No. 17-1314

In the Supreme Court of the United States

MOHSIN RAZA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court correctly instructed the jury that, for purposes of a charge of wire fraud, in violation of 18 U.S.C. 1343, a false statement's materiality can be established by proof that the statement "would reasonably influence a person to part with money or property."

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 876 F.3d 604.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 2017. A petition for rehearing was denied on December 18, 2017 (Pet. App. 43a-44a). The petition for a writ of certiorari was filed on March 15, 2018. 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 Eastern District of Virginia, petitioners were convicted of conspiracy to commit wire fraud affecting a financial institution, in violation of 18 U.S.C. 1349. Pet. App. 48a-49a. Petitioner Moshin Raza was

additionally convicted on three counts of wire fraud affecting a financial institution, in violation of 18 U.S.C. 1343 and 2. Pet. App. 49a. Petitioners Humaira Iqbal, Farukh Iqbal, and Mohammad Ali Haider were each convicted on one count of wire fraud affecting a financial institution, in violation of 18 U.S.C. 1343 and 2. Pet. App. 56a, 63a, 70a. Raza was sentenced to 24 months of imprisonment, to be followed by two years of supervised release. *Id.* at 50a-51a. Humaira Iqbal was sentenced to 15 months of imprisonment, to be followed by two years of supervised release. *Id.* at 57a-58a. Farukh Iqbal and Haider were each sentenced to 12 months and one day of imprisonment, to be followed by two years of supervised release. *Id.* at 64a-65a, 71a-72a. The court of appeals affirmed. *Id.* at 1a-41a.

1. In 2006 and 2007, Raza opened and managed the Annandale, Virginia, office of SunTrust Mortgage. Pet. App. 6a; Gov't C.A. Br. 4-5. Humaira, Raza's wife, worked as his personal assistant, although she also performed loan officer duties. Pet. App. 6a. Humaira's brothers, Farukh and Haider, worked for Raza as loan officers. *Ibid.*

As loan officers, petitioners assisted prospective borrowers in obtaining residential mortgages and refinancing existing mortgages. Pet. App. 6a. During a consultation with a loan officer, a prospective borrower would provide relevant information, either orally or in writing, such as the prospective borrower's income, employment, and assets. *Ibid.*; Gov't C.A. Br. 5. The loan officer used that information to prepare the prospective borrower's mortgage loan application. Pet. App. 6a. The loan officers, in preparing applications, selected the type of loan that SunTrust should consider; each type of

loan had different rates and documentation requirements. *Id.* at 6a-7a. A "full document" loan, for example, required supporting documents corroborating the loan applicant's income, employment, and assets; a "no-income-verification" loan required proof of the applicants' employment and current assets, but no proof of current income; and a "stated income, stated asset" loan required only those documents necessary to verify the applicant's employment for the prior two years. *Id.* at 7a; Gov't C.A. Br. 6. Generally, the more documentation that was required, the lower the interest rate for the borrower. Gov't C.A. Br. 6.

After completing a loan application, the loan officer forwarded the application to a SunTrust underwriter in Richmond for review and possible approval. Pet. App. 7a. The underwriter would sometimes approve a loan application conditionally, subject to the bank's receipt of additional supporting documents. *Ibid.* If the loan officer and the applicant thereafter fulfilled the specified conditions, such as by providing the underwriter with the applicant's pay stubs or bank statements, the loan application would be approved for closing. *Ibid.* SunTrust would then fund the loan by wiring money from Georgia to a bank account in Virginia. *Ibid.* Following the loan closing, SunTrust paid a commission to the loan officer. *Ibid.*

Petitioners' fraudulent scheme involved mortgage loans for 13 properties made by SunTrust between May 2006 and February 2007. Pet. App. 5a; Gov't C.A. Br. 8. For 12 of those properties, SunTrust made two simultaneous loans: one for 80% of the property value, and the other for all or a portion of the remaining 20%. Gov't C.A. Br. 8. Farukh and Haider were the loan officers

for two of the properties. *Ibid.* Raza was the designated loan officer for the remaining 11 properties, although Humaira worked exclusively with the borrowers on four of those properties. *Ibid.*

For each of the 13 loans, petitioners submitted loan applications that stated higher incomes for the borrowers than they in fact earned. Gov't C.A. Br. 8. The loans for nine of the properties were "full-document" loans, and the submitted files contained false pay stubs (showing the purported wages and earnings of the borrowers for a particular two-week period), false W-2 tax forms (showing the purported wages and earnings of the borrowers for a one-year period), or both. *Id.* at 8-9. The loans for three of the properties were "no-income-verification" loans, and the loans for the final property were "stated income, stated asset" loans. *Id.* at 9.

Rina Delgado, a loan officer at the Annandale SunTrust branch, testified that either Raza or Humaira reviewed each loan application originated at Annandale before it was submitted to the SunTrust underwriters. Pet. App. 8a. Raza and Humaira would review an applicant's income, assets, and liabilities; if the income was insufficient, they would sometimes tell Delgado to inflate the income on the application. *Ibid.* On one occasion, Humaira had Delgado impersonate an applicant's landlord over the phone and falsely confirm to a SunTrust underwriter that the applicant was current on his rental payments. *Ibid.* Delgado also provided Farukh and Haider with false bank statements to verify assets shown on pending loan applications. *Ibid.*

Ranjit Singh, a tax preparer in Northern Virginia, testified that Farukh and Haider would provide him with the identities of loan applicants and the names of purported employers, employment dates, and salaries.

Pet. App. 9a. Singh used that information to generate false tax and payroll documents, which petitioners used to help loan applicants obtain SunTrust mortgages. *Ibid.* The false documentation frequently misrepresented not only the earnings and assets, but also the occupations, of the applicants (*e.g.*, representing that a cook and cabdriver was employed as a systems analyst). *Id.* at 9a-13a. The misrepresentations included false information invented entirely by petitioners, rather than information suggested or provided by the applicants themselves. *Ibid.*

Barbara Daloia, a vice-president of SunTrust's national underwriting team in North Carolina, explained that "[a]ll" of the information on the loan applications was "important" to SunTrust during the relevant time period. Pet. App. 14a-15a (citation omitted). The same was true of supporting documentation, which SunTrust used to "authenticate the information on the loan application." *Ibid.* Daloia explained that, although SunTrust often contracted with investment banks to sell its mortgage loans on the secondary market, SunTrust remained exposed on those loans because the sales agreements required SunTrust to repurchase any loans that failed to comply with its underwriting guidelines, including loans "procured by fraud." *Id.* at 14a. In addition, as noted, home purchases were often financed with two separate loans (a larger loan of 80%, and a smaller loan of 20%). *Ibid.* Under those circumstances, SunTrust would "always" retain the second, smaller loan. *Ibid.* Even if the first, larger loan was sold, therefore, "SunTrust would nevertheless be exposed to the risk of the smaller loan's default." *Id.* at 15a. Finally, the sup-

porting documentation submitted as part of the loan application was used by SunTrust to determine the loan's applicable interest rate. *Id.* at 7a; Gov't C.A. Br. 6.

Petitioners' fraudulent scheme caused SunTrust to make mortgage loans based on applications that significantly misrepresented key information. One applicant, for instance, obtained a $470,000 loan based on representations that the applicant's wife worked as a systems engineer earning $14,825 per month and had $45,000 in a Wachovia Bank savings account; earnings and bank statements were submitted to corroborate those numbers. Pet. App. 11a. In fact, the applicant's wife was a quality technician who earned $25,000 per year and had never banked at Wachovia. *Id.* at 11a-12a. Another applicant obtained a $414,000 loan based on an earning statement and W-2 form indicating that he was a practicing dentist who earned $11,580 per month and had $68,000 in savings. *Id.* at 11a. In fact, the applicant did clerical and maintenance work in his sister's medical office, earned far less income, and had fewer assets. *Ibid.* Other loans obtained based on applications submitted by petitioners involved similar misstatements and fraudulent documentation. *Id.* at 9a-13a.

2. Petitioners were charged with one count of conspiracy to commit wire fraud affecting a financial institution, in violation of 18 U.S.C. 1349, and with various substantive counts of wire fraud affecting a financial institution, in violation of 18 U.S.C. 1343. Pet. App. 4a-5a. Petitioners proceeded to trial.

Before deliberations, petitioners asked the district court to instruct the jury that the materiality element of wire fraud could be satisfied only if a false statement has "a natural tendency to influence or be capable of influencing a decision of the particular decisionmaker to

whom it is addressed—here, the decision of SunTrust to approve and fund mortgages for the properties named in the indictment." Pet. App. 17a (citation omitted). The prosecution proposed a materiality instruction explaining that a "statement or representation is 'material' if it has a natural tendency to influence or is capable of influencing a decision or action." *Ibid.* (citation omitted).

The district court instructed the jury that the government was obliged to prove that "the scheme or artifice to defraud, or the pretenses, representations, or promises, were material; that is, they would reasonably influence a person to part with money or property." Pet. App. 20a (citation omitted). The court further instructed that a particular fact is material if it "may be of importance to a reasonable person in making a decision about a particular matter or transaction" and that "[a] statement or representation is material if it has a natural tendency to influence or is capable of influencing a decision or action." *Id.* at 20a-21a (citations omitted).

The jury found all four petitioners guilty of conspiracy to commit wire fraud. Pet. App. 17a. The jury also found Raza guilty on three counts of substantive wire fraud and found Humaira, Farukh, and Haider guilty on one count of wire fraud each. *Ibid.* Raza was sentenced to 24 months of imprisonment, Humaira was sentenced to 15 months of imprisonment, and Farukh and Haider were each sentenced to 12 months and one day of imprisonment. *Id.* at 17a-18a.

3. On appeal, petitioners argued that the instructions improperly failed to advise the jury that it had to find that their misrepresentations and false statements were subjectively material to their victim, SunTrust, and instead had erroneously instructed the jury on a

"reasonable lender" standard of materiality. Pet. App. 20a. The court of appeals disagreed.

The court of appeals observed that in *Neder* v. *United States*, 527 U.S. 1 (1999), this Court held that "Congress intended to incorporate common law materiality principles" into fraud offenses and thus "relied on the objective materiality test spelled out in the Second Restatement of Torts." Pet. App. 26a (citing *Neder*, 527 U.S. at 22 n.5). The court of appeals observed that, under that test, "a fact is material if a 'reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question.'" *Id.* at 26a-27a (quoting *Neder*, 527 U.S. at 22 n.5, in turn quoting Restatement (Second) of Torts § 538, at 80 (1977)). Where the defendant has been charged with "a fraud scheme that targets a private lender such as SunTrust," the court determined, materiality can thus be established by evidence that a rational lender would have been influenced by the fraud. *Id.* at 26a. The court also noted that the *Neder* Court "declined to incorporate" into the mail, wire, and bank fraud offenses "the common law elements of reliance and damages," which would have required "proof that the misrepresentations actually influenced and harmed the target." *Id.* at 27a n.7 (citing *Neder*, 527 U.S. at 24-25).

The court of appeals further observed that, "[c]onsistent with *Neder*," its precedent had "adhered to an objective standard of materiality for a criminal fraud offense that targeted a private lender." Pet. App. 27a (citing *United States* v. *Wolf*, 860 F.3d 175, 193-196 (4th Cir. 2017)); see *id.* at 28a (citing *United States* v. *Colton*, 231 F.3d 890, 903 n.5 (4th Cir. 2000), for the proposition that "the susceptibility of the victim of the fraud, in this case a financial institution, is irrelevant to

the analysis"). Several other circuits, the court noted, had reached similar conclusions. *Id.* at 28a-30a (citing *United States* v. *Lindsey*, 850 F.3d 1009, 1010-1019 (9th Cir. 2017); *United States* v. *Irvin*, 682 F.3d 1254, 1267 (10th Cir. 2012); *United States* v. *Brien*, 617 F.2d 299, 311 (1st Cir.), cert. denied, 446 U.S. 919 (1980)).

The court of appeals rejected petitioners' contention that this Court's decision in *Universal Health Services, Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), required a different approach. Pet. App. 30a-34a. First, the court of appeals reasoned that "to the extent *Universal Health* altered the concept of materiality in fraud proceedings, it is not likely that its impact extends beyond the context of qui tam actions," which are civil proceedings that protect the federal government. *Id.* at 32a. The court noted *Universal Health*'s recognition that the False Claims Act's "materiality standard is demanding," and that the Act "is not an all-purpose antifraud statute." *Ibid.* (quoting *Universal Health*, 136 S. Ct. at 2003).

Second, the court of appeals observed that "if *Universal Health* controlled our decision on materiality in these appeals, it is unclear what the impact might be." Pet. App. 32a. The court noted that although *Universal Health* stated that "'materiality looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation,'" this Court also emphasized that a matter is material under the common law of torts "'if a reasonable man would attach importance to it in determining his choice of action in the transaction in question,'" suggesting that "those two standards * * * are not in tension." *Id.* at 32a-33a (quoting 136 S. Ct. at 2002-2003) (brackets omitted). Put another way, the court of appeals continued, an objective materiality test

does "'look to the effect on the likely or actual behavior of the recipient,'" as *Universal Health* contemplates; "[i]n those circumstances, however, the recipient is a 'reasonable man.'" *Id.* at 33a (quoting 136 S. Ct. at 2002-2003).

Finally, the court of appeals noted, "*Universal Health* involved a civil fraud scheme that had targeted the federal government." Pet. App. 33a. The court reasoned that although "evidence of a government entity's past disregard of particular types of false statements might undermine the materiality element" in that context, a similar principle "does not apply when the fraud victim is a private lender." *Ibid.* "The weight the Government gives to a particular statutory, regulatory, or contractual requirement," the court explained, "is analogous not to the weight an individual lender gives to a statement on its loan application, but rather the weight the entire mortgage industry gives to that type of statement." *Id.* at 34a (quoting *Lindsey*, 850 F.3d at 1017).

In addition to determining that "the district court did not err in failing to require the misrepresentations in the SunTrust loan applications to be material to SunTrust as the fraud victim," Pet. App. 34a, the court of appeals also held in the alternative that, even assuming the trial court had "somehow misstated the applicable principles concerning materiality, that error would be entirely harmless," *id.* at 34a n.9. The court determined that "[t]he evidence established that certain types of loans required supporting documents verifying the various loan applicants' income, employment, and assets." *Ibid.* The court found that to be why petitioners went to "great lengths" to falsify those documents in order to support the misrepresentations in the loan applications, including by "seeking out and purchasing fraudulent W-2s and pay stubs from a reprobate tax

preparer," and by making "ludicrous misrepresentations" regarding applicants' qualifications. *Ibid.*; see *ibid.* (applicant was identified on an application as "a 'senior analyst' at Ikon Solutions" even though he in fact "cooked pizzas for Pizza Hut"). The court thus determined that testimony "stress[ing] the importance of accurate information being reflected on all loan applications" had merely "confirmed the obvious. SunTrust would not have funded the loans had [petitioners] painted an accurate picture of the applicants' qualifications." *Ibid.*

ARGUMENT

Petitioners renew their argument (Pet. 8-21) that the jury instructions for their fraud charges were deficient because they required the jury to find that petitioners' false statements were capable of influencing a reasonable decisionmaker, rather than the particular victim to which the statements were addressed (SunTrust). The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals. In any event, the court of appeals expressly held, in the alternative, that any error in the jury instructions was harmless. Further review is not warranted.

1. Under the federal wire fraud statute, it is unlawful to use a wire to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. In *Neder* v. *United States*, 527 U.S. 1 (1999), the Court concluded that Congress intended to incorporate into the mail and wire fraud statutes the common law requirement of materiality. *Id.* at 20-25. *Neder* thus construed the meaning of materiality under the statute by reference to the two-

part, disjunctive common law definition, as articulated in the Restatement of Torts:

> The Restatement instructs that a matter is material if:
>
> "(a) a reasonable man would attach importance to its existence or nonexistence in determining his choice of action in the transaction in question; *or*
>
> "(b) the maker of the representation knows or has reason to know that its recipient regards or is likely to regard the matter as important in determining his choice of action, although a reasonable man would not so regard it."

Id. at 22 n.5 (quoting Restatement (Second) of Torts § 538, at 80) (emphasis added).

Consistent with that understanding, the district court here instructed the jury that a particular fact is material if it "may be of importance to a reasonable person in making a decision about a particular matter or transaction," and also instructed that a "statement or representation is material if it has a natural tendency to influence or is capable of influencing a decision or action." Pet. App. 20a-21a (citations omitted). As the court of appeals correctly explained, those instructions, which track the Restatement, were a correct statement of the materiality requirement. *Id.* at 34a.

Petitioners nevertheless contend (Pet. 13-16) that this Court's decisions require proof that a misstatement or omission had the capability to influence the "intended victim," even if it is undisputed that the misstatement or omission had the capability of influencing a reasonable decisionmaker. Pet. 14 (emphasis omitted). Petitioners' argument, which relies on selective quotations

from cases in which the question presented here played no role in the decision, is incorrect.

First, petitioners point (Pet. 13-14) to this Court's decision in *United States* v. *Wells*, 519 U.S. 482 (1997). Yet the holding in *Wells* was that that materiality is *not* an element of 18 U.S.C. 1014, which prohibits the making of false statements to federally insured financial institutions. In so holding, *Wells* understood the proposed materiality standard to require that a falsehood have "a natural tendency to influence, or [is] capable of influencing, the decision of the decisionmaking body to which it was addressed." 519 U.S. at 489 (quoting *Kungys* v. *United States*, 485 U.S. 759, 770 (1988)). But the Court did not state—much less hold—that misstatements are *not* material if they are capable of influencing a reasonable decisionmaker. To the contrary, the Court found "no controversy over the law as stated in [the jury] instructions," which informed the jury that a material fact is one "'that would be important to a *reasonable person* in deciding whether to engage or not to engage in a particular transaction.'" *Id.* at 485 (emphasis added; citation omitted). Those instructions are nearly identical to the instructions given in this case.

Petitioners next rely (Pet. 14-15) on *Neder*, where the Court similarly stated, while discussing tax-fraud charges under a separate statute, that "[i]n general, a false statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed." 527 U.S. at 16 (brackets, citation, and internal quotation marks omitted). But the relevant question in *Neder* was whether the defendant's "failure to report substantial amounts of income on his tax returns [was or] was not

'a material matter'" under the tax statute. *Ibid.* (quoting 26 U.S.C. 7206(1)). There was no dispute about whether the federal government viewed the significance of the information differently than a hypothetical reasonable decisionmaker would have. Indeed, the language in *Neder* (and *Wells*) on which petitioners rely originated in *Kungys*, in which the Court explained that the "the central object of the inquiry" into materiality is "whether the misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official *decision*." 485 U.S. at 771 (emphasis added). And the Court in *United States* v. *Gaudin*, 515 U.S. 506 (1995), on which *Neder* (and *Wells*) also relied, see 527 U.S. at 16, explained that the "materiality inquiry" under the *Kungys* formulation involves "assessments of the inferences a *reasonable decisionmaker* would draw from a given set of facts." 515 U.S. at 512 (emphasis added; brackets, citation, and internal quotation marks omitted); see *id.* at 509.

Petitioners' crabbed reading of selected statements in prior decisions rests, at bottom, on a false dichotomy. The fact that a statement is material if it is capable of influencing the intended victim is entirely consistent with a rule that a statement may also be material if it is capable of influencing a reasonable decisionmaker. The Restatement, quoted in *Neder*, is explicit on that point: *Either* finding is enough to prove materiality. See Restatement (Second) of Torts § 538; see also *Neder*, 527 U.S. at 22 n.5. As courts of appeals have explained, "[p]roof that a defendant created a scheme to deceive reasonable people is *sufficient* evidence that the defendant intended to deceive, but a defendant who intends to deceive the ignorant or gullible by preying on their infirmities *is no less guilty*." *United States* v.

Svete, 556 F.3d 1157, 1165 (11th Cir. 2009) (en banc) (emphasis added), cert. denied, 559 U.S. 1009 (2010); see *United States* v. *Davis*, 226 F.3d 346, 358-359 (5th Cir. 2000) (a misstatement is material "if a reasonable person would rely on it" *or* "if the maker knew or had reason to know his victim was likely so to rely"), cert. denied, 531 U.S. 1181 (2001); *United States* v. *Brien*, 617 F.2d 299, 311 (1st Cir.) (finding "no intention on the part of Congress to differentiate between schemes that will ensnare the ordinary prudent investor and those that attract only those with lesser mental acuity"), cert. denied, 446 U.S. 919 (1980); see also Restatement (Second) of Torts § 538 cmt. *f* ("One who practices upon another's known idiosyncrasies cannot complain if he is held liable when he is successful in what he is endeavoring to accomplish.").

For similar reasons, petitioners are incorrect in arguing (Pet. 16) that this Court's decision in *Universal Health Services, Inc.* v. *United States ex rel. Escobar*, 136 S. Ct. 1989 (2016), supports their position. That case addressed the False Claims Act, which (unlike the mail fraud statute) "is not an all-purpose antifraud statute." *Id.* at 2003 (citation and internal quotation marks omitted). The Court stated there that the materiality standard "looks to the effect on the likely or actual behavior of the recipient of the alleged misrepresentation." *Id.* at 2002 (brackets and citation omitted). But the Court did not thereby suggest that materiality (particularly in the wire-fraud context) cannot be proved objectively. To the contrary, the Court noted that, under the common law, a matter is material in *either* of "two circumstances":

> (1) "if a reasonable man would attach importance to it in determining his choice of action in the transaction"; or (2) if the defendant knew or had reason to know that the recipient of the representation attaches importance to the specific matter "in determining his choice of action," even though a reasonable person would not.

Id. at 2002-2003 (quoting Restatement (Second) of Torts § 538) (brackets omitted). A similar disjunctive standard exists in contract law. See *id.* at 2003 (citing Restatement (Second) of Contracts § 162(2) & cmt. *c*, at 439, 441 (1981)). As the court below correctly observed, the references in *Universal Health* to a statement's potential impact both on the intended victim and on a reasonable decisionmaker suggests that these tests "are not in tension." Pet. App. 33a.

In sum, this Court has never endorsed the principle advocated by petitioners here: that a statement may be material *only* if it is capable of influencing the particular victim to whom the statement was addressed, even if the statement is capable of influencing a reasonable decisionmaker. To the contrary, this Court's decisions indicate that a showing as to either standard is sufficient to establish materiality.

2. Petitioners assert (Pet. 8-13) that the courts of appeals conflict as to whether, in a fraud case involving a private victim, the government must establish that the misstatement or omission is capable of influencing the intended victim, rather than a reasonable decisionmaker. Petitioners' assertion of a circuit conflict, like their assertions about this Court's cases, relies on selective quotations from decisions in which the distinction was not at issue. Petitioners have identified no decision

in which a court of appeals overturned a conviction because of a materiality instruction that permitted a guilty verdict based on proof about a statement's effect on a reasonable decisionmaker.

First, every court of appeals has stated that a false statement or omission is material if it is capable of influencing a reasonable decisionmaker. See *United States* v. *Tum*, 707 F.3d 68, 72 (1st Cir.) (wire fraud requires proof of "false or omitted statements that a reasonable person would consider important in deciding what to do"), cert. denied, 569 U.S. 1025 (2013); *United States* v. *Weaver*, 860 F.3d 90, 94 (2d Cir. 2017) (per curiam) ("A statement is material if the misinformation or omission would naturally tend to lead or is capable of leading a reasonable person to change his conduct.") (brackets, citation, and internal quotation marks omitted); *United States* v. *Lucas*, 709 Fed. Appx. 119, 123 (3d Cir. 2017) ("[M]ateriality is an objective test, and requires showing that a defendant's misrepresentations would have been important to a reasonable person deciding whether to take the requested action, not that the victim actually relied on those misrepresentations."); Pet. App. 34a (4th Cir.) (materiality "measures a misrepresentation's capacity to influence an objective 'reasonable lender'"); *Davis*, 226 F.3d at 358-359 (5th Cir.) (a misstatement is material "if a reasonable person would rely on it" or "if the maker knew or had reason to know his victim was likely so to rely"); *United States* v. *Daniel*, 329 F.3d 480, 487 (6th Cir. 2003) (finding material misstatements supporting wire fraud conviction where defendant "made several assertions he knew were false and that would have affected a reasonable person's actions in the situation"); *United States* v. *Betts-Gaston*, 860 F.3d 525, 532

(7th Cir. 2017) (en banc) ("[W]hether a statement is material depends on its effect on a reasonable person—or, in this case, a reasonable lender.") (citation and internal quotation marks omitted), cert. denied, 138 S. Ct. 689 (2018); *United States* v. *Heppner*, 519 F.3d 744, 749 (8th Cir.) ("[A] material fact is a fact that would be important to a reasonable person in deciding whether to engage or not to engage in a particular transaction.") (citation and internal quotation marks omitted), cert. denied, 555 U.S. 909 (2008); *United States* v. *Lindsey*, 850 F.3d 1009, 1014 (9th Cir. 2017) ("The element of materiality is evaluated under an objective test, in which we must examine the intrinsic capabilities of the false statement itself, rather than the possibility of the actual attainment of its end.") (citation and internal quotation marks omitted); *United States* v. *Williams*, 865 F.3d 1302, 1312 (10th Cir.) (addressing whether "misrepresentations had the capability or natural tendency to influence a reasonable bank's decision of whether to provide a loan") (citation and internal quotation marks omitted), cert. denied, 138 S. Ct. 567 (2017); *Svete*, 556 F.3d at 1165 (11th Cir.) ("Proof that a defendant created a scheme to deceive reasonable people is sufficient evidence that the defendant intended to deceive, but a defendant who intends to deceive the ignorant or gullible by preying on their infirmities is no less guilty."); *United States* v. *Philip Morris USA Inc.*, 566 F.3d 1095, 1122 (D.C. Cir. 2009) ("This materiality requirement is met if the matter at issue is of importance to a reasonable person in making a decision about a particular matter or transaction.") (citation and internal quotation marks omitted), cert. denied, 561 U.S. 1025 (2010).

Petitioners cite no court of appeals decision holding that a misstatement or omission cannot be material if it

is capable of influencing a reasonable decisionmaker, but not the intended victim. Instead, petitioners rely on decisions (Pet. 10-12) in which a court of appeals, in determining that sufficient evidence existed for a jury to find that a misstatement or omission was material, considered evidence of the impact of the misstatement on the intended victim. See, *e.g.*, *United States* v. *Appolon*, 715 F.3d 362, 368 (1st Cir.) (finding sufficient evidence to support materiality based on "information material to [a mortgage company's] decisionmaking process," combined with the fact that the company's "loan application explicitly sought [certain] information from the applicant"), cert. denied, 571 U.S. 929 (2013); *United States* v. *Wright*, 665 F.3d 560, 574-575 (3d Cir. 2012) (finding sufficient evidence that misstatements were material where victim "testified that the presence of any renters or squatters in the building would have been material to him as, in effect, its purchaser"); *United States* v. *Curtis*, 635 F.3d 704, 719 n.51 (5th Cir.) (finding sufficient evidence of material misstatements where "[r]epresentatives from each of the lending institutions * * * testified that had they known these representations in the loan documents were false, they would not have approved the loans"), cert. denied, 565 U.S. 857 (2011); *United States* v. *Lucas*, 516 F.3d 316, 341 (5th Cir.) (finding sufficient evidence of material misstatements where "[a] witness who had asked [the defendant] whether there were any wetlands on the property testified that it 'would have made a huge difference' in her decision to buy the property if [the defendant] had informed her that it contained wetlands"), cert. denied, 555 U.S. 822 (2008); *United States* v. *Morganfield*, 501 F.3d 453, 463 (5th Cir. 2007) (finding sufficient evi-

dence of material misstatements where "[b]ank representatives testified that a d/b/a certificate was necessary to open a checking account, as was valid personal identification," such that defendants' misrepresentations "directly influenced the banks' decisions to open checking accounts in the names of the shell companies"), cert. denied, 553 U.S. 1067 (2008); *United States* v. *Holmes*, 406 F.3d 337, 355 (5th Cir.) (finding sufficient evidence that misstatement regarding filing date of civil lawsuit was material where the misrepresented date "could have saved the suit from the time-bar thenbeing pressed by * * * defense counsel"), cert. denied 546 U.S. 871 (2005); see also *United States* v. *Neder*, 197 F.3d 1122, 1130-1131 (11th Cir. 1999) (failure to instruct jury on materiality requirement harmless where "[t]he Government elicited testimony from all of the lenders that if they had known the truth, they would not have approved Neder's land acquisition loans on the same terms and conditions, if at all"), cert. denied, 530 U.S. 1261 (2000); cf. *United States* v. *Fallon*, 470 F.3d 542, 547 (3d Cir. 2006) (as to materiality of false statement, error in excluding evidence regarding industry practice was harmless in light of other evidence of industry custom and practice, as well as evidence that victim "himself relied upon" the defendant's misstatements).

None of those decisions, however, turned on the difference between the fraud's effect on the intended victim, as opposed to its effect on a reasonable decisionmaker. That is unsurprising: as the court below noted, evidence regarding a statement's effect on the actual victim often speaks as well to how a reasonable decisionmaker was likely to react. Pet. App. 32a-33a. And as noted, the Restatement defines materiality to include

evidence that would satisfy either formulation. See pp. 15-16, *supra*.

Nor do the remaining cases upon which petitioners rely demonstrate a conflict among the circuits. Petitioners contend (Pet. 8) that *United States* v. *Rigas*, 490 F.3d 208 (2d Cir. 2007), cert. denied, 552 U.S. 1242 (2008), held that misstatements are material only if they are capable of influencing the intended victim (as opposed to a reasonable decisionmaker). That is incorrect. The misstatements in question (about leverage ratios) had been alleged as material only to a particular decision (what interest rate to choose). *Id.* at 234-235. But the government failed to establish that the bank "could make" that particular decision, which had been "cabined" by contract. *Id.* at 235. In other words, the government never proved that the misstatements were made to a "decisionmaker" with authority to make the relevant "decision." See *ibid.* ("For those misstatements to be material, however, they had to be capable of influencing a decision that the bank was able to make.").

Petitioners also err in contending (Pet. 8-9) that the Second Circuit reversed the defendant's conviction in *United States* v. *Rodriguez*, 140 F.3d 163 (1998), because the charged misrepresentations were incapable of influencing the particular victim to which they were directed. In fact, the court reversed because the defendant was charged with defrauding a bank by depositing checks that she knew had not been authorized by the issuing company, and the act of "simply depositing checks into a bank account where the depositor knows that he/she is not entitled to the funds does not alone constitute false or fraudulent pretenses or representations." *Id.* at 168; see *ibid.* ("[T]he act of presenting those checks to Chemical Bank for deposit and payment

is not a deceptive course of conduct."). The only actual misrepresentation was the defendant's false claim about her employer in her application to open an account, but "[t]here simply was no evidence adduced at trial" that such a misstatement was material—whether to the particular bank or to a hypothetical rational bank. *Ibid.* Indeed, the Second Circuit in *Rodriguez* expressly described the materiality standard in objective terms, see *ibid.* ("A misrepresentation is material if it is capable of influencing *a bank's* actions.") (emphasis added), belying petitioners' claim that the court rejected an objective test in favor of a subjective one.

In any event, as petitioners acknowledge (Pet. 9 n.2), the Second Circuit has recently confirmed that a "statement is material if the 'misinformation or omission would naturally tend to lead or is capable of leading a reasonable person to change his conduct.'" *Weaver*, 860 F.3d at 94 (quoting *United States* v. *Rybicki*, 354 F.3d 124, 145 (2d Cir. 2003) (en banc), cert. denied, 543 U.S. 809 (2004)) (brackets omitted). This Court does not typically grant certiorari to address assertions of an intra-circuit conflict. See *Davis* v. *United States*, 417 U.S. 333, 340 (1974); *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

Finally, contrary to petitioner's claim (Pet. 12), the Sixth Circuit did not apply an "intended victim" standard in *United States* v. *McAuliffe*, 490 F.3d 526, cert. denied, 552 U.S. 976 (2007). Rather, the court there concluded only that an indictment is not "fatally insufficient" when it fails to explicitly refer to materiality, so long as "the facts alleged in the indictment warrant the inference of" materiality. *Id.* at 532. In reaching that conclusion, the court quoted *Neder*'s statement that a

misrepresentation "is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decision-making body to which it was addressed." *Id.* at 531 (quoting *Neder*, 527 U.S. at 16). The court did not distinguish between a statement's effect on a reasonable decisionmaker and its effect on the intended victim; there was no suggestion in *McAuliffe* that the fraud's victim (an insurance company) was anything other than reasonable. See *id.* at 532. As petitioners acknowledge (Pet. 12), the Sixth Circuit has separately endorsed a "reasonable person" standard. *Daniel*, 329 F.3d at 487.

3. Even if a conflict among the circuits did exist, this case would be a poor vehicle through which to address it. The court of appeals expressly held that, even "[i]f the trial court somehow misstated the applicable principles concerning materiality, that error would be entirely harmless" in light of overwhelming evidence that petitioners' misrepresentations were in fact material to SunTrust. Pet. App. 34a n.9; see *Hedgpeth* v. *Pulido*, 555 U.S. 57, 61 (2008) (per curiam) (jury instruction error involving omission or misstatement of an element of the offense is reviewed for harmlessness). That alternative holding precludes the question presented by petitioners from having any potential to affect the judgment below.

First, all of the materiality evidence introduced at trial was directed at the actual decisionmakers in this case, the SunTrust underwriters. See Gov't C.A. Br. 24. The government made no argument about how a "reasonable decisionmaker" other than SunTrust would have reacted to petitioners' misrepresentations. And the trial evidence overwhelmingly demonstrated that SunTrust's underwriters were, in fact, capable of being influenced

by the misrepresentations. Evidence showed that petitioners "repeatedly mischaracterized the loan applicants' qualifications" and "went to great lengths" to obtain "supporting documents verifying" those qualifications. Pet. App. 34a n9. One loan applicant "walked into SunTrust's Annandale branch a custodian in a medical office, but left as a licensed medical professional." *Ibid.* Another "understood that he cooked pizzas for Pizza Hut" but was "identified on SunTrust loan documents as a 'senior analyst' at Ikon Solutions." *Ibid.* A jury could only acquit if it believed that "those ludicrous misrepresentations [we]re meaningless, i.e., that SunTrust would have funded [those] loans in any event." *Ibid.* Yet "[i]f that were the case, why make such misrepresentations" and "surreptitiously purchase and submit fraudulent documents?" *Ibid.* Indeed, the vice-president of SunTrust's national underwriting team also "stressed" in her testimony "the importance of accurate information being reflected on all loan applications." *Ibid.* She explained that, even though SunTrust sold many first mortgages, it continued to hold the second mortgages and therefore was exposed to loss in the event of a default. *Id.* at 14a; Gov't C.A. Br. 8. Her testimony thus "confirmed the obvious. SunTrust would not have funded the loans had [petitioners] painted an accurate picture of the applicants' qualifications." Pet. App. 34a n.9.

Petitioners criticize the court of appeals (Pet. 20) for relying, in its harmless-error analysis, on petitioners' "wrongful *intent*." But petitioners misunderstand the court's point about the import of petitioners' actions. The fact that petitioners, who were SunTrust employees, went to extraordinary lengths to falsify loan applications and supporting documentation showed that they believed SunTrust was capable of being influenced by

such misrepresentations. That is powerful evidence that SunTrust was, in fact, capable of being influenced just as petitioners believed.

Petitioners likewise err in asserting (Pet. 20) that there was "ample evidence" from which a jury could infer that the misrepresentations were immaterial. Petitioners cite "testimony from a former SunTrust underwriter that 'what a borrower wrote down on a loan application didn't matter at all to SunTrust.'" Pet. 20 (quoting C.A. J.A. 309). That quotation, however, is from counsel's opening statements, not from any trial testimony. See C.A. J.A. 309. The underwriter's actual testimony was different: She testified only that she "believe[d]" that it was common knowledge at SunTrust that there were misrepresentations in loan applications, *id.* at 1117, and that she "felt like [there was] a don't ask/don't tell policy," *id.* at 1124. But, the premise of a don't ask/don't tell policy is that it matters if you *do* tell; the witness's testimony thus indicated that petitioners' lies and false documentation were necessary to maintain a pretense of regularity that, if punctured, would have required SunTrust to reject the applicants. The witness's belief was predicated, moreover, on a misunderstanding that "SunTrust was making all these loans just to sell them to somebody else." *Id.* at 1119. In fact, SunTrust did *not* sell any of the second mortgages that it issued, Pet. App. 14a, and all but one of the 13 properties at issue in this case involved a second mortgage, Gov't C.A. Br. 8.

Petitioners suggest that petitioners' misstatements did not affect loan approvals because SunTrust approved 98.7% of mortgage applications during the relevant period. Pet. 20 (citing C.A. J.A. 1165). That suggestion lacks support in the evidence. It is based on

Home Mortgage Disclosure Act data showing that SunTrust's "rejection rate" during the relevant period was 1.3%. See C.A. J.A. 1165. But that statistic does not account for applications that were withdrawn or for which the files were incomplete. Gov't C.A. Br. 37-38; see C.A. J.A. 1168-1170. In fact, SunTrust's approval rate was substantially lower than 99%—and was only slightly higher than Bank of America's—when those incomplete and withdrawn applications are accounted for. See Gov't C.A. Br. 37; C.A. J.A. 1168-1170. In any event, even if SunTrust routinely granted mortgage applications for applicants who claimed high incomes and assets (even if the information was false), that says nothing about whether SunTrust would have granted those applications had the applicants' true (and far less favorable) financial circumstances been disclosed. Petitioners plainly did not think so, which is why they took such great pains to falsify the application information and supporting documentation.

Finally, neither the purported testimony of the underwriter nor the rejection-rate statistic undermines the court of appeals' harmless-error analysis, as they speak at most to the materiality of misrepresentations on the loan applications; they say nothing about the materiality of the falsified documentation that petitioners created to support those misrepresentations. Indeed, petitioners have not disputed that the amount of documentation affected the interest rate paid by the borrower, and each of the loans at issue in this case was supported by such documentation. Pet. App. 7a; Gov't C.A. Br. 6. Even if petitioners were correct (Pet. 20) that SunTrust approved every application because the information on an application "didn't matter," petition-

ers' false documents would have affected SunTrust's decisions about which interest rates to approve for the loans. And even if SunTrust was primarily concerned with origination of loans of any sort, the existence of multiple tiers of loans illustrates that it was not indifferent to interest rates.

If petitioners were correct (Pet. 17) that a genuine circuit conflict affecting "countless" fraud prosecutions does exist, then the Court will have the opportunity to address it in a case that lacks a harmless-error alternative holding. Further review in this case, however, is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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