

No. 09-7576

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IN THE  
**Supreme Court of the United States**

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DAVID W. SVETE,  
*Petitioner,*

v.

UNITED STATES,  
*Respondent.*

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**On Petition for a Writ of Certiorari to the  
U.S. Court of Appeals for the Eleventh Circuit**

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**REPLY BRIEF FOR THE PETITIONER**

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## INTRODUCTION

The government's brief in opposition underscores the need for this Court's review. The government does not repudiate its previous assertion that the issue "is one of exceptional importance." U.S. Pet. Reh'g *En Banc* ii. Nor does it disagree that this is an ideal case for resolving an issue with substantial implications for thousands of criminal fraud and civil RICO suits. Nor, though it disputes which rule some circuits apply, can it deny that a significant circuit split exists. Indeed, the government, represented by the Solicitor General's office, conceded below that the Sixth, Eighth, and Tenth Circuits' more recent decisions "embrac[e] the ordinary prudence rule." U.S. *En Banc* Br. 15 n.2.

Instead, the government advances three flawed arguments. First, it conflates the issues of intent and a scheme to defraud with questions of contributory negligence and materiality. Second, it understates the circuit split. Six courts of appeals require proof that a scheme to defraud was reasonably calculated to deceive a person of ordinary prudence as an element of mail, wire, and bank fraud. *Five of these courts have reversed convictions or affirmed dismissals on that basis.* Those cases irreconcilably conflict with the rule of the Eleventh Circuit and the five other circuits that require no such proof. The cases on which the government relies, which principally address the very different issue of a contributory-negligence defense, cast no doubt on the circuit split. Third, the government's arguments on the merits fail in light of the statute's text, common-law history, lenity, and policy considerations. Because this is the rare clean case in which the government has conceded that any instructional error was not harmless, this petition is an ideal vehicle to resolve a longstanding circuit conflict over a key element of one of the most frequently prosecuted federal crimes.

**I. THE ISSUE PRESENTED CONCERNS THE PROOF REQUIRED TO ESTABLISH INTENT AND A SCHEME TO DEFRAUD, NOT CONTRIBUTORY NEGLIGENCE OR MATERIALITY**

1. Like the *en banc* court below, the government confuses the elements of mail fraud with a contributory-negligence defense. It misstates the question presented as “[w]hether the mail fraud statute . . . prohibits schemes to defraud that are aimed at gullible or improvident victims.” Opp. i; *see also id.* at 18 n.4 (equating the issue with contributory negligence).<sup>1</sup> But the jury instruction Svete requested nowhere referred to victims’ acts or gullibility. Instead, it focused on requiring proof of each defendant’s conduct and mental state: “To prove a fraud crime, the government must show that the defendant under consideration intended to devise or participate in a scheme reasonably calculated to deceive persons of ordinary prudence and comprehension.” Def. David Svete’s Proposed Jury Instr. 4. Contrary to the government’s claim, it specifically instructed the jury *not* to focus on the investors: “The person of ordinary prudence standard is an objective standard and is *not directly related to the gullibility or level of knowledge and experience of any specific person or persons.*” *Id.* (emphasis added).

Criminal mail, wire, and bank fraud liability does not depend on an alleged victim’s particular characteristics. The purpose of the ordinary-prudence rule is to identify the kinds of conduct and misrepresentations that the law deems criminal, and to define a standard for inferring fraudulent intent (because direct evidence of intent to defraud is

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<sup>1</sup>The government has not alleged that Svete targeted a particular class of vulnerable investors. The common law had a different, more protective standard for persons in fiduciary relationships and for historically vulnerable classes such as “children, the blind, or the mentally disabled,” *United States v. Svete*, Pet. App. 16a n.1, 556 F.3d 1157, 1170 n.1 (11th Cir. 2009) (*en banc*) (Edmondson, C.J., concurring in the judgment), but that rule is not at issue here.

rare). The issue is not whether intentionally fraudulent schemes are immunized, but whether the defendant intended and took part in a scheme to defraud in the first place. Pet. 18, 31.

2. The government likewise confuses the ordinary-prudence element with materiality. As this Court recognized in *Neder v. United States*, materiality is about the facts asserted by statements and how much they matter to potential victims. 527 U.S. 1, 21-22 (1999). The ordinary-prudence standard, in contrast, is about the gravity and danger of the statements themselves, not the facts underlying them. Pet. 30-31. It focuses not on the importance the alleged victims assign to the statements but on whether defendants make statements “worthy of reliance.” *United States v. Jamieson*, 427 F.3d 394, 415 (6th Cir. 2005). As the Second Circuit explained, “The ordinary prudence standard therefore focuses on the violator, not the victim . . . [T]he standard is a tool the jury may utilize to gauge the defendant’s *intent* . . .” *United States v. Thomas*, 377 F.3d 232, 243 (2d Cir. 2004) (emphasis added).

Here, viators’ life expectancies were facts material to investors’ decisions. But the jury was entitled to find that sales agents’ alleged oral exaggerations about those facts—such as assurances that no viators would outlive their life expectancies—were unworthy of reliance given Svete’s express, written, contractual warnings to the contrary. Pet. 30-31. The materiality instruction given at trial did not require that Svete’s representations about those facts be worthy of reliance, demonstrating intent to defraud. Pet. 30-32. The omission of the requested ordinary-prudence instruction was thus reversible error.

## II. THE CIRCUIT SPLIT IS SUBSTANTIAL, IN BOTH CRIMINAL FRAUD AND CIVIL RICO CASES, AND SQUARELY IMPLICATED HERE

1. The government cannot directly deny the existence of a circuit split. Instead, it tries to characterize that split as “illusory” and claims that the “overwhelming majority of decisions from other circuits” have rejected the ordinary-prudence requirement. Opp. 13, 22. Neither characterization is accurate. The ordinary-prudence requirement is the subject of a substantial split among the federal courts of appeals. That requirement often is dispositive in both criminal fraud and civil RICO cases, as the government has conceded it was here. U.S. *En Banc* Br. 41-42. The government, represented by the Solicitor General’s office, acknowledged this split in its argument below. See U.S. *En Banc* Br. 15 & n.2 (characterizing “the majority of the courts of appeals” as on its side but acknowledging that the more recent decisions of the Sixth, Eighth, and Tenth Circuits “embrac[e] the ordinary prudence rule”).

2. Moreover, instead of grappling with civil RICO precedents that turn on the failure to satisfy the ordinary-prudence requirement, the government largely limits its discussion to criminal fraud cases. See, e.g., Opp. 15-17, 20-21 (ignoring civil RICO precedents from the Sixth and Seventh Circuits cited at Pet. 15-16, 18). That silence undermines the government’s position for two reasons. First, the exact same elements of mail, wire, and bank fraud under 18 U.S.C. §§ 1341, 1343, and 1344 must be proven in civil RICO suits as in criminal fraud prosecutions. To succeed in a civil RICO suit predicated on mail, wire, or bank fraud, the plaintiff must prove an “act which is indictable under . . . [§] 1341 . . . , [§] 1343 . . . , [or §] 1344.” 18 U.S.C. § 1961(1) (2006).

Second, because the elements of mail, wire, and bank fraud are exactly the same in both types of cases, courts regularly follow civil RICO precedents in criminal fraud cas-

es and vice versa. See, e.g., *Jamieson*, 427 F.3d at 415 (criminal fraud case citing *Berent v. Kemper Corp.*, 973 F.2d 1291 (6th Cir. 1992), a civil RICO case, to show that the ordinary-prudence requirement is “well-established in this circuit”); *United States v. Stephens*, 421 F.3d 503, 507 (7th Cir. 2005) (criminal fraud case relying on *Williams v. Aztar Ind. Gaming Corp.*, 351 F.3d 294 (7th Cir. 2003), a civil RICO case, to define a “necessary element” of mail fraud); *United States v. Goodman*, 984 F.2d 235, 237 (8th Cir. 1993) (criminal fraud case citing *Kehr Packages, Inc. v. Fidelcor, Inc.*, 926 F.2d 1406 (3d Cir. 1991), a civil RICO case, for the ordinary-prudence requirement); *Kehr Packages, Inc.*, 926 F.2d at 1416 (civil RICO case relying in turn on *United States v. Pearlstein*, 576 F.2d 531 (3d Cir. 1978), a criminal fraud case, for the ordinary-prudence rule). It would be illogical to treat the two types of cases differently for the same predicate crime. We have found no authorities that do so, and the government cites none. Lower courts treat precedents in each type of case as binding in the other.

Indeed, the government has previously recognized that the same rules regarding the elements of mail, wire, and bank fraud govern both types of cases. In *Neder*, it acquiesced in certiorari, asking this Court to resolve the elements of the mail-fraud statute for both criminal fraud and civil RICO cases (which this Court did):

The conflict merits this Court’s review. Mail fraud, wire fraud, and bank fraud are frequently prosecuted offenses. Moreover, as [Neder] correctly notes (Pet. 25), they are often included as predicate offenses in both criminal and civil cases under the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.* The Court should grant the petition to resolve the question whether those offenses include an element of materiality.

Br. for the U.S. 9 (acquiescing in certiorari), *Neder v. United States*, 527 U.S. 1 (1999).

The same logic applies here.

3. If prosecutors had filed this case in the Third, Sixth, Eighth, or Tenth Circuit, the failure to include Svete's proposed jury instruction would have been reversible error. The same result would likely hold in the Second and Seventh Circuits as well.

The Sixth Circuit's ordinary-prudence requirement is clear. "It is well-established in this circuit that a scheme to defraud, as prohibited by the mail fraud statute, must involve misrepresentations or omissions reasonably calculated to deceive persons of ordinary prudence and comprehension." *Jamieson*, 427 F.3d at 415 (internal quotation marks omitted). The government asserts that the materiality instruction given at Svete's trial would have satisfied the Sixth Circuit's requirement. Opp. 21. The instruction in *Jamieson*, however, specifically required the jury to find that "the *misrepresentation* must have 'had the potential or capability' to influence the action of or be relied upon by investors." 427 F.3d at 416 (emphasis added); Pet. 22-23.

Here, the jury was not instructed to evaluate the strength of any misrepresentation by Svete or to find that the alleged "scheme was at least minimally credible." *Jamieson*, 427 F.3d at 416. It had only to find that the *facts* at issue were material. Tr. 3/1/2005 at 65-66. Equating the two, as the government does, confuses the materiality and ordinary-prudence requirements. See Pet. 24-25 (explaining the difference); *supra* at 3-4 (same). Moreover, the government never disputes that civil RICO claims are dismissed in the Sixth Circuit if they fail to prove "misrepresentations . . . reasonably calculated to deceive persons of ordinary prudence." *Berent*, 973 F.2d at 1294; *Blount Fin. Servs., Inc. v. Walter E. Heller & Co.*, 819 F.2d 151, 153 (6th Cir. 1987).

The same confusion of materiality with ordinary prudence pervades the government's attempt to explain away the Tenth Circuit's holdings. While conceding that

more recent circuit law recognizes the ordinary-prudence requirement, the government argues that “[t]he materiality instruction in this case was substantially identical in relevant part” to the materiality instruction in *United States v. Fredette*, 315 F.3d 1235, 1241 (10th Cir. 2003). But the materiality instruction it quotes (Opp. 20) was not the instruction that satisfied the ordinary-prudence rule in *Fredette*. Rather, a separate instruction satisfied that element by requiring the jury to find that the defendant’s “representations or promises were material, that is, [they] would reasonably influence a person to part with money or property.” *Id.* at 1241-42 (first emphasis added); Pet. 22-23. The jury in this case received no similar instruction.<sup>2</sup>

The government’s efforts to distinguish the Third Circuit’s precedents likewise fail. The government focuses on cases in which that court correctly rejected a contributory-negligence defense, as all courts do. It also characterizes the civil RICO precedents as merely “recit[ing] . . . a boilerplate definition of a ‘scheme or artifice to defraud.’” Opp. 17-18. Although there is no contributory-negligence defense to mail fraud, the government must prove the elements of mail fraud in its case in chief; the two issues are distinct. *Supra* at 2-3. Indeed, even as the Third Circuit rejected the contributory-negligence defense, *United States v. Coyle*, 63 F.3d 1239, 1244 (3d Cir. 1995), it expressly reiterated the ordinary-prudence requirement, *id.* at 1243.

Moreover, far from merely being part of boilerplate definitions of fraud, the ordinary-prudence requirement was dispositive in the Third Circuit civil RICO cases cited in the petition. Pet. 17. In *Lum v. Bank of America*, for instance, the Third Circuit af-

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<sup>2</sup> The government never mentions, let alone distinguishes, *United States v. Hanson*, which the petition cited. Pet. 17. In *Hanson*, the Tenth Circuit reversed mail- and wire-fraud criminal convictions for failure to satisfy the ordinary-prudence requirement. 41 F.3d 580, 583-84 (10th Cir. 1994).

firmed summary judgment for the defendants because it was “unreasonable to infer that defendants’ [statement] was reasonably calculated to deceive persons of ordinary prudence and comprehension.” 361 F.3d 217, 226 (3d Cir. 2004). Svete’s proposed instruction is substantially similar to the Third Circuit’s model jury instruction on ordinary prudence.<sup>3</sup> The failure to include this instruction prevented Svete from defending himself against the charges of fraud.

The ordinary-prudence requirement is equally clear in the Eighth Circuit. In *Goodman*, it was not the “literal[] tru[th]” of the statements in the defendants’ promotional materials that precluded their convictions. 984 F.2d at 237. As the Eighth Circuit has made clear, literal truth alone is not a defense to a fraud prosecution. See *United States v. McNeive*, 536 F.2d 1245, 1249 n.10 (8th Cir. 1976) (“No misrepresentation of fact is required if the scheme is reasonably calculated to deceive persons of ordinary prudence.”). Even though the defendants’ statements in *Goodman* were literally true, they might have constituted unfair business practices. 984 F.2d at 240. They were not, however, “reasonably calculated to deceive persons of ordinary prudence” and so did not “rise to the requisite level of fraudulent deception.” *Id.* at 239-40. If the jury here had applied that standard, there is at least a reasonable doubt about whether it would have convicted Svete. The government conceded as much below, and both the panel and *en banc* court agreed. U.S. *En Banc* Br. 41-42; Pet 34.

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<sup>3</sup> Compare *Model Crim. Jury Instr.* 3d Cir. § 6.18.1341-1 (2007) (requiring representations “reasonably calculated to deceive persons of average prudence”), with Def. David Svete’s Proposed Jury Instr. 4 (requiring scheme and representations “reasonably calculated to deceive persons of ordinary prudence and comprehension”).

Finally, the government errs in arguing that the Second and Seventh Circuits would hold the ordinary-prudence (sometimes called “reasonable person”) standard inapplicable here. The Second and Seventh Circuits have correctly rejected unreasonable-victim or gullible-victim defenses based on over-readings of *Brown*. Opp. 14-15. Simultaneously, both circuits have endorsed the ordinary-prudence standard as a useful tool to “guide the jury in evaluating circumstantial evidence of fraudulent intent” and to distinguish “between real fraud and sharp dealing.” *United States v. Coffman*, 94 F.3d 330, 334 (7th Cir. 1996); see *Thomas*, 377 F.3d at 243 (describing the ordinary-prudence standard as “a tool the jury may utilize to gauge the defendant’s intent [that] is helpful in situations in which the defendant’s intent to deceive may be unclear”). The “special circumstance” in which the “reasonable person’ analysis is appropriate” is simply “where the defendant claims that he did not *intend* to deceive anyone.” *United States v. Masten*, 170 F.3d 790, 795 (7th Cir. 1999). That certainly is the case here. *Infra* at 14-15.

Thus, when one dispels the confusion between the ordinary-prudence requirement and an improper contributory-negligence defense or the distinct materiality requirement, the circuit split is in no way “illusory.” Four circuits always, and two more circuits in at least some circumstances, require the government to prove that an alleged scheme to defraud was reasonably calculated to deceive an ordinarily prudent person. Six circuits, in contrast, reject that requirement entirely. Pet. 19-20. This unusually broad split has matured for more than a decade and is firmly entrenched. Pet. 20-21. The government’s attempt to synthesize the circuits’ views is unavailing. This Court’s review is imperative.

### III. THE MAIL-FRAUD STATUTE INCORPORATES THE COMMON LAW'S ORDINARY-PRUDENCE REQUIREMENT, AS SHOWN BY THE STATUTORY TEXT, COMMON-LAW HISTORY, RULE OF LENITY, AND POLICY CONSIDERATIONS

1. As the government concedes, the common-law crime of cheat, as well as the civil action for fraud, required representations that would deceive reasonable persons. Opp. 26-27. Following the common law, the early federal mail-fraud cases almost all adhered to the ordinary-prudence rule. *E.g.*, *Etheredge v. United States*, 186 F. 434, 441-42 (5th Cir. 1911); *United States v. Fay*, 83 F. 839, 840 (D. Mo. 1897) (“Because there is no scheme set out in the indictment reasonably adapted to deceive persons of ordinary prudence, I am of the opinion there is no scheme to defraud, within the meaning of the [mail-fraud statute] and the motion to quash is sustained.”).

The government contests the import of the common law at the time that Congress enacted the mail-fraud statute in 1872. Opp. 25-26. But *Neder* squarely rejected a similar effort to distance the statute from its common-law roots, explaining: “[W]e must *presume* that Congress intended to incorporate [the common-law elements] unless the statute otherwise dictates.” 527 U.S. at 23 (internal quotation marks omitted).

The government next seeks to import the statutory crime of false pretenses, which was in flux. It argues that at the end of the nineteenth century, courts were moving away from the ordinary-prudence requirement for false pretenses. It also claims that Congress incorporated that trend by amending the statute in 1909. Opp. 27-29.

Contrary to the government’s assertion, neither *Durland v. United States* nor the 1909 amendment changed the importance of the crime of cheat and the action for fraud as they existed in 1872. *Durland* made clear that frauds need not relate to past or present facts but could rest upon misrepresentations about the future. 161 U.S. 306,

312-13 (1896). *Durland* “did not hold, as the Government argues, that the statute encompasses more than common-law fraud.” *Neder*, 527 U.S. at 24.

The 1909 amendment simply codified *Durland*'s interpretation of the mail-fraud statute as it had always stood. It neither created a separate crime of false pretenses nor imported a whole new body of false-pretenses law. Rather, it maintained a single unified crime subject to the ordinary-prudence element as the government concedes it existed in 1872. Pet. 29-30; *McNally v. United States*, 483 U.S. 350, 358-59 (1987); *Cleveland v. United States*, 531 U.S. 12, 26 (2000). Because the 1909 amendment was not a substantive change, the law of cheat and civil fraud as understood in 1872 is dispositive.

Even if one looks separately to the nineteenth-century statutory crime of false pretenses, and even if one reads the 1909 amendment as changing the meaning of “scheme or artifice to defraud” in the original 1872 statute, ordinary prudence is still required. Substantial contemporary evidence both before and after 1872 confirms that the statutory crime of false pretenses likewise required the ordinary-prudence element. *See, e.g., Commonwealth v. Gockley*, 14 Pa. D. 535, 1905 WL 3027, at \*2 (Pa. Quar. Sess. 1905) (requiring that representations be “calculated to impose upon one exercising reasonable caution and prudence”); *People v. Williams*, 4 Hill 9 (N.Y. Sup. Ct. 1842) (recognizing the ordinary-prudence element and the undesirability of extending the crime to every false pretense however “absurd or irrational on [its] face”); Stewart Rapalje, *A Treatise on the Law of Larceny and Kindred Offenses* § 404, at 558 (1892) (stating that there is no crime of false pretenses if the representations could not have misled the recipient “had he exercised common prudence”).

2. The government also stresses the mail-fraud statute's use of the word "any" in its ban on "any scheme or artifice to defraud" executed via the mails. Opp. 23-34 (citing 18 U.S.C. § 1341). It argues that "any" draws no distinction between prudent and vulnerable victims and that the statute was designed to stop swindlers. *Id.* Once again, the government's argument mistakenly assumes that it has already satisfied its burden of proving intent and a scheme to defraud, and that the issue is one of contributory negligence by victims. *Supra* at 2-3; Pet. 30-32.

This is not the first time the government has argued to this Court that the word "any" in the mail-fraud statute is limitless. Compare Opp. 23, with Br. for the U.S. 22-23, *McNally v. United States*, 483 U.S. 350 (1987) ("By outlawing *any* scheme to defraud, Congress demonstrated its intent to broadly prohibit fraud in connection with the mails."). In *McNally*, this Court was unpersuaded by that argument, rejecting the government's intangible-rights theory of liability as unsupported by the statute's history and purpose. See *McNally*, 483 U.S. at 356-60. It is equally unsupported here. The word "any" does not address what is a scheme or artifice to defraud in the first place. One must look to other sources to resolve that question.

3. Next, the government errs in suggesting that *Neder* resolved this issue by adopting a subjective approach to materiality. Opp. 24-25. It did not. *Neder* simply block-quoted the *Restatement of Torts (Second)* § 538 in a footnote, summarizing *Neder*'s contention without adopting it. Pet. 28 n.3 (analyzing 527 U.S. at 22 n.5); *Svete*, 556 F.3d at 1172, Pet. App. 18a (Tjoflat, J., concurring) (same).

4. Even on the government's reading of the history and case law, at least some support for the ordinary-prudence element persisted in the law of false pretenses in 1909.

*See* Opp. 29 (claiming only that the element “had largely been abandoned” by then). Likewise, there is abundant disagreement about the elements of the mail-fraud statute today. *Supra* at 4-10; Pet. 15-20. At a minimum, the statute’s meaning is ambiguous. In the face of ambiguity about the statute’s meaning, the rule of lenity requires resolving that ambiguity in favor of the defendant. *See McNally*, 483 U.S. at 359-60; Pet. 32-33.

5. Finally, compelling practical concerns support the ordinary-prudence requirement. The ordinary-prudence instruction guides juries in inferring intent to defraud, Pet 17-19, 31, and it protects legitimate businesses. The government’s test threatens criminal prosecution by sweeping in commonplace sales puffing. Naturally, commercial actors puff about material issues, and they do not puff in ways that consumers universally discount. Indeed, puffing exists in the marketplace precisely because some consumers believe in and rely on advertising hyperbole, and it boosts sales. Extreme puffing may be an appropriate subject for civil regulation by consumer-protection agencies, or even Lanham Act civil liability for false advertising, 15 U.S.C. § 1125(a)(1)(B) (2006), but it is not a federal crime. If Congress desired a harsh rule criminalizing mere advertising statements that entice the credulous, it needed to do more than invoke the generic language of fraud.

The importance of this rule is not limited to mere puffing, as the government’s rule threatens to confuse advertising with commercial contracts. Advertising does not include all the qualifications and disclaimers that will ultimately appear in a contract, and reasonable people know this. But the government’s rule would require marketers to list endless terms and conditions in their advertisements, making them unreadable. Here, some sales agents and glossy brochures allegedly exaggerated or left some inves-

tors with a false impression. Pet. 7. Svete tried to prevent misunderstandings by inserting crystal-clear warnings of the risks and uncertainties of viatical settlements into LifeTime's written contracts and requiring investors to initial them separately. *Id.* at 7-8. Yet some investors admitted that they had not even read the contracts. *Id.* at 8. Despite these explicit contractual disclaimers, at trial the government stressed sales agents' assurances that all viators would definitely die soon and that investors need not worry if viators did not die. *Id.* Entrepreneurs should be able to guard against prosecution, and the threat of treble-damage RICO suits, for ordinary contractual disagreements. Like the parol-evidence rule in contract law, the ordinary-prudence rule allows contracting parties to clarify their obligations in writing, without fear of oral contradiction. An ordinary-prudence instruction lets defendants argue and juries weigh issues of advertising puffing, sales talk, and express contractual disclaimers.

#### **IV. THE GOVERNMENT'S CONCESSION THAT ANY INSTRUCTIONAL ERROR WAS PREJUDICIAL MAKES THIS CASE AN IDEAL VEHICLE FOR REVIEW**

The government spends ten pages outlining the prosecution's case against Svete. Opp. 2-12. But this case is not a sufficiency-of-the-evidence challenge in which courts construe evidence in the light most favorable to the verdict. Rather, the petition challenges the inadequacy of the jury instructions given. Instructional errors that omit offense elements must be reversed unless the government can prove "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Neder*, 527 U.S. at 15 (internal quotation marks omitted). Lesser instructional errors are reversible if "one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substan-

tially swayed by the error . . . .” *Kotteakos v. United States*, 328 U.S. 750, 765 (1946). Either way, the government must prove harmlessness in context. The evidence favorable to the defense, which the government studiously ignores, is highly relevant to finding error harmless or reversible.

Indeed, though its rhetoric portrays intent to defraud as indisputable, *see* Opp. 3, 16, the government has already conceded that if the trial court should have given an ordinary-prudence instruction, the error was reversible, not harmless. U.S. *En Banc* Br. 41-42. The Eleventh Circuit panel and *en banc* court agreed. *Svete*, 556 F.3d at 1166 (*en banc*), Pet. App. 12a; *United States v. Svete*, 521 F.3d 1302, 1310-11 (11th Cir. 2008), *vacated upon grant of reh’g*, 532 F.3d 1133 (11th Cir. 2008), Pet. App. 28a-29a. The prejudice from the instructional error is manifest: The defense presented extensive evidence and argument that Svete lacked the intent to defraud investors or responsibility for alleged misrepresentations and simply ran a legitimate investment business that went sour. *See, e.g.*, Tr. 2/25/05 at 102-03, 123-43. Moreover, the trial judge acknowledged that the government’s two star witnesses had credibility and corroboration problems: “[T]here are reasons to discredit Ms. Zima’s testimony along with Ms. Austin’s.” Tr. 2/16/05 (a.m.) at 19-20; *see also* Pet. 6.

The government does not retract its concession below that any error was prejudicial and reversible. Thus, this case is the ideal vehicle for this Court to resolve the ordinary-prudence issue that has divided the courts of appeals.

## CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition, this Court should grant the writ of certiorari.

Respectfully submitted,



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