No. A17-________

In the Supreme Court of the United States

Mark A. Ellison, David D. Swenson, Jeremy S. Swenson, and Douglas L. Swenson.
Applicants,

v.

United States of America.

APPLICATION FOR EXTENSION OF TIME TO FILE A PETITION OR PETITIONS FOR WRIT OF CERTIORARI

Directed to the Honorable Anthony Kennedy, Associate Justice of the Supreme Court of the United States and Circuit Justice for the United States Court of Appeals for the Ninth Circuit

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December 29, 2017

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To the Honorable Anthony Kennedy, as Circuit Justice for the United States Court of Appeals for the Ninth Circuit:

Mark A. Ellison, David D. Swenson, Jeremy S. Swenson, and Douglas L. Swenson ("Applicants") respectfully request a 60-day extension of the deadline for filing their petition or petitions for writs of certiorari, from January 11, 2018, to Monday, March 12, 2018. Applicants will ask this Court to review a judgment by the United States Court of Appeals for the Ninth Circuit issued on August 15, 2017 (App. A). Applicants' motion for rehearing en banc was denied on October 13, 2017. (App. B). The Court will have jurisdiction under 28 U.S.C. § 1254(1).

1. Like many American businesses, Applicants' real estate investment business crumbled in the wake of the 2008 Lehman Brothers bankruptcy. Following the 2008 meltdown, the United States Department of Justice understandably sought to hold accountable those who had engaged in the questionable business practices that led to the Great Recession. But in this case, the Department went too far, arresting and charging applicants for alleged securities-law violations that simply are not crimes under this Court's interpretation of the law.

After a jury trial, all the Applicants were convicted of violating Section 10(b) of the Securities Exchange Act, and the Ninth Circuit affirmed their convictions. But Applicants were convicted based on erroneous interpretations of that statute and of Federal Rule of Criminal Procedure 16(b)—interpretations that contradict holdings of this Court and other federal circuit courts.

Applicants intend to give this Court a much-needed opportunity to correct these misinterpretations by presenting at least the following questions for this Court's review:

1. 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 a showing and finding that the defendant was at least generally aware that his conduct was unlawful?
2. Can a defendant properly be convicted of violating Section 10(b) without a showing and finding that the statement or omission on which the conviction was based was material, based at least in part on its impact on the "total mix" of information made available to investors?
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" within the meaning of Fed. R. Crim. Proc 16(b)?[1]

Each of these issues has divided the courts below. As to the first issue: The Ninth Circuit has held in several cases that a security seller can be guilty of willfully violating Section 10(b) and similar statutes *without* any knowledge that he is violating the law.[2] But the First Circuit has held the opposite.[3] And in confessing error before this Court in a recent case, the United States

[1] Applicant Douglas Swenson was also convicted of violating the federal mail and wire fraud statute, and presently intends to file a separate petition raising one or more additional issues related to those convictions.

[2] App. A at 8; *United States* v. *Reyes*, 577 F.3d 1069, 1079 (9th Cir. 2009); *United States* v. *Tarallo*, 380 F.3d 1174, 1185–1188 (9th Cir. 2004).

[3] *United States* v. *Faulhaber*, 929 F.2d 16, 19 (1st Cir. 1991) (noting willfulness requires a specific intent to disregard the law in Section 10b-5 cases) (citing *United States* v. *Bank of New England, N.A.*, 821 F.2d 844, 855–856 (1st Cir. 1987)).

acknowledged, as to an analogous statute, that knowledge of unlawfulness is indeed required for a conviction of willfulness.[4] That acknowledgment was also based on recent decisions of this Court.[5]

The second question likewise implicates a circuit split. Despite this Court's repeated emphasis that, in evaluating claims of securities fraud, the finder of fact must examine the "total mix" of available information,[6] the Ninth Circuit and two others have held that the finder of fact need not consider the "total mix" after all.[7] These Circuits instruct instead that a jury can consider and base a conviction upon seemingly "important" pieces of information in isolation from other information available to investors.[8] Not surprisingly, the majority of circuits follow this Court, either by explicitly requiring the "total mix" of information to be considered *in addition to* the factual inquiry required by

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[4] Brief of the United States in Opposition at 12, *Ajoku* v. *United States*, No. 13-7264 (Mar. 10, 2014) (noting that a conviction of willfulness typically requires that "the Government must prove that the defendant acted with knowledge that his conduct was unlawful" and acknowledging that; the willfulness requirement in 18 U.S.C. 1035 required knowledge) (citations and internal quotation marks omitted).

[5] *Id.* (quoting *Bryan* v. *United States*, 524 U.S. 184, 191–192 (1998), and *Ratzlaf* v. *United States*, 510 U.S. 135, 137 (1994)).

[6] *E.g. Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2413 (2014); *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 43, 45 (2011).

[7] App. A at 4-5; *Zweig* v. *Hearst Corp.*, 594 F.2d 1261 (9th Cir. 1979); *United States* v. *Sayre*, 434 F. App'x 622 (9th Cir. 2011); *KBC Asset Mgmt. N.V.* v. *Omnicare, Inc. (In re Omnicare, Inc. Sec. Litig.)*, 769 F.3d 455, 472 (6th Cir. 2014); *ABC Arbitrage* v. *Tchuruk*, 291 F.3d 336, 359 (5th Cir. 2002); *Longman* v. *Food Lion, Inc.,* 197 F.3d 675, 683 (4th Cir. 1999).

[8] *E.g.*, *Longman,* 197 F.3d at 683 (4th Cir. 1999).

the Ninth Circuit,[9] or simply by following this Court in explaining that the "total mix" analysis is—as the Second Circuit put it—"[t]he touchstone of the inquiry."[10]

The third issue is also the subject of a circuit split. The Ninth Circuit and several of its district courts have squarely held that a criminal defendant's "case-in-chief" can include cross-examination of the government's *own* witnesses during the presentation of the government's *own* case in chief.[11] But this contradicts the Eighth Circuit, which has held the opposite in the Rule 16 context,[12] and other circuits, which have held the opposite in other related contexts.[13] The Ninth Circuit's ruling also flouts the plain language of Rule 16, which draws a sharp temporal distinction between the Government's own case-in-chief and the defendant's "case-in-chief." See Fed. R. Crim. Proc. 16(b). And the Ninth Circuit's misinterpretation of Rule 16(b) risks violating criminal defendants' Fifth and Sixth Amendment rights, as established in such decisions as *Wardius* v. *Oregon*, 412 U.S. 470, 474 (1973) (Due Process Clause) and *Davis*

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[9] *Rockies Fund, Inc.* v. *SEC*, 428 F.3d 1088, 1096 (D.C. Cir. 2005); *City of Philadelphia* v. *Fleming Cos.*, 264 F.3d 1245, 1265 (10th Cir. 2001); *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 369 (3d Cir. 1993).

[10] *Halperin* v. *Ebanker Usa.com,* 295 F.3d 352, 357 (2d Cir. 2002). Three other Circuits follow this Court's "total mix" analysis. *Brennan* v. *Zafgen, Inc.*, 853 F.3d 606, 617 (1st Cir. 2017); *Finnerty v. Stiefel Labs., Inc.*, 756 F.3d 1310, 1321 (11th Cir. 2014); *Pub. Pension Fund Grp.* v. *KV Pharm.* Co., 679 F.3d 972, 981 (8th Cir. 2012).

[11] See App. A at 17-19; *United States* v. *Larkin*, No. 2:12-cr-319-JCM-GWF, 2015 WL 4415506 (D. Nev. July 20, 2015); *United States* v. *Holden*, 2015 WL 1514569 (D. Ore. March 19, 2015).

[12] *United States* v. *Eason*, 829 F.3d 633, 638 n.3 (8th Cir. 2016) (holding cross-examination of governmental witness not part of defendant's "case-in-chief" for purposes of Rule 16).

[13] See, *e.g.*, *Parker* v. *Scott*, 394 F.3d 1302, 1311 (10th Cir. 2005); *Argentine* v. *United Steelworkers of Am., AFL-CIO*, 287 F.3d 476, 486 (6th Cir. 2002).

v. Alaska, 415 U.S. 308, 315–16 (1974) (Confrontation Clause); cf. *Williams* v. *Florida*, 399 U.S. 78, 111 (1970) (Black, J., dissenting).

These issues are obviously crucial to Applicants, who were convicted based on the Ninth Circuit's idiosyncratic view of the law on each of these issues. Absent this Court's review, Applicants will be imprisoned, for substantial periods, based solely on the accident of which circuit they were tried in.

3. To adequately present these and perhaps other issues for the Court's consideration, undersigned counsel need additional time. The nature of this case and counsel's other obligations both require the full sixty additional days allowed by Supreme Court Rule 13.5.

First, the record in this case, generated from a ten-week trial, is voluminous. The joint record on appeal alone has 41 volumes, comprising over 9,300 pages. Because of the length of trial and the complexity of the issues, the Ninth Circuit authorized more than 300 pages of briefing on each side, with the longest brief—by Respondent—comprising over 70,000 words. And each of the questions presented involves complex legal issues which, to be adequately presented, require counsel to review a host of opinions from this and other courts.

Second, counsel of record Gene Schaerr and his (small) firm were retained very recently, and have not previously been involved in this case, either at the trial court or in the Ninth Circuit. Preparing and filing one or more petitions for certiorari will take a considerable amount of counsel's time for the entirety of the 60-day extension, even with the able assistance of co-counsel. Adequately preparing the petition(s) in less time is impossible.

Third, counsel of record has recently been occupied with a number of other matters, including various matters before this Court, and has therefore been unable to begin working earnestly on this case, even during the short time available thus far. For example:

- Counsel of record is today filing a petition for certiorari in *R.K.B.* v. *E.T.*, which concerns whether state or federal law controls the analysis of whether an unwed father has "acknowledged or established" paternity under the Indian Child Welfare Act. This is an issue on which certiorari was granted in *Adoptive Couple* v. *Baby Girl*, 133 S.Ct. 2552 (2013), but which was not decided in that case, *id.* at 2560 n.4. This petition has consumed the bulk of counsel's time as of late.
- Counsel of record is also preparing to file an amicus brief on behalf of the U.S. Conference of Catholic Bishops and other religious entities in *National Institute of Family and Life Advocates* v. *Becerra*, No. 17-609, which will be filed on January 16, 2017. That case presents important issues regarding the proper application of the Free Speech Clause to governmental efforts to compel speech in violation of religiously affiliated organizations' religious beliefs.

For all these reasons, Applicants respectfully request an extension of time to file their certiorari petition, up to and including Monday, March 12, 2018.

Respectfully submitted,

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December 29, 2017