They also attached forged and doctored documents in support of their applications." Id. at 8-9. Multiple witnesses testified about the significance of petitioners' misstatements, including a representative from First Franklin. See Gov't C.A. Br. 73, 77-78. And, as Judge Berzon recognized, nothing in the expert witness proffer "suggest[ed] that he would have testified that mortgage lenders were not influenced by the inclusion of the core mortgage statements, accurate or false, in a loan application and attached documents." Pet. App. 9. Accordingly, the admissibility of petitioners' proposed expert testimony had no bearing on the outcome of the case.

Third, review of New's untimely petition is unwarranted for the additional reason that the case is in an interlocutory posture as to him. The court of appeals vacated his sentence and remanded for resentencing. Pet. App. 7. The resentencing proceedings are ongoing in the district court. The interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial of" his petition. Hamilton-Brown Shoe Co. v. Wolf Bros. & Co., 240 U.S. 251, 258 (1916); see Brotherhood of Locomotive Firemen & Enginemen

v. Bangor & Aroostook R.R., 389 U.S. 327, 328 (1967) (per curiam); Virginia Military Inst. v. United States, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari). New will have the opportunity to raise his current claims, together with any other claims that may arise during the proceedings on remand, in a single petition for a writ of certiorari after he is resentenced. See Major League Baseball Players Ass'n v. Garvey, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from the most recent" judgment).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General

BRIAN A. BENCZKOWSKI
Assistant Attorney General

FINNUALA K. TESSIER
Attorney

APRIL 2020