No.

In the Supreme Court of the United States

MICHAEL GRAMINS, PETITIONER

v.

UNITED STATES OF AMERICA

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, for purposes of the federal fraud statutes, misstatements are immaterial when they pertain only to a party's negotiating position and all terms of the transaction are disclosed.

RELATED PROCEEDINGS

United States District Court (D. Conn.):

United States v. *Shapiro, et al.*, Crim. No. 15-555 (June 5, 2018) (order granting new trial)

United States v. *Shapiro, et al.*, Crim. No. 15-555 (Dec. 17, 2020) (final judgment)

United States Court of Appeals (2d Cir.):

United States v. *Gramins*, No. 18-2007 (Sept. 20, 2019)

United States v. *Gramins*, No. 21-5 (Oct. 12, 2022)

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Michael Gramins respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is unreported but is available at 2022 WL 6853273. The earlier opinion of the court of appeals (App., *infra*, 13a-59a) is reported at 939 F.3d 429. The earlier opinion of the district court (App., *infra*, 60a-75a) is unreported but is available at 2018 WL 2694440.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 2022. On December 30, 2022, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including February 9, 2023. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Section 1343 of Title 18 of the United States Code provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire * * * communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

Section 78j of Title 15 of the United States Code provides in relevant part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange * * * [t]o use or employ, in connection with the purchase or sale of * * * any security * * * any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange] Commission may prescribe as necessary or appropri-

> ate in the public interest or for the protection of investors.

Section 78ff of Title 15 of the United States Code provides in relevant part:

> Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter * * * shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both * * * but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

Section 240.10b-5 of Title 17 of the Code of Federal Regulations provides in relevant part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

STATEMENT

This case arises from a quixotic, decade-long campaign by the Justice Department to criminalize commonplace trading behavior. In an earlier decision in that series of prosecutions, the Second Circuit held that a bond trader's misstatement to a buyer regarding the trading firm's cost of acquiring a bond could be material for purposes of Sections 78j(b) and 78ff of title 15 of the United States Code. In the decision below, the Second Circuit applied that precedent to affirm petitioner's conviction for conspiracy to commit wire or securities fraud, 15 U.S.C. 78j(b), 78ff; 18 U.S.C. 1343. Because there is a square conflict with the Seventh Circuit concerning the fundamental question of the materiality of misrepresentations about a party's negotiating position, this Court's review is warranted.

The government prosecuted petitioner and two other bond traders for statements they made during negotiations with professional investment managers for the purchase or sale of certain bonds. In some of the transactions at issue, the traders concededly misstated their employer's cost of acquiring the bond or the resulting profit their employer would earn. Critically, however, the traders never made any misstatements concerning the quality of the bonds, the consideration to be exchanged, or any other term of the transaction. The misstatements pertained only to the traders' negotiating position. Put simply, the counterparties to the trades got exactly what they bargained for at the price they agreed to pay.

On the theory that the counterparties were nevertheless victims of fraud, the government charged petitioner and the other traders with nine counts of wire fraud, securities fraud, and conspiracy. After a four-week trial and more than a week of deliberations, the jury convicted only petitioner and only of a single count of conspiracy. The district court initially granted his motion for a new trial on evidentiary grounds, but the Second Circuit reversed. On the ensuing appeal from his conviction, the Second Circuit reaffirmed its rule that a misstatement concerning a party's cost of acquiring an asset or its expected profit can be material.

As the Seventh Circuit has recognized, the federal fraud statutes do not prohibit misrepresentations merely concerning a party's negotiating position. The Seventh Circuit has even identified a party's reserve price, which is closely related to its acquisition cost and expected profit, as an example of an immaterial negotiation fact. The Second Circuit's radical expansion of the fraud statutes criminalizes previously lawful practices in bond trading and chills numerous other economic activities. This Court's review is needed to resolve the conflict between the courts of appeals and to restore a crucial limitation on the federal fraud statutes.

A. Background

The federal wire-fraud statute prohibits only material misstatements and omissions. The statute makes it unlawful to "transmit[] or cause[] to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing" a "scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses." 18 U.S.C. 1343. This Court has held that "materiality of falsehood is an element" of wire fraud because "the well-settled meaning of 'fraud'" at common law "required a misrepresentation or concealment of *material* fact," and because there is no evidence that Congress "intended to drop that element from the fraud statutes." *Neder* v. *United States*, 527 U.S. 1, 22, 23, 25 (1999).

The securities-fraud statute at issue here likewise prohibits only material misstatements and omissions. Section 10(b) of the Securities Exchange Act of 1934 prohibits the use of "any manipulative or deceptive device or contrivance" in connection with the purchase or sale of a security that violates rules promulgated by the Securities and Exchange Commission. 15 U.S.C. 78j(b). Rule 10b-5 in turn prohibits "any device, scheme, or artifice to defraud"; any misstatement or omission regarding a "material fact"; and "any act, practice, or course of business which operates or would operate as a fraud or deceit." 17 C.F.R. 240.10b-5. Consistent with that text, the Court has required proof of materiality under Section 10(b) and Rule 10b-5. See *Basic Inc.* v. *Levinson*, 485 U.S. 224, 232 (1988).

"The question of materiality * * * is an objective one, involving the significance of an omitted or misrepresented fact to a reasonable investor." *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 445 (1976). Accordingly, a court assessing materiality "look[s] to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Universal Health Services, Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989, 2002 (2016) (alteration in original) (citation omitted). That standard is "demanding," *id.* at 2003, and the Court has been "careful not to set too low a standard of materiality," *Basic*, 485 U.S. at 231. "The role of the materiality requirement is not to attribute to investors a child-like simplicity, an inability to grasp the probabilistic significance of negotiations, but to filter out essentially useless information that a reasonable investor would not consider significant, even as part of a larger mix of factors to consider in making his investment decision." *Id.* at 234 (internal quotation marks and citations omitted).

B. Facts And Procedural History

1. During the period relevant to this case, petitioner worked as a bond trader at Nomura Securities International. In that role, he transacted with professionals at firms that manage investment funds. App., *infra*, 16a.

The bonds that petitioner traded were a type of residential mortgage-backed securities (RMBS) that consist of pools of home mortgages. App., *infra*, 15a. In those bonds, underlying mortgages and loans serve as collateral, and bondholders receive payments based on homeowners' payments on their mortgages. *Ibid.* The bonds are not publicly traded on an exchange, and there is no centralized listing of available bonds or the prices at which they are trading. *Id.* at 16a.

The RMBS market is dominated by sophisticated institutional investors that typically transact through registered broker-dealers such as Nomura. App., *infra*, 16a. The transactions in this case took two forms. In an "order trade," Nomura would communicate and transact separately with an interested buyer and seller, and Nomura would briefly own the bond while completing buy-side and sell-side transactions. *Id.* at 17a. In a "bids-wanted-in-competition trade," there would be "an auction in which a putative seller sen[t] a bid-list to multiple broker-dealers." *United States* v. *Litvak*, 889 F.3d 56, 60 (2d Cir. 2018) (*Litvak II*). The broker-dealers would "solicit expressions of interest and price ranges from potential buyers" and "place[] a bid in the auction." *Ibid.* That bid could "differ from prices suggested by putative buyers." *Ibid.* If the broker-dealer won the auction, it would buy the bond and could offer to sell it to the potential buyer. *Ibid.*; see App., *infra*, 17a. In either case, after the broker-dealer completed its purchase, the presumptive buyer might not actually buy the bond from the broker-dealer at the anticipated price.

In both types of trades, Nomura earned a profit based on the difference between the amounts that the buyer and seller paid. Sometimes Nomura's profit was negotiated "on top" of the bond price, and sometimes Nomura quoted an "all-in" price that included an unspecified commission. *Litvak II*, 889 F.3d at 61. Either way, as the Second Circuit has recognized, "the counterparty ha[d] no legitimate expectation that the broker-dealer [would] resell the bond at the price paid to the counterparty"; the converse was true in a purchase. *Ibid.*

It is undisputed that all of the transactions here involved an arm's-length negotiation; at no point did Nomura act as an agent, or otherwise owe a fiduciary duty, to a counterparty. App., *infra*, 18a. And "while some RMBS transactions may be effectively riskless in practice, the broker-dealer *always* assumes *some* risk in the transaction, because an institutional investor can refuse to purchase a bond held by the broker-dealer." *Ibid.* (internal quotation marks and citation omitted). For their part, the counterparties recognized that broker-dealers were "not always being completely truthful" in the arm's-length negotiations. C.A. App. 714; see *Litvak II*, 889 F.3d at 71.

The sophisticated institutional investors in the RMBS market relied exclusively on highly complex, proprietary modeling programs to analyze the "fundamental[]" value of bonds. C.A. App. 521; see *id.* at 1208-1229. Each counterparty witness testified that his investment decisions were dictated by those models, rather than by representations from broker-dealers. *Id.* at 546, 750. The models considered information such as "national and regional data about home prices[,] * * * home price movements and amounts of homes that are available for sale or foreclosures"; "the characteristics of the borrowers whose mortgages were behind the securities"; and the "size of the mortgages." *Id.* at 398. The models produced a forecast of a bond's yield and the price at which the bond could profitably be bought or sold. *Id.* at 400; see *Litvak II*, 889 F.3d at 60. Counterparties would transact only when a broker-dealer offered a price that overlapped with the range calculated by the modeling software. See *Litvak II*, 889 F.3d at 61. Indeed, counterparties would often transact without having any information about the broker-dealer's acquisition cost. Counterparties testified they were able to do so because their models allowed them to assess whether a bond would be a good investment for them at a given price. C.A. App. 540-541, 752-753.

2. Petitioner and his codefendants never made any misrepresentations about the bonds themselves. They were always truthful with their counterparties about the underlying features and characteristics of the bonds that they bought or sold. And they always bought or sold the exact bond the counterparty wanted at the exact price the counterparty agreed to pay. C.A. App. 233.

Petitioner's only misstatements related to Nomura's acquisition cost—the amount it paid to acquire a bond—and Nomura's expected profit if it later sold the same bond. C.A. App. 170. For example, in the final trade at issue here, Nomura purchased bonds at a cost of $79.25 and sold them at a price of $80.50. *Id.* at 1206-1207. Neither counterparty asked about the size of Nomura's profit, and petitioner did not volunteer that information. *Id.* at 1153-1204. The seller offered to sell for $80, *id.* at 1187, and the buyer informed petitioner it was willing to bid $80, *id.* at 1193. Petitioner told the seller that the buyer was "passing over 80," and petitioner made an offer to buy at the price of $78.75. *Id.* at 1199-1200. The seller asked if petitioner had a bid at that price from the buyer. Petitioner answered: "To you. He's paying me on top."

Id. at 1200. The seller ultimately sold the bond to petitioner at a price of $79.25 without asking about how much Nomura would make. *Id.* at 1206; see *id.* at 1202. Petitioner told the buyer that he had "beaten [the seller] up" as much as he could and the price of $80.50 was "the best I can get them to you." *Id.* at 1194. The buyer asked whether that price included Nomura's profit, and petitioner confirmed that it did and that the seller was paying him. *Id.* at 1194-1195.

3. On September 3, 2015, petitioner and two of his Nomura colleagues, Ross Shapiro and Tyler Peters, were indicted in the United States District Court for the District of Connecticut on charges of wire fraud under 18 U.S.C. 1343; securities fraud under 15 U.S.C. 78j(b) and 78ff and 17 C.F.R. 240.10b-5; and conspiracy to commit wire or securities fraud under 18 U.S.C. 371. C.A. App. 50-62. In each transaction at issue, petitioner or one of his codefendants misrepresented to a counterparty Nomura's cost of acquiring a bond or its expected profit.

The government tried petitioner jointly with Mr. Shapiro and Mr. Peters. At trial, there was no dispute that defendants were always truthful about the features and characteristics of the bonds; that they always bought or sold the exact bond the counterparty wanted at the exact price the counterparty agreed to pay; or that the terms of each deal were fully disclosed and subject to arm's-length negotiation. C.A. App. 233. The evidence instead focused on instances in which petitioner or his colleagues, over the course of a negotiation, misrepresented to their counterparties what Nomura paid to acquire a bond or how much Nomura would profit when it later sold the same bond. *Id.* at 170. The government elicited testimony that Nomura's profit margin was "important" to its counterparties and that the counterparties would have negotiated differently if they had possessed that information. *Id.* at 537, 704,

743. But nothing in the record suggests that, if the counterparties had continued negotiating, Nomura would have agreed to transact with them at a more favorable price. Nor did anything in the record show that RMBS investors put stock in broker-dealers' representations about their own profit. And nothing shows that the Nomura traders' misrepresentations had any impact on the price their counterparties agreed to pay or their decisions to buy the bonds at issue.

After deliberating for a week, the jury convicted petitioner of a single count of conspiracy to commit wire or securities fraud. C.A. App. 961. The jury failed to reach a verdict on several wire- and securities-fraud counts, and it acquitted petitioner on the remaining counts. *Id.* at 961-963. The jury acquitted Mr. Peters on all nine counts and acquitted Mr. Shapiro on all counts except for conspiracy, as to which it was unable to reach a verdict. *Id.* at 961-964.

4. Petitioner moved for a new trial, and the district court granted the motion. App., *infra*, 60a-75a. It concluded that one of the government's witnesses had "strongly implied" that there was an agency relationship between petitioner and the counterparties. *Id.* at 71a. The district court further concluded that, "[e]ven if the admission of [that] testimony, standing alone, does not justify vacating [petitioner's] conviction," a "combination of errors" involving a reference to uncharged conduct and a comment about "lying to take people's money" warranted a new trial. *Id.* at 68a-69a, 75a.

The court of appeals reversed and remanded. App., *infra*, 13a-59a. It concluded that the witness did not misstate agency law or refer to petitioner as his agent. *Id.* at 43a-54a. It further determined that any error was harmless. *Id.* at 54a-58a. And it rejected the alternative ground that cumulative error required a new trial. *Id.* at 58a-59a.

On remand, the district court sentenced petitioner to two years of probation, with the first six months to be spent on home confinement. C.A. App. 1146.

5. On petitioner's subsequent appeal from the conviction, the court of appeals affirmed. App., *infra*, 1a-12a. As is relevant here, petitioner argued that there was insufficient evidence that any misrepresentations were material because they pertained only to Nomura's acquisition costs or expected profits, not to the terms of the deal. *Id.* at 5a. Based on its precedent in *Litvak II*, the court of appeals rejected that argument. *Id.* at 5a-6a. The court reasoned that a "broker-dealer's profit is part of the price and lies about it can be found by a jury" to be material. *Id.* at 5a (quoting *Litvak II*, 889 F.3d at 67). Accordingly, the court concluded that there was sufficient evidence of materiality even though petitioner's misstatements "affect[ed] only the negotiation over price." *Ibid.* (quoting *Litvak II*, 889 F.3d at 67).

REASONS FOR GRANTING THE PETITION

The court of appeals' decision implicates a circuit conflict on the question whether misstatements concerning a party's negotiating position are immaterial for purposes of the federal fraud statutes, even where the terms of the deal are fully disclosed to the counterparty. That conflict involves two circuits—the Second and Seventh—that are home to the Nation's major financial and commercial centers. It also implicates a fundamental limitation on the scope of numerous federal fraud statutes. Because the circuits are in conflict on an important question of federal law, the petition for certiorari should be granted.

A. The Decision Below Perpetuates A Conflict Among The Courts Of Appeals

The Second Circuit's definition of materiality conflicts with that of the Seventh Circuit, which has held that misrepresentations concerning a party's negotiating position are immaterial as a matter of law. In addition, the Eleventh Circuit has adopted a definition of materiality in the context of the Securities Litigation Uniform Standards Act (SLUSA) that adds to the disarray concerning materiality under the federal fraud statutes. This Court should grant review to resolve the conflict.

1. In *United States* v. *Weimert*, 819 F.3d 351 (2016), the Seventh Circuit held that "lack of candor about the negotiating positions of parties to a business deal" is immaterial as a matter of law. *Id.* at 354. In that case, a bank executive had been tasked with selling the bank's share in a real-estate development. See *id.* at 353. The executive succeeded in arranging a sale that significantly exceeded the bank's target price and relieved the bank of a liability that was twice the sale price. See *ibid.* In the process, however, the executive "deliberately misled his board and bank officials to believe that the successful buyer would not close the deal if [the executive] were not included as a minority partner," and the bank agreed that he would acquire a minority interest financed in part by a bonus from the bank. *Ibid.* The executive did not mislead the bank as to "the nature of the asset it was selling or the consideration it received." *Id.* at 366. Nor did the executive mislead the bank as to his financial interest in the transaction. See *ibid.*

The Seventh Circuit reversed the executive's convictions for wire fraud, holding that his misrepresentations were immaterial as a matter of law. See *Weimert*, 819 F.3d at 364. The court explained that "[d]eception about negotiating positions—about reserve prices and other terms and their relative importance—should not be considered material." *Id.* at 358. That is because "negotiating parties, and certainly the sophisticated businessmen in this case, do not expect complete candor about negotiating positions." *Ibid.* It was not enough that the bank "might have been able to secure a better deal if it had known the underlying priorities of prospective buyers" and the executive. *Id.* at 370. What mattered was that "[a]ll the actual terms of the deal * * * were fully disclosed and subject to negotiation." *Id.* at 354. The Seventh Circuit's decision in *Weimert* thus stands for the proposition that the federal fraud statutes cannot be "stretched to criminalize deception about a party's negotiating positions, such as a party's bottom-line reserve price." *Id.* at 357.

The Seventh Circuit recently doubled down on its definition of materiality in *United States* v. *Filer*, 56 F.4th 421 (2022). The defendant in that case, a lawyer, represented a debtor in connection with a loan. See *id.* at 425. The lawyer concealed the fact of his representation during negotiations with his client's bank. See *id.* at 430. The court reasoned that the lawyer's concealment of the "key fact" of his representation was material because the lawyer knew that the bank's policies "forbade it from negotiating a discount with or transferring its lien to [the client]." *Id.* at 431; see *id.* at 425. Crucially, however, the court contrasted those misstatements with ones regarding "a mere negotiating position, such as [a] reserve price," which would have been immaterial. *Ibid.* As the court explained, "sophisticated businesspeople are expected to hide their 'true goals, values, priorities, or reserve prices' from their negotiating partners," and "such concealment [is] not material." *Ibid.* (quoting *Weimert*, 819 F.3d at 754).

2. The Second Circuit, by contrast, has expanded the concept of materiality to encompass misstatements that "affect[] only the negotiation over price." App., *infra*, 5a (alteration in original; citation omitted). Specifically, it has held in a series of decisions that misstatements concerning a party's acquisition costs or expected profits—both of which are quintessential negotiation facts—may be material.

In *United States* v. *Litvak*, 808 F.3d 160 (2d Cir. 2015) (*Litvak I*), the government prosecuted another RMBS trader, Jesse Litvak, for misstatements concerning his firm's cost of acquiring bonds. See *id.* at 175. The Second Circuit held that, "on the trial record before [it], a rational jury could have concluded that Litvak's misrepresentations were material." *Ibid.* Although the court of appeals ultimately vacated Litvak's convictions on other grounds, it explained that there was sufficient evidence of materiality because several counterparties testified that Litvak's misrepresentations were " 'important' to them in the course of the transactions." *Id.* at 176.

After being convicted at a second trial, Litvak again appealed and challenged the sufficiency of the evidence of materiality. See *United States* v. *Litvak*, 889 F.3d 56, 67 (2d Cir. 2018) (*Litvak II*). The Second Circuit rejected Litvak's argument that "his misstatements cannot, as a matter of law, be material because they were not relevant to the intrinsic value of the bond" and "at best affect[ed] only the negotiation over price." *Ibid.* (internal quotation marks and citation omitted). In the court's view, the same argument "appears to have been considered and rejected in *Litvak I*." *Ibid.* (citing *Litvak I*, 808 F.3d at 175-178). The court made clear that "statements about the price paid by the broker-dealer for a RMBS" could be material even though they were "not intended, or understood, as relevant to the intrinsic value of the bond," on the ground that "[t]he broker-dealer's profit is part of the price." *Ibid.*

Finally, in the decision below, the Second Circuit applied the *Litvak* decisions and affirmed petitioner's conviction. Petitioner argued that, in light of the counterparties' independent valuation of the bonds and awareness that broker-dealers made misrepresentations about their acquisition costs and expected profits, his misstatement could not be material as a matter of law. See Pet. C.A. Br. 20-21. But the court of appeals observed that it had "rejected a virtually identical argument" in *Litvak II*. App., *infra*, 5a. It adhered to its holding that misstatements could be material even if they "affect[ed] only the negotiation over price" and had nothing to do with the intrinsic value of the bond. *Ibid.* (quoting *Litvak II*, 889 F.3d at 67).

3. The decision below also implicates broader disarray among the courts of appeals. In *Brink* v. *Raymond James & Associates, Inc.*, 892 F.3d 1142 (2018), the Eleventh Circuit adopted its own interpretation of the materiality requirement of the Securities Litigation Uniform Standards Act (SLUSA), in a case involving a broker-dealer's misrepresentation concerning the size of its commission. See *id.* at 1144-1145. SLUSA generally prohibits state-law class actions based on "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security," which is actionable under the federal securities laws. 16 U.S.C. 78bb(f)(1)(A). The broker-dealer had offered an investment account that charged a flat "Processing Fee," and the account agreement stated that the fee was for "transaction execution and clearing services" and was "not [a] commission[]." *Brink*, 892 F.3d at 1144. Execution and clearing costs, however, were allegedly no more than $5 per transaction,

meaning the firm kept at least half of the fee as "undisclosed profit." *Id*. at 1145.

The Eleventh Circuit held that SLUSA did not preclude the plaintiff's action because the misrepresentation was immaterial. The court observed that "customers chose to trade securities with full knowledge of the amount of the Processing Fee for each trade and never paid more than they agreed." *Brink*, 892 F.3d at 1149. It further explained that a reasonable investor would not have made "different investment decisions" if the investor had "known that some of the Processing Fee—a fee she had agreed to pay and presumably had included in her cost-benefit calculation before making each trade—included profit for [the defendant] instead of merely covering the transaction execution and clearing costs." *Ibid*.

The Eleventh Circuit purported to reconcile its decision with *Litvak I* on the ground that the misrepresentation regarding the Processing Fee "did not 'mislead [the broker-dealer's] customers as to what portion of the total transaction cost was going toward purchasing securities versus the cost of the broker's involvement.'" *Brink*, 892 F.3d at 1149 (quoting *Litvak I*, 808 F.3d at 176). But that distinction fails to account for the fact that customers still did not know their broker-dealer's profit, and the Eleventh Circuit's interpretation of *Litvak I* is inconsistent with that adopted by the Second Circuit itself in *Litvak II*. See pp. 15-16, *supra*. Regardless, the Eleventh Circuit's decision only adds to the disarray among the circuits in this area.

* * * * *

There is a square conflict between the Second and Seventh Circuits with respect to the definition of materiality under the federal fraud statutes. Under the Seventh

Circuit's definition, petitioner would not have been convicted, because all terms of the deal were disclosed and Nomura's acquisition costs and expected profits were part of its negotiating position. Without guidance from this Court, the courts of appeals will remain divided on this important question.

B. The Decision Below Is Incorrect

The court of appeals' decision cannot be reconciled either with the settled understanding of materiality or with this Court's precedents. As a matter of law, petitioner's misstatements regarding Nomura's acquisition costs and expected profits were immaterial, and the court of appeals' contrary holding is erroneous.

1. The court of appeals' decision is inconsistent with the settled meaning of materiality. This Court has turned to the common law to interpret the core element of materiality in fraud statutes. Although "the fraud statutes did not incorporate all the elements of common-law fraud," *Neder* v. *United States*, 527 U.S. 1, 24 (1999) (emphasis omitted), "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms," *Kungys* v. *United States*, 485 U.S. 759, 770 (1988) (citation omitted); see *Universal Health Services, Inc*. v. *United States ex rel. Escobar*, 136 S. Ct. 1989, 1999 (2016).

The meaning of materiality was well established at common law. A false statement was not unlawful if it concerned only "some trifling collateral circumstance, to which no regard is paid." 4 William Blackstone, *Commentaries on the Laws of England* 137 (1772). Instead, to be material, a misrepresentation had to "affect[] and go[] to" the transaction's "very essence and substance." William

W. Kerr, *A Treatise on the Law of Fraud and Mistake* 34 (2d ed. 1883). A misrepresentation was material if it was "of such a nature as, if true, to add substantially to the value of property, or [was] calculated to increase substantially its apparent value." *Id.* at 35. By contrast, a misrepresentation that "remotely or indirectly contributed to the transaction," or that "supplied a motive to the other party to enter into it," was not material. *Ibid.*

Consistent with that understanding, courts deemed misrepresentations concerning a party's acquisition costs or expected profits to be immaterial as a matter of law. It was "fundamental that the mere statement by the vendor of what an article cost him would not be regarded as a matter on which a vendee should rely where * * * the vendee had an unrestricted opportunity to learn the actual value of the property, and * * * he actually undertook to ascertain such value." *McCaw* v. *O'Malley*, 249 S.W. 41, 45 (Mo. 1923).

For example, a misrepresentation made to "an experienced real estate man" who "had dealt in stocks" that the seller of a stock was making a commission of 75¢ per share was held to be "pure 'dealer's talk'" that was immaterial because "the identical thing promised [was] delivered, at the price agreed, and the parties [were] dealing at arm's length." *Steiner* v. *Hughes*, 44 P.2d 857, 860 (Okla. 1935) (per curiam); see also *Schoellkopf* v. *Leonard*, 6 P. 209, 210-211 (Colo. 1885). Similarly, false representations that a bid "was as low as the work could be done" and that "there was no profit in it at that price" were deemed "dealer's talk" that would not invalidate a contract on a theory of fraud in the inducement. *Worrell & Williams* v. *Kinnear Manufacturing Co.*, 49 S.E. 988, 990-991 (Va. 1905). And a defendant's false statement about his overall expected profit was held to be immaterial because "nothing in the statement, if untrue, * * * was calculated to deceive the [plaintiff] as to the real value of his interest." *Byrd* v. *Rautman*, 36 A. 1099, 1101 (Md. 1897).

Of particular note here, courts deemed immaterial those facts that would affect a counterparty's decision to negotiate further by shedding light on an opponent's willingness to accept a less favorable price. For example, Kentucky's highest court held that a lie about the lowest price a defendant would accept was immaterial because otherwise the "validity of [plaintiff's] purchase would depend, not upon what he was willing to pay, but upon the price at which the property might be purchased." *Ripy* v. *Cronan*, 115 S.W. 791, 794 (1909). And in the leading English decision of *Vernon* v. *Keys*, 104 Eng. Rep. 246 (K.B. 1810), the court explained that a "seller is unquestionably liable to an action of deceit if he fraudulently misrepresent[s] the quality of the thing sold to be other than it is in some particulars, which the buyer has not equal means with himself of knowing" or if the seller does so "to induce the buyer to forbear making the inquiries" that "he would otherwise have made." *Id.* at 249. But the court could not find "any case, or recognized principle of law," that would create liability for "misrepresenting the seller's chance of sale, *or the probability of his getting a better price for his commodity*, than the price which such proposed buyer offers." *Ibid.* (emphasis added). Otherwise, "an action might be maintained against a man for representing that he would not give * * * beyond a certain sum" whenever "it could be proved that he had said he would give much more than that sum." *Ibid.*

Consistent with the common-law understanding, this Court has defined materiality with reference to the actions of a reasonable participant in the relevant market. In *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976), the Court explained that information is material in the proxy-solicitation context if it presents "a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Id.* at 449. The Court quoted the same definition of materiality in *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1998), where it applied the materiality requirement to Section 10(b) and Rule 10b-5. See *id.* at 231-232. Although this Court has never directly addressed the question presented, its materiality precedents strongly suggest that, where a misrepresentation pertaining to a party's negotiating position is not capable of affecting the recipient's ultimate *decision* about whether to transact for the particular good at an agreed-upon price, it cannot be material.

2. In reaching a contrary holding, the court of appeals relied on its previous decisions in *Litvak I* and *Litvak II*. See App., *infra*, 5a-6a. Neither of those decisions withstands scrutiny.

a. In *Litvak I*, the court of appeals cited the principle—recognized by this Court—that Section 10(b) "should be construed not technically and restrictively, but flexibly." *Litvak I*, 808 F.3d at 177 (citation omitted); see *Securities and Exchange Commission* v. *Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 195 (1963). But that principle is "not without limit." *TSC Industries*, 426 U.S. at 448. And this Court's more recent cases have emphasized the role of the common law in interpreting materiality. See, *e.g.*, *Universal Health Services*, 136 S. Ct. at 1999.

Reversing petitioner's conviction would do no violence to Section 10(b)'s remedial purposes. Investors in the RMBS market bear no resemblance to the stock-market investors that Section 10(b) and Rule 10b-5 were "designed to protect." *Basic*, 485 U.S. at 230. The RMBS market, unlike the stock market, is dominated by institutional investors. App., *infra*, 15a-16a. In the words of

Congress, those investors are "sophisticated" and "capable of protecting themselves." H.R. Rep. No. 622, 104th Cong., 2d Sess. 31 (1996).

What is more, when a broker-dealer acts as a principal for its own account in the RMBS market, it is not required to disclose its acquisition cost for, or profit margin on, a transaction. See 17 C.F.R. 240.10b-10(a)(2)(ii)(A). As the record demonstrates, the institutional investors that dominate the RMBS market were well aware of the rampant misrepresentations concerning negotiating positions in that market and took steps to protect themselves. C.A. App. 714; see *Litvak II*, 889 F.3d at 70. In those circumstances, it would be incongruous to attach criminal penalties to misrepresentations concerning negotiating positions based on some unbounded understanding of Congress's remedial purpose, where the Securities and Exchange Commission has not seen fit directly to regulate such representations.

b. The court of appeals' decision in *Litvak II* is equally unavailing. Aside from *Litvak I*, the only decision the court cited on the question presented was *Basic*, *supra*. As discussed above, this Court's focus in *Basic* on the investor's decision to transact is consistent with the settled meaning of materiality at common law. See pp. 20-21. Indeed, the Court emphasized in *Basic* that it has been "careful not to set too low a standard of materiality." 485 U.S. at 231. Yet that is precisely what the court of appeals has done in its recent decisions, culminating in the decision below.

3. Application of the correct definition of materiality is straightforward here. As a matter of law, petitioner's misstatements were immaterial to any reasonable investor in the RMBS market "under all the circumstances." *TSC Industries*, 426 U.S. at 449. It is undisputed that pe-

titioner and his fellow Nomura traders were always truthful with their counterparties about the underlying characteristics of the bonds that Nomura bought or sold. It is also undisputed that Nomura traders always bought or sold the exact bond the counterparty wanted at the exact price to which the counterparty agreed. The only misrepresentations pertained to Nomura's negotiating position—specifically, its acquisition costs and expected profits. In the concededly arm's-length transactions at issue here—involving sophisticated investors that were aware broker-dealers engaged in "dealer's talk" and that relied on independent valuation tools to determine the price at which they were willing to transact—the misstatements were immaterial as a matter of law.

The court of appeals concluded that petitioner's misrepresentations concerning Nomura's acquisition costs and expected profits were indistinguishable from misrepresentations concerning the bonds' value. See App., *infra*, 5a. But the undisputed evidence rebuts that conclusion. The buyers and sellers in the RMBS market were sophisticated institutional investors that calculated the value of the bonds based on their extensive, independent, and highly technical analysis of factors other than Nomura's acquisition costs and expected profit. C.A. App. 396, 398, 521, 540, 546, 711, 749-750, 752, 1208-1229. The buyers and sellers were also well aware that broker-dealers misrepresented their own acquisition costs and expected profits, and they frequently transacted without any information at all about those costs. *Id*. at 540, 714, 752. Because the terms of every deal were fully disclosed and the only misrepresentations made by petitioner and his codefendants involved Nomura's acquisition costs and expected profits—quintessential negotiation facts—the decision below was incorrect.

C. The Question Presented Is Important And Warrants The Court's Review In This Case

The question presented is exceedingly important, and this case is an ideal vehicle in which to consider it.

1. This Court has repeatedly emphasized that the federal fraud statutes do not "criminaliz[e] all acts of dishonesty." *Kelly* v. *United States*, 140 S. Ct. 1565, 1571 (2020); see *McDonnell* v. *United States*, 136 S. Ct. 2355, 2370-2371 (2016); *Yates* v. *United States*, 574 U.S. 528, 536, 543 (2015); *Skilling* v. *United States*, 561 U.S. 358, 410-412 (2010). But the Second Circuit has adopted (and adhered to) a dangerously broad interpretation of materiality that would criminalize every lie about a party's negotiating position in a wide range of commonplace economic activities—effectively eliminating an important restraint on prosecutors when bringing charges under the federal fraud statutes.

Both on Wall Street and on Main Street, "[t]o conceal one's true position, to mislead an opponent about one's true settling point, is the essence of negotiation." James J. White, *Machiavelli and the Bar: Ethical Limitations on Lying in Negotiation*, 1980 Am. Bar Found. Rsch. J. 926, 928 (1980); see Robert H. Frank, *Passions Within Reason* 165 (1988). Making misrepresentations about acquisition costs, expected profits, and the like is such a widespread practice that the legal profession has expressly protected it in the Model Rules of Professional Conduct, which provide in a comment that misstatements about a party's true settling point ordinarily are not "statements of material fact." Model Rule of Professional Conduct 4.1 cmt. 2; see Scott R. Peppet, *Can Saints Negotiate? A Brief Introduction to the Problems of Perfect Ethics in Bargaining*, 7 Harv. Negot. L. Rev. 83, 94 (2002); Eleanor Holmes Norton, *Bargaining and the Ethic of Process*, 64 N.Y.U. L. Rev. 493, 508 (1989).

Under the Second Circuit's holding, every car dealer who tells a customer that he cannot lower his price any further, because he is already earning only a miniscule profit on the sale, would be guilty of fraud. And if a mere effect on a counterparty's decision to negotiate harder is enough to establish materiality, then all manner of misrepresentations—whether about a party's monthly sales quota, the time pressure on a deal, or a shared love of a sports team—would qualify. The range of facts that can potentially affect a negotiation, even if they have no bearing on the value of the item at issue, is nearly boundless. If the decision below is allowed to stand, criminal liability for everyday misrepresentations will be subject to the whims of federal prosecutors.

The Second Circuit's sweeping interpretation of the materiality requirement cannot be limited to the wire- and securities-fraud statutes. Materiality is a ubiquitous requirement in dozens of federal statutes prohibiting false and fraudulent representations. See, *e.g.*, *United States* v. *Gaudin*, 28 F.3d 943, 959-960 & nn.3-4 (9th Cir. 1994) (Kozinski, J., dissenting) (collecting statutes), aff'd, 515 U.S. 506 (1995). And this Court has adopted a uniform definition of "materiality" in statutes where "neither the evident objective sought to be achieved by the materiality requirement, nor the gravity of the consequences that follow from its being met, is so different as to justify adoption of a different standard." *Kungys*, 485 U.S. at 770; accord *id*. at 786-787 (Stevens, J., concurring in the judgment). If left uncorrected, the Second Circuit's reading of the materiality requirement could greatly expand liability under not just the wire- and securities-fraud statutes, but well beyond.

2. This case is an excellent vehicle for the Court's review. The question presented has now been addressed

multiple times by the Second and Seventh Circuits. Further percolation is unnecessary, particularly in light of the outsized role that those circuits play in financial and commercial activities. This Court should grant review and reaffirm the traditional understanding that misrepresentations concerning a party's negotiating position are immaterial as a matter of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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