Nos. 12-218, 12-5812 and 12-5847

In the Supreme Court of the United States

JAMES BROOKS, PETITIONER

v.

UNITED STATES OF AMERICA

JAMES PATRICK PHILLIPS, PETITIONER

v.

UNITED STATES OF AMERICA

WESLEY C. WALTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court's instruction on willful blindness was consistent with this Court's decision in *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060 (2011).

2. Whether the district court abused its discretion when it declined to compel the government to grant immunity to a potential defense witness or to grant such immunity itself.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-81) is reported at 681 F.3d 678.[1]

JURISDICTION

The judgment of the court of appeals was entered on May 18, 2012. The petition for a writ of certiorari in No. 12-5812 was filed on August 9, 2012, and the petitions in No. 12-218 and No. 12-5847 were filed on August 16, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of Texas, petitioners were convicted on numerous counts of false reporting under the Commodity Exchange Act (CEA), 7 U.S.C. 1 *et seq.*, in violation of 7 U.S.C. 13(a)(2) (2000); numerous counts of wire fraud, in violation of 18 U.S.C. 1343 (2000); and one count of conspiracy to commit false reporting and wire fraud, in violation of 18 U.S.C. 371 (2000). See Pet. App. 12; Gov't C.A. Br. 4. Brooks was sentenced to 168 months of imprisonment, to be followed by three years of supervised release. Gov't C.A. Br. 5-6. Phillips and Walton were each sentenced to 135 months of imprisonment, to be followed by three years of supervised release. *Id.* at 4-5. The court of appeals affirmed. Pet. App. 1-81.

1. Petitioners worked for El Paso Merchant Energy Corporation (EPME), a company that engaged in physical trades and financial transactions involving natural gas. Pet. App. 2-4. Brooks was EPME's Senior Vice President for Risk Management and its Managing Di-

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[1] Unless otherwise noted, references are to the petition appendix in No. 12-218.

rector for Natural Gas. *Id.* at 4. Phillips was a senior physical trader and manager of the Texas Desk of EPME, and Walton was a financial trader for both the Texas Desk and Northeast Desk. *Ibid.*

On September 25, 2006, petitioners were charged in a second superseding indictment with false reporting and wire fraud. The indictment alleged that Brooks directed other EPME employees, from April 2000 through May 2002, to report false information to two private newsletters (*Inside FERC Gas Market Report (Inside FERC)* and *Natural Gas Intelligence*) that published natural gas price indicators in order to influence the market price for natural gas in a way that would benefit EPME's financial positions. Pet. App. 7-8. The indictment further alleged that Phillips sent fictitious information to the two trade publications and that Walton informed traders whether he wanted the price of natural gas to go up or down during the next month so that they could report fictitious data to manipulate the published indices accordingly. *Id.* at 8.

2. During the two-month trial, EPME traders testified that Brooks had instructed them and Phillips to submit false data to *Inside FERC* based on the information that Walton supplied them about his financial positions. In addition to 12 other witnesses, the government's evidence included "a large number of incriminating emails" among petitioners and the traders, as well as recorded phone conversations in which Walton discussed submitting reports that had affected published indexes and "whether certain reported trades were too low to be credible." Pet. App. 9. Another EPME employee testified that only 3.6% of the trades reported to the publications matched actual trades. *Id.* at 10-11. The primary defense witness was Brooks, who testified that petition-

ers reported data "based on their perception of where gas was actually trading." *Id.* at 11.

a. One potential defense witness, Don Guilbault, invoked his Fifth Amendment privilege against compelled self-incrimination on the day that he was scheduled to testify. Pet. App. 11. At the time, Guilbault, a trader at EPME, had pleaded guilty to submitting false reports and was awaiting sentencing. *Id.* at 11, 63. Walton subpoenaed Guilbault to testify and informed the government of the subpoena the day before Guilbault was to testify. *Id.* at 63. Later that evening, a prosecutor called Guilbault's attorney and asked whether Guilbault would indeed testify. *Ibid.* The next day, Guilbault's attorney informed the court that Guilbault had decided to invoke his Fifth Amendment rights. *Ibid.* Contending that Guilbault would have testified that Walton had not given him information about Walton's financial positions, *id.* at 11, petitioners requested that the district court order the government to grant Guilbault immunity, *id.* at 64. The district court denied the motion. 12-5847 Pet. App. B1.

b. As part of its jury instructions, the district court gave the Fifth Circuit's pattern "willful blindness" or "deliberate ignorance" instruction:

> You may find that a defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of the defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

Pet. App. 41 (quoting 5th Cir. Pattern Crim. Jury Instructions § 1.37 (2001)). Petitioners had requested an

alternative deliberate-ignorance instruction that would have required the jury to find that a defendant "was *subjectively* aware of a high probability of the existence of illegal conduct and *purposefully* contrived to avoid learning of the illegal conduct." See 12-5847 Pet. 9.

c. After three days of deliberations, the jury found petitioners guilty on the conspiracy count and on many, but not all, of the false-reporting and wire-fraud counts. Pet. App. 12. On December 17, 2009, the district court sentenced Brooks to 168 months of imprisonment, and Phillips and Walton to 135 months of imprisonment. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1-81.

a. The court of appeals rejected petitioners' argument that the pattern instruction on deliberate ignorance given by the district court "was an improper statement of the law in light of the Supreme Court's recent decision in *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060 (2011)" (*Global Tech*).[2] Pet. App. 44-46. The court of appeals observed that *Global-Tech* had described willful blindness as requiring "proof that: '(1) the defendant[] subjectively believe[d] that there [was] a high probability that a fact exists and (2) the defendant [took] deliberate actions to avoid learning of that fact.'"[3]

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[2] The court of appeals also rejected petitioners' contention that the deliberate-ignorance instruction was not warranted in light of the evidence, finding "more than sufficient evidence to find that [petitioners] were subjectively aware of a high [probability] of the existence of illegal conduct and that they purposely contrived to avoid learning of the illegal conduct." Pet. App. 42-43. Petitioners do not renew that contention before this Court. See, *e.g.*, 12-218 Pet. 7-8.

[3] The court of appeals used the terms "willful blindness" and "deliberate ignorance" interchangeably; this brief does likewise. See Pet. App. 44-45 & n.19; *United States* v. *Vasquez*, 677 F.3d 685, 696

Id. at 44 (quoting *Global-Tech*, 131 S. Ct. at 2070) (brackets in original). While the court acknowledged that the Fifth Circuit pattern instruction given by the district court "does not use the same language as *Global-Tech*," the court held that the district court's instruction adequately conveyed the core requirements identified in *Global-Tech*. *Id.* at 46. Specifically, the district court's requirement that petitioners must have deliberately closed their eyes to an otherwise-obvious fact conveyed that petitioners must have "subjectively believe[d] that there [was] a high probability that a fact exists." *Id.* at 44. And the district court's instruction that petitioners must have "deliberately blinded" themselves to the otherwise-obvious fact conveyed that petitioners had to have made active efforts to avoid learning of the fact. *Id.* at 45. The court of appeals therefore concluded that the district court's instruction did not suffer from "the same failings as the Federal Circuit standard reversed in *Global Tech*." *Ibid.* That standard had departed substantively from the elements of willful blindness by requiring only a "known risk," and by omitting the requirement that the defendant "make an active effort to avoid knowledge." *Id.* at 45-46; see *Global-Tech*, 131 S. Ct. at 2071.

b. The court of appeals also rejected Walton's argument that the district court should have either granted Guilbault immunity or compelled the government to do so. Pet. App. 62-66. The court explained that under Fifth Circuit precedent, a district court has no authority to grant immunity to a witness when the government has not done so. *Id.* at 65 (citing *United States* v. *Thevis*, 665 F.2d 616, 638-641 (5th Cir.), cert. denied, 456

(5th Cir. 2012) (referring to "willful blindness" as "deliberate ignorance's civil equivalent").

U.S. 1008, and 458 U.S. 1109, and 459 U.S. 825 (1982)). "At most," the court observed, "this Court has left open the possibility" that a district court might compel the government to grant immunity when "necessary to stem government abuse." *Ibid.*

The court of appeals held that the district court did not abuse its discretion in declining to compel immunity because "Walton has failed to show" that Guilbault's invocation of his Fifth Amendment rights was the result of any prosecutorial misconduct. Pet. App. 65-66. The court explained that the prosecutor's call to Guilbault's attorney the night before Guilbault would have testified was a reasonable "inquiry to determine whether the government would need to prepare to cross-examine Guilbault," and that Guilbault's attorney had informed the court that his client's decision to invoke the Fifth Amendment was not the result of any governmental pressure. *Id.* at 66. The court also rejected Walton's other asserted evidence of prosecutorial misconduct, concluding that the government's postponements of Guilbault's sentencing were a reasonable means of ensuring his continued cooperation as a potential government witness and that the government's ultimate decision not to present Guilbault as a witness was a justifiable response to legitimate concerns about Guilbault's truthfulness. *Id.* at 63, 66.

The court of appeals further held that although the Third and Ninth Circuits do not require prosecutorial misconduct as a condition of compelling a grant of immunity, the district court would have been justified in declining to compel immunity under the standards used in those circuits. Pet. App. 65 n.28. The court explained that Guilbault's testimony was not essential to Walton's case, as required under the Third Circuit's precedent.

Ibid. (citing *Government of the Virgin Islands* v. *Smith*, 615 F.2d 964, 974 (1980)). The court further observed that Guilbault's testimony would not have "directly contradict[ed]" the testimony of the government's witnesses, as required under the Ninth Circuit's precedent. See *ibid.* (citing *United States* v. *Straub*, 538 F.3d 1147, 1156-1157 (2008)). Even if Guilbault would have testified that Walton never asked him to send false trade information to the industry newsletters, the court reasoned, such testimony would not have contradicted the testimony of other witnesses that Walton had provided *them* with information about his financial positions.[4] *Ibid.*

ARGUMENT

Petitioners contend (12-218 Pet. 7-16, 12-5812 Pet. 27-31, 12-5847 Pet. 22-27) that the deliberate-ignorance instruction given by the district court is inconsistent with this Court's decision in *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 131 S. Ct. 2060 (2011) (*Global-Tech*). Petitioners Walton and Phillips further contend (12-5847 Pet. 11-22; 12-5812 Pet. 14-26) that the district court erred by refusing either to grant immunity to a potential defense witness or to compel the government to do so. Further review is unwarranted. The court of appeals' decision is correct, and it does not conflict with any decision of this Court or other courts of appeals.

1. Petitioners argue (12-218 Pet. 7-16, 12-5812 Pet. 27-31, 12-5847 Pet. 22-27) that the deliberate-ignorance

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[4] The court of appeals also rejected petitioners' contention that the government interfered with EPME's payment of their legal fees, as well as petitioners' challenges to the applicability and constitutionality of the CEA, various jury instructions, and the calculation of their sentences. Pet. App. 13-41, 46-61, 67-81. Petitioners do not renew those contentions here.

instruction given by the district court—which followed the Fifth Circuit's pattern instruction—is inconsistent with *Global-Tech*. Petitioners are incorrect. The court of appeals correctly held that although the deliberate-ignorance instruction given in this case does not precisely track the language used by the *Global-Tech* Court in synthesizing the ingredients generally understood to constitute willful blindness, the instruction conveyed the substance of the standard set forth in *Global-Tech*.

a. *Global-Tech*, a civil patent case, concerned whether "a party who 'actively induces infringement of a patent' under 35 U.S.C. § 271(b) must know that the induced acts constitute patent infringement." 131 S. Ct. at 2063. The Court held that knowledge of the infringing nature of the acts is required under Section 271(b) and that the knowledge requirement could be satisfied by "willful blindness." *Id.* at 2068. To determine the standard that should be used to determine the existence of willful blindness in the patent-inducement context, the Court looked to the criminal context, observing that "[t]he doctrine of willful blindness is well established in criminal law." *Ibid.*

Surveying the courts of appeals, the Court explained that "[w]hile the Courts of Appeals 'articulate the doctrine of willful blindness in slightly different ways,'" they "all appear to agree on two basic requirements: (1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact." *Global-Tech*, 131 S. Ct. at 2070. The Court stated that "[w]e think these requirements give willful blindness an appropriately limited scope that surpasses recklessness and negligence." *Ibid.*

The Court distilled these aspects of willful blindness from the varying formulations used by the courts of appeals. *Global-Tech*, 131 S. Ct. at 2070 n.9. For instance, the Court approvingly quoted the Sixth Circuit's definition, which "prevent[s] a criminal defendant from escaping conviction merely by deliberately closing his eyes to the obvious risk that he is engaging in unlawful conduct." *Ibid.* (quoting *United States* v. *Holloway*, 731 F.2d 378, 380-381 (1984) (per curiam)). The Court also quoted the Seventh Circuit's formulation, under which "knowledge may in some circumstances be inferred from strong suspicion of wrongdoing coupled with active indifference to the truth," *ibid.* (quoting *United States* v. *Draves*, 103 F.3d 1328, 1333 (7th Cir.), cert. denied, 521 U.S. 1127 (1997)), and the Eighth Circuit's definition, which requires that the defendant be "put * * * on notice that criminal activity was particularly likely" and that he "fail[] to investigate those facts," *ibid.* (quoting *United States* v. *Florez*, 368 F.3d 1042, 1044 (8th Cir. 2004)). The Court also cited a Fifth Circuit decision that held that a deliberate-ignorance instruction is appropriate if the record supports inferences that the defendant was "subjectively aware of a high probability of the existence of" a fact and "purposely contrived to avoid learning" of it. *United States* v. *Freeman*, 434 F.3d 369, 378 (2005).

The *Global-Tech* Court did not suggest that it intended its distillation of the "basic requirements" of willful blindness, 131 S. Ct. at 2070, to supersede or replace the range of circuit court formulations on which it relied. Rather, the Court's approving citation of varying verbal formulations of willful blindness demonstrates the opposite. The Court recognized that these formulations in fact reflected "agree[ment]" on the core requirements of

willful blindness, notwithstanding differences in the terminology. *Ibid.*

In evaluating the adequacy of the Federal Circuit's willful-blindness standard, the Court examined whether that standard included the core requirements of willful blindness. The Court concluded that the Federal Circuit had departed from the "proper willful blindness standard" applied by the other courts of appeals because it required only a "known risk" of infringement and "deliberate indifference" to that risk, rather than a subjective belief that infringement has likely occurred and "active efforts * * * to avoid knowing about the infringing nature of the activities." *Global-Tech*, 131 S. Ct. at 2071. The Court did not suggest that it found the Federal Circuit's standard inadequate because that court had used wording that was different from the Court's. Rather, the Court emphasized that the Federal Circuit's standard required only recklessness and was therefore substantively more lenient than the standard that the Court drew from the decisions of other courts of appeals. *Ibid.*

b. Petitioners contend that the deliberate-ignorance instruction given in this case was inadequate under *Global-Tech*. Petitioners are incorrect. Because *Global-Tech* does not suggest that lower courts must adopt the precise verbal formulation that the Court used to synthesize the standards employed by the courts of appeals, the Fifth Circuit correctly examined whether the district court's instruction contained the core requirements identified in *Global-Tech*. As the court of appeals explained, the district court's instruction encapsulated both subjective awareness of a high probability of wrongdoing and the active efforts to avoid learning of that fact. See *Global-Tech*, 131 S. Ct. at 2070.

> The district court instructed the jury as follows:
>
> You may find that a defendant had knowledge of a fact if you find that the defendant deliberately closed his eyes to what would otherwise have been obvious to him. While knowledge on the part of a defendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish, knowledge can be inferred if the defendant deliberately blinded himself to the existence of a fact.

Gov't C.A. Br. 137. As the court of appeals correctly reasoned, the first requirement of *Global-Tech*'s formulation—that the defendant subjectively believed that there is a high probability that a fact exists—was reflected in the district court's direction that petitioners have "'deliberately closed [their] eyes' to a fact that 'would otherwise have been obvious to [them].'" Pet. App. 45. The instruction required that the fact be obvious to petitioners themselves, thus indicating that petitioners had to have been subjectively aware of the otherwise-obvious fact. See, *e.g.*, *United States* v. *Griffin*, 524 F.3d 71, 80 n.8 (1st Cir. 2008) (holding that requirement in federal pattern instruction that "*this* defendant" closed her eyes to a fact that would have been "obvious to *her*" connoted subjective, rather than objective, standard); but cf. 12-5847 Pet. 25 (arguing that district court employed an objective standard). And by requiring that petitioners must have purposefully decided to close their eyes to a fact that would otherwise have been "obvious" to them, the instruction indicated that the petitioners must have believed that there was a high likelihood that the fact existed.

The second requirement of *Global-Tech*'s formulation—that the defendant have taken "deliberate actions" to avoid learning of the fact, 131 S. Ct. at 2070—was sat-

isfied by the district court's direction that petitioners must have "deliberately closed [their] eyes" and "deliberately blinded [themselves] to the existence of a fact." Pet. App. 45. Both formulations clearly connote that petitioners must have taken steps to avoid learning of the falsity of their reports. Thus, as in the *Global-Tech* formulation, petitioners could be convicted only upon a finding that they took "deliberate actions to avoid confirming a high probability of wrongdoing and * * * can almost be said to have actually known the critical facts." 131 S. Ct. at 2070-2071.

Any doubt that the district court's instruction is functionally equivalent to *Global-Tech*'s formulation of the elements of willful blindness is eliminated by an examination of the circuit court willful-blindness standards on which the *Global-Tech* Court relied. In particular, the Sixth Circuit standard quoted in the Court's opinion—that the defendant "deliberately clos[e] his eyes to the obvious risk that he is engaging in unlawful conduct," 131 S. Ct. at 2070 n.9—is nearly identical to the standard used by the district court in this case.

Petitioners contend (12-218 Pet. 9-11; 12-5812 Pet. 29; 12-5847 Pet. 24) that the district court's instructions improperly permitted the jury to convict based merely on a finding of recklessness or negligence. To the contrary, the instruction required subjective belief in the probable existence of an otherwise-obvious fact and deliberate efforts to avoid learning of that fact. The court of appeals therefore correctly concluded that the instruction did not permit the jury to convict upon a finding of recklessness because the instruction contained the same requirements as those that the *Global-Tech* Court identified. Pet. App. 44-45. The instruction, moreover, cautioned the jury that "knowledge on the part of the de-

fendant cannot be established merely by demonstrating that the defendant was negligent, careless, or foolish." *Id.* at 41. That instruction ensured that the jury—which is presumed to have followed the court's instructions—did not convict based on a finding that petitioners simply disregarded a known risk.[5] See *United States* v. *Geisen*, 612 F.3d 471, 486 (6th Cir. 2010) ("cautionary language" instructing the jury that "[c]arelessness, or negligence, or foolishness on [the defendant's] part is not the same as knowledge" forecloses "'the possibility of th[e] error' that a conviction is improperly based on negligence or carelessness") (alterations in original), cert. denied, 131 S. Ct. 1813 (2011); *United States* v. *Rayborn*, 491 F.3d

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[5] Petitioner Brooks also challenges (12-218 Pet. 11-15) the district court's instruction, in response to a jury question about the conspiracy charge, that "[t]he government is not required to prove that a defendant knew the purpose of the agreement was in fact unlawful, that is, in violation of a statute, but the government must prove the defendant knew the purpose of the agreement, and the government must prove that the purpose was in fact unlawful." Pet. App. 36. Brooks contends (12-218 Pet. 14) that this instruction permitted the jury to convict him of wire fraud and conspiracy to commit wire fraud even if it concluded that Brooks believed he was providing accurate information to the industry publications. As the court of appeals correctly explained, however, the instructions given on the elements of wire fraud clearly informed the jury that "conscious knowing intent to defraud" was necessary. Pet. App. 40 n.18. The jury was thus informed that it had to find that petitioners knew that their reporting was false in order to convict. To the extent that Brooks argues that the jury should have been required to find that petitioners knew that their fraudulent conduct violated the specific federal statutes under which they were charged, the court of appeals correctly held that intent to defraud is all that is required. *Ibid.*; cf. *Cheek* v. *United States*, 498 U.S. 192, 199-201 (1991) (explaining that certain tax statutes are an "exception" to the general rule because they require knowledge of a legal duty).

513, 520-521 (6th Cir. 2007), cert. denied, 552 U.S. 1188 (2008).

c. Petitioners contend (12-5812 Pet. 29-31; 12-5847 Pet. 24-27) that a conflict among the circuits exists with respect to the proper deliberate-ignorance instruction after *Global-Tech*. Petitioners first rely on the fact that other circuits already used the formulation employed by the Court in *Global-Tech*. See *United States* v. *Jinwright*, 683 F.3d 471, 479-480 (4th Cir. 2012), petition for cert. pending, No. 12-6350 (filed Sept. 20, 2012); *United States* v. *Heredia*, 483 F.3d 913, 919-920 (9th Cir.) (en banc), cert. denied, 554 U.S. 1077 (2007); *United States* v. *Mari*, 47 F.3d 782, 785 (6th Cir.), cert. denied, 515 U.S. 1166 (1995). But as the *Global-Tech* Court recognized, the courts of appeals have "articulate[d] the doctrine of willful blindness in slightly different ways," while agreeing on the fundamental requirements of subjective awareness of a high probability that a fact exists and a deliberate effort to avoid learning of the fact. 131 S. Ct. at 2070. The Fifth Circuit's conclusion that its pattern instructions embody the *Global-Tech* standards does not conflict with decisions that approve the precise language that *Global-Tech* adopted or indicate any disagreement on the substantive standard for deliberate ignorance.

Petitioners point out that the Third and Eighth Circuits have changed their pattern instruction on deliberate ignorance to track the *Global-Tech* formulation more closely. That linguistic change is permissible, but it does not suggest any substantive disagreement. And in any event, the pattern instructions on which petitioners rely (12-5847 Pet. 25-26) cannot create a circuit conflict warranting this Court's review, because those instructions, like all pattern instructions, are not intended to

bind courts, but are instead merely "helpful suggestions." See *United States* v. *Norton*, 846 F.2d 521, 525 (8th Cir. 1988); *United States* v. *Maury*, 695 F.3d 227, 259 (3d Cir. 2012).

d. In any event, petitioners were not prejudiced by the use of a deliberate-ignorance instruction that differed from the precise language used in *Global-Tech*. As the court of appeals observed, "there was a great deal of evidence admitted at trial" showing that petitioners "believed that their conduct was illegal, or were aware of a high probability that it was illegal" and that they took steps to "purposely avoid[] learning of the illegal nature of the[ir] conduct." Pet. App. 43-44; see *Neder* v. *United States*, 527 U.S. 1, 9 (1999) (noting this Court "applie[s] harmless-error analysis to cases involving improper instructions on a single element of the offense," and collecting cases).

The government presented ample evidence that petitioners were subjectively aware of a high probability that the data they reported to the industry publications was false, including emails among petitioners and other traders discussing the fact that the publication "had a standardized format for reporting data, but * * * the 'integrity of the data . . . is not verified.'" Pet. App. 10. Brooks "told co-workers that they would 'be toast' if the government looked into their index reporting practices" and "ordered traders to delete all copies of the reports that had been sent to the trade publications." *Id.* at 43. Petitioners also were involved in an email exchange in which the traders agreed to continue reporting data based on "book bias" rather than "verifiable" trades, and also agreed that they should not discuss the "book bias" method over email. *Id.* at 10. As the court of appeals explained, "an obvious inference from these

comments is that the traders were aware their 'book bias' method of reporting was likely illegal." *Id.* at 43.

The government also presented substantial evidence that petitioners took deliberate steps to "avoid learning of illegal conduct." Pet. App. 43-44. Evidence in the record showed that petitioners purposely avoided learning of *Inside FERC*'s instructions for reporting data, including by failing to open reporting instructions emailed by the publication. Gov't C.A. Br. 143. The government also presented evidence that Brooks and Walton avoided learning how the data sent to *Inside FERC* were created, relying on the fact that the publication would "basically take pretty much anything you would give them." *Ibid.* In addition, Phillips was aware that certain traders refused to report their data because the "numbers * * * weren't right," but he did not report this to the El Paso ethics committee or the legal department. *Id.* at 140-141.

Because a rational jury that found petitioners guilty under the instruction given would have reached the same result under instructions modeled on the language in *Global-Tech*, this would not be an appropriate vehicle for addressing the precise language for instructing a jury on deliberate ignorance. Further review is not warranted.

2. Petitioners Walton and Phillips contend (12-5847 Pet. 11-22; 12-5812 Pet. 14-26) that the district court erred by refusing either to grant immunity to Guilbault, a potential defense witness, or to compel the government to do so. Petitioners assert a conflict among the circuits concerning whether and when a court may compel the government to grant immunity to a witness. This case is not a suitable vehicle for resolving any disagreement among the circuits, however, because the

court of appeals correctly concluded that the district court's refusal to compel immunity would have been justified under either of the two standards used by other courts of appeals.

a. The court of appeals correctly held that the district court did not abuse its discretion in declining to grant Guilbault immunity. Pet. App. 62-66. The court explained that it was well established that a district court has no inherent power to grant immunity and that a court may not compel a grant of immunity simply because a witness may have exculpatory evidence. *Id.* at 65. Fifth Circuit precedent "left open the possibility," however, that a district court might appropriately compel the government to grant immunity to a defense witness when "necessary to stem government abuse." *Ibid.* (citing *United States* v. *Thevis*, 665 F.2d 616, 641 (5th Cir.), cert. denied, 456 U.S. 1008, and 458 U.S. 1109, and 459 U.S. 825 (1982)).

The court of appeals correctly affirmed the district court's finding that prosecutors committed no misconduct in declining to grant Guilbault immunity. See Pet. App. 66; 01/24/08 Trial Tr. 5438 (district court's conclusion that it "ha[d] found absolutely no misconduct"). Walton's "sole evidence" of abuse consisted of the prosecutor's call to Guilbault's counsel the night before Guilbault was to testify; the government's maintaining Guilbault as a potential prosecution witness while professing concerns about his truthfulness; and the government's seeking continuances of Guilbault's sentencing. Pet. App. 66. The court correctly concluded that this evidence raises no inference of prosecutorial misconduct. The government's call to Guilbault's counsel was prompted by Walton's announcement that he would call Guilbault to testify the next day, and the government's in-

tent was simply to determine whether it was necessary to prepare to cross-examine him. *Ibid.* The government had a "reasonable basis" for concluding, after designating Guilbault as a potential government witness, that inconsistencies in Guilbault's statements rendered him insufficiently credible to allow him to testify for the government. *Id.* at 64, 66. Finally, the government's postponement of Guilbault's sentencing resulted from its reasonable desire to facilitate Guilbault's potential cooperation in petitioners' prosecution. *Id.* at 63a. The lower courts' fact-bound conclusion that the government did not intentionally seek to prevent Guilbault from testifying for the defense is correct and does not warrant this Court's review.

b. Petitioners contend that the circuits are divided concerning the circumstances in which a district court may grant immunity to a defense witness, or compel the government to do so. Any variance in the standards used by the circuit courts does not warrant this Court's review.

As an initial matter, the courts of appeals have overwhelmingly held that "a district court does not have the inherent authority to grant a defense witness use immunity." *United States* v. *Serrano*, 406 F.3d 1208, 1217 (10th Cir.), cert. denied, 546 U.S. 913 (2005); see *United States* v. *Castro*, 129 F.3d 226, 232 (1st Cir. 1997), cert. denied, 523 U.S. 1100 (1998); *United States* v. *Turkish*, 623 F.2d 769, 773 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981); *United States* v. *Moussaoui*, 382 F.3d 453, 466 (4th Cir. 2004), cert. denied, 544 U.S. 931 (2005); *Thevis*, 665 F.2d at 639-640 (5th Cir.); *United States* v. *Pennell*, 737 F.2d 521, 527-528 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *United States* v. *Herrera-Medina*, 853 F.2d 564, 568 (7th Cir. 1988); *United States*

v. *Capozzi*, 883 F.2d 608, 613-614 (8th Cir. 1989), cert. denied, 495 U.S. 918 (1990); *United States* v. *Alessio*, 528 F.2d 1079, 1081-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976); *United States* v. *Cuthel*, 903 F.2d 1381, 1384 (11th Cir. 1990); *United States* v. *Perkins*, 138 F.3d 421, 424 (D.C. Cir.), cert. denied, 523 U.S. 1143 (1998). As the Second Circuit explained in *Turkish*, any judicial interference in the prosecution's immunity decisions raises significant separation-of-powers concerns, because granting immunity is a function of the Executive Branch, not of the judiciary, and "a court is in no position to weigh the public interest in the comparative worth of prosecuting a defendant or his witness." *Turkish*, 623 F.2d at 776.

Several of the courts of appeals have stated, however, that there may be circumstances in which it would be appropriate for the district court to compel the government to grant a defense witness immunity. The majority of the courts of appeals to consider the issue have, like the Fifth Circuit, indicated that such an order would be available, if at all, upon a showing of prosecutorial misconduct. See Pet. App. 65; *United States* v. *Angiulo*, 897 F.2d 1169, 1191-1192 (1st Cir.), cert. denied, 498 U.S. 845 (1990); *United States* v. *Ebbers*, 458 F.3d 110, 118-120 (2d Cir. 2006) (stating that prosecutorial "overreaching" would be necessary, but holding that district court did not abuse its discretion in declining to compel grant of immunity), cert. denied, 549 U.S. 1274 (2007); *United States* v. *Abbas*, 74 F.3d 506, 512 (4th Cir.) (same), cert. denied, 517 U.S. 1229 (1996); *United States* v. *Wright*, 634 F.3d 917, 919-920 (7th Cir. 2011); *United States* v. *Blanche*, 149 F.3d 763, 767-768 (8th Cir. 1998) (stating that if district court may ever compel grant of immunity, it would be in a situation involving prosecuto-

rial misconduct); *Serrano*, 406 F.3d at 1218 n.2 (10th Cir.) (reserving question whether prosecutorial misconduct might justify compelling immunity); *United States* v. *Sawyer*, 799 F.2d 1494, 1506-1507 (11th Cir. 1986), cert. denied, 479 U.S. 1069 (1987). In addition, the Sixth Circuit has suggested that government conduct that results in "egregiously lopsided" access to evidence may justify compelling the government to grant immunity, but it has never so held.[6] *United States* v. *Talley*, 164 F.3d 989, 997 (6th Cir.), cert. denied, 526 U.S. 1137 (1999); see also *United States* v. *Emuegbunam*, 268 F.3d 377, 401 n.5 (6th Cir. 2001), cert. denied, 535 U.S. 977 (2002).

Only two courts of appeals have held that a district court may compel the government to grant immunity, or grant immunity itself, in situations that do not involve government misconduct. In *Government of the Virgin Islands* v. *Smith*, 615 F.2d 964 (1980), the Third Circuit held that a trial court has the inherent authority to grant judicial immunity to a potential defense witness whose testimony would be "clearly" exculpatory and essential to the defendant's case, when there are "no strong governmental interests which countervail against a grant of immunity."[7] *Id.* at 972; see *United States* v.

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[6] Petitioners' amici argue that the Second and Eighth Circuits have held that a court may grant immunity in the absence of evidence of prosecutorial misconduct. 12-5847 Former U.S. Att'ys Amicus Br. 11-13. That is incorrect. See *Ebbers*, 458 F.3d at 119 (requiring a "two-pronged showing" of (1) government overreaching or discriminatory use of immunity, and (2) the material, exculpatory nature of the evidence); *Blanche*, 149 F.3d at 767-768 (stating that witness's testimony must be clearly exculpatory and government must have committed misconduct).

[7] *Smith*'s holding that courts have inherent authority to grant immunity is in tension with this Court's statement, in the context of

Mike, 655 F.3d 167, 171-172 (3d Cir. 2011). And in *United States* v. *Straub*, 538 F.3d 1147 (2008), the Ninth Circuit held that a district court may compel the prosecution to grant immunity to a defense witness when the prosecution has already granted immunity to a government witness in order to obtain that witness's testimony, but the prosecution has "denied immunity to a defense witness whose testimony would have directly contradicted that of the government witness, with the effect of so distorting the fact-finding process that the defendant was denied his due process right to a fundamentally fair trial." *Id.* at 1162-1164. Both the Third and Ninth Circuits have recognized, however, that granting, or compelling the government to grant, immunity raises significant separation-of-powers concerns and is appropriate only in narrow circumstances. See *Mike*, 655 F.3d at 172; *Straub*, 538 F.3d at 1156.

This case would not be a suitable vehicle to resolve the divergence between the Third and Ninth Circuits and the other courts of appeals to consider the issue because the Fifth Circuit held that the district court was justified in declining to compel immunity even under the standards applied by the Third and Ninth Circuits. Pet. App. 65 n.28. The court of appeals explained that Guilbault's testimony would not have "directly contradict-[ed]" the testimony of the government's witnesses, as

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construing the immunity provisions set forth in 18 U.S.C. 6002 and 6003, that "[n]o court has [statutory] authority to immunize a witness" because that "responsibility * * * is peculiarly an executive one." *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983); see *United States* v. *Doe*, 465 U.S. 605, 616-617 (1984) ("The decision to seek use immunity necessarily involves a balancing of the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation.").

required under the Ninth Circuit's precedent. *Ibid.*; see *Straub*, 538 F.3d at 1156-1157. Even if, as Walton argues (12-5847 Pet. 17), Guilbault would have testified that Walton never asked him to send false trade information to the industry newsletters, such testimony would not have contradicted the testimony of other witnesses that Walton had provided *them* with information about his financial positions. Pet. App. 65 n.28. Nor was Guilbault's testimony essential to petitioner Walton's case, as required under the Third Circuit's precedent. See *Smith*, 615 F.2d at 972. Because Walton had already presented evidence "that he did not always provide the traders with his positions," Guilbault's possible testimony "would not have been materially more exculpatory" than other evidence introduced at trial. Pet. App. 65-66 n.28 (explaining that exculpatory evidence must not be cumulative). In sum, Walton did not demonstrate that the exclusion of Guilbault's testimony "skewed the evidence in the government's favor." *Ibid.*

The court of appeals' decision thus demonstrates that Walton would not receive any benefit from a ruling that a district court has discretion to compel the government to grant immunity in the circumstances set forth by the Third and Ninth Circuits. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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NOVEMBER 2012