No. 17- _____

In the Supreme Court of the United States

MARK ELLISON, DAVID SWENSON, AND JEREMY SWENSON, PETITIONERS,

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners were convicted of selling securities in violation of Section 10(b) of the Securities Exchange Act, which forbids using "any manipulative or deceptive device" in such sales. The district court instructed the jury that Petitioners could be convicted of willfully violating the Act without knowledge that their actions violated it, and refused to instruct that the materiality of challenged statements or actions must be judged by their impact on the "total mix" of information available to investors, *contra*, *e.g.*, *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27 (2011). The district court also required Petitioners to produce, in advance, the exhibits they planned to use in cross-examining witnesses during the government's case-in-chief. The Ninth Circuit affirmed. The questions presented are:

1. Can a defendant properly be convicted of violating Section 10(b) of the Securities Exchange Act without proof that the relevant statement or conduct was material, based at least in part on its impact on the "total mix" of information made available to investors?

2. Can a defendant properly be convicted under a federal criminal statute requiring "willful" misstatements or fraud—such as Section 10(b) of the Securities Exchange Act—without proof of *mens rea* with respect to the unlawfulness of his conduct?

3. Can a criminal defendant properly be required to produce, in advance, the exhibits he plans to use in cross-examining witnesses during the government's case-in-chief, on the theory that such cross-examination actually constitutes part of the defendant's own "case-in-chief" under Fed. R. Crim. Proc 16(b)?

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INTRODUCTION

Like many American businesses, the real estate investment firm for which Petitioners worked crumbled in the wake of the 2008 Lehman Brothers bankruptcy. The U.S. Department of Justice later sought to hold accountable those who had engaged in the improper practices that led to the Great Recession. But in this case the Department went too far, charging Petitioners with alleged securities-law violations that simply are not crimes under settled interpretive principles articulated by this Court and faithfully applied by several other federal circuit courts.

Nevertheless, after a jury trial, all three Petitioners were *acquitted* of each specific count of mail and wire fraud, and of each count alleging specific fraudulent statements or omissions, or conspiracy, in violation of Section 10(b) of the Securities Exchange Act, as interpreted in SEC Rule 10b-5. They were each convicted of violating *only* the broad "catch-all" provision of Rule 10b-5(c), which makes it unlawful for anyone, "directly or indirectly," with respect to the sale of a security, to "engage in any act, practice, or course of business" that "operates or would operate as a fraud or deceit upon any person[.]"

Petitioners respectfully suggest that the Court use this case to resolve widespread conflicts on two key issues that arose during Petitioners' trial, that infect the resulting convictions, and that likely affect hundreds of other cases nationwide: (1) the proof of materiality necessary to sustain a conviction of willful securities fraud under Section 10(b), and (2) the *mens rea* necessary to sustain a conviction under that statute and other federal laws with similar "willfulness" requirements. These questions are critical to the fair administration of Section 10(b) and Rule 10b-5, which Chief

Justice Rehnquist and Justice Thomas have aptly called "unusual[ly] . . . open-ended," *United States* v. *O'Hagan*, 521 U.S. 642, 691 (1997) (Thomas, J., concurring in part and dissenting in part) (quoting exchange with Chief Justice Rehnquist during argument), but which apparently form the basis for thousands of prosecutions each decade.

The Court should also use this case to clarify when, for purposes of Federal Rule of Criminal Procedure 16(b)'s reciprocal discovery provision, the government's case-in-chief ends and the "defendant's case-in-chief" begins. This issue likewise affects many of the twenty-five thousand federal criminal trials that occur each decade.

OPINIONS BELOW

The Ninth Circuit's decision is reported at 704 Fed. App'x 616. 1a. The orders staying that decision pending certiorari are reprinted at 24a and 26a. The order denying rehearing en banc is reprinted at 28a. The trial court opinion regarding Rule 16 is reported at 298 F.R.D. 474, and reprinted at 29a. The jury verdict is reprinted at 76a.

JURISDICTION

The Ninth Circuit issued its opinion on August 15, 2017. Rehearing en banc was denied on October 13, 2017. Justice Kennedy granted an extension until Saturday, February 10, 2018. No. 17A707, making the petition due February 12, 2018. S. Ct. R. 30.1. This Court has jurisdiction under 28 U.S.C. 1254(1).

RELEVANT STATUTORY PROVISIONS

Section 10(b) of the Securities Exchange Act, 15 U.S.C. 78j, provides in relevant part:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe . . ..

The provision providing penalties for violating Section 10(b), 15 U.S.C. 75ff, states that (with exceptions not relevant here):

> Any person who willfully violates any provision of this chapter . . . or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78o of this title, . . . which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both . . . but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

STATEMENT

An understanding of why review is warranted requires some background on (a) the relevant federal securities laws; (b) the collapse of Petitioners' employer; (c) the government's theory and jury instructions; (d) the district court's procedural ruling; and (e) the Ninth Circuit's opinion.

A. Section 10(b) and Rule 10b-5

Section 10(b) forbids using "any manipulative or deceptive device" to sell securities. 15 U.S.C. 78j(b). Implementing that law, the SEC has promulgated Rule 10b-5, which makes it unlawful for "any person, directly or indirectly":

> (a) To employ any device, scheme, or artifice to defraud, [or]
>
> (b) To make any untrue statement of a material fact or to omit 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 . . ..

17 C.F.R. 240.10b-5 ("Rule 10b-5"). These straightforward prohibitions are supplemented by a broad "catch-all," paragraph (c), which makes it unlawful for anyone, "directly or indirectly," to "engage in any act, practice, or course of business which *operates or would operate* as a fraud or deceit upon any person, in connection with the purchase or sale of any security." *Id.* (emphasis added).

As relevant here, prosecution of criminal conduct under Section 10(b) has two important limitations, the exact meaning of which is at issue in this case. *First*, any act taken or information withheld must be "material." *Basic Inc.* v. *Levinson,* 485 U.S. 224, 226 (1988).

Second, the relevant act or omission must be done "willfully." 15 U.S.C. 78ff. And the United States has acknowledged as to an analogous statute that proof of willfulness requires a showing of *mens rea* not only as to the "wrongfulness" of the act in question, but also as to the illegality of that act—typically a showing that the defendant knew the act was unlawful.[1]

B. The company's collapse

DBSI, Inc. (DBSI) was a real estate investment company incorporated in 1979, with its principal place of business in Boise, Idaho. Although none of Petitioners owned shares in DBSI, they helped operate it from 2004 through 2008. Petitioners Jeremy and David Swenson were salaried DBSI employees and secretaries of a DBSI subsidiary. Petitioner Mark Ellison was DBSI's general counsel. The CEO and majority owner of DBSI was Doug Swenson, who is filing a separate petition.

1. DBSI was a real estate syndication company. It would typically buy real estate, mark up the price, and resell it to investors—always disclosing the original price. *E.g.*, AER 2528. With many such sales, the purchasers would then pay DBSI to manage the property.

As the government admitted below, DBSI for many years "had real estate expertise, could identify profitable and high-quality commercial properties, and could manage them well." Government's Answering

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[1] Brief of the United States in Opposition at 12, *Ajoku* v. *United States*, No. 13-7264 (Mar. 10, 2014); 24-26, *infra*. The Act also limits the penalty of *imprisonment* to individuals who know the content of rules or regulations they violate. 15 U.S.C. 78ff(a). This limitation reflects a choice by Congress to not imprison unsophisticated securities sellers.

Br. at 48, Docket no. 79-1 (9th Cir. Aug. 1, 2016). DBSI's books show that it was profitable from its opening through the start of the Great Recession in 2007. *E.g.*, AER 4632–4639 (2007 financial report).[2] Even though it posted a loss in the first half of 2008, it also projected a rebound in the last half of 2008 through cost-cutting and general economic improvement. AER 4690–4691; JER 5371. However, DBSI depended on healthy financial markets to keep selling its property investment products. As anyone who has bought a home knows, one usually needs access to credit to buy or sell real estate and other investments. Similarly, banks and other investment companies need access to credit in order to be able to give loans.

DBSI's fortunes changed dramatically after the September 2008 bankruptcy of Lehman Brothers, which devastated the lending market.[3] Companies like DBSI, and even traditional banks, could not get credit.[4] Unable to obtain credit, DBSI could no longer acquire properties and thus lost the ability to sell its investment products. Like 170,000 other businesses[5]

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[2] AER refers to the Appellants' Excerpts of the Record, while JER means the Joint Excerpts of the Record. All cited excerpts of the record were filed with the Ninth Circuit.

[3] See JER 300–302; 1725; 8836; 7467; Victoria Ivashina & David S. Scharfstein, *Bank Lending During the Financial Crisis of 2008* July 31, 2009), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1297337.

[4] See, *e.g.*, Newsweek, *How Lehman Shook the Global Economy*, (Sep. 13, 2009), http://www.newsweek.com/how-lehman-shook-global-economy-79633.

[5] G. Scott Thomas, *Recession claimed 170,000 small businesses in 2 years*, The Business Journals (July 23, 2012: 11:00

and over 500 banks,[6] DBSI collapsed during the Great Recession.

Most (if not all) real estate investors who had bought investments through DBSI retained their ownership or creditor interests in the underlying assets. See AER 2327–2412 (sample contract). These investors lost money when the broader downturn reduced the value of their interests, but the interests themselves did not depend on DBSI's continued existence. The investors could have continued their investments by, for example, making mortgage payments and accepting lease payments and waiting for values to rebound. Cf. AER 2354 (mortgage payments still due if calamity occurs). Or, like any other investors during a downturn, they could have sold their investments at a loss.

Offerings by DBSI included numerous disclaimers explaining the investments' risks, suggesting that investors must be prepared to bear the total loss of the investment. *E.g.*, AER 2528, 2534, 2543, 2556, 2552–2553, 3923. For example, in 16 pages of disclosures (AER 1354–1370), buyers of DBSI's real-estate offerings were informed of risks such as:

- uncertain tax consequences (AER 1354–1359);
- limitations on the buyers' rights (AER 1359);
- changes in market conditions (AER 1359);
- conflicts of interests (AER 1361–1362);

PM), https://www.bizjournals.com/bizjournals/on-numbers/scott-thomas/2012/07/recession-claimed-170000-small.html.

[6] Federal Deposit Insurance Corporation, Failed Bank List, https://www.fdic.gov/bank/individual/failed/banklist.html (noting banks that failed between 2008 and 2014).

- risks unique to specific portfolios (AER 1362); and
- the possibility that DBSI would be unable to meet payment obligations (AER 1362–1363).

2. By 2008, all DBSI investments were so-called "Regulation D" offerings, sold through broker-dealers. Sales took place only after a broker-dealer conducted its own due diligence and approved DBSI's offering for sale to its clients. JER 5860, 5972–5973, 6447, 7214–7215.

In the due diligence process, broker-dealers also hired third-party due diligence providers who evaluated DBSI offerings, AER 4566–4583, and gave the broker-dealers their reports, *e.g.*, JER 7220–7222. As a result, broker-dealers could and would decline to sell DBSI offerings. JER 5972. Moreover, each offering sold to an investor included a signature by the broker-dealer's representative certifying that the investor had been informed of "all pertinent facts relating to the liquidity and marketability of [the] investment." AER 3920.

The offerings were also limited to investors of significant financial means. Potential investors had to show that they had at least $1 million in assets (excluding a primary residence) or made at least $200,000 or $300,000 a year. 17 CFR 230.215; *e.g.*, AER 4652.

C. The government's theory and jury instructions

The Department investigated DBSI and, in 2013, charged Petitioners with securities fraud based on a set of investments DBSI had sold in 2008. JER 1–79. Those investments fell into two categories: real-estate ownership or "tenant-in-common" offerings, and "notes

corporation" offerings, which were notes securing loans made to certain technology companies coupled with real estate interests. The government's theory relied on five supposed misstatements that allegedly exaggerated DBSI's financial stability. Cf. AER 2139, 2179, 2162 n.2, 2299; JER 1334.

At trial, however, the government failed to produce any evidence that implicated Petitioner Ellison in *any* of the five alleged frauds. No evidence showed he had any knowledge of the allegedly misrepresented facts, and he was not among the lawyers responsible for preparing, reviewing, or approving the key disputed documents. AER 4633–4667; JER 7582. A jury thus could not have concluded that Petitioner Ellison committed any of the five alleged frauds with *mens rea* as to their illegality. The same is true for Petitioners David and Jeremy Swenson: They did not have licenses to sell securities, their roles were largely ministerial, and they did nothing to perpetrate the specific alleged frauds. Cf., *e.g.*, Swenson, Swenson, and Ellison Supplemental Record Excerpts at 7–8.

That is no doubt why the jury ultimately acquitted all three Petitioners on the counts charging them with those specific frauds, which would have been violations of the mail and wire fraud statutes, or of subsections (a) or (b) of Rule 10b-5. AER 382–599.

However, the government separately charged Petitioners, and the jury convicted them, under the catch-all provision in Rule 10b-5(c). As to that charge, the district court instructed that the government must prove that "the defendant willfully . . . [e]ngaged in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person[.]" Pet. 77a. The district court defined willfully simply to mean "intentionally undertaking an act, making an

untrue statement, or failing to disclose for the wrongful purpose of defrauding or deceiving someone." Pet. 78a. And, following settled Ninth Circuit precedent, the court instructed that "[a]cting willfully does *not* require that the defendant know that the conduct was unlawful." Pet. 78a.

The district court also rejected a proposed instruction, based on *Matrixx*, that "[a] false statement or omission is material if it significantly alters the total mix of information available, and was of such importance that it could reasonably be expected to cause or to induce a person to invest or not[.]" AER 639. The instructions stated only that "a fact is material if there is a substantial likelihood that an investor would consider it *important* in making the decision to purchase" (Pet. 79a)—never hinting that the jury must evaluate that fact in light of the "total mix" of other available facts.

This omission was crucial to the convictions, given the uncertainty in the market and the other information DBSI made available to investors. *E.g.,* AER 2556 (warning broker-dealers about economic downturn). Allowing the jury to disregard the total mix of information also allowed it to ignore due diligence reports produced by third parties, which correctly disclosed the financial status of DBSI's investment offerings. *E.g.*, AER 4566–4573. This and other pieces of evidence showed that the information DBSI *did* disclose made the information that went undisclosed irrelevant to the total mix. See, *e.g.*, JER 5554–5555.

In light of Petitioners' acquittal on all counts of fraud premised on specific misstatements and omissions, their convictions based on the broad language of Rule 10b-5(c) were thus presumably based on the premises that (a) they need not have known that their

actions were illegal, *and* (b) any informational aspect of their unnamed offending "act, practice, or course of business" need only have been "important" to investors in the abstract—and hence, need not have been significant to the "total mix" of available information. See JER 8101-8102.

D. The district court's Rule 16 ruling

During trial, a dispute also arose as to whether Petitioners were required to produce in advance the materials they intended to use in cross-examining government witnesses. Federal Rules of Criminal Procedure 16 requires that:

> [i]f a defendant requests disclosure under Rule 16(a)(1)(E) and the government complies, then the defendant must permit the government, upon request, to inspect [any item] if:
>
> > (i) the item is within the defendant's possession, custody, or control; and
> >
> > (ii) the defendant intends to use the item in the *defendant's* case-in-chief at trial.

The government claimed this meant Petitioners were obligated to disclose, in advance, all non-impeachment exhibits to be used during Petitioners' cross-examination of government witnesses, on the theory that cross-examination was actually part of defendants' "case-in-chief." The district court agreed, holding that "Defendants have a duty to produce any exhibits they intend to use at trial during cross examination of a government witness other than for impeachment purposes." Pet. 34a. Petitioners complied.

E. The Ninth Circuit decision

After extensive briefing (totaling over 700 pages), and oral argument, the Ninth Circuit affirmed.

- As to materiality, the Ninth Circuit all but ignored this Court's repeated statement that the "total mix" of information must be considered. Instead, the court held that, "by referring to a reasonable investor, the instruction adequately communicated that the jury should consider relevant circumstances in evaluating materiality." Pet. 4a.
- The Ninth Circuit also held that a "willful" violation of the Securities Act may be proven without any showing the defendants knew their actions were unlawful. Pet. 6a–7a.
- The Ninth Circuit likewise affirmed the district court's conclusion that a "defendant's case-in-chief" for purposes of Rule 16 includes the defendant's cross-examination of government witnesses during the government's own case-in-chief. Pet. 15a–16a.

The Ninth Circuit denied rehearing en banc. Pet. 28a.

REASONS FOR GRANTING THE PETITION

Review should be granted to resolve three important issues on which the Ninth Circuit has split from holdings of this Court, the text of the applicable rules and statutes, and/or other circuit court decisions: (1) the materiality demanded for a conviction under Section 10(b), (2) the *mens rea* requirement for convictions under that statute or others requiring willfulness, and (3) the meaning of Rule 16's "case-in-chief" requirement. This case presents each of these important issues in a clean vehicle.

I. Review is urgently needed to resolve a square circuit conflict on the materiality issue.

As to materiality: This Court and most circuits define materiality under Section 10(b) in terms of the "total mix" of information available to investors. But the Ninth Circuit (along with the Fourth and Sixth Circuits) has departed from that rule and authorized fact finders to consider the potential importance of information in the abstract, without considering the total mix of information. That means that a defendant facing a trial in one of the latter circuits faces a substantial risk of conviction based on an alleged act or omission that had *no* potential to mislead investors. And that is especially problematic given the "unusually open-ended" character of Section 10(b) and Rule 10b-5. *O'Hagan*, 521 U.S. at 691 (Thomas, J., concurring in part and dissenting in part).

1. In *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976)), this Court confronted how to define "materiality" for purposes of securities fraud. Before that decision, there was debate among the circuits about "how significant a fact must be" to be material.

Id. at 445. Rejecting a test that merely asked whether a "reasonable shareholder *might* consider [the fact] important," *id.* (emphasis in original, citation omitted), this Court established a heightened standard of materiality, in two parts. First, the Court said, "[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote." *Id.* at 449. Second, the Court provided a test for determining when this "importance" standard is satisfied: "[T]here *must* be 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 made available." *Ibid.* (emphasis added).

Almost a decade later, in *Basic Inc.* v. *Levinson*, 485 U.S. 224, 232 (1988), the Court expressly extended this definition to Section 10(b)) and Rule 10b–5 violations). And over the years, the Court has repeatedly emphasized the need to consider the "total mix" of information available to investors when determining if a representation or omission is material. See *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2413 (2014); *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 43 (2011). Indeed, rather than merely serving as a clarification of some other test for materiality, the "total mix" standard has become the *core* of the materiality analysis. See*, e.g.*, *Matrixx Initiatives*, 563 U.S. at 43 (defining materiality using only the "total mix" standard); *Halperin* v. *Ebanker Usa.com*, 295 F.3d 352, 357 (2d Cir. 2002).

The "total mix" standard means that materiality must be evaluated in the case-specific context of the *actual* information made available to *actual* investors—not the hypothetical importance of information

made available to imaginary investors. A lower standard—one that considers only the "importance" of the information in the abstract—would "set too low a standard of materiality," and thus "bury the shareholders in an avalanche of trivial information." *Basic*, 485 U.S. at 231; *accord Matrixx*, 563 U.S. at 38.

2. Despite this Court's clear teachings, the Ninth Circuit instead asks solely "whether there is a substantial likelihood that a reasonable investor would consider the fact *important* in making his or her investment decision"—but omitting the "total mix" test. *Zweig* v. *Hearst Corp.*, 594 F.2d 1261, 1266 (9th Cir. 1979) (emphasis added); see also Pet. 4a. ("At bottom, 'materiality depends on the significance the reasonable investor would place on the withheld or misrepresented information.'"). That approach is reflected in the Ninth Circuit's pattern jury instructions. See Ninth Cir. Model Criminal Jury Instructions § 9.9 ("A fact is material if there is a substantial likelihood that a reasonable investor would consider it important in making the decision to [purchase] [sell] securities.").

This abstract "importance-only" standard conflicts with this Court's holdings, which repeatedly stress the need to consider "*all* the circumstances." *TSC Industries,* 426 U.S. at 449 (1976) ("What the standard does contemplate is a showing of a substantial likelihood that, under *all* the circumstances, the omitted fact would have assumed actual significance in the deliberations of the reasonable shareholder.") (emphasis added); see also *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2413 (2014). Indeed, never has this Court defined materiality as the Ninth Circuit does, that is, by measuring the significance of a piece of information in the abstract. And for good reason: As the Court originally explained in *TSC,* if the standard

of materiality is set too low—as in the Ninth Circuit—"the corporation and its management" may "be subjected to liability for insignificant omissions or misstatements," 426 U.S. at 448, thus leading to the "avalanche of trivial information" described above. See *id.*; see also *Basic*, 485 U.S. at 231; *Matrixx*, 563 U.S. at 38. And ultimately, the Ninth Circuit's "importance-only" standard allows securities sellers to be imprisoned for conduct they did not and could not know was illegal. See *infra* Section II.

The decision below makes the Ninth Circuit's approach even worse. The panel below ruled that the word "reasonable," as part of the "important to the investor" test, adequately conveyed to the jury the need to consider the "total mix" of information. Pet. 4a. But that ignores the core of *TSC*, which itself resolved a circuit split over how to weigh a fact's importance to a reasonable investor and "how certain it must be that the fact would affect a reasonable investor's judgment." 426 U.S. at 445. The Court's conclusion, again, was that jury verdicts on a "reasonable investor's" judgment must hinge expressly on the "total mix" of information available. *Id.* at 449. But if the Ninth Circuit were right that a lay jury would somehow intuitively *derive* the "total mix" test from the "reasonable investor" standard, then *TSC* served no purpose. The panel opinion not only contradicts *TSC*'s analysis; it sets the clock back to the confusion that existed before that decision.

3. The Ninth Circuit is not alone in its use of a flawed standard: The Fourth Circuit allows district courts to use *either* the "total mix" standard *or* the "important to the decision" standard. *E.g.*, *Longman* v. *Food Lion, Inc.*, 197 F.3d 675, 683 (4th Cir. 1999) ("[A]

fact stated or omitted is material if there is a substantial likelihood that a reasonable purchaser or seller of a security (1) would consider the fact important in deciding whether to buy or sell the security *or* (2) would have viewed the total mix of information made available to be significantly altered by disclosure of the fact.") (emphasis added); *accord United States SEC* v. *Pirate Investor LLC*, 580 F.3d 233, 240 (4th Cir. 2009). The Sixth Circuit, like the Fourth, treats the "total mix" and "reasonable investor" standards as interchangeable. *E.g.*, *In re Omnicare, Inc. Sec. Litig.*, 769 F.3d 455, 472 (6th Cir. 2014) ("[M]isrepresented or omitted facts are material only if a reasonable investor would have viewed the misrepresentation or omission as having significantly altered the total mix of information made available. Put another way, a fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.") (quotation marks and citations omitted). Though better than outright dismissal of the important "total mix" consideration, these courts fall into the same errors that characterize the Ninth Circuit's approach.

4. In contrast to the Fourth, Sixth, and Ninth Circuits, other circuits that have addressed this issue follow this Court in requiring express application of the "total mix" standard. Most strikingly, the Second Circuit labels the "total mix" standard *the* "touchstone of the [materiality] inquiry." *Halperin* v. *Ebanker Usa.com*, 295 F.3d 352, 357 (2d Cir. 2002). This phrasing cannot be squared with the Ninth Circuit's general "importance" standard, which, again, allows juries to ignore the total mix of then-available information. Nor can it be squared with the panel's post-hoc reasoning that "reasonableness" is a sufficient instruction: No

circuit that thinks the "total mix" analysis articulated in this Court's decisions was the "touchstone" of the inquiry would hide that touchstone in a single word—let alone a word as vague as "reasonable."

Several other circuits follow the Second Circuit's approach, in conflict with the Ninth Circuit and its allies. For example, the Third Circuit has held that "a fact or omission is material only if 'there is a substantial likelihood that it would have been viewed by the reasonable investor as having significantly altered the "total mix" of information' available to the investor." *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1330 (3d Cir. 2002); *accord In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 369 (3d Cir. 1993) ("For an omission to be deemed material, 'there must be a substantial likelihood that [its disclosure] would have been viewed by the reasonable investor as having significantly altered the "total mix" of information made available.'") The D.C. Circuit has similarly held "that if there is a substantial likelihood that a reasonable investor would have viewed the misleading or omitted fact as 'significantly altering the total mix of information,' it is material." *Rockies Fund, Inc.* v. *SEC*, 428 F.3d 1088, 1096 (D.C. Cir. 2005). The Eighth and Eleventh Circuits likewise use only the "total mix" standard. *Pub. Pension Fund Grp.* v. *KV Pharm. Co.*, 679 F.3d 972, 981 (8th Cir. 2012)) ("To fulfill the materiality requirement there must be 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 made available."); *Finnerty* v. *Stiefel Labs., Inc.*, 756 F.3d 1310, 1321 (11th Cir. 2014) ("For an omission to be material, 'there must be 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 made available.'"). While those courts sometimes reference the supposed alternative "important to the decision" standard, they consistently do so in conjunction with the "total mix" standard. See, *e.g.*, *United States* v. *Bachynsky*, 415 F. App'x 167, 172 (11th Cir. 2011).

So too the Tenth Circuit, which concluded—in a decision that made the split with the Ninth Circuit particularly obvious—that the "important to the decision" (Ninth Circuit) *and* "total mix" standards must *both* be satisfied for information to be deemed material. *City of Phil.* v. *Fleming Companies, Inc.*, 264 F.3d 1245, 1265 (10th Cir. 2001). Referencing *Basic* and relying on Tenth Circuit precedent, the court held that "'[a] statement or omission is only material if a reasonable investor would consider it important in determining whether to buy or sell stock,' *and* if it would have 'significantly altered the total mix of information available to current and potential investors.'" *Id.* (alteration in original) (emphasis added); see also *Grossman* v. *Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997).

In short, most circuits follow this Court and require juries to apply the "total mix" standard. Had Petitioners been in any circuit other than the Fourth, Sixth, Ninth (and maybe the Seventh, which has no binding precedent on the question), their convictions would have been overturned for failure to provide the "total mix" jury instruction. As it is, Petitioners were convicted using an idiosyncratic and unlawful standard—one that allowed them to be convicted based on acts or omissions that had no real potential to mislead investors. The Court should grant review to resolve the circuit conflict on this important question arising under this "unusually open-ended" criminal statute.

II. Review is urgently needed to resolve serious conflicts over the "willfulness" issue.

In addition to abandoning the total mix test, the decision below is the latest in a series of Ninth Circuit decisions holding that the word "willfulness" in various criminal statutes does not require any *mens rea* as to the illegality of the underlying conduct—for example, no knowledge that the conduct was unlawful. See, *e.g.*, *United States* v. *Ajoku*, 718 F.3d 882 (9th Cir. 2013); *United States* v. *Ratzlaf*, 976 F.2d 1280 (9th Cir. 1992). Some of these decisions—including *Ajoku* four years ago—have already been reversed or vacated by this Court, on the ground that such *mens rea* was indeed required. See *Ajoku* v. *United States*, 134 S. Ct. 1872 (2014) (vacating Ninth Circuit decision); *Ratzlaf* v. *United States*, 510 U.S. 135 (1994) (reversing Ninth Circuit decision). And the Ninth Circuit's holding in this case—which reaches the same conclusion as these earlier Ninth Circuit decisions—conflicts with the First Circuit's *mens rea* standard for willfulness in Section 10(b) cases; with the standard in the Third Circuit for an analogous statute; and, in principle, with several decisions of this Court in analogous settings.

1. Like most federal fraud statutes, the Securities Exchange Act imposes punishment only if the defendant violated the statute, or a rule promulgated thereunder, "willfully." 15 U.S.C. 78ff. While this Court has never expressly construed that provision, *Bryan* v. *United States* held that, in criminal prosecutions generally, "to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted with knowledge that his conduct *was unlawful*.'" 524 U.S. 184, 191–92 (1998) (quoting *Ratzlaff,* 510 U.S. at 137) (emphasis added). In so holding, the Court also distin-

guished willfully from knowingly: It noted that violating a law "knowingly" requires knowledge of neither the law that was violated nor the fact that one's action is a crime, but merely the basic knowledge of one's actions. *Id.* at 193. In other words, if one lies, but does not know that lying is a crime, he is acting "knowingly"—but not "willfully." *Id.* at 191–193.

The Court reiterated that principle as recently as 2007, in *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 57 n.9 (2007). And under the rule of lenity, it is especially appropriate to adhere to a robust understanding of "willful" in the context of "open-ended" provisions like Section 10(b) and Rule 10b-5(c). See, *e.g.,* Antonin Scalia & Bryan Garner, *Reading Law* 296-302 (2012).

Yet in this and other cases involving alleged securities fraud under Section 10(b), the Ninth Circuit has held that no such *mens rea* requirement applies. Instead, the Ninth Circuit in this case affirmed an instruction that "[a]cting willfully does *not* require that the defendant know that the conduct was unlawful," and that "[t]he government is *not* required to prove that the defendant knew that his acts were unlawful, it was unlawful to make the statement, or his failure to disclose was unlawful." Pet. 79a (Instruction No. 30) (emphasis added). In so doing, the Ninth Circuit was simply adhering to its holdings in a number of other decisions, and in its pattern jury instructions—several of which have been adopted since *Bryan*. See *United States* v. *Reyes*, 577 F.3d 1069, 1080 (9th Cir. 2009); *United States* v. *Tarallo*, 380 F.3d 1174, 1187 (9th Cir. 2004); *United States* v. *English*, 92 F.3d 909, 914–915 (9th Cir. 1996); Manual of Ninth Circuit Model Criminal Jury Instructions at 90, 449 (2017).

Other than stating that the instruction matched is own model rules, in this case the Ninth Circuit's sole

comment on this point was that under Ninth Circuit precedent "[t]he definition of "willfully" that typically applies to other crimes does not apply to securities fraud." Pet. 7a. But the Ninth Circuit never explained *why* it makes sense to hold the government to a higher standard of willfulness in prosecuting, for example, false statements made to government officials under 18 U.S.C. § 1001, than it must meet in proving securities fraud—especially in light of the "unusually open-ended" character of Section 10(b) and Rule 10b-5(c)'s catch-all provision. See *supra* at 13.

2. The Ninth Circuit is not alone in refusing to impose a *mens rea* requirement as to the illegality of a defendant's conduct in the Rule 10b–5 context. For example, in *United States* v. *Kaiser*, the Second Circuit held that willfulness did not require knowledge that the conduct was unlawful. 609 F.3d 556, 568 (2d Cir. 2010). In reaching that conclusion, the Second Circuit relied on both its own precedent and on the Ninth Circuit's decision in *Tarallo*, 380 F.3d at 1187.

Likewise, in *U.S.* v. *O'Hagan*, the Eighth Circuit rejected an argument that, because the securities seller there did not know he was selling securities, he did not break the law willfully. 139 F.3d 641, 647 (8th Cir. 1998). The Eighth Circuit held that "willfully" simply requires the intentional doing of the wrongful acts—no knowledge of illegality is required. *Id.*

3. The First Circuit, however, has gone the other way. In *United States* v. *Bank of New England,* it upheld (under plain error review) the following instruction: "Willfully means voluntarily, intentionally, and with a specific intent to disregard, to disobey the law, with a bad purpose to violate the law." 821 F.2d 844,

855 (1st Cir. 1987).[7] Thus the First Circuit indicated that conviction under a statute requiring willfulness necessarily requires a guilty *mens rea* as to the lawfulness of the defendant's conduct. This Court cited that definition with approval in *Ratzlaf*, 510 U.S. at 141.

Similarly, in *United States* v. *Faulhaber*, 929 F.2d 16, 19 (1st Cir. 1991), the First Circuit specifically relied upon the willfulness standard from *Bank of New England* in the Rule 10b–5 context. Rejecting an unpreserved argument that the district court's definition of willfulness lacked sufficient detail, the court specifically noted with approval the "definition . . . set forth in *United States* v. *Bank of New England* . . . ."

Thus, if Petitioners had been prosecuted in the First Circuit, they likely would have received an instruction similar to that in *Bank of New England,* one that makes clear the requirement that the defendant have some *mens rea*—such as knowledge or reckless disregard—regarding the illegality of his conduct.

4. Consistent with the First Circuit and this Court in *Bryan*, other circuits have required knowledge of unlawful conduct in contexts similar to Section 10(b). For example, in the context of 18 U.S.C. 1001, which prohibits "knowingly and willfully" making false statements of material fact, the Third Circuit has held that willfulness requires a knowledge that the conduct is unlawful. *United States* v. *Starnes*, 583 F.3d 196 (3d Cir. 2009); see also *United States* v. *Moore*, 612 F.3d

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[7] The court also upheld an instruction that "willfulness could be found via flagrant indifference . . . toward" the statutory requirements. 821 F.3d. at 856 (emphasis added). But indifference to the legality of one's actions is a well-established means of establishing the *mens rea* of "willfulness." See, *e.g.*, *United States* v. *Blankenship,* 846 F.3d 663, 673 (4th Cir. 2017) (collecting cases).

698, 704 (D.C. Cir. 2010) (Kavanaugh, J., concurring) (suggesting a similar standard). Indeed, when analyzing Section 1001, Justice Ginsburg has noted that restricting its scope is necessary to contain "the extraordinary authority Congress . . . has conferred on prosecutors to manufacture crimes." *Brogan* v. *United States*, 522 U.S. 398, 414 (1998) (Ginsburg, J., concurring). If anything, that concern is even greater when it comes to violations of the "unusually open-ended" provisions of Section 10(b) and Rule 10b-5.

5. The Solicitor General has also acknowledged a circuit split on the closely related issue of the meaning of "willfulness" in 18 U.S.C. 1001 and a cousin statute, 18 U.S.C. 1035, which likewise prohibits willfully making false statements. In his opposition to the petition in *Ajoku* v. *United States,* the Solicitor General conceded that "the government has concluded that the 'willfully' element of" Sections 1001 and 1035 "requires proof that the defendant knew his conduct was unlawful." *Id.* The Solicitor General further noted that "this Court has "consistently held that a defendant cannot [act willfully] unless he 'acted with knowledge that his conduct was unlawful.'" *Id.* at 14 (quoting *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 57 n.9 (2007)). The Solicitor General thus conceded error as to the government's prior interpretation of Section 1035.

In so doing, the Solicitor General also noted that, when any statute requires the government to prove a crime was committed both willfully and knowingly, "interpreting 'willfully' to mean 'deliberately and with knowledge' would deprive "willfully' of independent effect." *Ajoku* Response at 14. This "need to give the term 'willfully' some independent effect" confirmed "that, in the context of Sections 1001 and 1035, it should be interpreted to require proof that the defendant knew his

conduct was unlawful." *Id.*[8] As Section 78ff (the statute imposing criminal liability for violations of Section 10(b) and Rule 10b-5) also contains the terms "willfully" and "knowingly," the same logic applies to convictions under Section 10(b) and Rule 10b-5.[9]

For all these reasons, any criminal conviction under Section 10(b) and Rule 10b-5 requires some level of *mens rea* with respect to the illegality of the defendant's conduct. Certiorari should be granted to resolve the conflict on that issue. [10]

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[8] The *mens rea* requirement for convictions under Section 1001 or 1035 is an important issue in its own right. Even since the Solicitor General's confession of error in *Ajoku*, two Courts of Appeals have continued either to view the law as unsettled or to hold that "willful" violations of Section 1001 or Section 1035 do *not* have a knowledge requirement. *United States* v. *Perry*, 659 F. App'x 146, 157 (4th Cir. 2016); *United States* v. *Eglash*, 640 F. App'x 644, 646 (9th Cir. 2016); *United States* v. *Mazzeo*, 592 F. App'x 559, 562 (9th Cir. 2015). That issue could likewise be resolved in this case, depending on the breadth of the Court's opinion.

[9] Section 78ff also allows a defendant to prove he had no knowledge of the statute, and if he does, to avoid imprisonment. Section 78ff thus distinguishes between sophisticated securities sellers who are eligible for imprisonment because they have read and understood the law, and lay sellers who are subject to only financial liability even if they acted willfully. Petitioners Jeremy and David Swenson submitted unrebutted affidavits showing they had no knowledge of the pertinent statute and rule, and thus should not have been sentenced to prison. See, *e.g.*, Swenson, Swenson, and Ellison Record Excerpts at 7–8.

[10] Although the Ninth Circuit faulted Petitioners for not objecting before their convictions to the district court's willfulness instruction as lacking a *mens rea* element, the district court did address the issue prior to appeal, and the Ninth Circuit addressed the point under plain error review. Pet. 6a, 57a. The Ninth Circuit's error is therefore fully preserved for this Court's review.

III. Review is needed to resolve serious conflicts over the Rule 16(b) issue.

The Ninth Circuit also erred in holding that criminal defendants must disclose in advance exhibits intended for cross-examination. Pet. 15a–16a. That holding is based on the theory that cross-examination is somehow part of the cross-examining party's "case-in-chief." Pet. 15a–16a; 31a–34a (district court). But this theory departs from the meaning of "case-in-chief" as used by both this Court and circuit courts at the time the term was first introduced into Federal Rule of Criminal Procedure 16. The Ninth Circuit's novel approach introduces new confusion into criminal trials and should be promptly overturned.

1. Under Rule 16, if a defendant requests disclosure of government exhibits, the government has the option to ask the defendant to disclose all the exhibits he intends to introduce. Fed. R. Crim. Proc. 16(b)(1)(A); see also *id.* 16(a)(1)(E). But the defendant need only disclose materials to be used in his "case-in-chief."

This rule, enacted in 1975, contained no ambiguity about the meaning of that term. Numerous decisions before 1975 stated that a defendant's "case-in-chief" comprised the time from the calling of his first witness until he rested. See, *e.g.*, *Rice* v. *Louisville & N. R. Co.*, 344 F.2d 776, 780 (6th Cir. 1965); *McVey* v. *Phillips Petroleum Co.*, 288 F.2d 53, 54 (5th Cir. 1961). And this was equally true of the government's case-in-chief: This Court and the circuit courts all defined the *government's* case-in-chief to include the defense's cross-examination of the government's witnesses, but not the government's cross-examination of defense witnesses during the *defense's* case-in-chief. See, *e.g.*, *Chambers* v. *Mississippi*, 410 U.S. 284, 287 n.1 (1973)

(defendant dismissed after government's case-in-chief ended); *United States* v. *Means*, 513 F.2d 1329 (8th Cir. 1975) (government's case-in-chief ended a month before defendant's arguments began); *United States* v. *Lewis*, 482 F.2d 632 (D.C. Cir. 1973)) (government's case-in-chief was nearly over before defense witnesses were called).

Thus, the definition of case-in-chief used by the Ninth Circuit conflicts with the definition used in numerous opinions of this Court and others at the time of Rule 16's adoption.

2. Moreover, Rule 16's drafters evidently transplanted the word "case-in-chief" from past judicial opinions. As Justice Frankfurter observed, such transplanted language "brings its soil with it." Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947); *accord* Scalia & Garner, *Reading Law* 73. Indeed, as Justice Scalia and Bryan Garner have explained, when a federal statute uses a term that has been used with uniform meaning by this Court or the courts of appeal, it is presumed the statute uses the same meaning. See *id.* at 322.

Not surprisingly, *after* the 1975 Amendments, most courts continued to define case-in-chief as they had done before the Amendments. See, *e.g.*, *United States* v. *Dunnigan*, 507 U.S. 87, 89 (1993) ("The case in chief for the United States consisted of five witnesses . . . ."); *Lytle* v. *Household Mfg., Inc.*, 494 U.S. 545, 549 (1990)) (stating "[a]t the close of [plaintiff's] case in chief . . . ."); *Messer* v. *Kemp*, 474 U.S. 1088, 1089 (1986) (Marshall, J., dissenting) (noting that defense counsel "put on no case in chief," even though defense counsel cross-examined the state's witnesses); *Martin* v. *Weaver*, 666 F.2d 1013, 1020 (6th Cir. 1981); *Holloway* v. *McElroy*, 632 F.2d 605, 610-11 (5th Cir. 1980).

The Ninth Circuit's interpretation conflicts with all of these authorities as well.

While none of these decisions arose in the Rule 16 context, it is unlikely other circuits that reject the Ninth's definition of case-in-chief will have the opportunity to rule on the Rule 16 issue: The defendant has no incentive to appeal a *favorable* ruling and, if the government loses at trial, it cannot appeal an acquittal. Thus, the only way for a circuit split to develop would be for a circuit to *reverse* a conviction on these grounds. Accordingly, despite the practical importance of the issue, percolation in the courts of appeal is unlikely.

However, district courts are already sharply divided on this issue. District courts in two circuits have questioned or declined to follow what has become the Ninth Circuit's rule. *United States* v. *Kubini*, 304 F.R.D. 208, 214–215 (W.D. Pa. 2015) (noting criticism of Ninth Circuit rule and interpreting pretrial order to define a party's "case-in-chief" as between when that party calls its first witness and rests.); *United States* v. *Harry*, 2014 WL 6065705 (D.N.M. Oct. 14, 2014) (disagreeing with Ninth Circuit rule). Meanwhile, district courts in four circuits besides the Ninth follow the Ninth's counter-textual test. *United States* v. *Napout*, No. 15-CR-252, 2017 U.S. Dist. LEXIS 204133, at *22 (E.D.N.Y. Dec. 12, 2017); *United States* v. *Crinel*, CR 15-61, 2016 WL 5779778, at *3–*4 (E.D. La. Oct. 4, 2016); *United States* v. *Waddell*, 2016 WL 3031698, at *3 (S.D. Ga. May 25, 2016); *United States* v. *Hsia*, 2000

WL 195067 at *2 (D. D.C. Jan. 21, 2000).[11] This Court should resolve the confusion.

3. Legal dictionaries likewise highlight the Ninth Circuit's error. Although the edition of Black's Law Dictionary in print at the time of the 1975 Amendments—the Fourth—did not expressly define case-in-chief, the Fifth Edition, adopted shortly after those amendments, defined case-in-chief as follows: "That part of a trial in which the party with the initial burden of proof presents his evidence after which he rests." *Black's Law Dictionary* 196 (5th ed. 1979). The Sixth Edition defined the term the same way. *Black's Law Dictionary* 216 (6th ed. 1990). Those definitions squarely foreclose the Ninth Circuit's view that the defendant's "case-in-chief" includes its cross-examination of government witnesses.

To be sure, in 1999—24 years after the rule change—the *Seventh* Edition defined case-in-chief as "[t]he part of a trial in which a party presents evidence to support its claim or defense." *Black's Law Dictionary* 207 (7th ed. 1999). And it was that definition that the district court adopted below. Pet. 32a. But this definition was from the Seventh Edition—the *third* edition published after the 1975 rule change, and the first under a new editor.[12] Not surprisingly, subsequent editions have again made the traditional definition the primary one. *Black's Law Dictionary* 229 (8th

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[11] Two other district courts in the Ninth Circuit have reached the same conclusion. *United States* v. *Larkin*, 2015 WL 4415506(D. Nev. July 17, 2015); *United States* v. *Holden*, 2015 WL 1514569 (D. Ore. March 19, 2015).

[12] See *Black's Law Dictionary* xxiii (10th ed. 2014) (describing "major overhaul" in the Seventh Edition).

ed. 2004); *Black's Law Dictionary* 244 (9th ed. 2009); *Black's Law Dictionary* 207 (10th ed. 2014).

Indeed, the contrary approach—adopted by the Ninth Circuit here—would make the term "case-in-chief" redundant. No one disputes that in a trial the defense can present evidence only (1) through its *own* witnesses (which is part of the defense case-in-chief), (2) through non-impeachment cross-examination of the government's witnesses, or (3) through impeachment of the government's witnesses. And no matter when presented, *all* defense evidence is designed (not surprisingly) to support the defense. Thus, if the Ninth Circuit's reading were correct, Rule 16, which at present reads:

> "the defendant intends to use the item *in the defendant's case-in-chief* at trial,"

could be simplified by excising the italicized language, with no change in meaning. See Fed. R. Crim. Proc. 16(b)(1)(A)(ii). But it is generally improper to interpret texts in a way that "renders some words altogether redundant." *United States* v. *Alaska*, 521 U.S. 1, 59 (1997) (citation omitted); *accord* Scalia & Garner, *Reading Law* 174–179 (collecting numerous cases and sources). The Ninth Circuit's error in interpreting the rule is obvious for this reason as well.

4. Making no attempt to determine the original meaning of "case-in-chief," the Ninth Circuit held below that, because a defendant may establish his case through cross-examination, the defense's cross-examination was necessarily part of the defense's "case-in-chief." Pet. 15a–16a. To be sure, a defendant can establish his innocence by cross-examination alone. But the defendant who chooses that course gives up the right to call his own defense witnesses—a substantial

cost. Moreover, even if Rule 16 gives defendants an advantage, courts are to apply Rule 16 according to its original meaning, not manipulate it to suit their own sense of fairness.[13] As shown above, it is clear the Ninth Circuit's definition of "case-in-chief" would be foreign to Rule 16's drafters. See 27–28, *supra*.

The Ninth Circuit's approach also undermines the painstaking efforts undertaken over the years to ensure the fairness of criminal trials. Armed in advance with the most important exhibits in the defense's own case, prosecutors in the Ninth Circuit and elsewhere can now avoid or neuter the strongest parts of defendants' cross-examination as well as their case-in-chief.

For all these reasons, the Ninth Circuit's erroneous interpretation of Rule 16 warrants this court's review.

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[13] The district court's concern (at Pet. 37a) about the amount of material that could be used for cross-examination is irrelevant: As defendants had no obligation to produce cross-examination exhibits under the language of Rule 16, the court should not have forced them to do so for policy reasons of its own making.

IV. This case is an excellent vehicle for resolving the questions presented.

Not only do all three of the questions presented warrant review, but this case is a particularly good vehicle for resolving them.

1. Petitioners were undoubtedly prejudiced by each error explained above. As previously noted, all of these Petitioners were acquitted, not only of the conspiracy charges, but also of all the specific mail and wire fraud charges, and the specific securities counts alleging fraudulent statements or omissions. JER 0086–0103. The *only* theory on which Petitioners were convicted was the alleged violation of Rule 10b-5(c)'s "catch-all."

The prejudice from the district court's materiality instruction is easily established by the government's approach to liability. The Government's main theory against these Petitioners was that they had somehow assisted in depriving investors of all the information they needed to make informed decisions about DBSI. JER 8159–8235. Petitioners therefore suffered serious prejudice from the district court's decision not to instruct the jury to consider the "total mix" of information *already* "made available" to investors—an instruction that likely would have produced an acquittal on this sole theory. That result was especially likely given the large amount of pertinent information that was otherwise available to investors, either directly or through their registered broker-dealers and third-party evaluators. JER 8258–8266; 8291–8311.

Consider too the potential impact of an instruction properly informing the jury that it must find *mens rea* with respect to illegality. Here, there was little if any evidence suggesting these Petitioners were directly involved in any portion of any fraud. See 9–11, *supra.*

There was even less evidence suggesting these Petitioners were *aware* they were part of a fraud. And there was no evidence at all that these Petitioners knew they were voluntarily involved in *unlawful* activity. Once the Ninth Circuit's erroneous instruction on willfulness is corrected, it is clear petitioners would be entitled to a directed verdict—or, at a minimum, a new trial, which would likely result in their acquittal.

Nor is there any doubt that the government gained a potentially dispositive advantage from the district court's erroneous interpretation of Rule 16(b). Almost all the documents Petitioners planned to use on cross-examination came originally from the government. See AER 99. The Rule 16(b) ruling, then, allowed the government to avoid reviewing the government's own files by waiting for the defendants to select what they deemed significant, and then tailoring the government's case around that new information.

For example, the government decided against calling broker-dealers as witnesses, and to limit the scope of one of their witnesses' testimony—that of DBSI employee Josh Hoffman—to avoid discussion of his interactions with broker-dealers, *only* after viewing the exhibits produced under the district court's erroneous order. See, *e.g.,* AER 653–657 (original witness list included broker-dealers, but none was called after exhibit information provided), JER 7056–7057 (Government chose to not question Hoffman on interactions with broker-dealers and sought to prohibit Petitioners from that line of questioning); Joint Pet. for rehearing *en banc* 17.

This was highly significant because Hoffman and the broker-dealers would each have testified that, given the other information already available, the broker-dealers certainly would have understood the risk

of investing in DBSI. And this of course would have meant that the total mix of information available to investors was far greater than the government was willing to admit. See, *e.g.,* JER 8258–8266; 8291–8311 (broker-dealers would have understood risk); see also JER 7056–7057 (Government did not want to hear what Hoffman had to say about broker-dealer interactions). Requiring Petitioners to disclose their cross-examination exhibits thus allowed the government to adjust its own witness selection strategy so that mitigating factual accounts were not provided to the jury.

2. In addition, the Ninth Circuit's decision is final, all the errors raised here have been fully preserved, and the Court can reach the questions presented without addressing other preliminary issues. Resolving the questions presented will resolve the conflicts outlined above. It will also provide Petitioners with a proper trial—if the government chooses to retry them despite the likelihood of an acquittal on the one remaining theory under Section 10b-5's "catch-all" provision.

3. Moreover, absent resolution by this court, the Ninth Circuit's erroneous logic will affect numerous criminal trials and securities fraud prosecutions. In the past ten years, the federal government has held 26,001 criminal jury trials.[14] Virtually every one of those is potentially affected by the definition of "case-in-chief" if the defendant elects to request discovery from the government under Rule 16. Likewise, the definitions of materiality and willfulness affect virtually all federal securities fraud prosecutions, of which

[14] See Office of the United States Attorneys, Annual Statistics Reports, https://www.justice.gov/usao/resources/annual-statistical-reports (Table 2 for 2007-2011 and Table 2A for 2012-2016).

there have been some 1,600 over the past decade.[15]

CONCLUSION

In explaining the rationale for the rule of lenity, the late Justice Scalia and Bryan Garner remarked that "a fair system of laws requires precision in the definition of offenses and punishments." Scalia & Garner, *Reading Law* 301. With a statute as "open-ended" as Section 10(b), *O'Hagan*, 521 U.S. at 691 (Thomas, J., concurring in part and dissenting in part), providing such precision is challenging. But that is why it is important, especially in this context, for lower courts to apply faithfully this Court's settled teachings on such things as materiality and willfulness.

Here, the Ninth Circuit departed from those teachings and, in so doing, entrenched pre-existing circuit conflicts on those two important issues—as well as on the proper interpretation of Rule 16(b). The petition should be granted.

Respectfully submitted,

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[15] See *id.* (Table 3 for 2007-2009, Table 3A for 2010-2013, and Table 3B for 2014-2016).