Nos. 17-1134 and 17-7809

In the Supreme Court of the United States

MARK A. ELLISON, DAVID D. SWENSON, AND JEREMY S. SWENSON, PETITIONERS

v.

UNITED STATES OF AMERICA

DOUGLAS L. SWENSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOHN P. CRONAN
Acting Assistant Attorney General
WILLIAM A. GLASER
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court erred in instructing the jury that a fact is "material" under the securities laws if there is a substantial likelihood that a reasonable investor would consider it important in making the decision to purchase securities.

2. Whether the district court plainly erred in instructing the jury that the "willfully" element of 15 U.S.C. 78ff(a) requires proof that the defendant acted for a wrongful purpose, but not proof that he knew that his actions were unlawful.

3. Whether the district court abused its discretion by requiring petitioners to disclose, as part of the reciprocal discovery required by Federal Rule of Criminal Procedure 16(b)(1)(A), the non-impeachment exhibits they intended to introduce during cross-examination of witnesses called by the government.

4. Whether the district court abused its discretion by excluding as hearsay statements in an email that purported to describe an out-of-court conversation.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a[1]) is not published in the Federal Reporter but is reprinted at 704 Fed. Appx. 616. The order of the district court addressing petitioners' reciprocal-discovery obligations under Federal Rule of Criminal Procedure 16 (Pet. App. 29a-38a) is reported at 298 F.R.D. 474. The order of the district court denying petitioners' post-trial

[1] References to "Pet. App." refer to the appendix to the petition for a writ of certiorari in No. 17-1134.

motions (Pet. App. 39a-69a) is not reported in the Federal Supplement but is available at 2014 WL 4071034.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2017. A petition for rehearing was denied on October 13, 2017 (Pet. App. 28a). On January 5, 2018, Justice Kennedy extended the time within which to file petitions for writs of certiorari to and including February 10, 2018. The petitions were filed on February 12, 2018 (Monday). 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 District of Idaho, petitioners were convicted on 44 counts of securities fraud, in violation of 15 U.S.C. 78j (2006) and 15 U.S.C. 78ff. Petitioner Douglas Swenson was also convicted on 34 counts of wire fraud, in violation of 18 U.S.C. 1343. The district court sentenced Douglas Swenson to 240 months of imprisonment, petitioner Mark Ellison to 60 months of imprisonment, and petitioners David and Jeremy Swenson to 36 months of imprisonment. The court also imposed varying terms of supervised release and ordered restitution. The court of appeals affirmed the convictions and sentences, but vacated the district court's restitution order and remanded for entry of a corrected order. Pet. App. 1a-23a.

1. Douglas Swenson was the president, chief executive officer, and majority owner of Diversified Business Services and Investments, Inc. (DBSI). Ellison was DBSI's general counsel and was responsible for its regulatory compliance. David and Jeremy Swenson (Douglas Swenson's sons) served as DBSI executives and were

present for all important meetings about DBSI's financial condition. Pet. App. 48a-52a; Gov't C.A. Br. 12.[2]

DBSI sold interests in shopping centers, office buildings, and other real-estate developments. It targeted investors seeking to take advantage of an Internal Revenue Code provision allowing deferred taxation for in-kind exchanges of property. DBSI sold investors tenant-in-common interests in the subject properties and then leased the properties back. DBSI would manage the properties on the investors' behalf and guarantee a rate of return on their investment—usually seven percent. DBSI kept any profit beyond the guaranteed return, but it was liable to investors if the properties operated at a loss. To minimize the perceived risk associated with investing in a particular property, DBSI consolidated all of its tenant-in-common investment properties into a Master Lease Portfolio. Pet. App. 44a.

Throughout the period covered by the indictment, DBSI represented to investors that the Master Lease Portfolio was profitable. In fact, it began losing money—more than $21 million in 2006, and $38 million in 2007. As a result, "DBSI was only able to continue functioning through the infusion of cash from the sale of new [tenant-in-common] [i]vestments," but that fact was "not disclosed to the investment community." Pet. App. 45a.

DBSI's marketing materials and financial statements also contained other significant misstatements and omissions. For example, Douglas Swenson had loaned roughly $225 million of DBSI's money to startup technology companies that he owned, known as the Stellar companies. Pet. App. 46a. Those loans were risky—indeed, the Stellar companies never made a significant

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[2] References to DBSI include both DBSI and its affiliated companies. See Pet. App. 2a n.1.

payment on them. *Ibid.* But "[t]his questionable and very speculative asset was hidden" on DBSI's financial statements "by netting it against the monies DBSI owed to its bond and note holders, so as to show a very small netted number." *Ibid.* For example, rather than showing more than $225 million in risky loans, DBSI's 2007 balance sheet showed only a $1.4 million asset for "net receivable from affiliates." Gov't C.A. Br. 31 (brackets omitted).

In addition, DBSI represented that its Master Lease Portfolio was backed by a subsidiary company with more than $15 million in liquid assets. Pet. App. 45a. DBSI fostered that impression by depositing millions of dollars into the subsidiary's accounts just before its audit at the end of each year, but "the bulk of that money would then be removed in early January," such that the subsidiary "had virtually no cash on hand for the remainder of the year." *Id.* at 46a.

Finally, DBSI collected from investors an amount it called "Accountable Reserves," which its marketing materials stated would be used exclusively for capital improvements and other expenditures to benefit the investors' properties. Pet. App. 47a. In fact, "DBSI spent the bulk of the accountable reserve funds for DBSI's general operations." *Ibid.*

2. A grand jury in the District of Idaho returned a superseding indictment charging petitioners with conspiracy to commit securities fraud, wire fraud, mail fraud, and interstate transportation of stolen property, in violation of 18 U.S.C. 371, 1341, 1343, and 18 U.S.C. 2314 (2006); two counts of conspiracy to commit money laundering (only one count as to Ellison), in violation of 18 U.S.C. 1956 (2006 & Supp. II 2008); 44 counts of securities fraud, in violation of 15 U.S.C. 78j (2006) and

15 U.S.C. 78ff; 34 counts of wire fraud, in violation of 18 U.S.C. 1343; six counts of interstate transportation of property taken by fraud, in violation of 18 U.S.C. 2314 (2006); and two counts of bank fraud, in violation of 18 U.S.C. 1344. C.A. J.E.R. 23-75.[3]

a. Federal Rule of Criminal Procedure 16 provides that, if a defendant requests disclosure of the exhibits the government intends to use in its case-in-chief and the government complies, the defendant must disclose any exhibits within his control that he "intends to use * * * in [his] case-in-chief at trial." Fed. R. Crim. P. 16(b)(1)(A). Petitioners requested disclosure under Rule 16, and the government complied. Pet. App. 34a-36a. But petitioners did not provide reciprocal disclosures, in part because they asserted that Rule 16(b)(1)(A) reached only exhibits they planned to introduce after the government had rested, and not any documents they intended to introduce while cross-examining witnesses called by the government. *Id.* at 31a-37a.

The district court rejected that view, reasoning that an exhibit introduced for a non-impeachment purpose during cross-examination is part of the defendant's "case-in-chief" under Rule 16(b)(1)(A). Pet. App. 34a. Among other things, the court observed that petitioners had not "presented any case law supporting their narrow reading" of Rule 16(b)(1)(A)'s reciprocal-discovery obligation, a reading that would effectively render that obligation "a nullity unless a defendant asserted an affirmative defense or planned to put on his or her case after the government rested." *Id.* at 33a-34a. The court

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[3] References to "C.A. J.E.R." refer to the parties' joint excerpts of record filed in the court of appeals. References to "C.A. Pets. E.R." refer to petitioners' shared excerpts. And references to "C.A. DLS E.R." refer to the excerpts filed by Douglas Swenson.

accordingly directed petitioners to disclose their non-impeachment exhibits. *Id.* at 38a.

b. During the trial, petitioners sought to introduce an email that Ellison had sent to two employees in DBSI's legal department in January 2008. The email stated:

> I reviewed the sections of the draft [private placement memorandum (PPM)] that addressed the use of funds for the Stellar companies. I believe we need more disclosure about those companies. Doug has also finished his review and reached the same conclusion. As I spoke to Doug about it over the weekend we thought that it might be easiest to add an Exhibit to the PPM that describes each Stellar company and includes some financial information. Doug is going to work on the financial information. Let's talk Monday about the other information for the Stellar companies.
>
> There are also some other changes to the draft PPM that I will give you on Monday. Thanks.

C.A. DLS E.R. 36.

The government objected that the email was hearsay, and the district court admitted it only "for the limited purpose of reflecting Mr. Ellison's state of mind when he wrote [the email]"—not for the truth of the statements it contained. C.A. J.E.R. 6334-6335. Consistent with that limited purpose, the court required that the sentences referring to "Doug" (Douglas Swenson) be redacted. *Id.* at 6333.

c. With respect to the securities-fraud counts, the district court instructed the jury (using the Ninth Circuit model instruction) that "[a] fact is material if there is a substantial likelihood that a reasonable investor would consider it important in making the decision to

purchase securities." Pet. App. 79a; see *Ninth Circuit Manual of Model Criminal Jury Instructions* 9.9, at 483 (2010).

The district court also instructed that, to find petitioners guilty of securities fraud, the jury had to find that they acted "willfully." Pet. App. 77a. Without objection from petitioners, the court defined "willfully" as follows:

> "Willfully" means intentionally undertaking an act, making an untrue statement, or failing to disclose for the wrongful purpose of defrauding or deceiving someone. Acting willfully does not require that the defendant know that the conduct was unlawful. You may consider evidence of the defendant's words, acts, or omissions, along with all the other evidence, in deciding whether the defendant acted willfully.

Id. at 78a.

d. The jury found all four petitioners guilty of all 44 securities-fraud counts, and it found Douglas Swenson guilty of all 34 wire fraud counts. Pet. App. 40a. On the government's motion, the district court dismissed the interstate transportation and bank fraud charges and one of the money laundering conspiracy counts. C.A. J.E.R. 80, 86, 92, 98. The jury acquitted petitioners on the remaining charges. Pet. App. 40a. The court sentenced Douglas Swenson to 240 months of imprisonment, Ellison to 60 months of imprisonment, and David and Jeremy Swenson to 36 months of imprisonment. C.A. J.E.R. 81, 87, 93, 99. It also ordered restitution. Pet. App. 22a.

3. In an unpublished opinion, the court of appeals affirmed petitioners' convictions and sentences, vacated the district court's restitution order, and remanded for the entry of a corrected order. Pet. App. 1a-23a. As

relevant here, the court rejected four challenges to petitioners' convictions.

First, the court of appeals rejected petitioners' contention that the district court had erred in instructing the jury on materiality by failing to expressly "tell the jury to consider the purported omission or misstatement in light of all the circumstances." Pet. App. 4a. The court agreed that materiality depends on "all of the circumstances." *Ibid.* It determined, however, that the district court had "adequately communicated that the jury should consider relevant circumstances in evaluating materiality." *Ibid.* The court explained the district court had instructed the jury to consider whether petitioners' statements and omissions would have been important to a "reasonable investor," and that "a reasonable investor would consider all of the circumstances in determining whether a false statement or omitted fact was significant." *Ibid.*

Second, the court of appeals rejected, on plain-error review, petitioners' contention that the district court had erred by instructing the jury that the "willfully" element of the securities-fraud charges did not require the government to prove that petitioners knew that their conduct was unlawful. Pet. App. 6a-7a. The court explained that, although the term "willfully" has a different meaning in some other criminal statutes, in the securities-fraud context it "'means intentionally undertaking an act that one knows to be wrongful,' and 'does *not* require that the actor know specifically that the conduct was unlawful.'" *Ibid.* (quoting *United States* v. *Tarallo*, 380 F.3d 1174, 1188 (9th Cir. 2004)).

Third, the court of appeals determined that the district court had properly "refus[ed] to cabin [petitioners'] 'case-in-chief'" for purposes of their reciprocal-

disclosure obligation under Rule 16(b)(1)(A) "to the period after which they called their first witness." Pet. App. 15a. The court explained that "a defendant may establish his defense by cross-examining the government's witnesses," not just by calling witnesses after the government has rested. *Ibid.*

Fourth, the court of appeals determined that "[t]he district court properly limited consideration of the [Ellison] email because it was hearsay, and was relevant only insofar as it" reflected Ellison's own state of mind. Pet. App. 16a. The court rejected Douglas Swenson's claim that the district court had abused its discretion by redacting the email's references to him. *Ibid.* The court explained that "the references to Douglas were relevant only insofar as Ellison accurately reported that Douglas had 'reached the same conclusion' and agreed with him that more disclosure was needed." *Id.* at 16a-17a. The court therefore determined that "[t]heir relevance lay only in the truth of the matters asserted by Ellison in the email" and that they were "properly redacted" as hearsay. *Ibid.*

ARGUMENT

Petitioners renew their challenges to the jury instructions on materiality and willfulness, the application of Rule 16, and the redaction of the Ellison email. The court of appeals correctly rejected each of those challenges. The court's nonprecedential decision does not conflict with any decision of this Court or another court of appeals. And, for a variety of reasons, this case would be a poor vehicle in which to consider the questions petitioners seek to raise even if those questions otherwise warranted this Court's review. The petitions for writs of certiorari should be denied.

1. Petitioners first contend (Pet. 13-19[4]; 17-7809 Pet. 10-14) that the court of appeals erred in upholding the district court's materiality instruction. But the instruction correctly conveyed the law—in fact, it was drawn almost verbatim from this Court's decision defining materiality in the securities context. This Court and the courts of appeals have also used other formulations to describe materiality, but those formulations simply reflect alternative ways of conveying the same standard. And even if the proper framing of jury instructions on materiality otherwise warranted this Court's review, this case would be a poor vehicle in which to consider that issue because petitioners' alternative materiality instruction was legally erroneous and because the overwhelming proof of materiality rendered any instructional error harmless.

a. Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, makes it unlawful to "use or employ, in connection with the purchase or sale of any security * * * , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange Commission (SEC)] may prescribe." 15 U.S.C. 78j(b). Rule 10b-5 implements that provision by making it unlawful:

> (a) To employ any device, scheme, or artifice to defraud,
>
> (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, or

[4] Unless otherwise noted, references to "Pet." refer to the petition for a writ of certiorari in No. 17-1134.

> (c) 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.

17 C.F.R. 240.10b-5.[5]

This Court's definition of "materiality" in the securities context originated in *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976), which addressed an SEC rule prohibiting false or misleading proxy statements. In that context, the Court held that "[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. "Put another way," the Court continued, "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." *Ibid.* This Court later held that the *TSC Industries* standard also governs in cases under Rule 10b-5. *Basic Inc.* v. *Levinson*, 485 U.S. 224, 232 (1988).

The district court in this case instructed the jury that "[a] fact is material if there is a substantial likelihood that a reasonable investor would consider it important in making the decision to purchase securities." Pet. App. 79a. That instruction was drawn nearly verbatim from this Court's definition of materiality in *TSC Industries*:

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[5] The jury concluded that Douglas Swenson violated all three subsections of Rule 10b-5, but that the other petitioners violated only Subsection (c). Pet. App. 89a-99a, 106a-116a, 118a-124a, 126a-127a, 129a-130a, 132a-142a. Although Subsection (c) does not expressly reference materiality, the parties have proceeded on the assumption that materiality is required. Cf. *Neder* v. *United States*, 527 U.S. 1, 22-24 (1999) (concluding that the term "fraud," as used in the mail fraud, wire fraud, and bank fraud statutes, requires materiality).

> The general standard of materiality * * * is as follows: An omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote.

426 U.S. at 449. The instruction thus correctly conveyed the governing legal standard.

b. Petitioners assert (Pet. 15-16; 17-7809 Pet. 11-13) that the district court's instruction misstated the law because it did not expressly direct that the jury should determine materiality based on "all of the circumstances" or the "total mix" of information available. But as the court of appeals explained, the instruction "adequately communicated that the jury should consider relevant circumstances" because it focused the jury's attention on whether the fact would have been important to a "reasonable investor," and "a reasonable investor would consider all of the circumstances in determining whether a false statement or omitted fact was significant." Pet. App. 4a. A reasonable investor would not regard as "important" a fact that merely duplicated information available elsewhere or otherwise did not significantly alter the total mix of available information.[6]

Indeed, this Court's decision in *TSC Industries* introduced petitioners' preferred "total mix" formulation as merely "another way" to describe information that a reasonable investor would regard as important. 426 U.S. at 449. And the Court's subsequent decisions likewise have not distinguished between those two formulations,

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[6] Petitioners thus err in asserting (Pet. 14-15) that the district court's instruction—which, again, was drawn directly from *TSC Industries*—reflected a "lower" standard or allowed the jury to determine materiality based on "the hypothetical importance of information made available to imaginary investors" rather than the "*actual* information made available to *actual* investors."

and have sometimes defined materiality as whether "a reasonable investor would consider [a fact] important" without using the "total mix" language. *Omnicare, Inc.* v. *Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1333 (2015) (brackets and citation omitted); see, *e.g.*, *Chadbourne & Parke LLP* v. *Troice*, 134 S. Ct. 1058, 1066 (2014); *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1090 (1991). The two formulations are different ways of saying the same thing.

c. Petitioners assert (Pet. 17-19) that the court of appeals' decision conflicts with decisions of the Second, Third, Eighth, Tenth, Eleventh, and D.C. Circuits. But that assertion again rests on petitioners' mistaken premise that the "important to a reasonable investor" formulation used here differs in substance from the "total mix" formulation petitioners prefer. The decisions on which petitioners rely do not support their premise. None of them held that a jury instruction like the one given here is inadequate—in fact, none of them involved challenges to jury instructions at all. And although those decisions described materiality using the "total mix" formulation, none of them suggested, much less held, that one formulation substantively differs from the other. Indeed, most of the decisions on which petitioners rely quote both formulations—as the court of appeals did here, Pet. App. 4a & n.7.[7]

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[7] See *Rockies Fund, Inc.* v. *SEC*, 428 F.3d 1088, 1096 (D.C. Cir. 2005); *In re NAHC, Inc. Sec. Litig.*, 306 F.3d 1314, 1331 (3d Cir. 2002); *Halperin* v. *eBanker USA.com, Inc.*, 295 F.3d 352, 357 (2d Cir. 2002); *City of Philadelphia* v. *Fleming Cos.*, 264 F.3d 1245, 1265 (10th Cir. 2001); *Grossman* v. *Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997); *In re Donald J. Trump Casino Sec. Litig.*, 7 F.3d 357, 369 (3d Cir. 1993), cert. denied, 510 U.S. 1178 (1994).

d. Even if the proper formulation of jury instructions on materiality otherwise warranted this Court's review, this case would not be an appropriate vehicle in which to consider that issue for two reasons.

First, petitioners' proposed alternative instruction was legally erroneous. That instruction included the "total mix" standard, which would have been consistent with *TSC Industries*. See C.A. Pets. E.R. 639. But it also specified that a statement or omission is not material unless it was "of such importance that it could reasonably be expected to cause or to induce a person to invest or not to invest." *Ibid.* That heightened standard is inconsistent with this Court's decisions, which have required only a "substantial likelihood" that a reasonable investor would consider the fact "important" or that the fact would have "assumed actual significance in the [investor's] deliberations"—not that the fact by itself would have caused a reasonable investor to invest or refrain from investing. *TSC Indus.*, 426 U.S. at 449. Petitioners' core objection to the jury instructions in this case—that they were missing additional clarifying language—founders on petitioners' own failure to propose language that would have correctly stated the law.

Second, any error in the district court's instruction was harmless in light of the overwhelming evidence that petitioners' misrepresentations significantly altered the "total mix" of information available to investors. Petitioners' false statements and omissions concealed the fact that DBSI's real estate holdings were losing between $20 and $40 million dollars a year, that DBSI had extended more than $225 million in loans to failing technology companies, that DBSI had surreptitiously drained a subsidiary that was advertised to have more

than $15 million in liquid assets, and that DBSI was using investors' accountable reserve funds for unauthorized purposes. See pp. 3-4, *supra*. Even assuming that the two formulations substantively differ, any reasonable investor would have regarded those facts as significantly altering the "total mix" of available information for the same reasons that any reasonable investor would have regarded them as "important."

2. Petitioners next contend (Pet. 20-22; 17-7809 Pet. 14-17) that the district court erred by instructing the jury that the "willfully" element of the securities-fraud charges required proof that they acted with a "wrongful purpose," but not proof that they knew that their conduct was unlawful. Pet. App. 78a. The court of appeals' decision rejecting that argument does not conflict with any decision of this Court or another court of appeals, and the plain-error posture of this case would in any event make it an unsuitable vehicle for resolving the question presented.

a. This Court has repeatedly observed that "willfully" is a "'word of many meanings' whose construction is often dependent on the context in which it appears." *Bryan* v. *United States*, 524 U.S. 184, 191 (1998) (citation omitted); accord, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 141 (1994). "The word often denotes an act which is intentional, or knowing, or voluntary, as distinguished from accidental." *United States* v. *Murdock*, 290 U.S. 389, 394 (1933). Accordingly, "[o]ne may say, as the law does in many contexts, that 'willfully' refers to consciousness of the act but not to consciousness that the act is unlawful." *Cheek* v. *United States*, 498 U.S. 192, 208-209 (1991) (Scalia, J., concurring in the judgment). Although that interpretation is most common in the civil context, see *Bryan*, 524 U.S. at 191, this

Court has also applied it to criminal statutes. See, *e.g.*, *Browder* v. *United States*, 312 U.S. 335, 341 (1941).

The more typical criminal-law meaning of "willfully" "refers to a culpable state of mind." *Bryan*, 524 U.S. at 191. This Court has thus explained that, "[a]s a general matter, when used in the criminal context, a 'willful' act is one undertaken with a 'bad purpose.'" *Ibid.*; see, *e.g.*, *Heikkinen* v. *United States*, 355 U.S. 273, 279 (1958) ("bad purpose"); *Murdock*, 290 U.S. at 394 (same); *Felton* v. *United States*, 96 U.S. 699, 702 (1878) ("bad intent"). "[A] variety of phrases have been used to describe that concept," *Bryan*, 524 U.S. at 191, including an act taken "without justifiable excuse"; an act taken "stubbornly, obstinately, [or] perversely"; an act taken "without ground for believing it is lawful"; and an act taken with "careless disregard [to] whether or not one has the right so to act," *Murdock*, 290 U.S. at 394-395; see *Bryan*, 524 U.S. at 191 n.12. The Court has also held that a defendant acts "willfully" in this sense if he acts with "knowledge that the conduct is unlawful." *Bryan*, 524 U.S. at 196; see *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 57-58 & n.9 (2007) (citing *Bryan*).

b. The court of appeals concluded that, in the specific context of the securities laws, the word "willfully" does not require proof that the defendant knew that his conduct was unlawful. The court relied on its decision in *United States* v. *Tarallo*, 380 F.3d 1174 (9th Cir. 2004), which grounded that conclusion in the text of the relevant statute, 15 U.S.C. 78ff(a). Section 78ff(a) provides that "[a]ny person who willfully violates any provision of" certain securities statutes "or any rule or regulation thereunder" is subject to a fine of up to $5 million, imprisonment of up to 20 years, or both. *Ibid.* But Congress also specified 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." *Ibid.* The Ninth Circuit concluded that "[i]f 'willfully' meant 'with knowledge that one's conduct violates a rule or regulation,' the last clause proscribing imprisonment—but not a fine—in cases where a defendant did *not* know of the rule or regulation would be nonsensical." *Tarallo*, 380 F.3d at 1188. That is, if the "willfully" element of Section 78ff(a) required knowledge of illegality, there would have been no reason for Congress to "proscribe imprisonment (but permit imposition of a fine) for someone who acted *without* knowing that he or she was violating a rule or regulation," because "[s]uch a person could not have been convicted in the first place." *Ibid.*

Although the Ninth Circuit has determined that the "willfully" element of Section 78ff(a) does not require proof that the defendant knew that his actions were *unlawful*, the court still requires proof that the defendant acted with the sort of "bad purpose" or "culpable state of mind" that criminal willfulness ordinarily demands. *Bryan*, 524 U.S. at 191. The Ninth Circuit has explained that "'willfully' as it is used in [Section] 78ff(a) means intentionally undertaking an act that one knows to be wrongful." *Tarallo*, 380 F.3d at 1188. Consistent with that standard, the district court in this case instructed the jury that "'[w]illfully' means intentionally undertaking an act, making an untrue statement, or failing to disclose for the wrongful purpose of defrauding or deceiving someone." Pet. App. 78a.

c. The Ninth Circuit's interpretation of "willfully" in Section 78ff(a) does not conflict with any decision of another court of appeals. To the contrary, "[c]ourts that have interpreted 'willfully' in [Section 78ff(a)] have

reached the same conclusion," likewise holding that it "requires the intentional doing of the wrongful acts—no knowledge of the rule or regulation is required." *United States* v. *O'Hagan*, 139 F.3d 641, 647 (8th Cir. 1998); see, *e.g.*, *United States* v. *Kaiser*, 609 F.3d 556, 568 (2d Cir. 2010). Like the Ninth Circuit, those courts have grounded their interpretation in the "unique statutory language" of Section 78ff(a), *Kaiser*, 609 F.3d at 568—language that petitioners do not address.

Petitioners assert (Pet. 22-23; 17-7809 Pet. 17) that the First Circuit has adopted a different interpretation of "willfully." But the two decisions on which they rely do not support that assertion. One of them is inapposite because it interpreted a different statute with different language. See *United States* v. *Bank of New England, N.A.*, 821 F.2d 844, 854-855 (1st Cir.) (addressing the Bank Secrecy Act, 31 U.S.C. 5322 (Supp. IV 1986)), cert. denied, 484 U.S. 943 (1987). The other was a securities-fraud case, but the First Circuit simply rejected, on plain-error review, the *defendant's* challenge to an instruction requiring proof that he knew that his actions were unlawful. *United States* v. *Faulhaber*, 929 F.2d 16, 18-19 (1991). Because it was the defendant who challenged that instruction, the court had no occasion to consider whether it had held the government to an unnecessarily high standard. The First Circuit did not even quote the relevant instruction, much less hold that such an instruction is *required* in Section 78ff(a) cases.

Petitioners also discuss (Pet. 23-25; 17-7809 Pet. 16) decisions addressing 18 U.S.C. 1001 and 1035, which prohibit "knowingly and willfully" making certain false statements. As petitioners observe, the government has acknowledged that the "willfully" element of those statutes requires proof that the defendant knew that his

false statement was unlawful. Br. in Opp. at 10, *Ajoku* v. *United States*, 134 S. Ct. 1872 (2014) (No. 13-7264) (*Ajoku* Opp.); Br. in Opp. at 6, *Russell* v. *United States*, 134 S. Ct. 1872 (2014) (No. 13-7357) (*Russell* Opp.). But the government's concession was specifically limited to Sections 1001 and 1035, which do not contain the textual features that have led the courts of appeals to adopt a different interpretation of "willfully" in Section 78ff(a). And the government emphasized that "'willfully' is 'a word of many meanings'" and that "[c]ontext and history may support a different interpretation of that term in other criminal statutes." *Ajoku* Opp. at 15 (citation omitted); see *Russell* Opp. at 11 (same).[8]

d. Even if this Court were inclined to address the meaning of "willfully" in Section 78ff(a), this case would not be an appropriate vehicle in which to do so. 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." Pet. App. 6a. To prevail under that standard, petitioners would have to show an error that was clear at the time of appeal, that affected their substantial rights, and that so seriously undermined the fairness or integrity of the proceedings as to warrant this Court's exercise of discretion to correct it. Fed. R. Crim. P. 52(b); see *Puckett* v. *United States*, 556 U.S. 129, 135 (2009). Petitioners could not make that showing.

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[8] This Court has previously denied other petitions for writs of certiorari invoking the government's concession in *Ajoku* and *Russell* and asserting that "willfully" requires a showing of knowledge of illegality in all criminal statutes, regardless of context. See, *e.g.*, *Blankenship* v. *United States*, 138 S. Ct. 315 (2017) (No. 16-1413); *Gupta* v. *United States*, 136 S. Ct. 2009 (2016) (No. 15-900).

Even assuming that petitioners' interpretation of Section 78ff(a) is correct, they could not show that the error in district court's contrary interpretation was "clear or obvious, rather than subject to reasonable dispute," *Puckett*, 556 U.S. at 135, when several courts of appeals have adopted the same interpretation and none have rejected it. In addition, petitioners could not establish that any error affected their substantial rights. The district court's instructions allowed the jury to find them guilty of securities fraud only if, among other things, it found that they intentionally made untrue statements or failed to disclose material facts "for the wrongful purpose of defrauding or deceiving" investors. Pet. App. 78a. "[N]o reasonable person could have thought" that such conduct was "lawful." *United States* v. *Awad*, 551 F.3d 930, 941 (9th Cir.) (finding an erroneous "willfulness" instruction to be harmless error), cert. denied, 556 U.S. 1269 (2009).

3. Petitioners next contend (Pet. 26-31; 17-7809 Pet. 17-20) that the court of appeals misinterpreted the scope of the reciprocal-discovery obligation in Rule 16. That contention lacks merit, does not implicate any disagreement among the courts of appeals, and does not warrant this Court's review.

a. Rule 16's reciprocal-discovery obligation covers evidence within the defendant's control that "the defendant intends to use * * * in the defendant's case-in-chief at trial." Fed. R. Crim. P. 16(b)(1)(A). The court of appeals correctly concluded that a defendant's Rule 16 disclosure obligation extends to non-impeachment exhibits that he intends to introduce through cross-examination of government witnesses, not merely the exhibits that he intends introduce through his own witnesses. Although the term "case-in-chief" can be used

to refer to "the evidence presented at trial by a party between the time the party calls the first witness and the time the party rests," it can also include "[t]he part of a trial in which a party presents evidence to support [a] claim or defense." *Black's Law Dictionary* 259 (10th ed. 2014). That broader definition readily encompasses exhibits the defendant offers while cross-examining government witnesses, because a defendant can "present[] evidence" through such cross-examination—indeed, he may be able to present his entire case that way.

As the district court explained, Rule 16 should be interpreted to incorporate the broader meaning of "case-in-chief" because the narrow meaning "would effectively render Rule 16(b)(1)(A) a nullity unless a defendant asserted an affirmative defense or planned to put on his or her case after the government rested." Pet. App. 33a-34a. Such an approach would also yield odd results: A defendant would not be required to disclose evidence that he intended to use in cross-examining a witness called by the government, but would be required to disclose the same evidence if he planned to introduce it by recalling the same witness after the government rested. Particularly given the district courts' broad authority to "determine generally the order in which parties will adduce proof," *Geders* v. *United States*, 425 U.S. 80, 86 (1976), Rule 16 should not be read to make a defendant's reciprocal-disclosure obligations contingent on whether he plans to introduce the evidence supporting his defense during cross-examination or by calling his own witnesses.

The history of Rule 16(b)(1)(A) reinforces that conclusion. As originally adopted in 1975, the rule did not use the phrase "case-in-chief." Instead, it required the

defendant to disclose evidence that he intended to introduce "as *evidence in chief* at the trial." Fed. R. Crim. P. 16(b)(1)(A) (1976) (emphasis added). That phrase is most naturally read to include non-impeachment evidence offered during cross-examination—as the Fourth Circuit determined in 2001. See *United States* v. *Young*, 248 F.3d 260, 269 (concluding that non-impeachment evidence offered during cross-examination was offered "as 'evidence-in-chief'" under Rule 16(b)(1)(A)), cert. denied, 533 U.S. 961 (2001). And although the rule was amended in 2002 to replace "evidence in chief" with "case-in-chief," that change was "stylistic only." Fed. R. Crim. P. 16 advisory committee's note (2002 Amendments).

b. Petitioners identify no sound reason to reject the court of appeals' interpretation of Rule 16.

First, petitioners contend (Pet. 26) that, when Rule 16's reciprocal-discovery provisions were adopted in 1975, "[n]umerous decisions * * * stated that a defendant's 'case-in-chief' comprised the time from the calling of his first witness until he rested." But the 1975 version of the rule did not use the phrase "case-in-chief." And in any event, the decisions petitioners cite indicate only that a defendant's case-in-chief *includes* the period in which he calls his own witnesses, not that it is *limited* to that period. See *Rice* v. *Louisville & Nashville R.R. Co.*, 344 F.2d 776, 780 (6th Cir. 1965); *McVey* v. *Phillips Petroleum Co.*, 288 F.2d 53, 54 (5th Cir. 1961).[9]

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[9] Relatedly, petitioners note (Pet. 29-30) that although *Black's Law Dictionary* did not define "case-in-chief" in 1975, it defined the term a few years later as "[t]hat 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). Petitioners assert (Pet. 29) that this 1979 definition "squarely foreclose[s] the

Second, petitioners cite (Pet. 26-29) a variety of decisions that, in their view, use the phrase "case-in-chief" to refer to the evidence that a party puts on through its own witnesses rather than through cross-examination. But petitioners concede (Pet. 28) that "none of these decisions arose in the Rule 16 context." The fact that "case-in-chief" can be used in a narrower sense does not support petitioners' assertion that it should be interpreted that way in Rule 16, where the context and history support a broader interpretation.

Third, petitioners contend (Pet. 30) that the court of appeals' approach would read the phrase "in the defendant's case-in-chief" out of Rule 16(b)(1)(A) and require reciprocal discovery whenever "the defendant intends to use the item * * * at trial." That is incorrect. Rule 16's use of the phrase "in the defendant's case-in-chief" makes clear that the reciprocal-discovery obligation does not extend to impeachment evidence, which is not part of the defense's "case-in-chief." Here, the district court and the court of appeals correctly adhered to that limitation, recognizing that reciprocal discovery extends only to "non-impeachment evidence." Pet. App. 15a-16a; see *id.* at 33a-34a.

Ninth Circuit's view that the defendant's 'case-in-chief' includes its cross-examination of government witnesses." But Rule 16 cannot plausibly be interpreted to adopt the narrow 1979 definition, because under that definition a criminal defendant would *never* have a "case-in-chief"—and Rule 16(b)(1)(A) would never apply—unless the defendant asserted an affirmative defense on which he bore "the initial burden of proof." And in any event, by the time the phrase "case-in-chief" was actually added to the rule in 2002, *Black's Law Dictionary* included the broader definition that reaches evidence a party introduces on cross-examination. See *Black's Law Dictionary* 207 (7th ed. 1999) ("The part of a trial in which a party presents evidence to support its claim or defense.").

Finally, petitioners assert (Pet. 31) that the court of appeals' interpretation of Rule 16 is unfair because it allows prosecutors to anticipate and preempt "the strongest parts of defendants' cross-examination." But the mere disclosure of the non-impeachment exhibits that a defendant intends to introduce does not have that effect. Here, for example, the district court prevented the government from preempting petitioners' presentation of their disclosed exhibits to the jury by prohibiting it from introducing those exhibits on direct examination. C.A. J.E.R. 1429. And if a defendant does not want to disclose his exhibits to the government, he can simply forgo reciprocal discovery. But Rule 16 does not entitle him to the tactical advantage of viewing the government's exhibits without shouldering the burden of disclosing his own non-impeachment exhibits as well.

c. Petitioners correctly acknowledge (Pet. 28) that the court of appeals' decision does not conflict with any decision of another court of appeals interpreting Rule 16. Indeed, because the decision below was unpublished, petitioners have not identified *any* precedential decision addressing the question presented in the context of the current version of the rule. Petitioners nonetheless contend (*ibid.*) that this Court should grant review even in the absence of a circuit conflict because "district courts are already sharply divided on this issue." But even if such a division existed, a conflict among district court decisions would not warrant this Court's intervention. See Sup. Ct. R. 10; cf. *Camreta* v. *Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") (citation omitted).

In any event, the district courts that have decided the issue have concluded that Rule 16(b)(1)'s reciprocal-discovery obligation extends to non-impeachment exhibits used during cross-examination. See *United States* v. *Napout*, No. 15-cr-252, 2017 WL 6375729, at *6-*7 (E.D.N.Y. Dec. 12, 2017); *United States* v. *Crinel*, No. 15-cr-61, 2016 WL 5779778, at *3-*4 (E.D. La. Oct. 4, 2016); *United States* v. *Waddell*, No. 15-cr-95, 2016 WL 3031698, at *2-*3 (S.D. Ga. May 25, 2016); *United States* v. *Hsia*, No. 98-cr-57, 2000 WL 195067, at *1-*2 (D.D.C. Jan. 21, 2000); see also *United States* v. *Larkin*, No. 12-cr-319, 2015 WL 4415506, at *1-*5 (D. Nev. July 20, 2015); *United States* v. *Holden*, No. 13-cr-444, 2015 WL 1514569, at *2-*5 (D. Or. Mar. 19, 2015).

Petitioners cite (Pet. 28) *United States* v. *Harry*, No. 10-cr-1915, 2014 WL 6065705 (D.N.M. Oct. 14, 2014), which stated its disagreement with those decisions. But that statement was dicta, because the evidence at issue in *Harry* was offered "solely for the purpose of impeaching a witness." *Id.* at *11. Petitioners also cite (Pet. 28) *United States* v. *Kubini*, 304 F.R.D. 208 (W.D. Pa. 2015), which cited *Harry* and opined that the law is not "settled." *Id.* at 214. But *Kubini* had no occasion to reach the issue either, because it was interpreting its own discovery order, not Rule 16. *Ibid.*

Petitioners contend (Pet. 28) that "it is unlikely" that other circuits "will have the opportunity to rule on the Rule 16 issue" because defendants have "no incentive to appeal a *favorable* ruling," meaning that "the only way for a circuit split to develop would be for a circuit to *reverse* a conviction on these grounds." But the same could be said of nearly every discovery-related claim. The absence of a circuit conflict (or any precedential circuit authority) simply indicates that no circuit has yet

seen this issue arise in an outcome-determinative posture and found petitioners' position to have merit. That is a reason to deny the petitions for writs of certiorari, not to grant them. Moreover, because the Federal Rules of Criminal Procedure are promulgated by this Court under the Rules Enabling Act, 28 U.S.C. 2071 *et seq.*, any lack of clarity could also be rectified through the amendment process.

4. Finally, petitioner Douglas Swenson (Douglas) contends (17-7809 Pet. 21-29) that the court of appeals erred in upholding the district court's redaction of the portions of Ellison's January 2008 email purporting to describe a conversation between Ellison and Douglas. The court of appeals correctly held that the redacted portions of the email were inadmissible hearsay, and that conclusion does not conflict with any decision of another court of appeals.

a. Ellison's email stated as follows:

> I reviewed the sections of the draft PPM that addressed the use of funds for the Stellar companies. I believe we need more disclosure about those companies. *Doug has also finished his review and reached the same conclusion. As I spoke to Doug about it over the weekend we thought that* it might be easiest to add an Exhibit to the PPM that describes each Stellar company and includes some financial information. *Doug is going to work on the financial information.* Let's talk Monday about the other information for the Stellar companies.
>
> There are also some other changes to the draft PPM that I will give you on Monday. Thanks.

C.A. DLS E.R. 36 (emphases added).

The courts below correctly recognized that, although the rest of the email could be considered to the extent it shed light on the state of mind of Ellison (its author), the italicized references to Douglas were inadmissible hearsay. Hearsay is an out-of-court statement offered "to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). Ellison's email was an out-of-court statement, and Douglas sought to use its references to him to prove the truth of the matter asserted in the email—that is, to prove that Douglas had, in fact, "'reached the same conclusion' and agreed with [Ellison] that more disclosure was needed." Pet. App. 16a-17a. The email's references to Douglas were thus inadmissible hearsay. *Id.* at 17a; see Fed. R. Evid. 802.

b. Douglas asserts (17-7809 Pet. 22-27) that the references were not hearsay because they were (1) verbal acts that negated the existence of a conspiracy and (2) offered to prove his state of mind. Those arguments lack merit.

First, a verbal act is a statement that has "legal consequences or logical significance independent of [its] assertive aspect." 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8:18, at 108 (4th ed. 2013) (*Mueller & Kirkpatrick*). "Threats and demands for cash spoken by a gunman to his victim, for example, are verbal parts of a forced taking that support charges of robbery or theft." *Ibid.* Similarly, statements that embody a criminal agreement can be verbal acts reflecting "the formation of a conspiracy." *Id.* at 112.

Douglas asserts (17-7809 Pet. 23) that because words showing the formation of a conspiracy can qualify as verbal acts, the same is true of statements that purportedly "establish a *lack* of conspiracy." But even if that might be true as to some statements—for example, a

defendant's statement refusing to join a criminal agreement or withdrawing from an existing agreement—it would not apply here. Unlike such statements, Ellison's emailed statements purporting to describe his earlier conversation with Douglas did not have "legal consequences" or "logical significance" that was "independent of [their] assertive aspect." *Mueller & Kirkpatrick* § 8:18, at 108. Those statements would be relevant (and would tend to disprove the existence of a conspiracy) not based solely on the fact that Ellison made them, but instead "only insofar as Ellison accurately reported" what he and Douglas had discussed. Pet. App. 16a-17a. A statement whose relevance turns on the truth of the matter asserted is classic hearsay.

Second, Douglas asserts (17-7809 Pet. 21, 25-27) that Ellison's email was offered to establish his state of mind. But the relevant hearsay exception applies only to "[a] statement of *the declarant's* then-existing state of mind." Fed. R. Evid. 803(3) (emphasis added). Here, the "declarant" of the statements at issue was Ellison, the author of the email. And while the courts below therefore concluded that the email was admissible to the extent it reflected *Ellison's* state of mind, the state-of-mind exception in Rule 803(3) does not extend to Ellison's after-the-fact statements purportedly reflecting *Douglas's* state of mind.

Douglas misunderstands the nature of hearsay in contending (17-7809 Pet. 26) that even though Rule 803(3) does not apply, Ellison's statements "are not hearsay at all[] under Rule 801(c)" because they were offered to prove Douglas's state of mind. What matters under Rule 801(c) is whether the statement was offered "to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c)(2). As noted above, that

plainly describes the redacted statements, because those statements were relevant to Douglas's state of mind only to the extent they were true.

c. Douglas contends that the court of appeals' decision conflicts with decisions of other courts of appeals adopting his verbal-act and state-of-mind arguments. Even if that were correct, the nonprecedential decision below could not create a conflict warranting this Court's review. And in any event, no such conflict exists.

First, Douglas asserts (17-7809 Pet. 23) that "the Eleventh, Sixth, and Seventh Circuits have held that evidence offered by defendants to disprove a conspiracy * * * is not hearsay." But the decisions he cites do not support such a rule. One of them *upheld* the exclusion of statements offered to disprove the existence of a conspiracy because "the significance of the offered statements d[id] not lie 'solely in the fact that they were made.'" *United States* v. *Jackson*, 780 F.2d 1305, 1315 (7th Cir. 1986) (brackets and citation omitted). The same is true here. And the other decisions Douglas cites approved the admission of out-of-court statements because those statements were not offered for "the truth of anything asserted," but rather because their significance lay "solely in the fact that [they were] made." *United States* v. *Mateos*, 623 F.3d 1350, 1364 (11th Cir. 2010) (citation omitted), cert. denied, 562 U.S. 1222 (2011); see *United States* v. *Benton*, 852 F.2d 1456, 1468 (6th Cir.), cert. denied, 488 U.S. 993 (1988). This case is different: The references to Douglas in Ellison's email are not significant solely because Ellison made them; instead, they are relevant only to the extent that they correctly described Ellison's conversation with Douglas—that is, only to the extent that the factual assertions in the email are true.

Second, Douglas asserts (17-7809 Pet. 25-27) that the court of appeals' decision conflicts with decisions of other circuits concluding that "evidence presented by the defense to show a defendant's state of mind is not offered for the truth of the matter asserted." But the decisioins he cites do not support that claim. Many of them involved statements about the *declarant's* state of mind, rather than another person's. See *United States* v. *Ibisevic*, 675 F.3d 342, 350 (4th Cir. 2012); *United States* v. *Hayes*, 369 F.3d 564, 568 (D.C. Cir. 2004); *United States* v. *Harris*, 733 F.2d 994, 1004-1005 (2d Cir. 1984); *United States* v. *Parry*, 649 F.2d 292, 294-295 (5th Cir. 1981). The others involved out-of-court statements made *to* the defendant that were offered not for their truth, but rather to establish the information that the defendant had. See *United States* v. *Puzzo*, 928 F.2d 1356, 1365 (2d Cir. 1991); *United States* v. *Cantu*, 876 F.2d 1134, 1137 (5th Cir. 1989); *United States* v. *Leake*, 642 F.2d 715, 720 (4th Cir. 1981). Here, in contrast, Ellison's email was written neither by Douglas nor to him, and it thus had no bearing on his state of mind unless the statements it contained were true.

d. In any event, any error in excluding the email's references to Douglas did not prejudice him. The PPM that was the subject of Ellison's email was admitted into evidence. C.A. Pets. E.R. 3922-3986. And the evidence showed that, despite the decision to disclose "more" about the Stellar companies in that PPM, it still disguised the more than $225 million in loans to the Stellar companies. *Id.* at 3964; Gov't C.A. Br. 224. The PPM also misrepresented the size of the loans to the Stellar companies, describing them as a "small non-real estate portfolio," despite the fact that they constituted DBSI's largest asset. C.A. Pets. E.R. 3946; see Gov't C.A. Br.

224. And it represented that "all receivables from affiliated entities" (*i.e.*, the Stellar companies) were "fully collectible," despite the fact that the loans had been outstanding for nearly a decade and that several of the Stellar companies had failed. C.A. Pets. E.R. 3966; see Gov't C.A. Br. 224-225. Thus, even if Douglas had been allowed to show that he took part in the decision to include "more disclosure" in this PPM, C.A. DLS E.R. 36, it would have done him little good.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOHN P. CRONAN
Acting Assistant Attorney General
WILLIAM A. GLASER
Attorney

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