No. 22-759

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

REPLY BRIEF FOR THE PETITIONER

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This is the latest example of a case in which the government seeks to criminalize large swaths of routine conduct under an expansive interpretation of the federal fraud statutes. Petitioner was convicted for misrepresenting his acquisition costs and expected profits in arm's-length negotiations with institutional investors. The Second Circuit upheld that conviction on the ground that "[a] broker-dealer's profit is part of the price [of a security]" and "lies about it can be found by a jury" to be material. Pet. App. 5a (citation omitted). The Seventh Circuit, by contrast, has unambiguously held that misrepresentations regarding such negotiating positions are immaterial as a matter of law. See *United States* v. *Weimert*, 819 F.3d 351 (2016). The government now tries to disclaim the breadth of the Second Circuit's decision. But that decision

would criminalize everyday negotiation strategies, with no basis in the common law or this Court's precedents. That is precisely what the Seventh Circuit rejected.

In downplaying the circuit conflict, the government focuses on a nebulous, quasi-fiduciary duty. It leans heavily on the position of the dissent in *Weimert* that the defendant had breached a duty in making his misrepresentations. But the majority in *Weimert* explicitly declined to address whether the defendant had breached a fiduciary duty. And neither the law nor the record in this case support imposing such a heightened duty of disclosure on petitioner.

The government's tepid defense of the Second Circuit's decision fails for much the same reason. The government invents a distinction between "dealer's talk" concerning one's own position (which does not give rise to liability) and a misrepresentation concerning another party's willingness to accept a certain price (which does). That line has no support either in the common-law understanding of materiality or in this Court's cases. Nor is there any basis for imposing some sort of ad hoc duty on sophisticated participants in arm's-length negotiations.

The question presented is important, and it is ripe for the Court's review in this case. The government cannot identify a meaningful principle that would limit the implications of the decision below for numerous federal fraud statutes. While the government dismisses the decision below as factbound, there is no real dispute concerning the facts; the question presented is whether the *type* of misrepresentations at issue here—concerning acquisition costs and expected profits in arm's-length negotiations—can ever be material. That legal question is cleanly presented here and perfectly teed up for the Court's review. The petition for a writ of certiorari should be granted.

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

The Second and Seventh Circuits are starkly divided on the question whether statements concerning a party's negotiating position are immaterial as a matter of law. The government's attempt to downplay that conflict (Br. in Opp. 14-16), by making both cases about heightened disclosure obligations, lacks support in either case. And a decision of the Eleventh Circuit deepens the disarray regarding the materiality of such misrepresentations; the government simply misreads that decision (Br. in Opp. 16-17). The resulting conflict warrants the Court's review.

1. The government is incorrect to speculate that the Seventh Circuit might agree with the Second Circuit on the facts of this case. See Br. in Opp. 15. It is true that the dissent in *Weimert* suggested the bank that employed the defendant "had every reason to expect that [he] would fairly and honestly represent its interests." 819 F.3d at 370 (Flaum, J., dissenting). But the presence or absence of a fiduciary duty was irrelevant to the *Weimert* majority, which declined to address whether the bank officer might be civilly liable for breach of fiduciary duty. See *id.* at 369-370. The majority explained that, where "the only ways in which [the defendant] misled anyone concerned" third parties' "true goals, values, priorities, or reserve prices in a proposed transaction," those misrepresentations are immaterial. *Id.* at 354. In particular, the majority rejected the notion that a statement that is "important only in predicting how various parties were likely to respond to a counteroffer," or that "might have" permitted the listener to "secure a better deal," can be material. *Id.* at 366, 370.

The Seventh Circuit's later decision in *United States* v. *Filer*, 56 F.4th 421 (2022), does not bridge the gap with the Second Circuit. See Pet. 14. That decision reaffirmed

the holding of *Weimert* that misstatements regarding "a mere negotiating position, such as [a] reserve price," are immaterial. 56 F.4th at 431. In suggesting otherwise, the government quotes language from the decision out of context, failing to mention the facts that led the *Filer* court to distinguish *Weimert*. See Br. in Opp. 16. The defendant in *Filer* concealed from a counterparty bank that he represented the debtor whose loan was the subject of the negotiations, and it was undisputed that the bank would have refused to negotiate with the defendant if it had known that fact. See 56 F.4th at 430. The Seventh Circuit concluded that calling the concealed attorney-client relationship a negotiating position would "read[] too much into *Weimert*'s narrow holding." *Ibid.* The facts in *Filer* are completely unlike the ones here, where petitioner was convicted of "misle[ading] [one] party about [a third party's] negotiating position" and "all material facts and terms of the actual deal were disclosed." *Id.* at 431.

Nor is there any support in the record here for the government's assertion that petitioner was not a "negotiating partner" of the counterparties. Br. in Opp. 16. It is undisputed that, in all of the relevant trades, petitioner's counterparties either negotiated to sell bonds that he would resell to third parties or negotiated to buy bonds that he had acquired from third parties. See, *e.g.*, Pet. 7; Br. in Opp. 3. There is also no dispute that a "broker-dealer is not * * * an agent for its counterparties" in the residential mortgage-backed securities (RMBS) market. Pet. App. 18a (internal quotation marks and citation omitted). And insofar as the government now suggests that the jury could have found that the transactions at issue were not at arm's length, that would squarely have conflicted both with the court's instructions and with the testimony at trial. See *id.* at 47a-51a.

2. The government's discussion of the Eleventh Circuit's decision in *Brink* v. *Raymond James & Associates, Inc.*, 892 F.3d 1142 (2018), fundamentally misses the tension with the decision below. See Br. in Opp. 16-17. The government ignores that the Eleventh Circuit's interpretation of the Second Circuit's decision in *United States* v. *Litvak*, 808 F.3d 160 (2d Cir. 2015) (*Litvak I*), is inconsistent with the Second Circuit's reasoning in its later decision in *United States* v. *Litvak*, 889 F.3d 56 (2d Cir. 2018) (*Litvak II*). See Pet. 17. And the government's analysis fails to account for the fact that the customers in *Brink*, like the counterparties here, "never paid more than they agreed." 892 F.3d at 1149. This Court's review is thus needed to resolve the square conflict between the Second and Seventh Circuits, as well as the broader disarray involving the Eleventh Circuit.

B. The Decision Below Is Incorrect

The government offers only a lukewarm defense of the Second Circuit's decision on the merits (Br. in Opp. 9-14). That defense is ultimately unavailing.

1. The government seeks to disguise the breadth of its theory below by distinguishing between "driving a hard bargain about the prices that [petitioner] or his firm would accept," which would not give rise to liability, and misrepresenting the "bids and offers that he had received," which would. Br. in Opp. 13. But that is a false dichotomy. Petitioner did not do anything to add value to the goods he was buying and selling. It is thus unclear—and the government never explains—how petitioner could "driv[e] a hard bargain" *without* misrepresenting what a third party was bidding or offering.[1]

[1] Conversely, the counterparties in this case testified that, if they had known the truth about what third parties were bidding or

Even if such a distinction were valid, moreover, the government fails to cite a single common-law case recognizing it. The government does not dispute the "common-law exception for hard bargaining, or 'dealer's talk,' about the price a party is willing to pay or accept." Br. in Opp. 13. But that rule unambiguously covers misrepresentations concerning the speaker's own negotiating position, as well as those concerning a third party's. See Pet. 18-20.

The government's purported distinction has no basis in this Court's cases applying the materiality requirement, either. The government points to no authority suggesting that a decision concerning negotiating or portfolio strategy is equivalent to a shareholder's "deci[sion] how to vote" in the proxy-solicitation context. *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438, 449 (1976); see Br. in Opp. 10, 13-14. And the government's assertion that a "security's price" is material, *id.* at 13, fails to distinguish between the price the parties agreed upon (which is material) and the price the parties *might have* agreed upon (which is not).

2. The government also seeks to characterize the broker-dealer's relationship with counterparties in the RMBS market as giving rise to some sort of special duty. The government bases that supposed duty on counterparties' testimony that they "had to take" the word of broker-dealers on the prices at which bonds were available and that they "expected" broker-dealers to "provide accurate information." Br. in Opp. 11-12 (quoting Pet. App. 19a, 27a).

There was no special duty here. The government never disputes that the transactions at issue occurred at

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offering, they would simply have driven harder bargains. See, *e.g.*, Br. in Opp. 6, 12; Pet. App. 38a.

arm's length. See Br. in Opp. 16. Petitioner did not have a fiduciary obligation to any counterparty, and the government cites no authority imposing a quasi-fiduciary duty on broker-dealers. Nor does the government try to square that supposed duty with the undisputed testimony that the RMBS market was rife with misrepresentations concerning negotiating positions, by broker-dealers and counterparties alike. See Pet. 22-23. And the government simply dismisses the fact that the same counterparties testified that they relied on proprietary pricing models to decide whether to transact, meaning that bid or offer prices were relevant only insofar as they affected the counterparties' negotiating positions. See Br. in Opp. 12.

Courts have rejected the government's efforts to imply a duty in materially identical cases. In *Litvak II*, the Second Circuit vacated another trader's fraud convictions because the government treated the "concept of subjective trust" as a "back door for the jury to apply the heightened expectations of trust that an agency relationship carries." 889 F.3d at 69-70. Indeed, the Second Circuit recognized that "relationship of trust" arguments can taint jury deliberations. Pet. App. 52a; see *id.* at 71a-72a (granting petitioner's motion for a new trial on that ground). The government's continued reliance on the idea of a special duty has no obvious limiting principle and raises serious due-process concerns. Cf. *Percoco* v. *United States*, 143 S. Ct. 1130, 1138 (2023). Because petitioner's misrepresentations were immaterial as a matter of law, this Court should grant review and reverse the decision below.

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

The government's efforts to limit the implications of the Second Circuit's decision are unpersuasive, and it

identifies no valid reason why this case is anything other than an ideal vehicle to address the question presented (Br. in Opp. 17-19). Further review is warranted.

1. The government identifies no limiting principle that would prevent the Second Circuit's decision from covering commonplace negotiating strategies. Under the Second Circuit's test, lies are material if they are "important to [the counterparty] in the context of the price negotiations in which they occurred," Pet. App. 38a, and "the price must be considered in determining whether the purchase is deemed profitable," *id.* at 5a (citation omitted). The Second Circuit has specifically "rejected" the view that "misstatements cannot, as a matter of law, be material if they affect only the negotiation over price." *Ibid.* (internal quotation marks, citation, and alteration omitted).

If it is hard to see any limit on that definition of materiality, that's because there is none. The Second Circuit's interpretation of the materiality standard would "encourage arbitrary and discriminatory enforcement," *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983), and "hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges," *United States* v. *Davis*, 139 S. Ct. 2319, 2323 (2019). The federal fraud statutes simply do not give the government the discretion to prosecute everyday misrepresentations by participants in the marketplace.[2]

2. The government's contention that this case is not an ideal vehicle to answer the question presented does not withstand scrutiny.

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[2] The government observes that all fraud convictions require proof of willfulness. See Br. in Opp. 14. But the government must prove every element beyond a reasonable doubt; proof of one element cannot cure the failure to prove another as a matter of law.

First, the government's argument that materiality is "inherently fact-specific" would seemingly mean that no statement could be immaterial as a matter of law. Br. in Opp. 17 (internal quotation marks and citation omitted). This Court has recognized that "trivial information" may be immaterial. *Basic Inc.* v. *Levinson*, 485 U.S. 224, 231 (1988) (citation omitted). It has also recognized that, in some instances, the question of materiality "should not * * * go[] to the jury" in the first place. *United States* v. *Gaudin*, 515 U.S. 506, 517 (1995). Here, the question on which the courts of appeals disagree is a legal one: whether, under the federal fraud statutes, misstatements concerning a party's negotiating position are immaterial as a matter of law. It is an inquiry into the sufficiency of the evidence only insofar as it requires a determination that, irrespective of the government's evidence, a particular misstatement cannot be material.

Second, the "two-court rule" does not apply here, because the petition raises no factual issue on which the lower courts agreed. See Br. in Opp. 18. This Court will grant review where, as here, "the question[] of general importance considered" is "not contingent upon resolving conflicting testimony," but rather requires a conclusion that the judgment "cannot stand as a matter of law" because the legal standard applied was "less exacting than that required." *Great Atlantic & Pacific Tea Co.* v. *Supermarket Equipment Corp.*, 340 U.S. 147, 153-154 (1950); see *Keyes* v. *School District No. 1*, 413 U.S. 189, 198 n.9 (1973). The two-court rule is also irrelevant here because the lower courts considered themselves bound by circuit precedent. See, *e.g.*, Pet. App. 5a-6a.

Third, the government suggests in passing that there might be "potential distinctions" in the materiality standard under the federal fraud statutes. Br. in Opp. 18. But the government does not argue that there *are* such

distinctions, much less say what those distinctions might be, and there is no sound reason to think the materiality standard differs from statute to statute. As petitioner has noted, 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," this Court has adopted a "uniform understanding" of materiality. *Kungys* v. *United States*, 485 U.S. 759, 770 (1988); accord *id.* at 786-787 (Stevens, J., concurring in the judgment); see Pet. 25. And in the decision below, the Second Circuit explained that, "[i]rrespective of the type of fraud at issue, the different specifications of the materiality inquiry target the same question: would the misrepresentation actually *matter* in a *meaningful way* to a rational decisionmaker?" Pet. App. 3a (internal quotation marks and citation omitted). Under the broadly worded question presented here, the government is of course free to argue otherwise once certiorari is granted.

* * * * *

The federal fraud statutes do not "criminaliz[e] all acts of dishonesty." *Kelly* v. *United States*, 140 S. Ct. 1565, 1571 (2020). The Second Circuit upheld petitioner's conviction under a staggeringly broad theory of materiality, in direct conflict with a decision of the Seventh Circuit. If it is allowed to stand, the Second Circuit's decision will eliminate a crucial limitation on the scope of the federal fraud statutes, and it will criminalize routine negotiating strategies despite the clear historical understanding that misrepresentations concerning acquisition costs and expected profits are immaterial as a matter of law. The question presented is as ripe for review as it ever will be, and its importance cannot be overstated. The petition for a writ of certiorari should be granted.

Respectfully submitted.

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