NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

VERA ZHIRY and PYOTR BONDARUK, Petitioners,

VS.

UNITED STATES OF AMERICA, Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. For the crime of mail fraud, what level of connection between the fraudulent scheme and the mailing is required to trigger the federal statute's jurisdictional hook—a substantial connection or one that is merely remote?

2a. In evaluating materiality in federal fraud cases, Supreme Court precedent directs the factfinder to evaluate the misrepresentation's effect on the likely or actual behavior of its recipient. Does the Ninth Circuit's decision in *United States v. Lindsey*, 850 F.3d 1009 (9th Cir. 2017) conflict with this definition of materiality by barring consideration of the recipient's actual behavior to disprove materiality?

2b. When witnesses testify in the government's case-in-chief that misrepresentations were "significant" to their recipients, does the district court violate the United States Constitution by barring cross-examination and substantive evidence that show that the misrepresentations were actually of no consequence to the recipients?

LIST OF PARTIES

Petitioners Vera Zhiry and Pyotr Bondaruk submit this joint petition pursuant to Supreme Court Rule 12.4. All parties to this proceeding appear in the caption of the case on the cover page.

The following additional individuals were defendants in the district court proceeding and appellants in the consolidated appeals before the United States Court of Appeals for the Ninth Circuit:

1. Olga Palamarchuk[1]

2. Peter Kuzmenko

[1] Palamarchuk filed a separate petition for writ of certiorari on January 24, 2020. *See Palamarchuk v. United States*, No. 19-7469.

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Petitioners Vera Zhiry ("Zhiry") and Pytor Bondaruk ("Bondaruk") (collectively, "petitioners") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in Case Nos. 17-10344 and 15-10530.

OPINIONS BELOW

The unreported opinion of the United States Court of Appeals for the Ninth Circuit affirming the judgment on appeal is attached as Appendix A. The unreported order of the Court of Appeals denying panel rehearing and rehearing en banc is attached as Appendix B.

JURISDICTION

The judgment of the United States Court of Appeals for the Ninth Circuit was entered on November 8, 2019. A timely joint petition for rehearing was denied by the Ninth Circuit on January 3, 2020. This Court has jurisdiction pursuant to 28 U.S.C. section 1254(1).[2]

[2] On March 19, 2020, "[i]n light of the ongoing public health concerns relating to COVID-19," the Court "ordered that the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the . . . order denying a timely petition for rehearing."

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution:

"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

A. General Background

In 2011, Palamarchuk, Bondaruk, Kuzmenko and Zhiry (collectively, "defendants") were charged with conspiracy to commit mail fraud in violation of 18 U.S.C. section 1349 and money laundering in violation of 18 U.S.C. section 1957. The charges were based upon four real estate subprime loan transactions in Antelope, California, occurring between September 2006 and February 2007, at the height of the housing bubble. ER 649-63.[3] Specifically, the indictment alleged a single transaction involving the purchase of 7737 Megan Ann ("Megan Ann") and three transactions involving 7784 Hyde Park ("Hyde Park")—a purchase, a refinance, and a HELOC. ER 653-57. Each of the four transactions involved a separate, unrelated lender. The underlying offense for both the conspiracy and money laundering counts was mail fraud in violation of 18 U.S.C. section 1341.[4]

The case was tried to a jury in 2015. At trial, the defendants did not

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[3] "ER" refers to the Excerpts of Record and "SER" refers to the Supplemental Excerpts of Record filed in the Ninth Circuit. "AOB" references defendants' joint opening brief on appeal and "Gov't Br." refers to the government's answering brief in the appellate proceeding. "CR" refers to the Clerk's Record in the district court.

[4] Count Two alleged false statements to a bank in violation of 18 U.S.C. section 1014 against Palamarchuk and Bondaruk, but that charge is not at issue in this petition.

dispute that the statements on the loan applications and supporting documents – regarding Bondaruk's income, employment, assets, and intent to occupy the properties – were false. The defendants were convicted on all counts and each defendant received a multi-year prison sentence.

As raised in the district court and on appeal, two potential defenses applied in this case: (1) whether the mailing of the deeds of trust to the unrelated lenders satisfied section 1341's mailing requirement; and (2) whether the false statements on the loan applications were material under 18 U.S.C. section 1341.

B. Background Related to Mailing Element

Before trial, the government proposed a mail fraud jury instruction stating that the mailings only needed to be "incident to an essential part of the scheme." CR 163 at 53, 55. Over defendants' objections, the district court granted the government's request. ER 140-42.

As admitted during the government's case-in-chief, the key facts underlying the mailing issue were undisputed at trial:

- The government's theory was that the mailing requirement was met by the Sacramento County Recorder's Office's mailing of the deeds of trust to the lenders. Gov't Br. 92-93.

- The case involved four loan transactions with four separate lenders, which had no known or alleged

relationship with one another. AOB 5-14; ER 528.

- The lenders funded the loans prior to recording; the title company then disbursed the funds once the recording (and not the mailing) had taken place. AOB 67-69.

- Prior to disbursing the funds, the lenders verified that the recording had occurred through means other than receiving the deed by mail. AOB 69.

- The deeds were mailed to the lenders by the County Recorder's Office five to seven business days after the recording, which was well after the funds were disbursed. ER 406, 408.

- The County Recorder's Office maintained a scanned copy of the deed of trust, which would have been available to the lenders and the public. ER 405-06.

During closing and rebuttal arguments, the prosecutor repeatedly emphasized to the jury that the mailing "must *only* be incident to an essential part of the scheme." ER 526; *see also* ER 535, 539-41.[5] In its final jury instructions, the district court told the jury three times that it is sufficient "if the mailing is incident to an essential part of the scheme or plan." ER 544, 546-47.

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[5] Emphasis is added, and citations and quotations omitted, throughout this petition, unless otherwise noted.

C. Background Related to Materiality Element

During pretrial proceedings, defendants notified the government of their intent to call Professor Frank Partnoy of the University of San Diego as an expert witness regarding lenders' standards and practices at the end of the housing bubble in 2006. ER 647-48. As explained in the Rule 16(b)(1)(C) expert witness disclosure and during the in limine litigation, defendants proffered Professor Partnoy's testimony with respect to both lender-specific and industry-wide standards and practices. ER 647-48; SER 1480-96. The defense argued that the expert testimony was relevant to show whether the false statements in fact had a "natural tendency" to influence the subprime lenders' decision-making during the relevant time period. SER 1487.

The government moved to exclude evidence or defense argument of lender fault or negligence and to preclude defendants from presenting their expert on the lenders and the overall mortgage loan industry as part of their defense. CR 96-97. The government's motions were granted by the district court. ER 148-52.

During the government's case-in-chief, Anna Benz, a former employee of Resmae (the lender on Megan Ann), testified that the misrepresentations on the loan documents were "very significant" to the lender, and constituted information "the lender would want to know" before making a loan. ER 219,

222; *see also* ER 218-22, 230.

Because no witness testified from Argent (the lender on the Hyde Park purchase), the government presented testimony through Peter Carini, Palamarchuk's superior at a mortgage brokerage firm, that the misrepresentations in the loan application for the purchase of Hyde Park would have "matter[ed]" to the lender. ER 318-19. Similarly, Heidi Hatfield, a former employee of MortgageIT, the lender on the Hyde Park refinance, testified on direct that the false statements in the loan documents were "significant" and would have affected the issuance of the loan. ER 357, 360-66. Jennifer Chatman, an employee of Bank of America (the lender on the Hyde Park HELOC), likewise testified that a borrower's representation about his monthly income on a loan application was "significant." ER 302.

In conformity with its in limine ruling, and based upon objections from government counsel, the district court rejected attempts by defendants' counsel to cross-examine the witnesses regarding the subprime lenders' standards and practices during the relevant time period. *See*, *e.g.*, ER 239-40, 378-79.

In closing argument, the prosecutor urged the jury to "[r]emember the testimony of Anna Benz, Jennifer Chatman, Heidi Hatfield, and Peter Dominic Carini. All said income could be significant in deciding to part with money. Benz and Hatfield also discussed primary residence and how that could be

significant for a lender in deciding to part with money." ER 527. The prosecutor argued that "the false statements made in this case, *were material to the lenders, four different lenders*." ER 528; *see also* ER 527.

D. Ninth Circuit Memorandum Opinion

With regard to the jury instruction related to the mailing, the Ninth Circuit determined that "[t]he instructions properly stated that the use of the mail must be 'incident to' the scheme, and also instructed that the mailing must be used as 'part of the scheme,' to 'carry out or attempt to carry out an essential part of the scheme.'" Memorandum Opinion, attached hereto as Appendix A ("Mem. Op."), at A7-A8, *quoting Schmuck v. United States*, 489 U.S. 705, 710-11 (1989).

With respect to materiality, the Ninth Circuit held that the district court did not err in excluding the defense expert's testimony because appellants' "notice of expert testimony and their response to the government's motion to exclude that testimony demonstrated that Appellants' expert intended to testify about the conduct and motives of the victim lenders, not about the standards and general practices of the mortgage industry." *See* Mem. Op., at A4. Based upon this determination, the Ninth Circuit concluded that the proffered expert testimony was inadmissible under *United States v. Lindsey*, 850 F.3d 1009 (9th Cir. 2017), which held that "evidence of the general lending standards applied in the mortgage industry is admissible to disprove materiality, but evidence of

individual lender behavior is not admissible for that purpose." *Lindsey*, 850 F.3d at 1012.

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari to resolve two important issues in federal criminal fraud jurisprudence.

First, this case provides an excellent opportunity to address the long-standing ambiguity in Supreme Court precedent regarding the mailing requirement under the federal mail fraud statute, 18 U.S.C. section 1341. Section 1341 "reaches only 'those limited instances in which the use of the mails is *a part of the execution of the fraud*, leaving all other cases to be dealt with by appropriate state law.'" *Schmuck v. United States*, 489 U.S. 705, 722-23 (1989) (Scalia, J., dissenting), *quoting Kann v. United States*, 323 U.S. 88, 95 (1944) (emphasis in original). However, under this Court's prior case law, the scope of section 1341's mailing requirement—the statute's jurisdictional hook—remains opaque and enigmatic. On the one hand, this Court held in *Kann* that mailings that "were merely incidental and collateral to the scheme and not a part of it" were insufficient to satisfy the statutory requirement. *Kann*, 323 U.S. at 95. On the other hand, the Court has held that certain mailings can satisfy the statutory requirement if they are "incident to an essential part of the scheme." *Schmuck*, 489 U.S. at 712.

As this Court has previously held, ""the phrase 'incident to' does not

make clear whether a substantial (as opposed to a remote) connection is required." *Household Credit Servs., Inc. v. Pfennig*, 541 U.S. 232, 241 (2004). Since the line between mailings that are merely "incidental and collateral to" a scheme and those that are "incident to an essential part of the scheme" is ambiguous at best, the scope of the federal mail fraud statute's "jurisdictional hook" remains wholly unclear. This lack of clarity has yielded untenable conflicts and inconsistencies in circuit cases. It has also resulted in ill-defined jury instructions—such as those in the case at bar—that leave jurors free to convict defendants even though the facts do not satisfy section 1341's mailing requirement. The time has come to fix this fundamental problem in the Court's criminal fraud jurisprudence, and this case provides the perfect occasion to do so.

Second, the Court should grant the petition to overturn the Ninth Circuit's ill-considered opinion in *Lindsey*, 850 F.3d 1009. In *United States v. Gaudin*, 515 U.S. 506 (1995) and *Universal Health Servs., Inc. v. United States ex rel. Escobar*, 136 S.Ct. 1989 (2016), the Court made clear—as common sense would dictate—that the effect of a misrepresentation on its recipient is relevant as to whether a false statement is "material." *See Gaudin*, 515 U.S. at 509 (holding that a 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"); *Escobar*, 136 S. Ct. at 2002 (stating that "[u]nder *any* understanding of the concept, materiality 'look[s] to the effect *on the likely or actual behavior of the recipient of the alleged misrepresentation*'"). Despite this unambiguous language, the Ninth Circuit held in *Lindsey* that evidence of individual lender behavior is "not admissible" to disprove materiality in a mortgage fraud case. *Lindsey*, 850 F.3d at 1012. As applied in this case, *Lindsey* means that the government remains free to admit lender-specific materiality evidence, but the defense is barred from challenging that evidence, whether through cross-examination or in its own case-in-chief. In short, under *Lindsey*, materiality is a one-way street.

This result is not only unconstitutional as a denial of due process and confrontation, but it *also* conflicts with this Court's precedent and out-of-circuit case law. To overturn *Lindsey* and rein in the Ninth Circuit's sweeping judge-made rule that prevents defendants from contesting the government's theory of the case with respect to materiality, the Court should grant certiorari.

With regard to both of these issues, the case at bar presents an excellent vehicle for review. The two issues were fully preserved in the district court and on appeal. The relevant substantive and procedural facts are undisputed. And petitioners had no other viable defense at trial: the criminal case against

them turned on whether the mailings were sufficient and whether the admittedly false statements were material. Given that this case provides an ideal opportunity to resolve two major problems in federal criminal fraud jurisprudence, the Court should grant the petition.

I. Certiorari Should be Granted to Resolve a Long-Standing Ambiguity in this Court's Jurisprudence Regarding Section 1341's Mailing Requirement

The Court should grant certiorari to fix a deep-seated ambiguity in Supreme Court precedent regarding the scope of section 1341's mailing requirement.

A. This Court's Precedent Contains a Long-Standing Ambiguity Regarding Section 1341's Mailing Requirement

Supreme Court jurisprudence related to section 1341's mailing requirement holds that mailings that are "merely incidental and collateral to the scheme" are *in*sufficient to satisfy the fraud statute's mailing requirement, whereas mailings that are "incident to an essential part of the scheme" *are* sufficient. Given that "the phrase 'incident to' does not make clear whether a substantial (as opposed to a remote) connection is required" (*Household Credit Servs.*, 541 U.S. at 241), this Court's precedent is inherently and deeply ambiguous with respect to the reach of section 1341.

The federal mail fraud statute makes it a criminal offense to use the mails for the "purpose of executing" any scheme to defraud or other fraudulent

activity. 18 U.S.C. § 1341. The statute "does not purport to reach all frauds, but only those limited instances in which the use of the mails is part of the execution of the fraud, leaving all other cases to be dealt with by appropriate state law." *Kann*, 323 U.S. at 95. "To prove mail fraud under 18 U.S.C. § 1341, the government must show: (1) a scheme to defraud; (2) the use of the mails to execute the scheme; and (3) the specific intent to defraud." *United States v. Traxler*, 764 F.3d 486, 488 (5th Cir. 2014).

Federal courts—including this Court—have long struggled regarding the nexus required between the fraudulent scheme and the mailing under section 1341. In *Kann*, the Court addressed the mailing requirement in the context of a scheme to defraud a munitions company by its president, directors and employees. As part of the scheme, the defendants falsely represented to a contractor that they owned timber on land that belonged to the company. *Kann*, 323 U.S. at 92. The contractor gave the defendants a $12,000 check for the timber, which they cashed at a bank in Maryland. *Ibid*. That bank, in turn, sent the check by mail to a Delaware bank, on which it was drawn. *Ibid*.

The *Kann* Court held that the mailing did not satisfy section 1341 since the defendants had already irrevocably received the money. *Kann*, 323 U.S. at 94. Because "[it] was immaterial to them, or to any consummation of the scheme, how the bank which paid or credited the check would collect from the

drawee bank[,]" it could not "be said that the mailings in question were for the purpose of executing the scheme, as the statute requires." *Ibid*. In so holding, the Court rejected the government's argument that the mailing was sufficient because the fraudulent scheme was ongoing and the clearing of checks "in the ordinary course was essential to its further prosecution." *Id*. at 95. The Court held that "the scheme was completely executed as respects the transactions in question when the defendants received the money intended to be obtained by their fraud, and the subsequent banking transactions between the banks concerned *were merely incidental and collateral to the scheme and not a part of it.*" *Ibid*.

The Court revisited the issue ten years later in *Pereira v. United States*, 347 U.S. 1 (1954), which involved a scheme to defraud a wealthy widow. *Id*. at 3-4. As part of the scheme, the defendant induced the widow to advance $35,000, ostensibly to purchase a hotel. *Id*. at 5. The widow received a check in that amount from her bank in Los Angeles and gave it to the defendant, who endorsed it for collection at a bank in El Paso. *Ibid*. The check cleared, and the defendant received the money several days later. *Ibid*. He then absconded with the money. *Ibid*.

Under these circumstances, the Court held that the mailing of the check by the bank satisfied the statutory requirement because it was "*incident to an*

essential part of the scheme." *Pereira v. United States*, 347 U.S. at 8. As the Court stated, "[c]ollecting the proceeds of the check was an essential part of th[e] scheme [to defraud the widow]." *Ibid*. The Court held that the defendant knew that an out-of-state bank would be involved, and that it was "clear that an intent to collect on the check would include an intent to use the mails or to transport the check in interstate commerce." *Id*. at 12; *see also id.* at 9. In other words, the scheme in *Pereira* depended upon the mailing, since otherwise the defendant would not have gotten the money—a fact emphasized by the Court in *United States v. Maze*, 414 U.S. 395 (1974). *See Maze*, 414 U.S. at 401 (stating that "the mailings in *Pereira* played a significant part in enabling the defendant in that case to acquire dominion over the $35,000, with which he ultimately absconded"); *see also id.* at 402 n.5.

The line between a mailing incident to a fraudulent scheme, and one merely incidental to it, was further addressed in *Parr v. United States*, 363 U.S. 370 (1960), *Maze* and *Schmuck*. In relevant part, *Parr* involved a scheme to defraud a school district by the secretary and attorney of the district's Board of Trustees. 363 U.S. at 380, 382. The two individuals "obtained gasoline and oil for themselves upon the credit card and at the expense of the District." *Id.* at 382. The alleged mailings were the invoices sent by the oil company to the school district, and the district's return check paying for the invoices. *Ibid*.;

see also id. at 392-93. The *Parr* Court acknowledged that mailings "'incident to an essential part of the scheme'" fell within the scope of the mail fraud statute. *Id.* at 390, *quoting Pereira*, 347 U.S. at 8. However, the Court held that the mailings were insufficient under *Kann*:

> Here, as in *Kann*, '(t)he scheme in each case had reached fruition' when [the defendants] received the goods and services complained of. 'The persons intended to receive the (goods and services) had received (them) irrevocably. It was immaterial to them, or to any consummation of the scheme, how the (oil company) * * * would collect from the (District). It cannot be said that the mailings in question were for the purpose of executing the scheme, as the statute requires.'

Id. at 393, *quoting Kann*, 323 U.S. at 94 (parentheticals and ellipses in original).

The Court addressed the issue again in *Maze*, which involved a simple scheme whereby the defendant incurred travel expenses using his former roommate's credit card. 414 U.S. at 396. The alleged mailings were the invoices submitted by motels to the credit card company. *Ibid.* Relying on *Kann* and *Parr*, the *Maze* Court concluded that the mailings were insufficiently related to the fraudulent scheme. *Id.* at 400-02. The Court held that "[u]nlike the mailings in *Pereira*, the mailings here were directed to the end of adjusting accounts between the motel proprietor, the [credit card company] and [the roommate], all of whom had to a greater or lesser degree been the victims of [the] scheme. [Defendant's] scheme reached fruition when he checked out of

the motel, and there is no indication that the success of his scheme depended in any way on which of his victims ultimately bore the loss." *Id.* at 402.

Finally, in the context of an ongoing scheme involving repeat customers, the Supreme Court held in *Schmuck* that a mailing occurring after the defendant had received the money could satisfy the statutory mailing requirement. In *Schmuck*, the defendant was a used car dealer who bought cars, rolled back their odometers, and then resold them to other dealers at a higher price. 489 U.S. at 711. After the defendant had sold the cars and fraudulently obtained his money, the dealers who had bought the cars then resold them to innocent purchasers and mailed the title applications to the state motor vehicles agency on behalf of the new owners. This transferred title from the dealer to the owner, who then used the title to acquire a tag. *Ibid.*

In examining whether the mailings satisfied section 1341's requirement, the Court emphasized that the defendant had a "fairly large-scale" scheme involving approximately 150 cars. *Schmuck*, 489 U.S. at 711. He marketed the cars to "a number of dealers, several of whom he dealt with on a consistent basis over a period of about 15 years." *Ibid*. (citation omitted). Given that the defendant's scheme "was not a 'one-shot' operation in which he sold a single car to an isolated dealer," the Court concluded that "[a] rational jury could have concluded that the success of [the defendant's] venture depended upon

his continued harmonious relations with, and good reputation among, retail dealers, which in turn required the smooth flow of cars from the dealers to their . . . customers." *Id.* at 711-12. As the Court explained:

> Under these circumstances, we believe that a rational jury could have found that the title-registration mailings were part of the execution of the fraudulent scheme, a scheme which did not reach fruition until the retail dealers resold the cars and effected transfers of title. [The defendant's] scheme would have come to an abrupt halt if the dealers either had lost faith in [the defendant] or had not been able to resell the cars obtained from him. These resales and [the defendant's] relationships with the retail dealers naturally depended on the successful passage of title among the various parties. Thus, although the registration-form mailings may not have contributed directly to the duping of either the retail dealers or the customers, they were necessary to the passage of title, which in turn was essential to the perpetuation of [the defendant's] scheme. As noted earlier, a mailing that is "incident to an essential part of the scheme," *Pereira*, 347 U.S., at 8, satisfies the mailing element of the mail fraud offense. The mailings here fit this description.

Id. at 712; *see also id.* at 714.

Justice Scalia disagreed in a dissenting opinion, which was joined by Justices Brennan, Marshall and O'Connor. Justice Scalia explained that section 1341 "does not establish a general federal remedy against fraudulent conduct, with use of the mails as the jurisdictional hook, but reaches only 'those limited instances in which the use of the mails is *a part of the execution of the fraud*, leaving all other cases to be dealt with by appropriate state law.'" *Schmuck*, 489 U.S. at 722-23 (Scalia, J., dissenting), *quoting Kann*, 323 U.S. at 95

(emphasis in original). Expressly relying on *Kann*'s holding that "merely incidental and collateral" mailings were not enough under section 1341, Justice Scalia wrote that the mailing of the title application form in *Schmuck* was insufficiently "incidental" to the scheme. *Schmuck*, 489 U.S. at 725 (Scalia, J., dissenting). In so concluding, Justice Scalia foresaw that the holding in *Schmuck* would "create problems for tomorrow." *Ibid.*

Justice Scalia was correct. Under this Court's precedent, including *Schmuck*, a mailing that is "incident to an essential part of the scheme" is sufficient to satisfy section 1341's mailing requirement, but a "merely incidental and collateral" mailing is not enough. *Compare Pereira*, 347 U.S., at 8 *with Kann*, 323 U.S. at 95. Yet the difference between a mailing "incident to an essential part of the scheme" and a mailing "merely incidental and collateral" to the scheme is indiscernible, since the phrase "incident to" is largely indistinguishable from the term "incidental." *Compare Black's Law Dictionary* (10th ed. 2014) (defining "incident" as "[d]ependent on, subordinate to, arising out of, or otherwise connected with (something else, usu. of greater importance)") *with ibid.* (defining "incidental" as "[s]ubordinate to something of greater importance; having a minor role"). Indeed, in other contexts, this Court has repeatedly recognized the inherent ambiguity of the phrase "incident to." *Household Credit Servs., Inc. v.*

Pfennig, 541 U.S. 232, 241 (2004) (holding that "the phrase 'incident to' does not make clear whether a substantial (as opposed to a remote) connection is required"); *see also Holly Farms Corp. v. N.L.R.B.*, 517 U.S. 392, 403 n.9 (1996) (stating that the language "incident to or in conjunction with" does "not place beyond rational debate the nature or extent of the required connection"). If there exists a line between "incident to" and "incidental and collateral to" as applied to the federal mail fraud statute, it remains wholly undefined under this Court's jurisprudence.

B. The Confusion in this Court's Precedent Has Yielded Inconsistent Interpretations of Section 1341's Mailing Requirement in the Circuit Courts and in Jury Instructions

The results of the confused precedent in this Court related to the mailing requirement are evident in the lower courts and in jury instructions, which have inconsistently interpreted section 1341's mailing requirement.

Notwithstanding this Court's holding in *Kann*, circuit courts have often concluded that even an incidental connection between the mailing and the fraudulent scheme is enough under section 1341. *See*, *e.g.*, *United States v. Dobson*, 419 F.3d 231, 241 (3d Cir. 2005) (stating that "in order for a particular mailing to support a mail fraud conviction, all that is necessary is that such a mailing have been incidental to a necessary aspect of the scheme or have been sufficiently closely related to the scheme"); *United States v.*

Seward, 272 F.3d 831, 836 (7th Cir. 2001) ("The mailing must, at the least, be incidental to an essential part of the scheme or be a step in the plot."); *United States v. Lo*, 231 F.3d 471, 479 (9th Cir. 2000) (upholding convictions where "[t]he jury could have found that the routine mailings of the deeds to the owner of the property interest was incidental to an essential aspect of this overall sham sale scheme"); *United States v. Woodward*, 149 F.3d 46, 63 (1st Cir. 1998) (stating that "[t]he use of the mails or wires to further the fraudulent scheme need only be 'incidental'") (brackets in original); *Henderson v. United States*, 202 F.2d 400, 405 (6th Cir. 1953) ("If, in the execution of the scheme the mail is in fact used, even though it be incidental and unpremeditated, the statute is violated.") However, other circuit court decisions hold the contrary. *See*, *e.g.*, *United States v. Evans*, 148 F.3d 477, 483-84 (5th Cir. 1998) (overturning a defendant's convictions where the "mailing was entirely incidental to the scheme"); *United States v. Kent*, 608 F.2d 542, 545 (5th Cir. 1979) (stating that "fraudulent transactions only incidentally involving the mails" should "be prosecuted under state laws"); *United States v. Brown*, 583 F.2d 659, 668 (3rd Cir. 1978) ("[E]vidence may show that a mailing was for the purpose of fulfilling a business or legal procedure unrelated to the fraud and that it was not closely connected with the fraud. In such a case, the mailing is too remote to convert a state law fraud into federal mail fraud, even though

the mailing has the incidental effect of assisting the scheme.").

In fact, puzzling inconsistencies have even appeared within the same circuit court opinion. For instance, in *United States v. Rauhoff*, 525 F.2d 1170 (7th Cir. 1975), the Seventh Circuit cited *Maze* for the proposition that "the mailings must not have been merely incidental to such a scheme," and then relied on *Pereira* for the principle that "[m]ailings are in furtherance of a scheme if they are incidental to an essential part of the scheme." *Id.* at 1175-76. The Seventh Circuit made no attempt to resolve the evident conflict between these two propositions.

This confusion has also descended into jury instructions. Most model jury instructions do not contain either the "incident to" or the "incidental to" language.[6] However, the Seventh Circuit's pattern instructions provide that the mailings need only be "incidental to an essential part of the scheme." Pattern Criminal Jury Instructions of the Seventh Circuit (2012 ed.), at 442. Without citing *Kann* or *Maze*, the relevant Committee Comment states that the

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[6] *See* Pattern Criminal Jury Instructions for the District Courts of the First Circuit, No. 4.18.1341 (updated June 23, 2014); Model Criminal Jury Instructions for the District Courts of the Third Circuit, Nos. 6.18.1341 and 6.18.1341-5 (2015); Fifth Circuit Criminal Jury Instructions, No. 2.56 (2015); Sixth Circuit Pattern Jury Instructions, No. 10.01 (updated Aug. 1, 2016); Eighth Circuit Model Instruction No. 6.18.1341 (2014); Ninth Circuit Model Instruction, No. 8.121 (2010); Tenth Circuit Criminal Pattern Jury Instructions, No. 2.56 (updated Sept. 2015); Eleventh Circuit Pattern Jury Instructions, No. O50.1 (2016).

"'incidental to' line [was added] in response to *Schmuck v. United States*, 489 U.S. 705, 710-11 (1989)." *Id.* at 443.

Thirty years after *Schmuck*, the case at bar itself provides a cogent example of how this doctrinal morass plays out with respect to jury instructions. At the government's urging, the district court instructed the jury three times that the mailing only needed to be "incident to" the fraudulent scheme, without *also* informing the jury that a merely incidental and collateral connection was insufficient. ER 544, 546-47. Having successfully persuaded the district court to depart from the Ninth Circuit's model jury instructions, the prosecutor then minimized in closing and rebuttal arguments the required connection between the mailing and the scheme. *See* ER 526 (prosecutor telling jurors to "remember that the mailing must *only* be incident to an essential part of the scheme"); ER 535 (prosecutor arguing that the instructions "will tell you that the mailing *only* need be incident to an essential part of the scheme."); ER 539 (prosecutor stating that "the mailing need *only* be incident to an essential part of the scheme"). The district court's instruction, as requested and emphasized by the prosecution, left the jury free to find the defendants guilty even if there was "merely an incidental and collateral" connection between the mailing and the scheme, in violation of the holdings of *Kann* and its progeny. *Kann*, 323 U.S. at 95; *see also Griffin v. United*

States, 502 U.S. 46, 59 (1991) ("[W]hen . . . jurors have been left the option of relying upon a legally inadequate theory, there is no reason to think that their own intelligence and expertise will save them from that error.").

The ambiguity created by this Court's precedent does not relate to a mere technical issue. Instead, a loose and undefined mailing requirement yields an unwarranted expansion of federal jurisdiction over commonplace frauds that are traditionally resolved under "appropriate State law." *Schmuck*, 489 U.S. at 723 (Scalia, J., dissenting). It may be that Congress has the power under the Constitution to enact such an expansive federal criminal fraud statute. However, the exercise of any such power should be accomplished by clear statutory language manifesting a legislative intent to do so, and not through tortured interpretations of conflicting and ill-defined phrases in this Court's precedent.

C. This Case Provides an Excellent Vehicle for the Court to Resolve the Long-Standing Ambiguity Regarding the Scope of the Mailing Requirement

For a number of reasons, this case provides an excellent opportunity for the Court to clear up the deep-seated ambiguity regarding the mailing requirement under 18 U.S.C. section 1341.

First, given the district court's repeated use of "incident to" in the jury instructions, the meaning of that phrase was squarely presented at trial. The

defense also challenged the use of the "incident to" language, both in the district court and on appeal, and there is therefore no question of waiver or forfeiture.[7]

Second, the facts related to the mailings were undisputed at trial and on appeal, making the case ideal for this Court's review.

Third, the uncontroverted facts show that the mailings at issue—namely, the mailing of the deeds of trust by the County Recorder after recording—occurred well after the lenders funded the loans and the funds were distributed from the escrow accounts. At the same time, unlike the *Schmuck* case, the lenders were all unrelated, and no ongoing scheme depended on any of the mailings. Because the facts of this case fall somewhere between the holdings of *Kann* and *Schmuck*, this represents a rare occasion for the Court to resolve the ambiguous and conflicting language in its precedent, and to remove a nagging thorn in mail fraud jurisprudence once and for all.

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[7] As shown by the jury instructions and the parties' litigation over the "incident to" language in the district court, this case squarely presents the issue even though substantive mail fraud was not charged as a separate offense. Section 1341's mailing requirement was directly at issue at trial and on appeal because (1) the government had to prove all of the elements of mail fraud to sustain the money laundering charges (Gov't Br. 43, n. 6) and (2) the government had to prove that the "intended future conduct [the conspirators] agreed upon includes all the elements of the substantive crime" to sustain the conspiracy to commit mail fraud charge. *United States v. Porter*, 542 F.3d 1088, 1098 (5th Cir. 2008).

II. Certiorari Should be Granted to Overturn the Ninth Circuit's Ill-Considered Decision in *United States v. Lindsey*, 850 F.3d 1009 (9th Cir. 2017)

This Court should grant certiorari to overturn the Ninth Circuit's ill-advised decision in *Lindsey*.

A. The Ninth Circuit's Decision in *Lindsey* Conflicts with Supreme Court and Out-of-Circuit Precedent

The Ninth Circuit's poorly-reasoned decision in *Lindsey* conflicts with clear precedent from this Court and from other circuits.

Under this Court's precedent, a false statement is material under the criminal law 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*." *Gaudin*, 515 U.S. at 509; *see also Neder v. United States*, 527 U.S. 1, 16 (1999) (same). In *Escobar*, 136 S. Ct. 1989, this Court examined the materiality requirement under the False Claims Act (FCA), which "defines materiality using language that [the Court has] employed to define materiality in other federal fraud statutes . . . ." *Escobar*, 136 S.Ct. at 2002. As the Court made crystal clear in *Escobar*, "[u]nder *any* understanding of the concept, materiality 'look[s] to the effect on the likely or actual behavior *of the recipient of the alleged misrepresentation*.'" *Escobar*, 136 S. Ct. at 2002. In other words, this Court has made clear that recipient-specific evidence *is* directly relevant to materiality under federal law.

Despite this strong and unambiguous language in *Gaudin* and *Escobar*, the Ninth Circuit applies a different rule in mortgage fraud cases. In *Lindsey*, the Ninth Circuit held that "evidence of the general lending standards applied in the mortgage industry is admissible to disprove materiality, but *evidence of individual lender behavior is not admissible for that purpose*." *Lindsey*, 850 F.3d at 1012. In so holding, the Ninth Circuit acknowledged that "*Escobar* suggests that defendants be allowed to probe lender behavior to some extent," but then incomprehensibly concluded that "a bright-line rule against evidence of individual lender behavior to disprove materiality is both a reasonable and necessary protection and faithful to *Escobar*." *Id.* at 1017. It is beyond cavil that a "bright-line rule" excluding any evidence of individual lender behavior cannot be reconciled with *Escobar*, which specifically determined that materiality "look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Escobar*, 136 S. Ct. at 2002.

The Ninth Circuit's conclusion that *all* individual lender behavior is inadmissible is not only in conflict with this Court's holdings in *Gaudin* and *Escobar*. It is also contrary to cases from other circuits, which routinely hold that the effect of a misrepresentation on the behavior of its recipient is relevant. *See*, *e.g.*, *United States v. Rigas*, 490 F.3d 208, 235 (2d Cir. 2007), *citing Neder*, 527 U.S. at 16 (stating that a misstatement "had to be capable of

influencing a decision that *the bank* was able to make"); *United States v. Heath*, 970 F.2d 1397, 1403 (5th Cir. 1992) ("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. McAuliffe*, 490 F.3d 526, 532 (6th Cir. 2007), *quoting Neder*, 527 U.S. at 16 (holding that misstatements were material if they "had a 'tendency' to influence Grange [Insurance Company]'s decision to settle his claim"); *United States v. Wright*, 665 F.3d 560, 574-75 (3d Cir. 2012), *as amended* (Feb. 7, 2012); *but see United States v. Raza*, 876 F.3d 604, 621 (4th Cir. 2017) (stating that "the correct test for materiality . . . is an objective one, which measures a misrepresentation's capacity to influence an objective 'reasonable lender,' not a renegade lender with a demonstrated habit of disregarding materially false information").

In short, the Ninth Circuit's decision in *Lindsey* is contrary to *Gaudin* and *Escobar*, and reveals a deeper conflict between the circuit courts with respect to the admissibility of recipient-specific materiality evidence in criminal fraud cases.

B. This Case Presents an Ideal Opportunity to Overturn the Ninth Circuit's Decision in *Lindsey*

The case at bar provides an excellent vehicle to overturn the Ninth Circuit's decision in *Lindsey.*

This case is *Lindsey* on steroids. There is no indication that the

government in *Lindsey* relied upon a lender-specific materiality theory. Here, by contrast, *the government itself relied on lender-specific testimony to prove materiality at trial*. The government presented the testimony of multiple witnesses who testified that the false statements were "significant" to the individual lenders. *See* ER 218-22, 230 (testimony of Anna Benz); ER 318-19 (testimony of Peter Carini); ER 357, 360-66 (testimony of Heidi Hatfield); ER 302 (testimony of Jennifer Chatman). The lender-specific materiality testimony was carefully elicited by the prosecutor. *See*, *e.g.*, ER 218 ("Q. Now, could whether a borrower represented on a loan application that he would live in a property be significant *to ResMae*?"). When addressing the requirement that "the false statements or omissions must be material" during closing argument, government counsel emphasized the lender-specific testimony and told the jury that "the false statements made in this case, *were material to the lenders, four different lenders*." ER 537-28.

Notwithstanding the government's reliance on lender-specific evidence to prove materiality, the defense's attempts to show that the false statements were *not* material to the lenders were completely shut down. Through cross-examination and affirmative evidence, the defense could have shown that the lenders systematically ignored false information on loan applications to increase the volume of loans that were then repackaged and sold on the

secondary market. However, the defendants were neither allowed to cross-examine the lender witnesses on that issue (ER 238-40, 378-80), nor to present expert testimony in the defense case-in-chief about the standards and practices of the subprime lenders at the height of the housing bubble. ER 148-52. In other words, with respect to materiality, the trial was a one-way street: the government could rely on a lender-specific materiality theory presented through rose-colored glasses, but the defense could not contest it, in violation of the defendants' fundamental constitutional rights to due process and confrontation. *See*, *e.g.*, *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (holding that "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense"); *Davis v. Alaska*, 415 U.S. 308, 318 (1974) (holding that cross-examination where defense counsel is "unable to make a record from which to argue" a key issue at trial does not comport with the Sixth Amendment's Confrontation Clause); U.S. Const. Amends. 5 & 6. Because this case provides a clear illustration of the unfairness of the *Lindsey* rule, it is a perfect vehicle for this Court's review.

Other factors also strongly counsel in favor of a grant of certiorari here. The materiality issue was fully preserved at all stages, both in the district court

and on appeal.[8] The relevant facts are undisputed. And the Ninth Circuit's conclusion that the defense's expert proffer failed to meet the requirements of *Lindsey* does not weigh against the Court's review, since this petition raises whether the *Lindsey* rule is valid at all, and especially when the government itself relies on a lender-specific materiality theory at trial. As the Ninth Circuit itself acknowledged, it is undisputed that the defense proffered expert testimony regarding the standards and practices of the specific lenders at issue. *See* Mem. Op., at A4 (stating that the defendants' "expert intended to testify about the conduct and motives of the victim lenders").

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[8] Although a violation of the substantive mail fraud statute was not charged, the government had to prove materiality at trial, both to sustain the money laundering charges (Gov't Br. 43, n. 6) and to show that the defendants conspired to commit mail fraud (*Porter*, 542 F.3d at 1098). *See supra* at 25 n.7.

CONCLUSION

For the reasons expressed above, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Dated: May 28, 2020

Respectfully submitted,

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