No. 17-1134

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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The Government doesn't dispute that the "unusually open-ended" provisions of Section 10(b) and Rule 10b-5 underlie thousands of prosecutions each decade. See Pet.2 (quoting *United States* v. *O'Hagan,* 521 U.S. 642, 691 (1997) (Thomas, J., concurring in part and dissenting in part)). Nor does the Government seriously dispute that there are widespread conflicts on the issues presented, issues affecting hundreds of other securities prosecutions nationwide. See Pet.1, 34–35. Instead, the Government offers a series of technical challenges that evaporate under analysis.

I. The Government has not undermined Petitioners' showing on materiality.

In opening, Petitioners showed that the Ninth Circuit has repeatedly rejected the "total mix" standard articulated in decisions like *Matrixx Initiatives, Inc.* v. *Siracusano*, 563 U.S. 27, 38 (2011). The Government doesn't dispute that the Ninth Circuit—in its case law and pattern jury instructions—applies a different test, asking solely "whether there is a substantial likelihood that a reasonable investor would consider the fact *important* in making his or her investment decision," without referencing its impact on the "total mix" of available information. Pet.15. Nor does the Government deny that the district court's failure to give a "total mix" instruction substantially increased the likelihood that the jury here would ignore "a large amount of pertinent information" that was "available to investors … through their registered broker-dealers." Pet.32. Nor does the Government dispute that this issue was properly preserved.

1. The opposition's central contention is that the "importance" and total mix tests are "different ways of saying the same thing." Opp.13. But that, in essence, is the very question on which the circuits are divided—and which the petition asks the Court to resolve.

As explained in the petition (at 16–17), the Fourth and Sixth Circuits agree with the Ninth Circuit that the two tests are merely "different ways of saying the same thing"—and thus allow district courts to use either the "total mix" *or* the "importance" standard. However, as the petition explains (at 17–19), most other circuits hold that, regardless whether the "importance" standard is satisfied, liability *requires* satisfaction of the "total mix" standard.

Although the Government coyly notes (at 13) that "most of the decisions on which petitioners rely quote both formulations," the Government doesn't squarely deny that most circuits now require satisfaction of the "total mix" standard, even where the "importance" standard is satisfied. (And *that* is why some of the decisions "quote both formulations.") The Government also doesn't dispute that Petitioners likely would have had a complete acquittal if they had been tried in a circuit other than the Fourth, Sixth, or Ninth.

Nor could the Government dispute those conclusions. First, the Government ignores the Tenth Circuit's statement (summarizing its case law) 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 infor-

mation available' to current and potential investors." *City of Philadelphia* v. *Fleming Companies*, 264 F.3d 1245, 1265 (10th Cir.2001) (emphasis added); *accord Slater* v. *A.G. Edwards & Sons, Inc.*, 719 F.3d 1190, 1197 (10th Cir.2013). By holding that both requirements are mandatory, the Tenth Circuit contradicts the Government's and Ninth Circuit's contention that the standards are the same.

Moreover, the Tenth Circuit, in an opinion joined by Judge Hartz, Judge Ebel and then-Judge Gorsuch, has explained that the total mix of information must include documents that "an investor … would know of the existence of … and could readily access[.]" *United Food & Commer. Workers* v. *Chesapeake Energy Corp.*, 774 F.3d 1229, 1238 (10th Cir.2014). This would obviously include documents obtainable from the broker-dealers in this case. These statements demonstrate that Petitioners almost certainly would have prevailed in the Tenth Circuit—which the Government also doesn't dispute.

Second, the Government ignores the Second Circuit's holding that the "total mix" standard is not merely an alternative way to prove materiality, but is rather *the* "touchstone of the [materiality] inquiry." *Halperin* v. *Ebanker Usa.com*, 295 F.3d 352, 357 (2d Cir.2002); see Pet.17–18. The Second Circuit has also explained that the total mix may include "facts known *or reasonably available* to the shareholders." *United Paperworkers Int'l* v. *Int'l Paper Co.*, 985 F.2d 1190, 1199 (2d Cir.1993) (emphasis added). Given that the latter decision would include statements to the broker-dealers here, there can be no doubt—and the Government doesn't dispute—

that petitioners would have prevailed in the Second Circuit.

Third, the Government ignores decisions in the Eighth and Eleventh Circuits that squarely require satisfaction of the "total mix" standard, without even quoting the "importance" standard. For example, the Eighth Circuit holds that, "[t]o 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." *Public Pension Fund* v. *KV Pharmacy*, 679 F.3d 972, 981 (8th Cir.2012) (emphasis added); accord *Finnerty* v. *Stiefel Labs., Inc.*, 756 F.3d 1310, 1321 (11th Cir.2014) (same).

Fourth, contrary to the Government (at 12), these Circuits are correct in treating the "total mix" standard as adding significant value to the "importance" standard. As anyone who has tried a securities case to a jury will understand, an "importance" instruction alone would leave jurors wondering whether they can really consider the full range of information available when the disputed statement or omission was made. See *United States* v. *Nacchio*, 519 F.3d 1140, 1159 (10th Cir.2008) (instructions that lack the total mix instruction "not particularly informative"). The addition—or substitution—of the "total mix" standard eliminates that risk, and thus increases the likelihood that the jury will decide the issue fairly.

2. The Government inadvertently highlights the split's breadth in its argument (at 14) that Petitioners' proposed instruction was legally incorrect. To be sure, the Government doesn't dispute that, *if* Peti-

tioners are correct on the merits, the portion of Petitioners' proposed instruction requiring satisfaction of the "total mix" standard was correct. And that is enough to preserve the issue.

But the other portion of the proposed instruction to which the Government objects—that material information must be "of such importance that it could reasonably be expected to cause or to induce a person to invest or not to invest," Opp.14 (quoting AER 639)—is also correct under the Fifth Circuit's decision in *United States* v. *Skilling*, which also conflicts with the decision below. Although the Court need not reach the propriety of that portion of the instruction here, *Skilling* affirmed a conviction under an instruction virtually identical to the one sought by Petitioners below. *Compare* AER 639 with *United States* v. *Skilling*, 554 F.3d 529, 551 n.26 (5th Cir. 2009). And *Skilling* and subsequent Fifth Circuit decisions have consistently applied the total mix test. *E.g., United States* v. *Bruteyn,* 686 F.3d 318, 323 (5th Cir. 2012).

In short, analysis of the opposition merely reconfirms that the circuit conflict is wide, deep and mature.

3. The opposition further claims that "none of" the cases cited in the petition "involved challenges to jury instructions[.]" Pet.13. But the question presented is not limited to jury instructions; it frames a general question of law. Moreover, this Court regularly grants review where some of the cases forming a split involve jury instructions, and others present the issue in other procedural postures. *E.g., Smith* v. *United States*, 568 U.S. 106, 109 (2013). And in any event, *Skilling* involved jury instructions, and

correctly deployed the total mix test. 554 F.3d at 551 n.26, 555.

4. Finally, the opposition claims (at 14) that even if the "total mix" standard applies, there was "overwhelming evidence that petitioners' misrepresentations significantly altered the 'total mix' of information available to investors." But rather than being a reason to deny review, that allegation merely raises a harmless-error issue for the lower courts to resolve on remand, if this Court adopts Petitioners' proposed legal rule. See, *e.g., Hedgpeth* v. *Pulido*, 555 U.S. 57, 62 (2008).

In any event, the Government's argument misstates the record. For example, contrary to the opposition (at 3) (a) the Master Lease portfolio was losing $4 million, not the claimed $38 million in 2007, and (b) DBSI did not intend to manipulate its financials. AER 4561; JER 5223–5228; JER 2377. And the opposition is filled with other factual errors. See, *e.g.*, Douglas Swenson Reply at 6–7. The Government's factual misstatements destroy its suggestion that, even if the total mix standard had been articulated, a jury would still have convicted Petitioners.

Indeed, the Government doesn't dispute that the jury acquitted these Petitioners on *all* of the Government's theories alleging specific fraudulent statements or omissions. See Pet.1, 9. That strongly suggests the jury would also have acquitted them on the "catch-all" counts if it had been instructed on the total mix standard. And that makes this case an especially good vehicle for resolving Question 1.

II. The Government has not undermined Petitioners' showing on willfulness.

The same is true of the "willfulness" issue. As the Government admits, the general standard for "willfulness" in criminal cases is the standard this Court adopted in *Bryan* v. *United States*, 524 U.S. 184 (1998), the one the Government conceded was appropriate in *Ajoku* v. *United States*, 134 S. Ct. 1872 (2014). The Government further concedes that, under that standard, "a defendant acts 'willfully' … if he acts with 'knowledge that the conduct is unlawful.'" Opp.16 (quoting *Bryan*, 524 U.S. at 191); see *Amicus* Brief of CATO Institute et al. at 6–10. The Government also concedes (at 18) that the First Circuit applied that same standard in *United States* v. *Faulhaber*, 929 F.2d 16, 19 (1st Cir. 1991). Because the Ninth Circuit's decision conflicts with both *Bryan* and *Faulhaber,* review is needed.

1. As the Petition and Opposition acknowledge, the First Circuit's decision in *Faulhaber* arose in a setting where the error had not been preserved (Pet.23, Opp.18). But *Faulhaber* affirmed the proper standard—i.e., whether the defendant knew his action was illegal. 929 F.3d at 19 (citing *United States* v. *Bank of New England, N.A.*, 821 F.2d 844, 855 (1st Cir. 1987) ("Willfully means voluntarily, intentionally, and with a specific intent to disregard, to disobey the law, with a bad purpose to violate the law.")). And *Faulhaber* is the leading authority on the definition of willfulness for securities law in that Circuit.

The Government tries to distinguish *Faulhaber* on the grounds that (1) there the "defendant [] challenged that instruction" and the issue was thus whether an even higher level of *mens rea* applied,

and (2) "[t]he First Circuit did not even quote the relevant instruction." Opp.18. But the second distinction is irrelevant: The content of the instruction is clear from the opinion and its citation to *Bank of New England*.

The first distinction is also belied by the fact that the Government itself argued in *Faulhaber* that the "knowledge of illegality" standard adopted by the court there was "plain black letter law"—not that it was higher than the statute requires. Brief of Appellee at 38, *United States* v. *Faulhaber*, No. 89-1826, 929 F.2d 16 (1st Cir. 1991). In support of that conclusion, the Government cited a leading collection of federal pattern jury instructions that likewise follows the *Bryan* standard—in conflict with the Ninth Circuit patter instructions. *Id.*

In short, the Government's handwaving cannot get around the central point: If Petitioners had been prosecuted in the First Circuit, they would have received a willfulness instruction that follows *Bryan* and *Faulhaber*, not one that follows the Ninth Circuit's pattern instruction, which is based on that court's decision in *United States* v. *Tarallo*, 380 F.3d 1174 (9th Cir. 2004).

2. The Government also attempts to defend *Tarallo* by arguing that the Ninth Circuit's approach there was "grounded … in the text of the relevant statute." Opp.16. According to the Government (and *Tarallo*), "if the 'willful' element of Section 78ff(a) required knowledge of illegality," the final proviso of that section—precluding "incarceration" of someone with no knowledge of the *specific* statute—would be a dead letter "because "[s]uch a person could not

have been convicted in the first place." Opp 17 (quoting *Tarallo*, 380 F.3d at 1188). But *Tarallo*'s "textual" analysis is plainly incorrect.

That is because the last phrase of Section 78ff(a) does not purport to define "willfully," as used at the beginning of that (very long) provision. That proviso merely states that "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." But the entire provision subjects a defendant to a (maximum) $5 million fine *or* imprisonment (or both) if he "willfully violates any provision of this chapter … or any rule or regulation thereunder …" Thus, contrary to *Tarallo,* the "willfulness" requirement can easily be read as interpreted in *Bryan* and *Faulhaber* without making the final provision superfluous: Securities sellers may be *convicted* if they are generally aware that their conduct is illegal. See Pet.20. But if they can prove they had no knowledge of the specific rule, under the final proviso of Section 78ff(a), they must be fined rather than imprisoned.

Indeed, that situation is presented in this case—making it a particularly good vehicle for resolving the question. As noted in the petition (at 25 n.9), two of the three petitioners here—David and Jeremy Swenson—submitted unrebutted affidavits showing they were unaware of the provisions under which they were convicted. Thus, they should be immune from incarceration (and subject at most to a fine) under the final proviso of Section 78ff(a), even if this Court were to reject the Petitioners' (and the First Circuit's) reading of the willfulness requirement.

3. The opposition also ignores two central components of this Court's willfulness inquiry, both of which foreclose the Ninth Circuit's interpretation.

First, the opposition ignores that this Court's willfulness analysis considers the complexity of the statute. In *Cheek* v. *United States*, 498 U.S. 192, 199–200 (1991) (which the opposition barely references), this Court noted that a higher "knowledge of illegality" standard should be applied when "[t]he proliferation of statutes and regulations … [makes] it difficult … to know and comprehend the extent of the duties and obligations imposed by the law." Thus, even if one has an "irrational" belief about his legal duty, the complexities of the law mean that a jury may convict only if "the defendant knew of this duty, and … voluntarily and intentionally violated [it]." *Id.* at 203, 201.

The principles articulated in *Cheek* point to the general "knowledge-of-illegality" standard in *Bryan*, *Faulhaber* and *Ajoku* as being the proper standard for Section 10(b). As the petition, Justice Thomas, and Chief Justice Rehnquist have all explained, Section 10(b) and Rule 10b-5 are "unusually open-ended" and the "regulatory language is singularly uninformative." *O'Hagan*, 521 U.S. at 691 (Thomas, J., concurring in part and dissenting in part); Pet. 13. It is difficult enough for a lawyer like Petitioner Ellison to comprehend the duties imposed by Rule 10b-5 law. It is virtually impossible for those, like Petitioners David and Jeremy Swenson, who are untrained in its legal complexities.

Second, like the panel opinion and previous Ninth Circuit decisions, the Government never mentions the rule of lenity, let alone responds to the petition's explanation (at 21, 35) that the rule squarely

applies here. That rule, of course, is that "where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant." *Smith* v. *United States*, 508 U.S. 223, 246 (1993).

Here, there can be no doubt that the word "willfulness" is ambiguous, so doubts must be resolved in favor of the securities seller. For all the reasons above, this complex securities law should not be read to define "willfulness" in a way that is less demanding than in other, similar criminal statutes.

4. Following the Ninth Circuit, the opposition further claims (at 19) that "Petitioners 'did not object to the district court's definition of "willfully," and the court of appeals therefore reviewed their challenge to that definition only "for plain error." (citing Pet.6a) This is wrong. First, plain error review typically governs only matters "not brought to the attention of the trial court." *Peretz* v. *United States*, 501 U.S. 923, 954 (1991). But here, as the Government does not dispute, the district court addressed the willfulness issue before appeal. Pet.57a.

Second, it would have made no sense to raise willfulness at the jury instruction stage because *Tarallo* was the governing law. It is well-established, both in the Ninth Circuit and this Court, that a litigant need not challenge a controlling decision before the district court in order to challenge it on appeal or in this Court. See, *e.g.*, *Citizens United* v. *Federal Election Comm'n*, 130 S. Ct. 876 (2010); *United States* v. *Hernandez-Estrada*, 749 F.3d 1154, 1160 (9th Cir.2014); see also *Freed* v. *Geisinger Med. Ctr.*, 5 A.3d 212, 215–216 (Pa.2010)) (collecting examples from this Court).

Third, even if this Court were to apply a rigorous plain error standard in this case, both courts below plainly erred by departing from *Bryan* and the principles articulated in *Cheek*. As this Court has explained, "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that the error be 'plain' at the time of appellate consideration." *Johnson* v. *United States*, 520 U.S. 461, 468 (1997). Accordingly, even if plain-error review applies, the decision below must be reversed.

III. The Government has not undermined Petitioners' showing on Rule 16(b).

Petitioners incorporate the points in Douglas Swenson's reply brief (at 9–12), explaining why the Court should grant certiorari to resolve whether a defendant's "case-in-chief" under Rule 16(b) includes cross-examination of the prosecution's witnesses. See also Pet.26–31.

CONCLUSION

The opposition provides no reason to deny the petition, which should be granted.

Respectfully submitted,

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