No. 19-7469

IN THE SUPREME COURT OF THE UNITED STATES

_____

OLGA PALAMARCHULK

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 TO GOVERNMENT'S OPPOSITION

_____

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OLGAL PALAMARCHUK replies to the Brief for the United States in Opposition.

ARGUMENT

In a misguided attempt at disambiguation, the government not only misidentifies the Question Presented by petitioner, but disingenuously offers a Question Presented of its own that is, at best, a complete non-sequitur. The government then proceeds to answer its own question, unable, apparently to convincingly address Petitioner's.

This Court has made it clear that in those criminal cases requiring proof of the *materiality* of a defendant's misstatements, *materiality* may be determined by evidence of the "likely behavior of the recipient of the alleged misrepresentations." *Univ. Health Serv. Inc. v. United States ex.re. Escobar*, 136 S. Ct. 1989, 2003-2004.

The Ninth Circuit Court of Appeals, on the other hand, relying on *United States v. Lindsey*, 805 F.3d 1009 (9th Cir. 2017) has contradicted this Court by ruling that evidence of specific lender conduct is inadmissible to establish materiality.

Spin it how they might, the government's contention that both Courts are correct is untenable.

In this case the defense offered the very kind of "likely behavior of the recipient of the alleged misrepresentations[]" approved of by this Court in *Univ. Health Serv. Inc. v. United States ex.re. Escobar*, 136 S. Ct. 1989, 2003-2004.

Nonetheless, relying on the precedent of *United States v. Lindsey*, 850 F.3d 1009, 1015–16, which holds that the standard for proof of materiality is an objective one, the district court granted the government's *motion in limine* and precluded the defense expert's testimony as irrelevant because the testimony related to specific lender conduct. On appeal, the Ninth Circuit, also citing to its decision in *Lindsey*, 850 F.3d 1009, 1015–16, found, categorically that its own objective standard was the correct standard and ignored this Court's directive in *Escobar* that a subjective standard is applicable. Thus, it held an individual lender's conduct in the face of misrepresentations is irrelevant.

Lost in the government's noise is that the Ninth Circuit has held inadmissible for any purpose evidence of a lender's conduct on the question of materiality, while this Court has held the contrary, that subjective evidence is relevant on

the question of materiality. Only this Court can resolve the issue.

Petitioner does not dispute this Court's holdings in earlier cases that a false statement may be 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) and *Neder v. United States*, 527 U.S. 1, 16 (1999). Thus, the government is free to present evidence, if it can, and to argue the inherent tendency of an apparent misstatement to influence conduct. At the same time, however, and by virtue of this Court's holding in *Escobar*, nothing should preclude the defense from presenting evidence, if it can, and arguing that the misstatement was immaterial because it had no effect on the likely or actual behavior of the recipient of
the alleged misrepresentation.

Again, the Ninth Circuit has held that it may not. The Ninth Circuit held in this case that materiality is based exclusively on an objective standard; this Court held, in *Escobar,* that the objective standard touted by the *Lindsey* Court is not exclusive, that the recipient of an alleged misstatement's actual conduct, as determined by a subjective standard is equally worthy of consideration. The question presented here is: which Court is correct, which is hardly merely an academic discussion, as the government suggests.

As troubling as is the government's rewrite of the Question Presented is its mischaracterization, and rather casual dismissal of defendant's proffer at trial as inadequate. Gov't Br. at 10. In fact, a fair reading of defendant's entire proffer, orally stated and in writing, was far more detailed than the out-of-context snippet offered here by the government.

Appellants' proffer included a detailed summary

of the expert's testimony, Doc. 129; SER 1480-1496, which included the following:

> "The key issue in this case . . . is whether the truth in the loan applications was material . . ." SER 1485; "It is only by *understanding the industry* during that time frame that this question can be properly determined. *Id.* "The *lending industry* did not care whether the loans could be repaid . . . SER 1486.

Any fair reading of defendants' proffer leads irrevocably to the conclusion that the issue foremost on defendants' mind was industry wide, general lending practices. ER 647-648; SER 1480-1496.

And, not to put too fine a point on it, the government disingenuously argues that "the defense indicated" that its expert's testimony would have shown the victim's relied on petitioner's misstatements and for that reason too was inadmissible. Gov't Br. 12.

To the contrary, the defendant agreed that lender reliance was never at issue. SER 1493. In fact, citing to *United States v. Blixt*, 548 F.3d

882, 889 (9th Cir. 2008) defendants made plain that lender reliance was not at issue. SER 1493.

This Court really should clarify whether the Ninth Circuit's holding in petitioner's case, that the materiality standard is exclusively objective and that this Court was wrong is suggesting otherwise, or that this Court really meant to that a subjective standard of proof is applicable to determination of whether a misstatement is material to the recipient.

CONCLUSION

For all the forgoing reasons, this petition for a writ of certiorari should be granted.

DATED: May 11, 2020 Respectfully submitted,

/s/Michael B. Bigelow
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