No. 19-1412

In the Supreme Court of the United States

MARK JOHNSON, 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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QUESTIONS PRESENTED

1. Whether petitioner's scheme to misrepresent the terms and price of a foreign-exchange transaction constituted a scheme to defraud within the meaning of the wire-fraud statute, 18 U.S.C. 1343.

2. Whether petitioner's misrepresentations were material within the meaning of the wire-fraud statute.

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OPINION BELOW

The amended opinion of the court of appeals (Pet. App. 1-21) is reported at 945 F.3d 606.

JURISDICTION

The amended judgment of the court of appeals was entered on December 16, 2019. A petition for rehearing was denied on January 23, 2020 (Pet. App. 22). The petition was filed on June 19, 2020. 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 New York, petitioner was convicted on eight counts of wire fraud, in violation of 18 U.S.C. 1343, and one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 1349. Judgment 1. The court sentenced him to 24 months of imprisonment, to be followed by three years of supervised release.

Judgment 2-3. The court of appeals affirmed. Pet. App. 1-21.

1. Petitioner was the head of the foreign-exchange trading desk at the investment bank HSBC. Pet. App. 1. This case arises out of petitioner's activities in connection with a foreign-exchange transaction involving Cairn Energy, a British oil and gas firm. *Id.* at 4.

In 2011, Cairn earned approximately $3.5 billion from the sale of an interest in a subsidiary. Pet. App. 4; Gov't C.A. Br. 5. Cairn sought to convert that sum from U.S. dollars to British pounds, so that it could distribute the money to its shareholders. Pet. App. 4. Cairn was concerned, however, that the execution of such a large transaction could "mov[e] the market" against it, increasing the price of the pounds it sought to buy. Gov't C.A. App. 32. Cairn accordingly solicited proposals from various major banks, including HSBC, for executing the conversion at a favorable exchange rate. Pet. App. 4. Cairn required the banks to enter into confidentiality agreements, in which the banks promised to use information about Cairn's transaction solely to evaluate and facilitate the transaction. C.A. App. 264-266.

HSBC recommended a method of currency exchange known as a "fixing transaction." Pet. App. 4-5 (capitalization omitted). Under that method, Cairn would give HSBC approximately two hours' notice of a time for carrying out the transaction, and HSBC would guarantee pounds to Cairn at whatever exchange rate prevailed at the designated time. *Id.* at 5-6. HSBC told Cairn that the exchange rate could fluctuate to Cairn's disadvantage during that two-hour window. *Id.* at 5. In a phone call, however, petitioner assured Cairn's representative that HSBC would buy pounds "quietly," in order to avoid driving up the exchange rate during the

two-hour window. *Ibid.* (citation omitted). Petitioner also stated that he was "horrified" that some competitor banks would seek to artificially increase the exchange rate at the time of the fixing transaction through a practice known as "ramp[ing] the fix," in which a bank would increase its profit margin by structuring its own lower-price purchases of currency in a manner designed to maximize the sale price to a customer like Cairn. *Id.* at 6 (citation omitted). Petitioner represented that HSBC would refrain from that practice. *Id.* at 16. After those discussions, Cairn agreed to use the method proposed by HSBC, and it eventually designated 3 p.m. on December 7, 2011, as the time for carrying out the fixing transaction. *Id.* at 7.

Petitioner and his colleagues at HSBC then schemed to violate petitioner's representations, manipulating the transactions to increase the cost to Cairn and maximize the profits to HSBC. See Gov't C.A. Br. 12-17. That scheme proceeded in three steps. First, petitioner bought millions of pounds on behalf of HSBC, and he tipped his colleagues at HSBC to do likewise—in violation of the confidentiality agreement. *Id.* at 12-15. Second, petitioner and his colleagues schemed to carry out Cairn's fixing transaction using "'aggressive' buying techniques" that were designed "to drive up the price" in the hours leading up to 3 p.m. on December 7, 2011, Pet. App. 8 (citation omitted)—in violation of the representations that HSBC would buy pounds "quietly" and would refrain from "ramp[ing] the fix," *id.* at 17. Finally, after using Cairn's transaction to drive up the price of pounds, thereby forcing Cairn to buy the pounds from HSBC at an inflated price, petitioner and his colleagues also sold the millions of pounds that they had

previously purchased on behalf of HSBC. Gov't C.A. Br. 17.

Petitioner and his colleagues reaped profits for HSBC of approximately $3.1 million from their buying and selling of pounds before and after Cairn's transaction. Gov't C.A. Br. 17; Gov't C.A. App. 164. At the same time, that scheme resulted in significant economic harm to Cairn, because it drove up the price that Cairn had to pay for pounds. Pet. App. 7-9. Indeed, the designated time for the fixing transaction, 3 p.m. on December 7, 2011, turned out to be the single worst minute of the day for Cairn to buy pounds. Gov't C.A. Br. 17.

After the completion of the transaction, Cairn's treasurer expressed concern about the increase in the exchange rate in the hour preceding 3 p.m. Pet. App. 9. Petitioner falsely represented that the Russian Central Bank was responsible for the fluctuation. *Id.* at 9-10. The next day, petitioner appeared to confirm that he had lied, recounting to a colleague that, when Cairn had asked why the exchange rate had jumped, he had "said the usual, Russian names, other central banks, all that sort of stuff." *Id.* at 10 (citation omitted).

2. A grand jury indicted petitioner on ten counts of wire fraud, in violation of 18 U.S.C. 1343, and one count of conspiring to commit wire fraud, in violation of 18 U.S.C. 1349. Pet. App. 10. The government dismissed one of the ten wire-fraud counts before trial. *Id.* at 11 n.4.

At trial, the government proceeded under two theories of liability, which the court of appeals described as "misappropriation of the confidential information of Cairn in breach of a duty of trust and confidence owed to Cairn" and "denial of Cairn's right to control its assets by depriving it of information necessary to make

discretionary economic decisions." Pet. App. 3. As to the latter theory, the district court instructed the jury that the government was required to prove beyond a reasonable doubt that petitioner's misrepresentations went to the "heart of Cairn's bargain with HSBC" and that those misrepresentations could or did "result in tangible economic harm to Cairn." D. Ct. Doc. 161, at 36-37 (Oct. 18, 2017). The court cautioned the jury that a "scheme intended to deceive and to bring about financial gain to [petitioner] without causing financial or property loss to the victim [wa]s not sufficient." *Id.* at 37. The court also instructed the jury that "[t]he false or fraudulent representation or failure to disclose must relate to a material fact or matter," and that, "[t]o be material, a fact must be of such importance that it would reasonably be expected to cause a prudent person to act or not act in some way with respect to the transaction at issue." *Id.* at 32 (emphasis omitted). The court explained, in particular, that the government was required to prove beyond a reasonable doubt "that a reasonable person in Cairn's position would have considered the fact to be important in making a decision in connection with the underlying [foreign exchange] transaction with HSBC." *Id.* at 32-33.

The jury found petitioner guilty on eight of the nine counts of wire fraud and on one count of conspiring to commit wire fraud. Pet. App. 11. It found petitioner not guilty on the remaining count of wire fraud. *Ibid.* The district court sentenced petitioner to 24 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1-21. As relevant here, petitioner contended that the evidence

presented by the government was insufficient to support a conviction. *Id.* at 3. The court found the evidence sufficient to support a conviction under what it termed the "right to control" theory of liability; it accordingly declined to reach petitioner's arguments as to the misappropriation theory. *Ibid.*

The court of appeals explained that, to establish a violation of the wire-fraud statute, the government was required to prove that petitioner "(1) had an intent to defraud, (2) engaged in a fraudulent scheme to obtain Cairn's money or property 'involving material misrepresentations—that is, misrepresentations that would naturally tend to influence, or are capable of influencing,' Cairn's decisionmaking, and (3) used the wires to further that scheme." Pet. App. 13 (citation omitted). The court stated that its precedents had "recognized that the property interests protected by the mail and wire fraud statutes include the interest of a victim in controlling his or her own assets." *Ibid.* (quoting *United States* v. *Binday*, 804 F.3d 558, 570 (2d Cir. 2015) (brackets and ellipsis omitted), cert. denied, 136 S. Ct. 2487, and 136 S. Ct. 2488 (2016)).

The court of appeals rejected petitioner's contention that the government had failed to present sufficient evidence that he intended to defraud Cairn. Pet. App. 13-16. The court explained that "sufficient proof of fraudulent intent" would exist if "the defendant's deception 'affected the very nature of the bargain'" or "went to 'an essential element of the bargain'" between the defendant and the victim. *Id.* at 13 (brackets and citations omitted). The court noted that "fraudulent intent may be 'apparent' where 'the false representations are directed to the quality, adequacy or price of the goods

themselves because the victim is made to bargain without facts obviously essential in deciding whether to enter the bargain.'" *Id.* at 15 (citation and ellipsis omitted). And the court observed that in this case, after representing to Cairn that "HSBC would purchase pounds 'quietly' without ramping the 3 p.m. fix rate," petitioner directed his trader "to ramp the fix rate." *Id.* at 16 (citation omitted). The court explained that petitioner thereby "deceived Cairn with respect to both how the [foreign-exchange transaction] would be conducted and the price of the [transaction]"—sufficiently central elements of the bargain to allow the jury to find beyond a reasonable doubt that petitioner acted with the intent to defraud. *Ibid.*

The court of appeals also rejected petitioner's contention that the government had failed to present sufficient evidence that his misrepresentations were material. Pet. App. 16-19. The court explained that a misrepresentation is material "if it is capable 'of influencing the intended victim.'" *Id.* at 16 (quoting *Neder* v. *United States*, 527 U.S. 1, 24 (1999)). The court found sufficient evidence that petitioner made at least two material misrepresentations. *Id.* at 17. First, the court determined that a reasonable jury could find that petitioner's representation that HSBC would buy pounds "quietly" and would not "ramp the fix" were material. *Ibid.* (citation omitted). The court explained that the evidence showed that the representation "not only could, but in fact did, influence Cairn's decision as to the type of transaction to undertake." *Id.* at 18. Second, the court determined that a reasonable jury could also find materiality as to petitioner's representation that the Russian Central Bank was responsible for the movement in the market. *Id.* at 18-19. The court explained

that "Cairn was not stuck with the [foreign-exchange transaction]" after it was completed, because Cairn "could have, among other things, sought immediate legal action on the ground that it had been defrauded," and that a reasonable jury could have found that petitioner's misrepresentation "influenc[ed] Cairn's decision not to pursue various courses of action immediately after the fact." *Id.* at 19.

ARGUMENT

Petitioner contends (Pet. 19-23, 28-34) that his convictions for wire fraud rest on a legally invalid theory, although his petition for a writ of certiorari does not directly challenge either the jury instructions or the sufficiency of the evidence. Petitioner also contends (Pet. 23-27) that the court of appeals applied a legally flawed standard of materiality. The court correctly affirmed petitioner's convictions, and its decision does not conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. Petitioner contends (Pet. 19-23, 28-34) that his convictions rest on a legally invalid "right to control" theory of wire fraud. That contention lacks merit, and this Court has recently and repeatedly denied certiorari in cases that raise similar issues. See *Kelerchian* v. *United States*, No. 19-782, 2020 WL 2814776 (June 1, 2020); *Binday* v. *United States*, 140 S. Ct. 1105 (2020); *Aldissi* v. *United States*, 140 S. Ct. 1129 (2020); *Viloski* v. *United States*, 137 S. Ct. 1223 (2017); *Kergil* v. *United States*, 136 S. Ct. 2488 (2016); *Resnick* v. *United States*, 136 S. Ct. 2488 (2016); *Binday* v. *United States*, 136 S. Ct. 2487 (2016); *Viloski* v. *United States*, 575 U.S. 935 (2015). The same course is warranted here.

a. The federal wire fraud statute makes it a crime to use a wire communication to execute "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. 1343. The statutory phrase "scheme or artifice to defraud" covers "schemes to deprive [people] of their money or property." *Cleveland* v. *United States*, 531 U.S. 12, 19 (2000) (citations omitted). And the term "property" includes intangible property interests. See *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987).

Petitioner's scheme here fits squarely within that prohibition. At bottom, petitioner falsely represented to Cairn that HSBC's services would be performed differently—and thus cost less—than they actually did. See Pet. App. 16. In particular, he promised that HSBC would not "ramp the fix"—*i.e.*, aggressively try to maximize the spread between the (lower) price that HSBC paid for British pounds and the (higher) price at which Cairn was obligated to acquire them. *Id.* at 17 (citation omitted). By "deceiv[ing] Cairn with respect to both how the [transaction] would be conducted and the price of the [transaction]," *id.* at 16, petitioner trapped Cairn into paying more money (its property) than it should have for HSBC's services. That is fraud in the same way that it would be fraud for a contractor to falsely promise to minimize costs by using labor efficiently, instead intending to do the opposite.

b. Petitioner errs in contending (Pet. 31-32) that the decision below conflicts with this Court's decision in *Kelly* v. *United States*, 140 S. Ct. 1565 (2020), by allowing the government to obtain a conviction even if the object of the fraudulent scheme was not the victim's property. Contrary to petitioner's characterization, the

court of appeals has "repeatedly *rejected* application of the mail and wire fraud statutes where the purported victim received the full economic benefit of its bargain." *United States* v. *Binday*, 804 F.3d 558, 570 (2d Cir. 2015) (emphasis added), cert. denied, 136 S. Ct. 2487, and 136 S. Ct. 2488 (2016)). And in accordance with the court of appeals' precedents, the district court instructed the jury that the government was required to prove that petitioner's misrepresentations went to the "heart of Cairn's bargain with HSBC"; that "depriving Cairn of its property can only support a conviction if the misrepresentations or non-disclosures constituting the deprivation c[ould] or d[id] result in tangible economic harm to Cairn"; and that a "scheme intended to deceive and to bring about financial gain to [petitioner] without causing financial or property loss to the victim [wa]s not sufficient." D. Ct. Doc. 161, at 36-37. Similarly, the court of appeals, in affirming the judgment, made clear that that the evidence was sufficient to show, under its precedent, that petitioner "'contemplated some actual, cognizable harm or injury to their victims by deceiving them.'" Pet. App. 17 (citation omitted).

Petitioner argues (Pet. 19-23) that his oral representations regarding the manner of executing the foreign-exchange transaction were not enforceable promises, and that Cairn therefore *did* receive the full benefit of its bargain with HSBC. But as just discussed, the court of appeals and district court both applied the legal rule that petitioner advocates—namely, that petitioner could not be found guilty if Cairn received the full economic benefit of its bargain. The fact-bound contention that those courts misapplied that rule to this case does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the

asserted error consists of * * * the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts.").

In addition, petitioner failed to raise in his opening brief in the court of appeals his present contentions regarding the enforceability of his oral representations under contract law, see Pet. C.A. Br. 41-44, and the court accordingly did not address that issue, see Pet. App. 14-16. This Court's ordinary practice precludes the grant of a writ of certiorari to review a contention that "was not pressed or passed on below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). Petitioner identifies no sound reason for the Court—which is a "court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)—to depart from that practice here.

In any event, petitioner's arguments lack merit. Petitioner contends that, under the parol evidence rule, his oral representations would not have been enforceable promises. But the parol evidence rule provides that a "completely integrated agreement"—*i.e.*, a writing "adopted by the parties as a complete and exclusive statement of the terms of the agreement"—supersedes "prior agreements to the extent that they are within its scope." Restatement (Second) of Contracts §§ 210(1), 213(2) (1981). Cairn's agreement with HSBC regarding the execution of the foreign-exchange transaction, however, states that "[a]ny reference in this document to particular proposed terms of transaction is intended as a summary and *not* a complete description." C.A. App. 310 (emphasis added). And courts of appeals have rejected the contention that a defendant may invoke the

terms of a written contract to escape criminal fraud liability for an oral representation concerning that contract. See, *e.g.*, *United States* v. *Ghilarducci*, 480 F.3d 542, 546 (7th Cir.) (rejecting the contention that the defendant's oral representations could not support criminal liability because the defrauded victims had signed contracts stating that no oral promises had been made), cert. denied, 552 U.S. 866 (2007); *United States* v. *Davis*, 767 Fed. Appx. 714, 730 (11th Cir. 2019) (per curiam) (observing that defendant "offer[ed] no legal support for his argument that, in a criminal prosecution for mail fraud and wire fraud, a written contract will override material oral misrepresentations made to victims"), cert. denied, 140 S. Ct. 973 (2020); *United States* v. *Perry*, 537 Fed. Appx. 347, 348 (5th Cir. 2013) (per curiam) (observing that "[t]he parol evidence rule" is binding only between the parties to the contract and does not apply in criminal fraud prosecution where "the government seeks enforcement of the United States's criminal code"), cert. denied, 571 U.S. 1203 (2014).

Relatedly, petitioner errs in arguing that his oral statements were not enforceable promises because they were not "definite," not "clear," or a "bit of puffery." Pet. 22 (citation omitted). The district court instructed the jury that it could find petitioner guilty only if the government proved that petitioner's statements "would reasonably be expected to cause a prudent person to act or not act in some way with respect to the transaction at issue," and that petitioner could not be convicted if the statements were mere "'puffery or sales talk.'" D. Ct. Doc. 161, at 32-33. Petitioner's fact-bound challenge to the jury's finding that petitioner's representations satisfied those requirements does not warrant further review.

c. Petitioner's contention (Pet. 28) that his convictions are legally invalid because the fraud statutes apply only to property interests "that can be transferred from victim to defendant" is likewise misplaced. As explained above, petitioner's misrepresentations had the effect of causing Cairn to spend—and HSBC to receive—more money, the quintessential transferable property. In any event, in *Carpenter*, this Court upheld mail-fraud and wire-fraud convictions of defendants who conspired to trade on financial information contained in a newspaper column before the column became public, explaining that the newspaper "had a property right in keeping confidential and making exclusive use, prior to publication, of the [information contained in the] column." 484 U.S. at 26; see *id.* at 22-24. Although the defendants' scheme did not directly "transfer" (Pet. 31) that right of confidentiality and exclusivity from the newspaper to themselves, the Court had "little trouble" in holding that the defendants had engaged in a scheme to defraud by depriving the newspaper of that right and trading on the no-longer-confidential information themselves. *Carpenter*, 484 U.S. at 28.

The decisions on which petitioner relies (Pet. 28-30) do not show any infirmity in the convictions here. In *Kelly* and *Cleveland*, this Court held that a government's control of bridges and state gambling licenses were not "property" for purposes of the fraud statutes, on the ground that those interests were regulatory rather than proprietary. See *Kelly*, 140 S. Ct. at 1572-1573; *Cleveland*, 531 U.S. at 15, 20-22. The Court did not suggest that a private defendant would be exempt from fraud liability if he misrepresented the manner and price of a foreign-exchange transaction in order to line his company's pockets. Next, while *Skilling* v.

United States, 561 U.S. 358 (2010), descriptively contrasted honest-services fraud, which does not require proof that property was obtained, with "fraud in which the victim's loss of money or property supplied the defendant's gain, with one the mirror image of the other," *id.* at 400, it did not impose any requirement for property fraud that would preclude a conviction on these facts. Nor did the Court do so in defining Hobbs Act extortion, see 18 U.S.C. 1951(a), in *Sekhar* v. *United States*, 570 U.S. 729 (2013).

d. Petitioner errs in asserting (Pet. 32-33) that the decision below conflicts with *United States* v. *Sadler*, 750 F.3d 585 (6th Cir. 2014), and *United States* v. *Bruchhausen*, 977 F.2d 464 (9th Cir. 1992). Those cases concerned the application of the federal fraud statutes to buyers who deceived sellers about the use to which the goods being bought will be put—a matter that, in the context of those cases, was not an essential term of the bargain. See *Sadler*, 750 F.3d at 590-591 (false assurances that purchased opiates would be used for poor patients); *Bruchhausen*, 977 F.2d at 466-468 (false assurances that purchased equipment would not be sent to certain foreign countries). The Sixth and Ninth Circuits found that the deception in those cases did not constitute fraud because the seller had no property interest in "accurate information" about the intended use of its products, *Sadler*, 750 F.3d at 591, or "in the disposition of goods it no longer owns," *Bruchhausen*, 977 F.2d at 468. But this case does not involve a buyer's deception of a seller about the ultimate disposition of the items it was purchasing, and the deception in this case *did* concern "an essential element of the parties' bargain," Pet. App. 3—namely, whether HSBC would provide a lower-cost service, or instead a higher-cost service, to Cairn.

2. Petitioner's separate challenge to the standard of materiality that the court of appeals and district court applied here likewise lacks merit. This Court has recently denied certiorari in other cases presenting similar issues. See *New* v. *United States*, No. 19-7729, 2020 WL 2814797 (June 1, 2020); *Kuzmenko* v. *United States*, No. 19-7368, 2020 WL 2814796 (June 1, 2020); *Shevtsov* v. *United States*, No. 19-7361, 2020 WL 2814795 (June 1, 2020); *Raza* v. *United States*, 138 S. Ct. 2679 (2018). The same course is warranted here.

a. In *Neder* v. *United States*, 527 U.S. 1 (1999), this Court held that a false representation can be fraudulent within the meaning of the federal mail-fraud and wire-fraud statutes only if the representation is material. *Id.* at 20-25. The Court explained 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 [it] 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(2) (1977)) (emphases added). *Neder* thus makes clear that a court may judge materiality under either an objective standard (focusing on the effect of the misrepresentation on a reasonable person) or, in certain circumstances, a subjective standard (focusing on the effect on the particular recipient). *Neder* thus refutes petitioner's contention (Pet. 23) that courts must always "assess materiality from * * * the objective perspective of a reasonable person."

In any event, petitioner's conviction rests on the objective standard that he advocates. The district court

instructed the jury that, "[t]o be material, a fact must be of such importance that it would reasonably be expected to cause *a prudent person* to act or not act in some way with respect to the transaction at issue." D. Ct. Doc. 161, at 32 (emphasis added). The court further instructed the jury that the government was required to prove beyond a reasonable doubt "that *a reasonable person in Cairn's position* would have considered the fact to be important in making a decision in connection with the underlying [foreign exchange] transaction with HSBC." *Id.* at 32-33 (emphasis added).

Petitioner suggests that the court of appeals applied a subjective standard of materiality because it stated that petitioner's statements "not only could, but in fact did, influence Cairn's decision as to the type of transaction to undertake." Pet. 26-27 (quoting Pet. App. 18). But that suggestion is mistaken, for the court made the statement in the course of addressing petitioner's challenge to the sufficiency of the evidence, see Pet. App. 18, and a statement's effect on a particular victim can provide evidence about how a reasonable person would react, see, *e.g.*, *United States* v. *Raza*, 876 F.3d 604, 620-621 (4th Cir. 2017), cert. denied, 138 S. Ct. 2679 (2018).

b. Petitioner asserts (Pet. 23-27) the existence of a circuit conflict over whether courts should assess materiality under an objective or subjective standard. Even assuming that such a conflict exists, this case would present no occasion for resolving it, because, as just shown, petitioner's conviction rests on the objective standard that petitioner advocates.

In any event, no such conflict exists. The courts of appeals have uniformly recognized that a showing that a false statement or omission is capable of influencing a

reasonable decisionmaker is sufficient to establish materiality. See *United States* v. *Tum*, 707 F.3d 68, 72 (1st Cir.), cert. denied, 569 U.S. 1025 (2013); *United States* v. *Weaver*, 860 F.3d 90, 94 (2d Cir. 2017) (per curiam); *Raza*, 876 F.3d at 621 (4th Cir.); *United States* v. *Davis*, 226 F.3d 346, 358-359 (5th Cir. 2000), cert. denied, 531 U.S. 1181 (2001); *United States* v. *Daniel*, 329 F.3d 480, 487 (6th Cir. 2003); *United States* v. *Betts-Gaston*, 860 F.3d 525, 532 (7th Cir. 2017), cert. denied, 138 S. Ct. 689 (2018); *United States* v. *Heppner*, 519 F.3d 744, 749 (8th Cir.), cert. denied, 555 U.S. 909 (2008); *United States* v. *Williams*, 865 F.3d 1302, 1312 (10th Cir.), cert. denied, 138 S. Ct. 567 (2017); *United States* v. *Svete*, 556 F.3d 1157, 1165 (11th Cir. 2009) (en banc); *United States* v. *Philip Morris USA Inc.*, 566 F.3d 1095, 1122 (D.C. Cir. 2009) (per curiam), cert. denied, 561 U.S. 1025 (2010); see also *United States* v. *Lucas*, 709 Fed. Appx. 119, 123 (3d Cir. 2017).

Petitioner argues (Pet. 27) that courts of appeals have sometimes found sufficient evidence of materiality based in part on the effect of the misstatement on the intended victim. See *Davis*, 226 F.3d at 358-359; *United States* v. *Masten*, 170 F.3d 790, 796 (7th Cir. 1999); *United States* v. *Maxwell*, 920 F.2d 1028, 1036 (D.C. Cir. 1990). As already explained, however, a matter 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" *or* "the maker of the representation knows or has reason to know that its recipient regards or is likely to regard [it] as important in determining his choice of action, although a reasonable man would not so regard it." *Neder*, 527 U.S. at 22 n.5 (citation omitted). In addition,

the effect of the statement on the victim can provide evidence about how a reasonable person would react. *Raza*, 876 F.3d at 621. The cases that petitioner cites thus do not establish a circuit conflict; they instead reflect the reality that the government may properly show materiality in different ways in different cases.

3. Petitioner errs in contending (Pet. 34-37) that the practical consequences of the decision below justify this Court's review. For example, petitioner is wrong to claim (Pet. 36) that, under the decision below, "people are now exposed to criminal liability for stray remarks during negotiations." Petitioner's representations in this case were more than just "stray remarks" (*ibid.*); instead, the evidence showed that they "related to * * * an essential element of the parties' bargain"—specifically, whether Cairn was contracting for a higher-cost service or a lower-cost one—and were made with the "intent to defraud." Pet. App. 3, 13.

Petitioner also errs in arguing (Pet. 36-37) that the decision below "effectively criminalizes th[e] routine practice" of "[p]urchasing large quantities of currency before [carrying out a fixing transaction]." The court of appeals made clear that petitioner "was not convicted" for "trading ahead" of the fixing transaction; rather, he was "convicted of making material misrepresentations to Cairn about *how* HSBC would trade ahead * * * and [how] the price would be determined." Pet. App. 20; see *id.* at 21 ("A defendant who executes a fixing transaction engages in criminal fraud if he intentionally misrepresents to the victim how he will trade ahead of the fix, thereby deceiving the victim as to how the price of the transaction will be determined.").

4. In any event, this case would be a poor vehicle for reviewing petitioner's contentions. Petitioner did not

contest the relevant jury instructions in the district court or court of appeals, and the instructions were consistent with the rule that petitioner now advocates with respect to both the necessity of showing economic harm to the victim and the use of an objective standard for assessing materiality. See pp. 9-10, 16, *supra*. Petitioner instead argued in the court of appeals that the evidence was insufficient to support his conviction. See Pet. App. 2. In the absence of a preserved claim on the legal issues raised in the petition, the case is unsuitable for this Court's review.

In addition, in order to sustain a conviction obtained under multiple theories of guilt, the government need only show the validity of one of those theories. See *Skilling*, 561 U.S. at 414 n.46. And the government introduced ample evidence to show that petitioner had misappropriated confidential information for his own benefit. The evidence supporting that theory of liability included a confidentiality agreement between HSBC and Cairn, petitioner's admissions at trial that he was not permitted to trade on the information for his own benefit, and the timeline and pattern of the trades executed by petitioner. See Gov't C.A. Br. 36, 52, 53. Although the court of appeals found it unnecessary to reach that theory, the government may "defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Granfinanciera, S. A.* v. *Nordberg*, 492 U.S. 33, 38 (1989) (citation omitted). That alternative ground for affirming the court of appeals' judgment underscores the unsuitability of this case for this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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