No. 22-759

In the Supreme Court of the United States

MICHAEL GRAMINS, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in finding sufficient evidence of materiality to support petitioner's conviction for conspiring to commit securities and wire fraud.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is not published in the Federal Reporter but is available at 2022 WL 6853273. An earlier opinion of the court (Pet. App. 13a-59a) is reported at 939 F.3d 429. The opinion of the district court (Pet. App. 60a-75a) is not published in the Federal Supplement but is available at 2018 WL 2694440.

JURISDICTION

The judgment of the court of appeals was entered on October 12, 2022. On December 30, 2022, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including February 9, 2023, 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 District of Connecticut, petitioner was convicted of conspiring to commit securities and wire fraud in violation of 18 U.S.C. 371. Judgment 1; see Pet. App. 1a-2a. The district court granted petitioner's motion for a new trial, Pet. App. 60a-75a, but the court of appeals reversed and remanded with instructions to reinstate his conviction, *id.* at 13a-59a. On remand, the district court sentenced petitioner to a term of two years of probation. Judgment 1. The court of appeals affirmed. Pet. App. 1a-12a.

1. Petitioner, who worked as a trader at a broker-dealer, conspired with others to defraud investors in the market for residential-mortgage backed securities (RMBS). Petitioner and his co-conspirators schemed to inflate the profits that his firm earned as a market-maker on transactions in the RMBS market by lying to clients about the prices at which specific securities could actually be bought and sold.

a. "RMBS are large and complex aggregations of residential mortgages and home equity loans." *United States* v. *Litvak*, 889 F.3d 56, 59 (2d Cir. 2018) (*Litvak II*). "Banks typically create RMBS by packaging together groups of mortgages and issuing bonds backed by the principal and interest payments of the homeowners who received the mortgages." Pet. App. 15a. By convention, a price for an RMBS is stated as a percentage of its face value, which in turn is based on the mortgages and other loans from which the RMBS is derived. *Ibid.* The percentages are expressed in increments called "'ticks,' with one tick equal to 1/32 of a percentage point of the bond's face value." *Ibid.* For example, a bid to buy an RMBS at "'65 and 16 ticks,'" or 65-16,

means that the buyer is willing to pay 65.5% of the face value of the bond. *Ibid.*

RMBS are "bought and sold at very high prices," typically by institutional investors. Pet. App. 15a (citation omitted). RMBS do not trade on any public exchange, and their prices are "generally not publicly known." *Id.* at 16a. Institutional investors seeking to buy or sell RMBS rely on registered broker-dealers to make a market in the securities. *Ibid.*; see 15 U.S.C. 78*o*(a) (broker-dealer registration requirement). One way that a broker-dealer does so is by "match[ing] a prospective buyer of a particular RMBS with a prospective seller of that RMBS (and vice versa)." Pet. App. 16a. The broker-dealer carries out the transaction by buying the security from the seller and then selling it to the pre-arranged buyer. *Id.* at 17a. For its role in connecting the buyer and seller, the broker-dealer is typically compensated "by selling the bond for slightly more than it paid." *Ibid.* "Industry participants refer to this difference as 'commission,' 'pay on top,' or 'spread,' and often negotiate the amount of the difference explicitly with the broker-dealer." *Ibid.* (citations omitted).

b. From 2009 to 2013, petitioner worked as a trader at a registered broker-dealer, Nomura Securities International, Inc. (Nomura). Pet. App. 14a, 16a. During that time, petitioner and three other traders at Nomura conspired to lie to their clients about bids and offers for specific securities—falsely presenting lower bids to buy and higher offers to sell—in order to enlarge the spread, and thus Nomura's profits. *Id.* at 18a.

On "a daily basis," petitioner and his co-conspirators told prospective sellers that a bidder was only willing to buy a particular RMBS at a price "lower than what the bidder had actually bid" or told prospective buyers that

a seller was only willing to sell a particular RMBS at a price "higher than the offer actually was." Pet. App. 19a (citations omitted). Because potential buyers and sellers "typically only had the information that [the conspirators] were giving them," they "had to take [the conspirators'] word" about the price at which a counterparty was willing to deal. *Ibid.* (citation omitted). The upshot of the conspirators' lies was that "either one side or both sides" to the transaction would "lower their offer to sell or increase their bid to buy." *Ibid.* (brackets and citation omitted). Increasing the price spread—the difference between the price at which the buyer agreed to buy and the seller agreed to sell—in turn "increas[ed] the * * * money that Nomura earned on the trade." *Ibid.* (citation omitted).

For instance, in 2010, when QVT Financial expressed a willingness to sell a particular RMBS at 47-16 (*i.e.*, 47.5% of its face value), petitioner falsely stated that a potential buyer was offering only 46-16, even though he had yet to initiate a conversation about the sale with that prospective buyer, Goldman Sachs Asset Management. Pet. App. 20a. After QVT lowered its offer to 47-08, petitioner contacted Goldman Sachs and falsely stated that the bonds were being offered for sale at 49-00. *Ibid.* At the same time, petitioner informed QVT that the buyer would not offer more than 47-00, and QVT agreed to sell the bonds at that price. *Ibid.*

When Goldman Sachs in fact proposed bids of 48-12 and 48-20, petitioner maintained that the seller would not "budge" from 49-00, even though QVT had already agreed to a sale at 47-00. Pet. App. 20a-21a (citation omitted). Goldman Sachs indicated that it "would prefer to pay less" than 49-00, but petitioner falsely stated that the seller "'isn't moving at all'" and "'wants to stick

to his guns.'" *Id.* at 21a (citation omitted). QVT eventually agreed to sell the bonds to Nomura for 47-00, which then sold them to Goldman Sachs for 49-00, taking the fraudulently inflated difference between those two prices as its commission on the trade. *Ibid.*

In January 2013, a trader at another firm was indicted for allegedly engaging in a similar scheme to misrepresent bids when brokering transactions in the RMBS market. Pet. App. 24a; see *United States* v. *Litvak*, 808 F.3d 160, 166 (2d Cir. 2015) (*Litvak I*). The indictment in that case, which was widely discussed in the RMBS industry, caused Nomura to "schedule[] a compliance training session for traders," which petitioner attended. Pet. App. 25a. The session was held "specifically to discuss the conduct at issue in the Litvak indictment," and Nomura reiterated to its employees that, "if [they] say something, make sure it's accurate." *Ibid.* (citations omitted). "The training session also operated as a 'refresher' on principles from Nomura's compliance manual, including its prohibitions on making misrepresentations to clients." *Ibid.* (citation omitted). Despite those warnings, petitioner engaged in at least one later transaction in which he lied to both the buyer and the seller about prices in order to inflate Nomura's commission. *Id.* at 25a-26a.

2. In 2015, a grand jury in the District of Connecticut returned an indictment charging petitioner and his co-conspirators with two counts of securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff and 17 C.F.R. 240.10b-5; six counts of wire fraud, in violation of 18 U.S.C. 1343; and one count of conspiring to commit securities and wire fraud, in violation of 18 U.S.C. 371. Pet. App. 26a. The case proceeded to trial, where representatives of several of Nomura's clients testified

about trades in which petitioner and his co-conspirators had lied to them about prices.

The witnesses explained that because petitioner was supposed to be brokering a trade for them with a counterparty, they expected petitioner to be a truthful conduit for the bids and offers exchanged by the buyer and seller in such a transaction. Pet. App. 27a-28a. They also explained how petitioner's "lies had impacted their investment decisions." *Id.* at 27a. For instance, one witness testified that had he known "the truth," he would probably have tried "to see if [he] could buy the bonds at a cheaper price." *Id.* at 38a (citation omitted).

The jury found petitioner guilty on the conspiracy count, failed to reach a verdict with respect to petitioner on one count of securities fraud and one count of wire fraud, and acquitted petitioner on the remaining counts. Pet. App. 29a-30a. The district court declared a mistrial as to the counts on which the jury had deadlocked and accepted the verdict. *Id.* at 30a. Petitioner then moved for a judgment of acquittal or, in the alternative, a new trial. *Ibid.* Petitioner alleged, *inter alia*, that the evidence of materiality was insufficient for conviction on either the conspiracy count or the hung securities and wire fraud counts. *Id.* at 61a. In petitioner's view, his lies about RMBS prices were "not material as a matter of law" because "statements about price were not relevant to the intrinsic value of the bonds." *Id.* at 61a-62a.

The district court denied the motion for acquittal, explaining that the Second Circuit had already rejected a similar materiality argument in an appeal from the Litvak prosecution, and finding that petitioner's lies were not "so obviously unimportant to a reasonable investor as to compel a judgment of acquittal." Pet. App. 62a; see *id.* at 60a-65a. But it granted a new trial on the

theory that certain testimony had improperly implied an agency relationship between Nomura and its clients. See *id.* at 67a-73a.

3. The court of appeals, however, reversed the grant of a new trial and remanded with instructions to reinstate petitioner's conviction. Pet. App. 13a-59a.

The court of appeals found that the record had properly allowed the government "to advance its theory of materiality that[] * * * a reasonable investor would have relied on the sorts of misrepresentations that [petitioner] * * * made"; petitioner similarly "to advance [his] theory * * * that, in a market full of sophisticated investors relying largely on complex models, no reasonable investor would have credited broker-dealers' representations about RMBS prices"; and the jury "to accept whichever theory of materiality it found more persuasive." Pet. App. 37a. And the court determined that "a rational jury could have found, on the basis of * * * testimony" from the clients whom petitioner had conspired to defraud that the conspirators' lies about RMBS prices "were important to those counterparties' investment decisions" and were therefore "material." *Id.* at 39a. The court emphasized, *inter alia*, the testimony of multiple witnesses that they expected a broker-dealer to accurately relay bids and offers in "any non-inventory transaction" and that "'accurately relaying information back and forth would have been important, especially this kind of information regarding price level.'" *Id.* at 45a (citation omitted).

4. On remand, petitioner renewed his motion for acquittal. Pet. App. 2a. The district court adhered to its prior decision denying the motion. Pet. C.A. App. 1031. The court stated that it "continue[d] to believe that the evidence viewed most favorably to the government is

sufficient to support the verdict" on the conspiracy count, including with respect to materiality. *Id.* at 1036.

The Probation Office calculated petitioner's advisory Guidelines range to be 60 months of imprisonment (the statutory maximum), based largely on a determination that petitioner's offense conduct had caused losses to investors of between $9.5 million and $25 million. Presentence Investigation Report ¶¶ 66, 122. The district court sentenced petitioner to a below-Guidelines sentence of two years of probation, with the first six months to be served in home confinement. Judgment 1.

5. The court of appeals unanimously affirmed in an unpublished summary order. Pet. App. 1a-12a. Among other things, the court rejected petitioner's claim of insufficient evidence, finding that the evidence instead supported conspiracy to commit securities fraud, without any need to address the separate wire-fraud object. See *id.* at 3a n.2 (citing *Griffin* v. *United States*, 502 U.S. 46, 56-57 (1991)).

The court of appeals emphasized that the jury heard testimony from four of the investors whom petitioner had conspired to defraud about how petitioner's lies "had impacted their investment decisions." Pet. App. 4a (citation omitted). Quoting its prior opinion in this case, the court observed that "this sort of testimony from a broker-dealer's counterparties can constitute sufficient evidence of materiality to support a conviction for securities fraud." *Ibid.* And the court declined to hold that "the government was required to prove that 'absent his misrepresentations,' the counterparties 'would have declined to transact.'" *Id.* at 5a (brackets and citation omitted). The court explained that even if investors used models to estimate the value of a given RMBS, a reasonable jury could still find that the actual

price an investor pays a broker-dealer to buy the RMBS can be important to the investor because that price bears on whether "the purchase is deemed profitable." *Ibid.* (quoting *Livtak II*, 889 F.3d at 67).

ARGUMENT

Petitioner contends (Pet. 13-23) that the jury lacked sufficient evidence to find that the misrepresentations he conspired to make to investors were material, and that the decision below rejecting his sufficiency challenge implicates a division of authority between the Second and Seventh Circuits. Those contentions lack merit. The lower courts correctly recognized that it was reasonable for the jury to find that petitioner's lies were material, based in substantial part on testimony from investors about how and why petitioner's lies mattered to them, and the lower courts' fact-bound rejection of petitioner's sufficiency challenge does not conflict with any decision of this Court or any other court of appeals. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly rejected petitioner's challenge to the sufficiency of the evidence of materiality. The evidence here amply warranted the jury's implicit finding that petitioner conspired to make material misrepresentations when he engaged in a scheme to lie to his clients about bids and offers in order to inflate his firm's profits.

a. Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, makes it unlawful to "use or employ, in connection with the purchase or sale of any security * * * any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange Commission (SEC)] may prescribe." 15 U.S.C. 78j(b). The applicable SEC rule, in turn, identifies the specific misconduct of

"employ[ing] any device, scheme, or artifice to defraud," "mak[ing] any untrue statement of a material fact or * * * omit[ting] to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading," or "engag[ing] in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person," if done "in connection with the purchase or sale of any security." 17 C.F.R. 240.10b-5. A violation is criminal only if committed "willfully." 15 U.S.C. 78ff(a).

This Court's definition of "materiality" in the securities context originated in *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976), which held that an "omitted fact" in a proxy statement "is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Id.* at 449. This Court later adopted the *TSC Industries* standard in the Section 10(b) and Rule 10b-5 context. *Basic Inc.* v. *Levinson*, 485 U.S. 224, 232 (1988). Under that standard, "materiality depends on the significance that [a] reasonable investor would place on the withheld or misrepresented information." *Id.* at 240. And information is material to a reasonable investor if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information available." *Id.* at 231-232 (quoting *TSC Industries*, 426 U.S. at 449).

b. The lower courts correctly applied that standard to the facts of this case. The court of appeals' articulation of the materiality standard, in particular, closely mirrored this Court's precedent. See, *e.g.*, Pet. App. 4a (stating that, in the securities context, a misrepresentation is

material if there is a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the total mix of information available") (quoting, indirectly, *Basic*, 485 U.S. at 232-232); *id.* at 35a ("A misstatement in a securities transaction is material if there is a 'substantial likelihood that a reasonable investor would find the . . . misrepresentation important in making an investment decision.'") (citation omitted); cf. *id.* at 62a (district court's similar formulation of the materiality requirement). And both lower courts reviewed the extensive trial record and determined that the jury could reasonably have found materiality here. See pp. 6-9, *supra*.

The jury heard evidence from multiple Nomura clients to whom petitioner and his co-conspirators lied about the prices at which securities were available. Pet. App. 4a-6a, 37a-41a. The four key witnesses all "testified that they considered [petitioner's] lies important to them in the context of the price negotiations in which they occurred." *Id.* at 38a. The lies caused prospective buyers to raise their bids (and pay more) than they otherwise would, and prospective sellers to lower their offers (and receive less) than they otherwise would in the transactions, on the false belief that the state of the market required such concessions. *Id.* at 38a-39a. Petitioner's misstatements thereby increased the spread and Nomura's corresponding profits. See *id.* at 5a.

The witnesses testified that the nature of the RMBS market was such that they "only had the information that [Nomura was] giving them regarding price" and that they "had to take [the trader's] word when it came to the actual price" being offered by another counterparty for a given transaction. Pet. App. 19a (citation

omitted). The jury also heard that these witnesses expected petitioner and other traders to provide accurate information regarding price negotiations and that petitioner's lies about bid and offer prices "impacted their investment decisions." *Id.* at 27a. Specifically, the witnesses explained that had they known "the truth" about the market for these securities, they would have tried to "buy the bonds at a cheaper price," or sell at a higher price, rather than viewing such options as simply unavailable. *Id.* at 38a (citation omitted).

As the court of appeals recognized, a reasonable investor would naturally care about price "in determining whether the purchase [or sale] is deemed profitable," such that "lies about [price] can be found by a jury to significantly alter the total mix of information available." Pet. App. 5a. (quoting *Litvak II*, 889 F.3d at 67). Petitioner's lies warped the RMBS market, causing his clients to pay more (or receive less) than they otherwise would have. A reasonable investor would consider such lies important irrespective of whether, in a sense, he "got exactly what [he] bargained for at the price [he] agreed to pay," or a "'proprietary modeling program[]'" indicated that the purchase might be advantageous—albeit less so—even at the fraudulently inflated price. Pet. 4, 8 (citation omitted). By analogy, a "reasonable investor," *Basic*, 485 U.S. at 240, would view a stock priced at, say, $10 per share differently from one priced at $8, in terms of his willingness to buy it and the level of his portfolio's financial commitment to the stock if purchased.

c. Petitioner contends (Pet. 18-23) that no reasonable jury could have found his lies to be material. In petitioner's view, the bids and offers exchanged in these RMBS transactions were, as a matter of law, "essentially

useless" information, *Basic*, 485 U.S. at 234, and he was free to lie about them. That position is untenable, and the lower courts correctly rejected it.

Petitioner principally argues (Pet. 18-19) that the common law treated information about "acquisition costs or expected profits to be immaterial as a matter of law," and that federal fraud statutes incorporate that limitation. But a common-law exception for hard bargaining, or "dealer's talk," about the price a party is willing to pay or accept, Pet. 19 (citation omitted), is inapplicable here. Petitioner was not driving a hard bargain about the prices that he or his firm would accept; instead, he was brokering a transaction between counterparties and misrepresenting the state of the market by lying to them about the bids and offers that he had received. Even if concealing the true price that the speaker would pay or accept is not fraud, providing false information about the price that a different party is offering can be, and the jury permissibly found that it was here.

To the extent that petitioner renews his argument that such lies cannot be the basis for securities fraud unless the government proves that the false statements affected the victims' "ultimate decision" to transact, rather than just the price at which they transacted, Pet. 21 (emphasis omitted), he acknowledges that this Court has never announced such a requirement, *ibid.*, and imposing it in this case would be unsound. Different investors may reach different conclusions about whether to nevertheless buy or sell from a third party at a price affected by fraud, but a reasonable investor undoubtedly "would place" paramount "significance" on receiving accurate information about the security's price, *Basic*, 485 U.S. at 240—likely above and beyond any

other consideration. Even if the investor decides to engage in the transaction, the investor's expected profit margin will affect, *inter alia*, the investor's evaluation of its general portfolio, which may in turn affect its willingness to, for example, make other transactions—similar to how someone who needs a car will care whether she has to pay $20,000 or $30,000 for one.

Recognizing as much would not result in "criminal liability for everyday misrepresentations," as petitioner asserts (Pet. 25). As a threshold matter, that assertion rests on a misreading of the decision below as extending fraud liability to circumstances in which a party to a negotiation misrepresents that party's own willingness to deal at a given price. Again, however, this is not a case in which petitioner misled his clients by telling them that "he cannot lower *his* price." *Ibid.* (emphasis added). Petitioner instead lied to his clients about other parties' bids and offers in order to pad Nomura's commissions. And the government proved—as would be required in any securities-fraud prosecution—that the conduct was willful; among other things, the jury heard evidence that petitioner continued to engage in his scheme even after attending a "refresher" compliance course. Pet. App. 25a (citation omitted); see *id.* at 64a-65a (rejecting petitioner's challenge to the sufficiency of the evidence of willfulness); see also p. 5, *supra*.

2. Petitioner errs in asserting (Pet. 13-18) that the decision below implicates a conflict between the Second and Seventh Circuits. That assertion rests (see Pet. 13-14) on the Seventh Circuit's decision in *United States* v. *Weimert*, 819 F.3d 351 (2016). In *Weimert*, the Seventh Circuit addressed misrepresentations made by a bank's vice president (Weimert), tasked with arranging the sale of the bank's interest in a commercial development,

who “saw an opportunity to insert himself into the deal.” *Id.* at 353. After identifying potential buyers, Weimert persuaded them to “include[] in their offer letters a term having Weimert buy a minority interest in the property,” based on the misrepresentation that doing so would boost the viability of their bids, while misleading the bank into believing that the buyers would not proceed with the deal “if he were not included.” *Ibid.*; see *id.* at 353-354.

A divided panel of the court of appeals reversed, on the premise that Weimert himself was part of a three-way negotiation: it described Weimert’s statements to the buyers as “puffery” directed at an “opposing party” and similarly described his statements to the bank as occurring in the context of “an arms-length three-party deal” involving the buyers, the bank, and Weimert. *Weimert*, 819 F.3d at 365-366. It accordingly viewed Weimert’s misrepresentations to involve “negotiating positions” to one counterparty in that three-way transaction about what the third party would find acceptable. *Id.* at 364, 366. And it declined to treat such statements as fraud, based on the common law and the belief that “buyers and sellers * * * often try to mislead the other party about the prices and terms they are willing to accept.” *Id.* at 357; see *id.* at 357-358.

But it is not clear that, on the specific facts of this case, the Seventh Circuit would be bound to reach a different result from the unpublished decision below. The principal point of disagreement between the panel majority in *Weimert* and the dissenting judge, who would have affirmed Weimert’s convictions, was whether the case could in fact “be viewed as an arms-length, three-party transaction,” or whether the bank instead “had every reason to expect that Weimert would fairly and

honestly represent its interests." *Weimert*, 819 F.3d at 370 (Flaum, J., dissenting). And in this case, the evidence showed that both counterparties in an RMBS transaction counted on the broker as an honest, albeit non-fiduciary, conduit for the current state of the market for buying or selling a given RMBS. Pet. App. 43a-45a. Because petitioner and his co-conspirators were in a distinct role as communicators—not distorters—of the market, their misstatements were material.

The Seventh Circuit's decision in *United States* v. *Filer*, 56 F.4th 421 (2022)—which petitioner himself invokes (Pet. 14)—reinforces the absence of any meaningful conflict by cautioning against "read[ing] too much into *Weimert*'s narrow holding," which the court characterized in *Filer* as dependent on the premise that "sophisticated businesspeople are expected to hide their 'true goals, values, priorities, or reserve prices' from their negotiating partners." 56 F.4th at 430-431 (quoting *Weimert*, 819 F.3d at 354). As discussed, Nomura was not a "negotiating partner" in this case, and any tension between *Weimert* and the decision below is shallow and fact-bound—as one would expect in challenges to the sufficiency of the evidence, where there is no dispute that the jury was properly instructed about materiality. In other cases, the Seventh Circuit has, like the Second Circuit, articulated the legal standard for materiality in the securities context in terms that closely track this Court's *TSC Industries* standard. See, *e.g.*, *SEC* v. *Bauer*, 723 F.3d 758, 772 (7th Cir. 2013).

Petitioner further errs in suggesting (Pet. 16-17) that the decision below is in tension with the Eleventh Circuit's decision in *Brink* v. *Raymond James & Associates, Inc.*, 892 F.3d 1142 (2018). As the Eleventh Circuit explained there, its decision in *Brink* was

consistent with the Second Circuit's approach, and petitioner identifies no sound reason to infer a conflict that the Eleventh Circuit itself has disclaimed. The misrepresentation that *Brink* viewed as not material was concealment of the fact that part of a broker's fees, the total size of which were known to the customer, were for a commission. *Id.* at 1144-1145. Here, in contrast, the jury could readily have found that a reasonable investor would have cared about the RMBS prices that petitioner misrepresented because that information had a direct bearing on how much a buyer paid, or a seller obtained, for a given RMBS. See, *e.g.*, Pet. App. 38a (quoting testimony that petitioner's lies about a "seller's offer price" were important because the witness would have tried to "'buy the bonds at a cheaper price'" had he known the truth) (citation omitted).

3. In any event, this case would be an unsuitable vehicle for addressing materiality. This Court has explained that materiality is "inherently fact-specific," *Basic*, 485 U.S. at 236, and that determinations of materiality are therefore "peculiarly ones for the trier of fact," *TSC Industries*, 426 U.S. at 450. And petitioner's claims in this case essentially boil down to fact-bound challenges to the application of a well-accepted standard in the circumstances of this case.

Further review to determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt," *Musacchio* v. *United States*, 577 U.S. 237, 243 (2016) (citation omitted), is unwarranted. See Sup. Ct. R. 10. Both the district court and the court of appeals recognized that the jury's factual findings were consistent with the record. Pet. App. 3a-6a, 61a-62a. This

Court does not ordinarily "grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnston*, 268 U.S. 220, 227 (1925). And "under what [the Court] ha[s] called the 'two-court rule,' the policy has been applied with particular rigor when [the] district court and court of appeals are in agreement as to what conclusion the record requires." *Kyles* v. *Whitley*, 514 U.S. 419, 456-457 (1995) (Scalia, J., dissenting); see *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949).

Moreover, further review would address only a limited aspect of the case. Petitioner was convicted of conspiring to commit both securities fraud and wire fraud. Judgment 1. The court of appeals rejected his sufficiency challenge after finding that a reasonable jury could have found that he conspired to commit securities fraud, without addressing wire fraud. Pet. App. 3a n.2. As the court correctly recognized, a jury's general verdict finding a defendant guilty of conspiring to commit multiple crimes is based on sufficient evidence as long as the jury could reasonably have found a conspiracy to commit at least one of them. *Ibid.*; see *Griffin* v. *United States*, 502 U.S. 46, 56-57 (1991). Petitioner's repeated references to the "federal fraud statutes" (*e.g.*, Pet. I, 5, 12) suggest that he would have this Court treat the two objects of the conspiracy interchangeably. But this Court has articulated the materiality element for wire fraud in different terms than the materiality element for securities fraud under Section 10(b) and Rule 10b-5. Compare *Neder* v. *United States*, 527 U.S. 1, 22 n.5 (1999), with *Basic*, 485 U.S. at 231-232.

The court of appeals did not address the relevance of any potential distinctions between the two materiality standards, nor did it address whether the evidence was

sufficient for the jury to find that petitioner conspired to commit wire fraud. And petitioner identifies no sound basis for this Court to do so in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (stating that this Court is generally "a court of review, not of first view").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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