No. 23-1321

In the Supreme Court of the United States

JEFFREY BATIO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court plainly erred in instructing the jury that "[a] defendant's honest and genuine belief that he will be able to perform what he promised is not a defense to fraud if the defendant also knowingly made false and fraudulent representations."

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-8a) is available at 2023 WL 8446388. The order of the district court (Pet. App. 9a-39a) is available at 2020 WL 7353442.

JURISDICTION

The judgment of the court of appeals was entered on December 6, 2023. A petition for rehearing was denied on January 18, 2024 (Pet. App. 40a). On March 25, 2024, Justice Barrett extended the time within which to file a petition for a writ of certiorari to and including June 14, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner

was convicted on six counts of mail fraud, in violation of 18 U.S.C. 1341, and six counts of wire fraud, in violation of 18 U.S.C. 1343. Judgment 1. He was sentenced to 96 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-8a.

1. For more than a decade, petitioner schemed to defraud investors and prospective customers by representing that his companies had developed innovative computer products and were about to launch them into the consumer market, when in reality petitioner never had a product that was anywhere near completion and used much of the funds he collected for personal expenses. Pet. App. 2a-3a, 9a-10a. Petitioner's scheme largely centered on claims of two forthcoming products: the "Radian," which "featured multiple monitors that could be attached to a desktop computer," and the "Dragonfly," which "was a folding laptop computer that could also be used as a tablet and as a smartphone" and that was "as thin as a dime." *Id.* at 3a, 10a.

Petitioner made many misrepresentations in order to obtain millions of dollars from investors in his companies, Armada and Ideal Future, and prospective customers of the Radian and Dragonfly. Pet. App. 2a-3a, 15a-29a. Those misrepresentations included:

- In 2006, petitioner told investors that the Radian was "virtually complete from a design standpoint" and was projected to generate $40 million in revenue that year. Trial Tr. 842; see Pet. App. 16a, 74a; Trial Tr. 847. In fact, the product was "not yet ready for manufacturing, much less for sale." Pet. App. 16a; see Trial Tr. 509-510, 841-847.

- In the summer of 2008, the only two people working on the Radian (an employee and a consultant) left Armada after petitioner stopped paying them, and Armada neither replaced them nor made any significant progress on the Radian's design after they left. See Pet. App. 2a-3a, 17a-18a, 25a. Yet from 2009 to 2012, petitioner repeatedly represented to investors "that the Radian's launch was imminent" even though "there was 'nobody else to do any of the work' on the Radian" after the 2008 departures. *Id.* at 17a & n.5 (citation omitted); see *id.* at 2a-3a.
- In November 2008, petitioner told investors that Armada was "ready for Radian production" and "actually beginning the process of building and shipping the first Radians." Pet. App. 24a (citation omitted). In fact, Armada "had no manufacturing facility and no employees," "had already run out of money," and "was nowhere near completion of the product's engineering." *Id.* at 17a, 24a-25a.
- Petitioner told investors in December 2009 that Armada also had "created a unique software product" that was "ready for market" and would launch in the first quarter of 2010. Pet. App. 18a n.6 (citation omitted). But his sole employee with software experience had left in 2008 after creating only a basic prototype that the employee had estimated would take a team of 15 to 20 engineers six months to finalize. *Ibid.* Petitioner did not have even one engineer, much less a team of 15 to 20. *Id.* at 24a-25a.

- In December 2009, petitioner told investors that Armada was in discussions with Sony to license the Radian and another product. Pet. App. 25a. But the Sony employee with whom petitioner had spoken testified that he and petitioner had had no such discussions, that his role at Sony had nothing to do with licensing or product development, and that he had merely agreed to try out a prototype of the Radian and give petitioner feedback. *Ibid.*; Trial Tr. 272-276. After finding that the prototype did not work and that using it was "less productive than if I hadn't had it at all," he returned it to petitioner with his negative feedback. Pet. App. 25a (citation omitted); see Trial Tr. 260-262.
- In July 2012, petitioner told investors that Dragonfly would launch "'in 60 days,'" but in fact "'there was no product' in 2012, and the device * * * was not ready for crowdfunding." Pet. App. 28a (citations omitted).
- In August 2015, petitioner represented that Dragonfly would begin shipping by the end of the year. Pet. App. 3a, 18a. As the court of appeals later put it, that was "fantasy"—two different companies petitioner had hired to conduct feasibility studies had concluded that it was impossible. *Id.* at 3a; see *id.* at 18a-19a. Petitioner had not even figured out how to make a product with the Dragonfly's basic purported features, including cellphone capability. *Id.* at 28a.
- In October 2015, petitioner released a promotional video purporting to show "the working prototype" of the Dragonfly "in action," Gov't C.A. App. 302 (Gov't Ex. I-Update 73-1), in which a

woman uses a mouse to move items on dual screens and declares that "as you can see, we're up and running," Gov't Ex. Video 73, at 0:00:27; see Trial Tr. 427. In fact, the so-called "working prototype" was a nonfunctional plastic shell, painted and decorated to look like a finished device. Pet. App. 3a; see *id.* at 21a-22a.

- Even that empty shell was not as thin as advertised: at petitioner's direction, the table on which it sat had been hollowed out, hiding about an inch of thickness and leaving only the top of the casing visible. Pet. App. 3a, 21a.

While making such misrepresentations, petitioner raised money for Armada directly from investors and used a crowdfunding website to solicit "pre-orders" for the Dragonfly. Pet. App. 10a. Although petitioner assured his funders that the money he solicited would be used for product development, he instead siphoned off much of it to address his personal financial difficulties. *Id.* at 19a. For example, in 2008, petitioner transferred approximately $200,000 from Armada's accounts to his personal accounts. *Id.* at 19a-20a; Gov't C.A. App. 517 (Gov't Ex. Chart 4a); Trial Tr. 1258-1259. Petitioner later recategorized withdrawals from Armada to his personal accounts as "loans" and refused to give investors access to his companies' financial records. See Pet. App. 19a-20a.

2. A federal grand jury returned a superseding indictment charging petitioner with six counts of mail fraud, in violation of 18 U.S.C. 1341; and six counts of wire fraud, in violation of 18 U.S.C. 1343. Superseding Indictment 1-18. The indictment generally alleged that from approximately 2003 until his arrest in 2016, petitioner "devised, intended to devise, and participated in

a scheme to defraud investors and customers, and to obtain their money and property by means of false and fraudulent pretenses, representations and promises, and concealment of material facts." *Id.* at 3. And it specifically alleged many false representations and omissions that contributed to the scheme. *Id.* at 3-6.

At trial, the district court instructed the jury that "the government must prove one or more of the false or fraudulent pretenses, representations, or promises charged in the portion of the indictment describing the scheme * * * beyond a reasonable doubt. The government, however, is not required to prove all of them." Pet. App. 58a-59a. The court further instructed that petitioner must have acted "with the intent to defraud," and that "[a] person acts with intent to defraud if he acts knowingly with the intent to deceive or cheat the victim in order to cause a gain of money or property." *Id.* at 57a, 59a.

Petitioner requested that the district court additionally give a "good faith" instruction, arguing that "intent to defraud and good faith are mutually exclusive" and that a good-faith instruction would permit the jury to evaluate petitioner's intent to defraud "from a defense point of view." Pet. App. 42a-45a. The court overruled the government's objection that such an instruction was unnecessary, and opted to give the Seventh Circuit's pattern instruction on good faith. See *id.* at 42a-47a. The court accordingly instructed the jury as follows:

> If the defendant acted in good faith, then he lacked the intent to defraud required to prove the offenses of mail and wire fraud charged. The defendant acted in good faith if, at the time, he honestly believed the truthfulness and validity of the representations and promises that the government has charged as being

> false or fraudulent, as described in the portion of the indictment setting forth the scheme.
>
> The defendant does not have to prove his good faith. Rather, the government must prove beyond a reasonable doubt that the defendant acted with the intent to defraud.
>
> A defendant's honest and genuine belief that he will be able to perform what he promised is not a defense to fraud if the defendant also knowingly made false and fraudulent representations.

Id. at 4a (ellipses omitted); see *id.* at 59a, 67a-68a. Petitioner objected to the final paragraph of that instruction, arguing that it was not "justified by the evidence" because petitioner had not conceded that he had made any false or fraudulent representations. *Id.* at 46a. The court overruled that objection and gave the full instruction. *Id.* at 46a-47a.

The jury found petitioner guilty on all counts. Pet. App. 9a. The district court sentenced petitioner to 96 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. The court of appeals affirmed in an unpublished, per curiam order. Pet. App. 1a-8a.

As relevant here, the court of appeals determined that the district court did not err in including the third paragraph of the good-faith instruction. Pet. App. 4a-5a. The court of appeals explained that a jury instruction regarding good faith "just restates, from the defense perspective, that the prosecution must prove intent to defraud—and that making a statement that turns out to be wrong differs from fraud, a crime of specific intent." *Ibid.* The court observed that "[t]he contested third paragraph reminds the jury of an im-

portant principle: a sincere belief that everything will work out does not authorize deceit." *Id.* at 5a.

The court of appeals noted by way of analogy that an entrepreneur who materially inflates the value of his business's assets to obtain a loan commits criminal fraud even if he "is confident that the business will succeed and that he can repay the bank." Pet. App. 5a. The court observed that "the lie is criminal even if the business succeeds and the bank collects every penny" because "[t]he bank [wa]s still exposed to more risk than it agreed to bear." *Ibid.* The court explained that the "same idea justifies the use of the third paragraph in this case, for the investors and advance purchasers were deceived into taking more risk than they had agreed to bear." *Ibid.*

The court of appeals acknowledged that "[t]he language in the third paragraph may not be the most felicitous way of making the point, but [petitioner] did not propose any improvement." Pet. App. 5a. The court also observed that another circuit had "removed language of this kind from its pattern instructions, deeming it potentially confusing," and that the committee in charge of the Seventh Circuit's pattern instructions "may want to review the subject." *Id.* at 4a-5a.

ARGUMENT

Petitioner contends (Pet. 12-29) that the contested third paragraph of the good-faith instruction impermissibly permitted the jury to find him guilty on fraud charges in the absence of a finding that he had a fraudulent intent with respect to most or all of the knowingly fraudulent statements alleged in the indictment, because the jury would have interpreted that instruction as requiring it to treat a single knowingly false or fraudulent representation as automatic disproof of good faith

as to any alleged misrepresentation. That unpreserved contention lacks merit. The court of appeals' factbound and unpublished per curiam disposition does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. Petitioner's principal contention is that the contested instructional language impermissibly invited the jury to find him guilty "based on finding just one fraudulent misrepresentation," even if the jury believed that the government had failed to negate his good faith with respect to other misrepresentations alleged in the indictment. Pet. 20; see Pet. 19-23. The court of appeals correctly rejected that contention.

a. As an initial matter, petitioner's contention suffers from a fundamental flaw: it is necessarily premised on the assumption that when an indictment charges a scheme to defraud involving multiple misrepresentations, the government is required to prove that all (or nearly all) of them were fraudulent. Cf. Pet. 20 (asserting that "the government might prove a false statement or misrepresentation in one category (but not the others)," and "in the Seventh Circuit, that would still lead to a conviction for the full scope of the scheme alleged"). This Court has squarely rejected that assumption.

"The Court has long recognized that an indictment may charge numerous offenses or the commission of any one offense in several ways." *United States* v. *Miller*, 471 U.S. 130, 136 (1985). So long as the offense proved at trial was set forth in the indictment, a defendant's conviction will not be set aside on the ground that "the indictment charged more than was necessary." *Id.* at 140. Indeed, as particularly relevant here, this Court recognized that the Fifth Amendment's grand jury guarantee is not violated "when a defendant is tried

under an indictment that alleges a certain fraudulent scheme but is convicted based on trial proof that supports only a significantly narrower and more limited, though included, fraudulent scheme." *Id.* at 131.

The defendant in *United States* v. *Miller* was alleged to have "defrauded his insurer both by consenting to [a] burglary in advance and by lying to the insurer about the value of his loss" from that burglary. 471 U.S. at 132. Yet this Court held that the defendant was validly convicted based on trial proof that "concerned only the latter allegation," because that was sufficient by itself to constitute a violation of the fraud statute. *Id.* at 132-133; see *Salinger* v. *United States*, 272 U.S. 542 (1926) (similar).

Here, as in *Miller*, a single false or fraudulent representation with the intent to defraud is sufficient to violate 18 U.S.C. 1341 or 1343, if the other elements are met. See, *e.g.*, *United States* v. *Davis*, 53 F.4th 833, 847 (5th Cir. 2022) ("[W]ire fraud only requires a single misrepresentation."), cert. denied, 144 S. Ct. 72 (2023) (No. 22-945); cf. *Neder* v. *United States*, 527 U.S. 1, 22 (1999) (observing that "the well-settled meaning of 'fraud'" by the time Congress enacted the mail and wire fraud statutes "required *a* misrepresentation" of material fact) (emphasis added). Indeed, petitioner did not object to the district court's instructions to the jury that the relevant element of the offense required the government to prove that the "scheme to defraud involved *a* materially false or fraudulent pretense, representation, or promise" (singular); and that the government had to "prove one or more" of the charged false or fraudulent representations and was "not required to prove all of them." Pet. App. 57a-59a (emphasis added).

Accordingly, the indictment's allegation of a "scheme to defraud investors and customers" encompassing many "false and fraudulent pretenses, representations and promises" is immaterial. Superseding Indictment 3. Although the indictment charged petitioner with multiple fraud offenses, the jury's finding of guilt on all of them did not require it to find a separate intentional misrepresentation for each. The unit of prosecution for mail or wire fraud is not the misrepresentation, but instead the act of using the mail or wires in furtherance of the scheme. See *Badders* v. *United States*, 240 U.S. 391, 394 (1916) (mail fraud); *United States* v. *Haas*, 37 F.4th 1256, 1261 (7th Cir. 2022) (mail and wire fraud); see also *Pasquantino* v. *United States*, 544 U.S. 349, 355 n.2 (2005) ("[W]e have construed identical language in the wire and mail fraud statutes *in pari materia*."); Superseding Indictment 1-18 (counts based on different payments).

Because proof of a single falsehood with the intent to defraud is sufficient to sustain petitioner's convictions, his claim (Pet. 19) that the challenged jury instruction relieved the government of its burden to "establish an intent to defraud over the *full breadth of the scheme alleged* in the indictment" is unsound. The suggestion that the government bore such a burden effectively amounts to a claim—rejected by this Court—that "the indictment charged more than was necessary," *Miller*, 471 U.S. at 140. And even on petitioner's view, the contested third paragraph did not permit the jury to convict him unless it found that he made at least one knowingly false representation as part of the scheme with the intent to defraud. Cf. Pet. 18-20. Therefore, even if petitioner were correct (Pet. 18) that, having found an intent to defraud with respect to at least one misrepresentation, the jury

disregarded his good faith "as to all the other alleged misrepresentations," it would not matter because only one such misrepresentation is required in a scheme to defraud.

b. Even setting aside the flawed assumption underlying petitioner's challenge to the third paragraph of the good-faith instruction, the court of appeals correctly determined that his challenge lacked merit. Pet. App. 4a-5a. In the court below, petitioner had argued that the contested paragraph improperly shifted the burden to him to prove good faith, that it was confusing in the context of his case, and that it was unsupported by the evidence. Pet. C.A. Br. 53-59. The court properly rejected those contentions in light of the jury instructions as a whole and the trial record. See *Cupp* v. *Naughten*, 414 U.S. 141, 146-147 (1973) ("[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.").

The term "good faith" does not appear in the text of the mail- and wire-fraud statutes. See 18 U.S.C. 1341, 1343. Instead, as the court of appeals explained, a good-faith instruction effectively "just restates, from the defense perspective, that the prosecution must prove intent to defraud." Pet. App. 4a; see *United States* v. *Pomponio*, 429 U.S. 10, 13 (1976) (per curiam) (finding that because "[t]he trial judge * * * adequately instructed the jury on willfulness," "[a]n additional instruction on good faith was unnecessary"); *United States* v. *Schwartz*, 787 F.2d 257, 265 (7th Cir. 1986) ("'Good faith' is just the other side of knowingly making false statements."). The court also correctly explained that "making a statement that turns out to be wrong differs from fraud, a crime of specific intent." Pet. App. 4a-5a. And the instructions made clear that "the gov-

ernment must prove beyond a reasonable doubt that the defendant acted with the intent to defraud"; that "[i]f the defendant acted in good faith, then he lacked the intent to defraud"; and that "[t]he defendant does not have to prove his good faith." *Id.* at 4a.

Accordingly, taken as a whole, the instructions did not shift onto petitioner the burden to prove good faith or a lack of intent to defraud. As the court of appeals emphasized, petitioner did not challenge "any of the instructions telling the jury what the prosecution had to prove beyond a reasonable doubt." Pet. App. 5a. And those instructions accurately presented the law, including that the government must prove "one or more" of the false representations the government alleged were part of the scheme, but need not "prove all of them." *Id.* at 58a-59a. Furthermore, contrary to petitioner's suggestion (Pet. 18, 20) that a "small" or "narrow" misrepresentation might have sufficed, the instructions repeatedly informed the jury that the government had to prove a "material" misrepresentation, Pet. App. 57a-59a, 67a. As the court thus correctly determined, "the third paragraph, as given, did not relieve the prosecution of its burden on any issue in the case." *Id.* at 5a.

The court of appeals also correctly determined that the contested third paragraph was "justifie[d]" based on the evidence "in this case." Pet. App. 5a. "[R]emind[ing] the jury of [the] important principle" that "a sincere belief that everything will work out does not authorize deceit," *ibid.*, is especially important when, as here, a major theme of petitioner's case, including in his counsel's closing argument, was the portrayal of petitioner as a persistent true believer in the eventual success of his companies. See Trial Tr. 1645-1646 (arguing that petitioner was "persistent" and had

"spen[t] the better part of his adult life" embodying Thomas Edison's statement that "'[t]he most certain way to succeed is always to try one more time'").

The district court likewise explained that the facts of this case "fit[] perfectly with this third paragraph." Pet. App. 46a. As the court observed, the paragraph is appropriate where a defendant claims to have held an "honest and genuine belief that he w[ould] be able to perform what he promised," because such a belief "is not a defense to fraud if the defendant also knowingly made false and fraudulent representations." *Ibid.* As the court of appeals explained, a belief that circumstances will change for the better does not justify lying about current circumstances. *Id.* at 5a.

2. Contrary to petitioner's contention (Pet. 12-19), the decision below does not conflict with any decision of another court of appeals. As an initial matter, the decision below is unpublished and nonprecedential, and thus could not create or deepen a circuit conflict. Even setting that aside, petitioner identifies no case articulating any substantive disagreement with the reasoning of the decision below. Instead, consistent with this Court's precedents, all circuits recognize that where the government alleges more than one material misrepresentation as part of a scheme to defraud, it generally need only prove one, not all, of them—and therefore, *a fortiori*, the government need only prove an intent to defraud as to one, and not all, of them. The circuits also agree that a good-faith instruction is not required, but that when it is given, the applicable legal principles are those the jury was instructed on here.

a. No court of appeals has accepted the assumption underlying petitioner's claim (Pet. 18) that the government must prove "*all*," or even a variety of, "alleged

misrepresentations across the scope of an alleged fraudulent scheme." For example, the Fifth Circuit rejected a defendant's claim that because the indictment alleged "a *series* of misrepresentations," jury instructions stating that the scheme to defraud must have "employed *at least one of*" the charged misrepresentations impermissibly broadened the grounds on which the defendant could be convicted of wire fraud. *Davis*, 53 F.4th at 847. Relying on this Court's decision in *Miller*, the Fifth Circuit explained that "the Government could have chosen to prove its case by relying on any of the means described in the indictment," and the indictment's allegation of "*more* than what was necessary to convict" did not preclude the government from "prov[ing] its case by relying on any of the means described in the indictment." *Ibid.* Other courts of appeals likewise have recognized that proving "a single false representation or omission used to execute a fraudulent scheme" is sufficient to establish guilt under the mail or wire fraud statutes, where the other elements are satisfied. *United States* v. *Daniel*, 749 F.3d 608, 613 (7th Cir.), cert. denied, 574 U.S. 855 (2014); see, *e.g.*, *United States* v. *LaPlante*, 714 F.3d 641, 647 (1st Cir. 2013); *United States* v. *Rice*, 699 F.3d 1043, 1048 (8th Cir. 2012); *United States* v. *Woods*, 335 F.3d 993, 998-999 (9th Cir.), cert. denied, 540 U.S. 1025 (2003).

Consistent with the court of appeals' description of the role of good-faith jury instructions, Pet. App. 4a-5a, every court of appeals with criminal jurisdiction also agrees that such instructions are unnecessary in fraud cases "because a finding of the intent to defraud necessarily implies that there was no good faith." *United States* v. *Bowling*, No. 08-6184, 2009 WL 6854970, at *1 n.* (10th Cir. Dec. 23, 2009) (en banc) (citation and el-

lipsis omitted); see *United States* v. *Chavis*, 461 F.3d 1201, 1209 n.1 (10th Cir. 2006) (collecting the views of every circuit), cert. denied, 549 U.S. 1342 (2007); see also *United States* v. *Mutuc*, 349 F.3d 930, 934 (7th Cir. 2003) ("It is self-evident that one with an intent to defraud does not act in good faith."). And the courts of appeals also agree on the state of the law relevant to a good-faith instruction, where one is given. As petitioner acknowledges, the circuit courts "all agree that good faith—that is, an 'honest belief in the truth of representations made by a defendant'—is a defense to fraudulent intent," and they also agree "that a defendant's belief in ultimate success is not itself a defense." Pet. 13, 15 (emphasis omitted). As the decision below explained, merely "making a statement that turns out to be wrong" does not establish an intent to defraud, but at the same time "a sincere belief that everything will work out does not authorize deceit." Pet. App. 4a-5a.

b. Petitioner nonetheless contends that "[t]he pattern jury instructions among the courts of appeals reflect a divide in whether particular false representations negate a defendant's good faith across the board." Pet. 14 (emphases omitted); see Pet. 14-18. That contention does not warrant this Court's review.

As a threshold matter, this Court's intervention is not warranted to review differences in phrasing between pattern jury instructions, which are not the law and do not bind courts. See, *e.g.*, *United States* v. *Maury*, 695 F.3d 227, 259 (3d Cir. 2012) ("[T]he Model Instructions are not[] binding on this, or any, court."), cert. denied, 568 U.S. 1231 (2013); *United States* v. *Dohan*, 508 F.3d 989, 994 (11th Cir. 2007) (per curiam) ("Although generally considered 'a valuable resource, reflecting the collective research of a panel of distinguished

judges,' [the pattern jury instructions] are not binding."), cert. denied, 553 U.S. 1034 (2008). The Seventh Circuit itself has made clear that its pattern instructions "are not intended to be used mechanically and uncritically" in every case. *United States* v. *Edwards*, 869 F.3d 490, 497 (2017). And the decision below contemplated the possibility of revising the contested third paragraph. See Pet. App. 5a.

In any event, the asserted differences in the phrasing of good-faith instructions in various instances (Pet. 14-18) do not reflect any substantive disagreement about the underlying principles. For example, petitioner would draw a distinction between, on the one hand, instructions that (in his view) "*negate good faith*" because they state that a "'defendant does not act in good faith if, even though he honestly holds a certain opinion or belief, that defendant also knowingly makes false or fraudulent pretenses, representations, or promises,'" Pet. 14 (citation omitted), and, on the other hand, instructions that (in his view) "do not *negate* good faith but instead clarify that that a generalized belief in eventual success despite a knowing misrepresentation *is not in itself* good faith," Pet. 16. But so long as the jury instructions require a finding of a deliberate misrepresentation, as the instructions here clearly did, any verbal distinction between those formulations (which reflect an atextual gloss on the statutory mens rea) is insubstantial and irrelevant to petitioner's case.

Indeed, the illusory nature of any purported disagreement among the circuits is highlighted by petitioner's identification of the Sixth Circuit as being on both sides of the supposed divide, compare Pet. 14 (citing the Sixth Circuit pattern jury instructions), with Pet. 16 (citing *United States* v. *Lombardo*, 582 Fed.

Appx. 601 (6th Cir. 2014), cert. denied, 574 U.S. 1095 (2015), and 574 U.S. 1173 (2015)), and by his identification of the Ninth Circuit as both taking one side of the conflict but also adopting a middle-ground position, compare Pet. 15 (citing the Ninth Circuit pattern jury instructions), with Pet. 17 (citing *United States* v. *Burlingame*, 172 Fed. Appx. 719 (9th Cir. 2006) (mem.)). If the purported distinctions had the substantive significance and general importance that petitioner claims, such apparent inconsistencies would be unlikely.

c. Petitioner asserts (Pet. 17) that decisions in two circuits have found instructional language with some similarities to the challenged paragraph here to be "problematic." But the decisions he cites merely concluded that certain instructions were potentially confusing in the distinct contexts of those cases.

The Third Circuit's unpublished decision in *United States* v. *Basile*, 570 Fed. Appx. 252 (2014), cert. denied, 575 U.S. 904 (2015), reasoned that an instruction that the defendants did not act in good faith if they "'knowingly made false statements, representations, or promises to others'" was "confusing as used" in that tax-fraud case because of "how the good-faith defense interacts with the willfulness requirement" in the tax statutes in light of "the distinctive meaning of 'willfully' in tax cases." *Id.* at 256-257 (citations omitted). That reasoning does not apply in the mail- or wire-fraud context, which do not require such willfulness. And although the Third Circuit has removed the above-quoted language from its pattern jury instructions, see Pet. App. 4a, those instructions still make clear that the government "is not required to prove every misrepresentation charged in the indictment," but instead need only prove "that one or more of the alleged material misrepresen-

tations were made in furtherance of the alleged scheme to defraud," Third Circuit Model Criminal Jury Instruction 6.18.1341-1 (rev. Apr. 2024).

In *United States* v. *Rossomando*, 144 F.3d 197 (1998), the Second Circuit explained, consistent with the court of appeals' decision in this case, that a good-faith instruction containing language similar to the third paragraph here correctly reflects the principle that "where some immediate loss to the victim is contemplated by a defendant, the fact that the defendant believes (rightly or wrongly) that he will 'ultimately' be able to work things out so that the victim suffers no loss is no excuse." *Id.* at 201. The Second Circuit observed, however, that although such an instruction would be appropriate in the mine run of cases, it was potentially confusing in the case before it because "the essence of Rossomando's defense was not that he thought the [victim] would not 'ultimately' lose money, but that he thought it was *never* going to lose money because * * * the false information he provided" would not be relevant. *Id.* at 202. Petitioner here raises no similar claim. And the Second Circuit has since described *Rossomando* as "limited to [its] quite peculiar facts." *United States* v. *Ferguson*, 676 F.3d 260, 280 (2011) (citation omitted).

d. Finally, petitioner suggests (Pet. 23-24) that his case would have turned out differently in the Tenth Circuit, citing *Steiger* v. *United States*, 373 F.2d 133 (1967). In *Steiger*, a panel of the Tenth Circuit found that the defendants in that case were entitled to a good-faith instruction. See *id.* at 135. But the en banc Tenth Circuit has since made clear that "a separate 'good faith' jury instruction in fraud cases * * * is not necessary 'because a finding of the intent to defraud necessarily implies that there was no good faith.'" *Bowling*, 2009 WL

6854970, at *1 n.* (citation and ellipsis omitted). Regardless, the jury in petitioner's trial *did* receive a good-faith instruction, and nothing in *Steiger* suggests that the Tenth Circuit at that time would have viewed giving a good-faith instruction with language similar to the contested third paragraph here to be erroneous.

3. At all events, this case would be an inappropriate vehicle in which to address the question presented because petitioner's challenge is unpreserved and therefore reviewable only for plain error, and the evidence against him at trial was overwhelming.

Petitioner did not object to the third paragraph of the district court's good-faith instruction on the ground that it misstated the law, as he now argues in this Court. See Pet. 19-24. Instead, he argued only that the paragraph was not justified by the evidence. Pet. App. 46a. Although as a general matter a litigant may on appeal "make any argument in support of" a preserved claim of error, *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992), in the particular context of challenges to jury instructions, Rule 30(d) of the Federal Rules of Criminal Procedure imposes a more stringent preservation requirement: a party "must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate," and a "[f]ailure to object in accordance with this rule precludes appellate review, except" for plain error. Fed. R. Crim. P. 30(d); see Fed. R. Crim. P. 52(b). Because petitioner did not raise in the district court the "specific objection and the grounds for the objection" to the third paragraph of the good-faith instruction that he now raises in the petition for a writ of certiorari, any review of that objection would be limited to plain error. Fed. R. Crim. P. 30(d); see Gov't

C.A. Br. 47, 49 (arguing that petitioner's challenge was forfeited and therefore reviewable only for plain error).

Petitioner cannot establish an entitlement to plain-error relief. Plain-error relief requires the defendant to show (1) an "error"; (2) that is "plain," meaning "clear or obvious"; and (3) that affected his "substantial rights," meaning there is "'a reasonable probability that, but for the error,' the outcome of the proceeding would have been different." *Molina-Martinez* v. *United States*, 578 U.S. 189, 194 (2016) (citation omitted). For the reasons set forth above, petitioner cannot establish any error, let alone a "clear or obvious" one. *Ibid.* Nor can petitioner establish any prejudicial effect on his substantial rights because the evidence of his guilt was overwhelming. See pp. 2-5, *supra*; see also Pet. App. 2a-3a, 10a, 13a-22a. Indeed, petitioner would not be entitled to relief even if he had preserved his specific objection to the disputed paragraph and even if that objection were meritorious, because no reasonable jury—not even one willing to accept petitioner's contention that he sincerely believed that his companies would ultimately succeed—could conclude that petitioner lacked an intent to defraud. See *Neder*, 527 U.S. at 10.

For example, from 2006 to 2012, petitioner repeatedly told investors, whom he was (successfully) urging to give him more money, that the Radian was virtually complete and imminently ready to ship, even though he knew at the time that each of those statements was untrue—indeed, knew that he had no viable product and lacked the employees or facilities necessary to design or produce the product. See pp. 2-4, *supra*. He later made similar knowingly false representations about Dragonfly, and even oversaw the creation of a false video to fool customers into placing "pre-orders" for the product on

a crowdfunding website. See pp. 4-5, *supra*. All the while, petitioner siphoned investor and customer funds from the companies for his own personal expenses. See p. 5, *supra*. In light of those and other now-uncontested facts in the trial record, no reasonable jury could conclude that petitioner lacked an intent to defraud at the time he executed his scheme, regardless of whether he truly believed that the Radian and Dragonfly might, one day, come to fruition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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