No. 18-597

In the Supreme Court of the United States

JOHN CHING EN LEE, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether sufficient evidence supported petitioner's conviction for making a false statement to a department or agency of the United States, in violation of 18 U.S.C. 1001(a)(2), based on petitioner's statement to federal investigators that he did not fund his wife's business, when in fact he had provided her with at least $30,000 to run the business.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is reprinted at 726 Fed. Appx. 589.

JURISDICTION

The judgment of the court of appeals was entered on June 6, 2018. On August 24, 2018, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including November 2, 2018, 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 California, petitioner was convicted on one count of making a false statement or representation to a department or agency of the United States, in violation of 18 U.S.C. 1001(a)(2).

Judgment 1. The district court sentenced petitioner to two years of probation and imposed a $500 fine. Judgment 2-4. The court of appeals affirmed. Pet. App. 1a-3a.

1. On March 6, 2008, officers of the Contra Costa County Sheriff's Department in California searched a suspected brothel operating as the "Crystal Massage Parlor." Presentence Investigation Report (PSR) ¶ 7. The police arrested Qingmin Liu, the massage parlor's owner, after "she solicited prostitution to an undercover officer." *Ibid.* The next day petitioner, Liu's husband, posted bail for Liu and at least one other employee. PSR ¶ 8.

At the time of his wife's arrest, petitioner was an immigration officer with U.S. Citizenship and Immigration Services. PSR ¶¶ 7-8. Liu had immigrated to the United States four years earlier on a K-1 "fiancée" visa sponsored by petitioner, but she was not yet a naturalized citizen of the United States. PSR ¶ 8. Because of petitioner's position, Liu's immigration status, and concerns about the immigration status of other employees at the massage parlor, Contra Costa police referred the incident to petitioner's employer for further investigation. *Ibid.*

The Office of Inspector General at the Department of Homeland Security (DHS) opened an investigation into petitioner's ties to his wife's business. PSR ¶¶ 7, 10. Over the course of that inquiry, DHS investigators concluded that petitioner was not the legal owner of the Crystal Massage Parlor. PSR ¶ 10. Investigators also discovered, however, that petitioner had provided Liu with at least $30,000 to fund the massage parlor. *Ibid.*

In an interview with DHS case agents on August 26, 2009, petitioner denied any association with or support

for Liu's business or knowledge of the activities at the massage parlor. PSR ¶ 11. In an interview on August 29, 2013, Liu contradicted that account and informed investigators that petitioner had provided her with the money for the Crystal Massage Parlor, which she purchased for $30,000 in cash. PSR ¶ 12. The next day, investigators re-interviewed petitioner, who admitted that he had obtained a $30,000 loan from Wells Fargo in order to help Liu purchase the business. *Ibid.*

On September 19, 2013, a DHS case agent reviewed records of the Treasury Enforcement Communications System (TECS), a DHS database to which immigration officers have access. PSR ¶ 13. The records reflected that petitioner had conducted three searches on Liu on March 19, 2009. *Ibid.* In an interview with investigators on October 10, 2013, petitioner stated that he had "never" made unauthorized queries of his family members in the TECS database. PSR ¶ 14.

2. A federal grand jury indicted petitioner on two counts of making a false statement or representation to a department or agency of the United States, in violation of 18 U.S.C. 1001(a)(2). Indictment 1-2. Count 1 alleged that petitioner made a material false statement to DHS representatives on August 26, 2009, when he lied "about his involvement in providing funding to the owner of Crystal Massage Parlor." Indictment 1. Count 2 alleged that petitioner made a material false statement to DHS representatives on October 10, 2013, when he lied "about his use of [the TECS database] for personal reasons," knowing "that he had queried his own name, as well as the name of the owner of the Crystal Massage Parlor." Indictment 2. In accordance with a stipulation from petitioner, jurors were instructed that petitioner was charged with having "stated: 'No' to

the question whether he gave his wife any money to fund her business" (Count 1), and with having "stated: 'No' to the question whether he ever made any unauthorized queries of his wife in TECS for personal use" (Count 2). Jury Instructions Nos. 28, 29. The jury found petitioner guilty on both counts. Verdict Form 1.

Following the verdict, petitioner moved for a judgment of acquittal or a new trial. Pet. App. 4a. As relevant here, he argued that the government had adduced insufficient evidence of falsity, intent, and materiality on Count 1, and insufficient evidence of intent and materiality on Count 2. *Id.* at 8a. The district court denied petitioner's motion with respect to Count 1 but granted a judgment of acquittal on Count 2. *Id.* at 8a-21a.

On Count 1, the district court found that, while trial testimony varied as to the precise wording of the question that the DHS agents posed to petitioner on August 26, 2009, all variants "share[d] a common thread" of asking petitioner whether he had "fund[ed]" Liu's business. Pet. App. 13a; see *ibid.* ("Did you give her any money to fund the business?") (citation omitted); *ibid.* (petitioner was asked "specifically if he had given money to fund this business") (citation omitted). The court thus determined that the evidence was sufficient to support a finding of falsity, because "a rational trier of fact could have found that the term 'fund' included obtaining a loan," and could "[m]oreover" have understood the question "whether [petitioner] *gave* money to his wife for her business [as] includ[ing] giving her money he borrowed from a bank." *Ibid.* The court also rejected petitioner's challenges to the materiality and intent elements of Count 1, concluding that petitioner's false statement was "*capable* of influencing or affecting a federal

agency," *id.* at 15a (citation omitted), and that petitioner's legal education and lengthy federal service offered "sufficient evidence that he 'knew his conduct was unlawful,'" *id.* at 15a n.2 (citation omitted).

On Count 2, the district court granted petitioner's motion for a judgment of acquittal based on its conclusion that no rational trier of fact could find the essential element of materiality beyond a reasonable doubt. See Pet. App. 19a. In support of that conclusion, the court noted that, "[p]rior to the October 2013 interview," the DHS agent already "knew [petitioner] was lying" because the agent had previously "obtained a print-out from TECS showing [petitioner's] March 2009 queries of his wife's name." *Ibid.*

The district court sentenced petitioner to two years of probation and imposed a $500 fine. Judgment 1-4.

3. The court of appeals affirmed. Pet. App. 1a-3a. In rejecting petitioner's challenge to the sufficiency of the evidence on Count 1, the court found "ample evidence before the jury from which it could conclude that the questions the investigators asked [petitioner], numerous times in numerous iterations, about funding his wife's business were not misleading." *Id.* at 2a. The court noted the "lack of ambiguity in the possible versions of the question posed as recalled by the agents during their testimony at trial." *Id.* at 3a. The court also determined that petitioner's "false statement" in response to those questions "was material because the agents' testimony demonstrated it changed the scope of their investigation." *Id.* at 2a. In light of those considerations, as well as "the context of the interview and [petitioner's] background and experience," the court found "sufficient evidence to satisfy the elements" not

only of "falsity" and "materiality," but also of "specific intent," "under 18 U.S.C. § 1001(a)(2)." *Id.* at 3a.

ARGUMENT

Petitioner contends that this case implicates three questions on which the courts of appeals are divided: "whether an ambiguous question is determined in isolation or in a broader context" (Pet. 15); "what is needed for a willful mens rea to make a false statement to a government officer or agent" (Pet. 19); and "what is needed to establish [the] materiality" of a false statement (Pet. 21). None of those issues, however, is implicated by the decision below, in which the court of appeals correctly rejected petitioner's challenge to the sufficiency of the evidence. Nor does the decision conflict with the decision of any other court of appeals. The petition for a writ of certiorari should be denied.

1. a. Petitioner asserts (Pet. 15) that the courts of appeals disagree about "whether an ambiguous question is determined in isolation or in a broader context." That issue is not implicated by the decision below, however, because both parties agreed that the questions posed to petitioner should be considered in context, rather than in isolation. See Gov't C.A. Br. 23 ("The background and circumstances of the August 26, 2009, interview provided critical context for the jury."); see also *id.* at 11, 14, 20, 23-28; Pet. C.A. Br. 22. And the court of appeals similarly agreed that "the context of the interview and [petitioner's] background and experience" were relevant to determining "the elements of falsity, specific intent, and materiality under 18 U.S.C. § 1001(a)(2)." Pet. App. 3a. Based on testimony about petitioner's answers to investigators—in the context in which they were posed and the broader investigation—the court found "ample evidence before the jury from

which it could conclude that the questions the investigators asked [petitioner], numerous times in numerous iterations, about funding his wife's business, were not misleading." *Id.* at 2a; see *ibid.* (noting the "clarity" of investigators' questions). And "given the lack of ambiguity in the possible versions of the questions posed" by investigators, the court correctly determined that sufficient evidence existed for a reasonable jury to find that petitioner made a false statement with the requisite intent. *Id.* at 3a.

b. Contrary to petitioner's assertions (Pet. 15-16), no disagreement exists about whether allegedly false statements made in response to government-posed questions should be considered in context, rather than in isolation. In assessing such statements, including to determine whether a question posed to the defendant was ambiguous, every court of appeals to have addressed the issue has approved reliance on context. See, *e.g.*, *United States* v. *Richardson*, 421 F.3d 17, 33 (1st Cir. 2005) ("In determining whether a statement made in response to an ambiguous question could be said to be false, the context of the question and answer becomes critically important.") (citation and internal quotation marks omitted), cert. denied, 547 U.S. 1162 (2006); *United States* v. *Farmer*, 137 F.3d 1265, 1269 (10th Cir. 1998) ("A defendant may not succeed on a claim of fundamental ambiguity by isolating a question from its context in an attempt to give it a meaning entirely different from that which it has when considered in light of the testimony as a whole."); *United States* v. *Lighte*, 782 F.2d 367, 373 (2d Cir. 1986) ("[A] jury need not examine isolated segments of the question and answer exchange, but may view it within the context.").

Petitioner errs in contending (Pet. 15-16) that the Fourth Circuit "isolat[ed] the meaning of a term unmoored from its applied context" in *United States* v. *Sarwari*, 669 F.3d 401 (2012). In that case, the court upheld the defendant's conviction for making a false statement to a government agency when he identified himself as the "father" of his stepchildren on their passport applications. *Id.* at 408. Contrary to petitioner's assertion (Pet. 15), the defendant there had no "literal truth defense" to that charge, because he was undisputedly not the applicants' "birth or adoptive" male parent, *Sarwari*, 669 F.3d at 407. And in rejecting the defendant's argument that "the word 'father' is so 'fundamentally ambiguous' that [his] answer could not provide the basis for a false statement prosecution," the Fourth Circuit considered the "context" in which the question had been posed. *Id.* at 408. The court ultimately determined that "*[t]he context here*—an application for a United States passport—[was] a formal one," and that "*[i]n this context*" there was "no fundamental ambiguity" about the meaning of the word "father." *Id.* at 408-409 (emphasis added); see *id.* at 409 ("[I]n the context of an application for a United States passport, we cannot conclude that the word 'father' is fundamentally ambiguous.").

The Fourth Circuit, like other courts of appeals, thus applies a context-based standard for evaluating the defendant's allegedly false statements. And even if its approach were different in some way, nothing in *Sarwari* suggests that the Fourth Circuit would have vacated petitioner's conviction on the facts of this case.

c. Petitioner briefly argues (Pet. 11-12) that the court of appeals should have reversed his conviction on the ground that his statement to investigators that he did not give Liu funding for her business was "literally

true," because "[t]he verb 'gave' suggests a gift" rather than a loan. Even if correct, that factbound contention would not warrant this Court's review. See Sup. Ct. R. 10.

In any event, petitioner's argument lacks merit. The government submitted ample evidence to support a finding that petitioner's statement in this case was not factually true. The DHS agents who interviewed petitioner on August 26, 2009, testified that they asked petitioner in several "different ways" whether he had "funded," "assisted with," "loan[ed] * * * any money" to, "give[n] * * * any money" to, "provided money to fund," or "assist[ed] * * * with funding" Liu's business. Pet. App. 9a-12a (citations omitted). Petitioner contended in his closing argument (albeit focusing on the word "fund") that the agents' questions could be understood to distinguish between "money out of [petitioner's] own pocket" and "a loan he obtained from a bank." *Id.* at 13a. Sufficient evidence existed for the jury to reject that characterization and find the agents' queries to have encompassed any loan petitioner made to Liu—even assuming the jury believed petitioner that the money was solely a loan.

2. Petitioner next contends (Pet. 18-20) that 18 U.S.C. 1001(a)(2) requires proof of "heightened awareness that the predicate conduct of the lie or omission is unlawful." But nothing in the text requires that a defendant's statements be *about* conduct that is *itself* unlawful, and none of the circuit decisions he cites imposes such a requirement. Rather, the "conduct" at issue for mens rea purposes is the conduct of making the false statements. Whether or not petitioner "had knowledge that his conduct of funding his wife's business was unlawful," Pet. 17, he violated Section 1001(a)(2) by "knowingly and willfully * * * mak[ing] any materially false, fictitious,

or fraudulent statement or representation" on that subject to federal investigators. 18 U.S.C. 1001(a)(2).

The jury instructions in this case satisfied the definition of willfulness articulated by this Court in *Bryan* v. *United States*, 524 U.S. 184, 191-192 (1998), on which petitioner himself relies (Pet. 17). The jury was instructed that the government was required to prove that petitioner "acted willfully; that is, [petitioner] acted deliberately and *with knowledge* both that the statement was untrue and *that his conduct was unlawful*." Jury Instruction No. 28 (emphasis added). The government adduced ample evidence that petitioner acted with knowledge that his conduct was unlawful—including evidence that petitioner "had a law degree, * * * had worked as a federal employee since 2001, and * * * signed a *Garrity* form warning him that 'anything you say may be used against you as evidence both in an administrative proceeding or any future criminal proceeding.'" Pet. App. 15a (brackets and citation omitted). And the court of appeals upheld his conviction based on its view that the evidence against him was sufficient to support a finding of "specific intent." *Id.* at 3a. Petitioner was thus convicted, and his conviction was upheld, under the relatively stringent knowledge-of-illegality prong of the willfulness definition he advocates.

3. a. Petitioner finally argues (Pet. 21) that this Court's intervention is needed to resolve a dispute about "what is needed to establish materiality" in the context of a false-statement prosecution. But every court of appeals with criminal jurisdiction has determined, consistent with this Court's holding in *Neder* v. *United States*, 527 U.S. 1 (1999), that "a false statement is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decision-making

body to which it was addressed," *id.* at 16 (brackets, citation, and internal quotation marks omitted). See, *e.g.*, *United States* v. *Prieto*, 812 F.3d 6, 13 (1st Cir.), cert. denied, 137 S. Ct. 127 (2016); *United States* v. *Corsey*, 723 F.3d 366, 373 (2d Cir. 2013) (per curiam); *United States* v. *Riley*, 621 F.3d 312, 332 (3d Cir. 2010); *United States* v. *Wynn*, 684 F.3d 473, 479-80 (4th Cir. 2012); *United States* v. *Lucas*, 516 F.3d 316, 342 & n.104 (5th Cir.), cert. denied, 555 U.S. 822 (2008); *United States* v. *McAuliffe*, 490 F.3d 526, 531 (6th Cir.), cert. denied, 552 U.S. 976 (2007); *United States* v. *Seidling*, 737 F.3d 1155, 1160 (7th Cir. 2013); *Preston* v. *United States*, 312 F.3d 959, 961 & n.3 (8th Cir. 2002) (per curiam); *United States* v. *Tarallo*, 380 F.3d 1174, 1182 (9th Cir. 2004); *United States* v. *Lawrence*, 405 F.3d 888, 901 (10th Cir.), cert. denied, 546 U.S. 955 (2005); *United States* v. *Clay*, 832 F.3d 1259, 1309 (11th Cir. 2016), cert. denied, 137 S. Ct. 1814 (2017); *United States* v. *Stadd*, 636 F.3d 630, 638 (D.C. Cir. 2011) (noting that "*Neder*'s definition is of course the accepted definition of materiality," and citing cases from ten other circuits).

Petitioner asserts that the Third Circuit held in *United States* v. *McBane*, 433 F.3d 344 (2005), that "[a] false statement is material when it influences 'an actual, particular decision of the agency at issue.'" Pet. 21 (quoting *McBane*, 433 U.S. at 350) (emphasis omitted). To the contrary, however, *McBane* expressly rejected that narrow view of materiality, holding that "both the language of the materiality standard and the decisions applying that standard require only that the false statement at issue be of a type *capable of influencing* a reasonable decisionmaker." 433 F.3d at 351 (emphasis omitted); see *id.* at 350 ("[A] statement may be material even if no agency actually relied on the statement in

making a decision."). Petitioner's contrary characterization of *McBane* omits the phrase "capable of influencing" from the court's explanation of its inquiry into whether the "false statement [was] *capable of influencing* an actual, particular decision of the agency at issue." *Id.* at 350 (emphasis omitted).

b. The courts below correctly determined that sufficient evidence supported the jury's materiality finding. The jury instructions, adopting the *Neder* formulation nearly verbatim, told the jury that a "statement was material to the activities or decisions of the Department of Homeland Security" if "it had a natural tendency to influence, or was capable of influencing, the agency's decisions or activities." Jury Instruction No. 28. In his motion for a judgment of acquittal or new trial, petitioner characterized the DHS investigation as being "concerned with potential human trafficking at" the Crystal Massage Parlor, with petitioner's "involvement in immigration decisions of persons associated with" the Crystal Massage Parlor, and with petitioner's "receipt of outside gain or monetary compensation for his role at" the Crystal Massage Parlor. Mot. 16. The district court found that, "[e]ven adopting th[ose] stated purposes for the investigation," the evidence was sufficient to support a finding that petitioner's lies were "material to DHS's actions." Pet. App. 15a.

The court of appeals affirmed, explaining that petitioner's "false statement was material because the agents' testimony demonstrated it changed the scope of their investigation." Pet. App. 2a. Even assuming the government was required to prove that his false statement had actual effect, therefore, the court determined that the evidence supported the verdict. Petitioner offers (Pet. 21-22) various pieces of contrary evidence

that, in his view, undermine the jury's materiality finding. But whether taken separately or together, none shows that a rational jury could not have found him guilty, nor would such a factbound contention merit this Court's review.

c. Finally, petitioner argues (Pet. 20-21) that this Court adopted a new definition of materiality in *Maslenjak* v. *United States*, 137 S. Ct. 1918 (2017). But the Court there interpreted the distinct requirement, for a conviction under 18 U.S.C. 1425(a), that the government show the defendant "procur[ed], contrary to law, her naturalization." *Maslenjak*, 137 S. Ct. at 1931 (brackets omitted); see *id.* at 1924-1927. The Court did not purport to address, let alone heighten, what showing of "material[ity]" is required under Section 1001(a)(2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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