No. 16-1413

In the Supreme Court of the United States

DONALD L. BLANKENSHIP, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that a person "willfully" violates a mine safety standard within the meaning of 30 U.S.C. 820(d) if he acts in reckless disregard of the standard's requirements.

2. Whether the court of appeals erred in relying in part on petitioner's ability to recall the relevant witness in holding that any error in the district court's denial of his request for recross-examination was harmless.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-31a) is reported at 846 F.3d 663.

JURISDICTION

The judgment of the court of appeals was entered on January 19, 2017. A petition for rehearing was denied on February 24, 2017 (Pet. App. 32a-33a). The petition for a writ of certiorari was filed on May 25, 2017. 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 West Virginia, petitioner was convicted on one count of conspiring to violate federal mine safety and health standards, in violation of 18 U.S.C. 371 and 30 U.S.C. 820(d). He was sentenced to one year of imprisonment, to be followed by

one year of supervised release, and fined $250,000. The court of appeals affirmed. Pet. App. 1a-31a.

1. In the Federal Coal Mine Health and Safety Act of 1969 (Coal Act), Pub. L. No. 91-173, 83 Stat. 742, Congress sought to protect coal miners by imposing civil and criminal penalties on mine operators who violate federal health or safety standards. *Id.* § 109, 83 Stat. 756-758. In 1977, Congress "strengthened and streamlined [the Coal Act's] health and safety enforcement requirements," *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 211 (1994), by enacting the Federal Mine Safety and Health Act of 1977 (Mine Act), 30 U.S.C. 801 *et seq.*

The Mine Act establishes a comprehensive framework of mandatory safety and health standards "for the protection of life and prevention of injuries in coal or other mines." 30 U.S.C. 811(a). It imposes an affirmative obligation on mine operators to ensure compliance with those standards. 30 U.S.C. 801(e) and (g). The Secretary of Labor has authority to enforce the Mine Act through the Mine Safety and Health Administration (MSHA). 29 U.S.C. 557a; see *Thunder Basin*, 510 U.S. at 204 & n.4.

The Mine Act carries forward the Coal Act's criminal penalties for certain violations of federal health and safety standards. It provides that "[a]ny operator who willfully violates a mandatory health or safety standard" is subject to criminal prosecution. 30 U.S.C. 820(d). The "operator[s]" potentially subject to liability under Section 820(d) include any "owner, lessee, or other person who operates, controls, or supervises a coal or other mine." 30 U.S.C. 802(d). A first-time violator of Section 820(d) is guilty of a misdemeanor and may be imprisoned for up to one year, fined up to $250,000, or both. 30 U.S.C. 820(d).

2. Petitioner was the Chairman and Chief Executive Officer of Massey Energy Company, which owned the Upper Big Branch coal mine in Montcoal, West Virginia. Pet. App. 3a. In April 2010, the Upper Big Branch mine was the site of the deadliest coal mine disaster in decades, a coal-dust explosion that killed 29 miners. *Ibid.*; see generally MSHA, U.S. Dep't of Labor, *Report of Investigation: Fatal Underground Mine Explosion*, https://arlweb.msha.gov/Fatals/2010/UBB/FTL10c0331noappx.pdf (last visited Aug. 23, 2017).

The Upper Big Branch mine had a history of safety problems. In 2009, for example, MSHA identified 549 regulatory violations at the mine. Pet. App. 3a. In the 15 months before the explosion, the mine was cited for a greater number of serious violations than any other underground coal mine, save two. *Ibid.*; see C.A. App. 346-347. "Many of these violations related to improper ventilation and accumulation of combustible materials—problems that were key contributing factors to the accident." Pet. App. 3a.

Petitioner knew about the safety problems at Upper Big Branch because he maintained "close supervision of mine operations and staffing." Pet. App. 5a. Beginning in 2009, for example, he received "daily reports showing the numerous citations for safety violations at the mine." *Id.* at 4a. A senior Massey safety official also specifically warned petitioner about the serious safety problems at Upper Big Branch and the company's other mines. Among other things, the safety official advised that Massey miners were told "to run, run, run [coal] until we get caught; when we get caught, then we will fix it" and that "[t]he attitude at many Massey operations is 'if you can get the footage [*i.e.*, mine the coal], we can pay the fines'" for safety violations. C.A. App.

1907. As the safety official summarized, Massey "would rather get violations, including [serious violations], than wait for approval"—an attitude that "shows a lack of concern for both safety and the law." *Id.* at 1913.

Petitioner affirmatively encouraged that attitude. Although he portrayed himself to MSHA and the public as attempting to reduce safety violations, petitioner privately communicated to the Massey employee in charge of the Upper Big Branch mine that "safety violations were the cost of doing business" and that it was "cheaper to break the safety laws and pay the fines than to spend what would be necessary to follow the safety laws." C.A. App. 790-791; see *id.* at 475-476; Pet. App. 4a. Petitioner implemented that policy by directing supervisors to "focus on 'running coal' rather than safety compliance and to for[]go construction of safety systems." Pet. App. 4a (brackets omitted); see C.A. App. 1902, 1924. For example, he ordered the reopening of a portion of the Upper Big Branch mine that lacked legally required ventilation. Pet. App. 3a-4a. When a supervisor objected, citing safety rules, petitioner admonished him for "letting MSHA run [his] coal mines." C.A. App. 485. On another occasion, petitioner directed the supervisor of the mine to ignore ventilation—a critical safety issue—to maximize production. *Id.* at 1924 ("You need to get low on UBB #1 and #2 and run some coal. We'll worry about ventilation or other issues at an appropriate time. Now is not the time.").

3. In 2015, a grand jury returned a superseding indictment charging petitioner with conspiring to defraud the United States and to willfully violate mine safety

standards in violation of 30 U.S.C. 820(d), making false statements, and securities fraud. Pet. App. 5a.[1]

During a six-week jury trial, the government called numerous miners who described widespread safety violations at the Upper Big Branch mine and testified that Massey's safety policies were often ignored or never communicated to miners at all. Gov't C.A. Br. 7-8, 10. The government also presented a variety of documentary evidence reflecting petitioner's control of the Upper Big Branch mine, as well as petitioner's recordings of his conversations—including one in which he stated that the detailed written warning from the senior Massey safety official would "be a terrible [document] to be in discovery" if the company had a "fatal" accident. Gov't Supp. C.A. App. 1; see Gov't C.A. Br. 8-10.

In addition, the government called Chris Blanchard, the Massey employee in charge of the Upper Big Branch mine. Pet. App. 8a. Blanchard testified that there was "an understanding" at Massey "that a certain number of safety violations would be written [by MSHA] that could have been prevented" because "it was less money to pay the fines for the safety violations than the cost of preventing all the violations." C.A. App. 475-476. He also

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[1] Other Massey employees were also prosecuted in connection with the Upper Big Branch explosion. A jury convicted the Upper Big Branch security chief of making false statements and attempting to destroy documents material to an investigation. *United States* v. *Stover*, 499 Fed. Appx. 267 (4th Cir. 2012). An Upper Big Branch superintendent pleaded guilty to conspiring to defraud the United States by thwarting MSHA inspectors. See *May* v. *United States*, No. 12-cr-50, 2014 WL 427801, at *1 (S.D. W. Va. Feb. 3, 2014). And a Massey division president pleaded guilty to conspiring to defraud the United States by thwarting MSHA inspectors and conspiring to violate Mine Act safety standards. Plea Agreement, *United States* v. *Hughart*, No. 12-cr-220 (S.D. W. Va. Nov. 28, 2013).

testified that petitioner shared in and fostered that understanding. *Id.* at 476; see *id.* at 790-791. Petitioner cross-examined Blanchard for nearly five days—longer than the direct and redirect examinations combined—and then sought recross-examination. Pet. App. 11a. The district court denied the request because it concluded that the redirect examination "did not raise new matter." *Id.* at 9a.

After the close of evidence, the district court instructed the jury that a person "willfully" violates a safety standard within the meaning of Section 820(d) if that person acts "knowingly, purposely and voluntarily, either in intentional disobedience of the standard or in reckless disregard of its requirements." Pet. App. 40a. The court then elaborated on that standard, explaining that "[a] person with supervisory authority at or over a mine * * * willfully violates a mandatory mine safety or health standard if," among other things, "he knowingly, purposely and voluntarily takes action, or fails to do so, with reckless disregard for whether that action or failure to act will cause a mandatory safety or health standard to be violated." *Id.* at 41a.

The jury found petitioner guilty of conspiring to violate 30 U.S.C. 820(d) and acquitted on the remaining charges. The district court sentenced him to one year of imprisonment, to be followed by one year of supervised release, as well as a $250,000 fine. Pet. App. 5a; D. Ct. Doc. 589, at 1-3, 6 (Apr. 7, 2016).[2]

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[2] Petitioner began serving his sentence after the court of appeals denied his motion for bail pending appeal. According to the Federal Bureau of Prisons, he was released on May 10, 2017. Federal Bureau of Prisons, U.S. Dep't of Justice, *Find an Inmate*, https://www.bop.gov/inmateloc/ (last visited Aug. 23, 2017).

4. The court of appeals affirmed. Pet. App. 1a-31a.

a. As relevant here, the court of appeals first rejected petitioner's contention that he was entitled to a new trial because the district court violated the Confrontation Clause by denying his request to recross-examine Blanchard. Pet. App. 8a-12a. The court stated that recross-examination is required only if redirect examination raises "new matter." *Id.* at 8a-9a. The court observed that, "in reviewing whether the redirect examination [of Blanchard] raised new matter, the district court commendably received oral argument and * * * thoroughly reviewed the transcript of direct, cross, and redirect and explained how each issue raised on redirect did not constitute new matter." *Id.* at 9a-10a.

The court of appeals then held that, even if the district court erred, "any such error was harmless beyond a reasonable doubt." Pet. App. 10a. The court explained that "all of the subjects on which [petitioner] requested recross-examination were either effectively dealt with on cross-examination or cumulative of other evidence introduced at trial." *Ibid.* The court also noted that the nearly five-day cross-examination afforded petitioner "an extensive opportunity to examine" Blanchard. *Id.* at 11a. And the court stated that, "[m]ost significantly, [petitioner] could have recalled Blanchard as a witness later in the trial" had he wished to further explore the relevant subjects. *Ibid.*

b. The court of appeals also rejected petitioner's contention that reckless disregard of mine safety requirements is insufficient to satisfy Section 820(d)'s "willfully" element. Pet. App. 13a-28a. The court explained that this Court has instructed that "willfully" is "a word of many meanings whose construction is often dependent on the context in which it appears." *Id.* at

14a (quoting *Bryan* v. *United States*, 524 U.S. 184, 191 (1998)). The court then noted that it had "repeatedly" held, in a variety of contexts, that "reckless disregard" or "plain indifference" to the requirements of the law can constitute criminal willfulness, and that "other Circuits have reached the same conclusion." *Id.* at 16a; see *id.* at 19a (collecting cases). And the court rejected petitioner's contention that this Court's decisions in *Bryan* and in *Safeco Insurance Co. of America* v. *Burr*, 551 U.S. 47 (2007) (*Safeco*), establish a categorical rule that a criminal willfulness requirement cannot be satisfied by reckless disregard. Pet. App. 14a-19a.

After rejecting petitioner's contention that reckless disregard of the law can never constitute criminal willfulness, the court of appeals held that "'reckless disregard' amounts to willfulness for purposes of Section 820(d)." Pet. App. 19a. The court noted it had previously upheld jury instructions providing that a defendant "willfully" violates a mine safety standard if he acts "either in intentional disobedience of the safety standard or in reckless disregard of its requirements." *Ibid.* (brackets omitted) (quoting *United States* v. *Jones*, 735 F.2d 785, 789 (4th Cir.), cert. denied, 469 U.S. 918 and 469 U.S. 936 (1984)). The court added that, in "the only [other] appellate decision interpreting the meaning of 'willfully' in a criminal provision of a federal mine safety statute," the Sixth Circuit held that a defendant was guilty of a willful violation of a safety standard under the predecessor provision of the Coal Act if he "either intentionally disobeys the standard or *recklessly disregards* its requirements." *Ibid.* (quoting *United States* v. *Consolidation Coal Co.*, 504 F.2d 1330, 1335 (1974)).

5. The court of appeals denied rehearing en banc with no judge requesting a vote. Pet. App. 32a-33a.

ARGUMENT

Petitioner renews his contentions (Pet. 19-31) that the "willfully" element of 30 U.S.C. 820(d) requires proof that a mine operator had actual knowledge that his conduct violated safety standards and that the asserted error in the denial of his request for recross-examination was not harmless. The court of appeals correctly rejected those arguments, and its decision does not conflict with any decision of this Court or another court of appeals. The petition for a writ of certiorari should be denied.

1. Petitioner principally contends (Pet. 19-28) that the "willfully" element of Section 820(d) requires proof that a mine operator actually knew that his conduct violated the law. Although petitioner acknowledges that no court of appeals has adopted that interpretation of Section 820(d), he asserts that this Court's decisions in *Bryan* v. *United States*, 524 U.S. 184 (1998), and *Safeco Insurance Co. of America* v. *Burr*, 551 U.S. 47 (2007), establish that a criminal willfulness requirement can *never* be satisfied by anything less than actual knowledge of illegality. But *Bryan* and *Safeco* do not support that assertion, and no court of appeals has endorsed petitioner's understanding of those decisions. Furthermore, even if the meaning of Section 820(d)'s "willfully" element otherwise warranted this Court's review, this case would not be an appropriate vehicle in which to consider it. Petitioner was not convicted of violating Section 820(d); he was convicted of *conspiring* to violate Section 820(d). The district court separately instructed the jury on the willfulness element of conspiracy, and that instruction ensured that the jury found that petitioner knew that his conduct was unlawful.

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*, 524 U.S. at 191 (citation omitted); accord, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 141 (1994); *Spies* v. *United States*, 317 U.S. 492, 497 (1943).

"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. For example, the Court has held that a statute making it a crime to "willfully and knowingly" use a passport obtained by means of a false statement requires only proof that the passport was used "deliberately and with knowledge" that it was obtained under false pretenses. *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. (6 Otto) 699, 702 (1877) ("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 held that a defendant acts "willfully" in this sense if he acts with "knowledge that the conduct is unlawful" in a general sense, even if he is not aware of the specific law prohibiting it. *Bryan*, 524 U.S. at 196.

Finally, this Court has adopted a more stringent interpretation of "willfully" in the context of some tax statutes, holding that "the jury must find that the defendant was aware of the specific provision of the tax code that he was charged with violating." *Bryan*, 524 U.S. at 194; see *Ratzlaf*, 510 U.S. at 138 (adopting a similar rule in the context of a prohibition on structuring currency transactions). But the Court has applied that more demanding construction only in the context of "highly technical statutes that presented the danger of ensnaring individuals engaged in apparently innocent conduct." *Bryan*, 524 U.S. at 194-195.

b. In this case, the court of appeals correctly held that a mine operator "willfully" violates a safety standard under Section 820(d) if he either knows that his conduct violates that standard or recklessly disregards the standard's requirements. Pet. App. 23a. That interpretation appropriately ensures that an operator is not held criminally liable for an innocent or careless violation, and is instead convicted of violating Section 820(d) only if he acted with the sort of "bad purpose" or "culpable state of mind" that a criminal willfulness requirement ordinarily demands. *Bryan*, 524 U.S. at 191. And that interpretation is consistent with this Court's decisions discussing willfulness in other criminal statutes.

In the criminal context, "recklessness" is a subjective standard that is satisfied only if "a person disregards a risk of harm of which he is aware." *Farmer* v. *Brennan*, 511 U.S. 825, 836-837 (1994); see *Voisine* v. *United States*, 136 S. Ct. 2272, 2278 (2016). A defendant recklessly disregards the law in that sense only if he "'consciously disregard[s]' a substantial risk" that his conduct violates the law. *Farmer*, 511 U.S. at 839 (brackets omitted) (quoting Model Penal Code § 2.02(c) (1985)). A defendant who consciously disregards such a risk is properly regarded as acting with "bad purpose" or a "culpable state of mind." *Bryan*, 524 U.S. at 191.

For example, in *Screws* v. *United States*, 325 U.S. 91 (1945), the Court considered a provision, now codified at 18 U.S.C. 242, making it a crime for a person acting under color of law to "willfully" deprive another person of a right secured by the Constitution or laws of the United States. The plurality concluded that a defendant acts willfully within the meaning of that provision if he acts "in open defiance *or in reckless disregard* of a constitutional requirement which has been made specific and definite." *Screws*, 325 U.S. at 105 (opinion of Douglas, J.) (emphasis added). The Court's subsequent decisions have treated the *Screws* plurality's interpretation of Section 242 as controlling. See, *e.g.*, *United States* v. *Lanier*, 520 U.S. 259, 267 (1997). More broadly, the Court has stated that an interpretation of "willfully" that includes both knowledge of illegality and "reckless disregard" of legal requirements is "consistent with the meaning of 'willful' in * * * *criminal* and civil statutes." *Hazen Paper Co.* v. *Biggins*, 507 U.S. 604, 614 (1993) (emphasis added; citation omitted); see *Trans World Airlines, Inc.* v. *Thurston*, 469 U.S. 111, 126 (1985) (same).

c. Petitioner does not address those decisions. Instead, he asserts (Pet. 19-25) that *Bryan* and *Safeco* establish, as a categorical matter, that a criminal willfulness requirement *always* necessitates proof that the defendant actually knew that his conduct was unlawful. Neither *Bryan* nor *Safeco* supports that assertion.

i. In *Bryan*, this Court addressed 18 U.S.C. 924(a)(1)(D), which makes it a crime to "willfully" violate certain federal firearms laws. 524 U.S. at 186-189. The district court had instructed the jury that "a person acts willfully if he acts intentionally and purposely and with the intent to do something the law forbids, that is, with the bad purpose to disobey or to disregard the law." *Id.* at 190 (citation omitted). The defendant challenged that instruction, asserting that Section 924(a)(1)(D) required proof that he knew about the specific legal requirement at issue—a standard akin to the stringent interpretation of "willfully" that the Court had applied only in the context of tax laws and in *Ratzlaf*. *Id.* at 193-195. The Court rejected the defendant's argument, holding that a person acts "willfully" within the meaning of Section 924(a)(1)(D) if he "knew that his conduct was unlawful" in a general sense. *Id.* at 195.

In the passages on which petitioner relies (Pet. 19-20), the Court stated that, in general, a criminal willfulness element requires the government to "prove that the defendant acted with knowledge that his conduct was unlawful." *Bryan*, 524 U.S. at 192 (citation omitted); see *id.* at 195-196. But for at least three reasons, those statements cannot be read to establish that a criminal willfulness element can never be satisfied by reckless disregard for a known legal requirement.

First, the Court in *Bryan* reiterated that "willfully" is "'a word of many meanings' whose construction is often dependent on the context in which it appears." 524 U.S. at 191 (citation omitted). The Court also stated that, even in the criminal context, "a variety of phrases have been used to describe" the "culpable state of mind" that the word "typically" connotes. *Ibid.* Among other formulations, the Court reiterated *Murdock*'s observation that the word can mean "careless disregard" of legal requirements. *Id.* at 191 n.12 (quoting *Murdock*, 290 U.S. at 395). Contrary to petitioner's assertion (Pet. 20), the Court thus did not purport to "establish[]" actual knowledge of illegality as the "floor" for willfulness in all criminal contexts—much less to overrule *Screws* and the other decisions recognizing that reckless disregard may qualify.

Second, the jury instruction that the Court sustained in *Bryan* equated the "intent to do something the law forbids" with "the bad purpose to disobey *or to disregard* the law." 524 U.S. at 190 (emphasis added; citation omitted). The use of the disjunctive suggests that the instruction reaches not only those who knowingly disobey the law, but also those who view it as unnecessary to seek to conform their behavior to the law's requirements. See *Black's Law Dictionary* 573 (10th ed. 2014) (defining "disregard" as "[t]o ignore or treat as unimportant").

Third, the Court's opinion in *Bryan* expressly stated that "disregard of a known legal obligation is certainly sufficient to establish a willful violation." 524 U.S. at 198-199; see *id.* at 197 (same). In making that point, *Bryan* cited circuit-court decisions holding that a willfulness requirement "is satisfied by disregard of a known legal obligation." *Id.* at 196-197 & n.26 (citing

Perri v. *Department of the Treasury*, 637 F.2d 1332, 1336 (9th Cir. 1981); *Stein's Inc.* v. *Blumenthal*, 649 F.2d 463, 467-468 (7th Cir. 1980)). The cited decisions did not require an intentional violation of the known obligation; instead, they held that a defendant acts "willfully" if he "understands the requirements of the law, but knowingly fails to follow them *or was indifferent to them*." *Perri*, 637 F.2d at 1336 (emphasis added); see *Stein's*, 649 F.2d at 467 (requiring proof that the firearms dealer "knew of his legal obligation and purposefully disregarded or was plainly indifferent to [it]") (citation omitted).

Consistent with that understanding, courts of appeals have held that the interpretation of "willfully" articulated in *Bryan* is "satisfied by a showing of, among other things, a disregard of or an indifference to known legal obligations." *RSM, Inc.* v. *Herbert*, 466 F.3d 316, 321 (4th Cir. 2006); see, *e.g.*, *Article II Gun Shop, Inc.* v. *Gonzales*, 441 F.3d 492, 497-498 (7th Cir.) ("purposeful disregard" or "plain indifference"), cert. denied, 549 U.S. 995 (2006). Although those decisions interpreted 18 U.S.C. 923(e), a civil statute related to the provision at issue in *Bryan*, they applied *Bryan*'s criminal-law interpretation of "willfully." See *RSM*, 466 F.3d at 321 n.1; *Article II Gun Shop*, 441 F.3d at 497-498; see also Pet. App. 16a n.3.

The court of appeals expressly adopted the same interpretation here. Quoting *RSM*, it explained that a "long history of repeated failures, warnings, and explanations of the significance of the failures, combined with knowledge of the legal obligations, readily amounts to

willfulness" because it demonstrates "plain indifference" to the law." Pet. App. 21a (quoting *RSM*, 466 F.3d at 322); see *id.* at 16a-17a.[3]

ii. In *Safeco*, this Court considered a provision of the Fair Credit Reporting Act (FCRA) imposing civil liability on persons who "willfully" fail to comply with the statute's requirements. 15 U.S.C. 1681n(a). The Court held that the "willfully" standard was satisfied by "reckless disregard" of FCRA's requirements. *Safeco*, 551 U.S. at 52. In a footnote, the Court distinguished that interpretation of "willfully" from the meaning of the term "in the criminal law." *Id.* at 57-58 n.9. Quoting *Bryan*, the Court stated that the usual criminal-law meaning of "willfully" requires a showing that the defendant acted with "bad purpose," which the Court equated with "knowledge that his conduct was unlawful." *Ibid.* (citation omitted).

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[3] In this case, the district court instructed the jury, in accord with Fourth Circuit precedent, that reckless disregard "means the closing of the eyes to or deliberate indifference toward the requirements of a mandatory safety standard, which standard the defendant should have known and had reason to know at the time of the violation." Pet. App. 40a; see *United States* v. *Jones*, 735 F.2d 785, 790 (4th Cir.), cert. denied, 469 U.S. 318 and 469 U.S. 936 (1984). That instruction did not explicitly require a finding that petitioner had actual knowledge of the relevant safety standards, only that he had "reason to know" of them. But petitioner did not specifically challenge that aspect of the instruction in the court of appeals, and he has not sought this Court's review of the district court's definition of "reckless disregard"—only of the propriety of giving any reckless disregard instruction at all. Pet. i. In any event, petitioner has not argued, and could not plausibly argue, that he lacked actual knowledge of the relevant safety standards. Among other things, he received and reviewed "daily reports" of citations at the Upper Big Branch mine that specifically identified the mine's safety violations. Pet. App. 4a; see Gov't C.A. Br. 5.

The Court's statement in *Safeco* did not purport to overrule *Screws* or to reject *Bryan*'s statement that "disregard of a known legal obligation is certainly sufficient to establish a willful violation." 524 U.S. at 198-199. And because *Safeco* was a civil case, the Court had no occasion to parse the degree of proof necessary to satisfy the *Bryan* standard—much less to establish a categorical rule about the meaning of "willfully" in all criminal statutes.

The Court's statement instead accords with a fundamental distinction between civil and criminal "recklessness" that is not directly at issue here. *Safeco* described civil recklessness "as conduct violating an *objective* standard" and equated it with "gross negligence." 551 U.S. at 58, 68 (emphasis added). "[C]riminal recklessness," in contrast, "also requires subjective knowledge on the part of the offender"—in this context, subjective knowledge of the relevant legal standard. *Id.* at 68 n.18; see p. 12, *supra*. Objective recklessness of the sort discussed in *Safeco* may not qualify as criminal willfulness. But reckless disregard of a subjectively known legal duty—which is what the court of appeals deemed sufficient here, see Pet. App. 17a, 21a—is a different matter.

iii. Petitioner asserts that the government endorsed his understanding of *Bryan* and *Safeco* in two recent briefs in opposition. Pet. 21-22 (citing Br. in Opp., *Ajoku* v. *United States*, 134 S. Ct. 1872 (2014) (No. 13-7264) (*Ajoku* Opp.); Br. in Opp., *Russell* v. *United States*, 134 S. Ct. 1872 (2014) (No. 13-7357) (*Russell* Opp.)). That is not correct.

Ajoku and *Russell* involved 18 U.S.C. 1035, which prohibits "knowingly and willfully" making false statements in healthcare benefit matters. See *Ajoku* Opp. 7; *Russell* Opp. 4. In each case, the court of appeals held

that a person "knowingly and willfully" makes a false statement in violation of Section 1035 if he makes that statement "deliberately and with knowledge" of its falsity. *Ajoku* Opp. 8 (citation omitted); see *Russell* Opp. 5. In this Court, the government acknowledged that those decisions were erroneous and that the "willfully" element of Section 1035 should be interpreted to require proof that the defendant acted "with knowledge that his conduct was unlawful." *Ajoku* Opp. 10 (quoting *Bryan*, 524 U.S. at 193); see *Russell* Opp. 6 (same).

The government thus acknowledged in *Ajoku* and *Russell* that *Bryan*'s interpretation of "willfully" should govern in the context of Section 1035, and that the courts of appeals had erred in adopting an interpretation that did not require *any* awareness of the law or other showing of "bad purpose." But unlike this case, *Ajoku* and *Russell* did not present any question about whether and under what circumstances a criminal willfulness requirement may be satisfied by reckless disregard of a known legal obligation. And in any event, the government's concession in those cases was limited to Section 1035 (and the materially identical language in 18 U.S.C. 1001). 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. 15 (citation omitted); see *Russell* Opp. 11 (same).

d. Petitioner does not contend that the court of appeals' decision conflicts with any decision by another court of appeals. To the contrary, it appears that no other circuit has considered the meaning of "willfully" in Section 820(d). Instead, "the only [other] appellate decision interpreting the meaning of 'willfully' in a criminal provision of a federal mine safety statute" is a Sixth

Circuit decision interpreting Section 820(d)'s predecessor in the Coal Act. Pet. App. 19a. Consistent with the decision below, the Sixth Circuit held that a defendant "willfully" violates a safety standard if he "either intentionally disobeys the standard or recklessly disregards its requirements." *United States* v. *Consolidation Coal Co.*, 504 F.2d 1330, 1335 (1974). As the court of appeals observed, the fact that Congress enacted Section 820(d) against the backdrop of that judicial interpretation of a materially identical predecessor provision supports the court's conclusion here that an operator acts "willfully" under Section 820(d) if he recklessly disregards mine safety requirements. Pet. App. 20a-21a.

Petitioner also does not identify any decision adopting his view that *Bryan* and *Safeco* establish a "floor" that categorically requires actual knowledge of illegality to establish willfulness in the context of every criminal statute. To the contrary, he correctly acknowledges (Pet. 23-24) that "courts of appeals across the country continue to hold in various contexts * * * that criminal willfulness can be established without proof that the defendant intended to act unlawfully." The decisions petitioner cites (Pet. 24-25) interpret the willfulness requirements of particular criminal statutes in different ways, and in some contexts hold that "reckless disregard" is sufficient. *E.g.*, *United States* v. *Trudeau*, 812 F.3d 578, 588 (7th Cir.), cert. denied, 137 S. Ct. 566 (2016); *United States* v. *Figueroa*, 729 F.3d 267, 277 (3d Cir. 2013), cert. denied, 134 S. Ct. 1037 (2014).

The circuit courts' uniform failure to adopt petitioner's one-size-fits-all approach to willfulness is consistent with this Court's decisions giving that term different meanings in different criminal statutes. It also accords with the Court's admonition that the meaning

of "willfully" "is often dependent on the context in which it appears." *Bryan*, 524 U.S. at 191. And petitioner's recognition that courts often hold that a willfulness requirement is satisfied by something less than actual knowledge of illegality refutes his assertion (Pet. 26) that the decision below—which was closely tied to Section 820(d)—"threatens to dramatically expand" the scope of federal criminal liability more broadly.[4]

e. Even if the meaning of Section 820(d)'s "willfully" element otherwise warranted this Court's review, this case would not be a suitable vehicle for considering it. Petitioner was not convicted of violating Section 820(d); he was convicted of *conspiring* to violate Section 820(d). Pet. App. 5a. Petitioner focuses exclusively on the district court's instruction on the meaning of "willfully" in the context of Section 820(d)'s substantive offense. But the district court separately instructed the jury that it could not convict petitioner of the charged conspiracy unless it found that he "knowingly and willfully joined and participated in the conspiracy." Trial Tr. 5797

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[4] In addition to challenging the court of appeals' conclusion that reckless disregard for mine safety standards can satisfy Section 820(d)'s "willfully" element, petitioner also takes issue (Pet. 12-13, 16-17, 27) with other aspects of the district court's jury instructions elaborating on the meaning of "willfully." Those case-specific arguments are outside the scope of the question presented, see Pet. i, and their inclusion in the body of the petition is insufficient to preserve them for this Court's review. Sup. Ct. R. 14.1(a); see *Wood* v. *Allen*, 558 U.S. 290, 304 (2010). In any event, the court of appeals correctly held that the district court's additional instructions required the jury to find either that petitioner "knew that his actions and omissions would lead to violations of mine safety laws and regulations," Pet. App. 29a, or that he acted "with reckless disregard as to whether [his] action[s] or omission[s] would lead to a violation of mine safety laws," *id.* at 27a-28a.

(D. Ct. Doc. 626 (Nov. 17, 2015)). And the court's instructions on the "willfully" element of the conspiracy charge ensured that the jury found that petitioner acted with knowledge that the object of the conspiracy was to violate mine safety standards.

In particular, the district court instructed the jury that "[a] defendant enters into a conspiracy knowingly and willfully if he joins and participates in the conspiracy with knowledge of and the intent to further its unlawful object." Trial. Tr. 5797. The court further instructed that the jury had to find that petitioner "intentionally joined the [conspiracy] knowing that one of its objects was to willfully violate mine safety standards" and that he "*intended that willful violations of mine safety standards be committed*." *Id.* at 5798 (emphasis added). Notwithstanding the reckless-disregard language in the instructions on Section 820(d)'s substantive offense, the jury would have understood the italicized language—particularly in the context of the other conspiracy instructions—to require it to find that petitioner intended that violations of mine safety standards actually occur. The conspiracy instructions thus ensured that the jury found that petitioner acted with knowledge that his conduct was unlawful.

It is not surprising that the jury made that finding. The government's theory throughout the trial was that petitioner conspired with other Massey employees "to violate the mine health and safety laws in order to run more coal." Trial Tr. 5822 (closing argument). The government thus argued that petitioner "was involved in an understanding with others at Massey that he and others *knew* would and did result in intentional violations of the mine safety laws." *Id.* at 5832 (emphasis added). The government's closing statements did not use the

words "reckless disregard." And the government's argument that petitioner acted with knowledge that mine safety standards would be violated was supported by overwhelming evidence. See pp. 3-6, *supra*.[5]

Accordingly, any error in the district court's instruction on the underlying elements of Section 820(d) was harmless. See *United States* v. *McFadden*, 823 F.3d 217, 224 n.2 (4th Cir. 2016) (an instructional error is harmless if "the jury necessarily found facts that would satisfy the omitted element"), cert. denied, 137 S. Ct. 1434 (2017). At minimum, the conspiracy overlay and the multiple relevant willfulness instructions would make this case a poor vehicle in which to address the meaning of "willfully" in Section 820(d).

2. Petitioner also contends (Pet. 29-31) that the court of appeals erred in treating his ability to recall Chris Blanchard as one factor supporting its conclusion that any error in the denial of his request for recross-examination was harmless. But other courts of appeals have likewise considered a defendant's ability to recall the relevant witness in finding particular denials of recross-examination to be harmless error, and petitioner does not cite any decision treating such consideration as improper. In any event, this case would not be

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[5] Petitioner asserts (Pet. 32) that his acquittal on the false-statement charge shows that the district court's instruction on the meaning of "willfully" in Section 820(d) was "dispositive." But petitioner overlooks the court's separate instruction on the willfulness element of conspiracy, which ensured that the jury found that he joined the conspiracy knowing and intending that it would lead to violations of mine safety standards. Petitioner's acquittal on the false-statement charge was thus likely attributable to that charge's different substantive elements, not to any difference in the applicable definitions of "willfully." Cf. Trial Tr. 5805-5808 (jury instructions on the false-statement charge).

an appropriate vehicle in which to consider the question presented even if it otherwise merited review.

a. The Confrontation Clause guarantees a criminal defendant the right "to be confronted with the witnesses against him." U.S. Const. Amend. VI. This Court has held that a trial court may violate the Confrontation Clause if it unduly restricts a defendant's ability to cross-examine a government witness. See, *e.g.*, *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986). But the Court has also emphasized that "trial judges retain wide latitude * * * to impose reasonable limits on such cross-examination." *Ibid.* "[T]he Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware* v. *Fensterer*, 474 U.S. 15, 20 (1985) (per curiam).

In this case, the district court denied petitioner's request to recross-examine Blanchard because it determined, after a thorough review, that "each issue raised on redirect did not constitute new matter." Pet. App. 10a. The court of appeals held that any Confrontation Clause error in that determination was harmless, in part because petitioner "could have recalled Blanchard as a witness later in the trial." *Id.* at 11a.

b. Petitioner contends (Pet. 29-31) that the court of appeals erred in considering his ability to recall Blanchard in its harmless-error analysis, but he does not cite any decision holding that such consideration is improper. In fact, other circuits have likewise relied on a defendant's ability to recall a witness in finding that particular denials of recross-examination constituted harmless error. See *United States* v. *Ross*, 33 F.3d 1507, 1518 (11th Cir. 1994) (citing *Hale* v. *United States*,

435 F.2d 737, 752 n.22 (5th Cir. 1970), cert. denied, 402 U.S. 976 (1971)), cert. denied, 515 U.S. 1132 (1995); see also, *e.g.*, *United States* v. *Quiel*, 595 Fed. Appx. 692, 695 (9th Cir. 2014), cert. denied, 135 S. Ct. 2336 (2015).

Petitioner errs in asserting (Pet. 29-30) that the court of appeals' decision is inconsistent with *Melendez-Diaz* v. *Massachusetts*, 557 U.S. 305 (2009). In that case, this Court held that a trial court violated the Confrontation Clause by admitting affidavits reporting the results of drug tests when the prosecution had not called the analysts who prepared the affidavits. *Id.* at 310-311. In reaching that conclusion, the Court rejected an argument that the Confrontation Clause was not violated because the defendant "had the ability to subpoena the analysts" himself. *Id.* at 324. The Court explained that the ability to subpoena a witness "is no substitute for the right of confrontation" because it is "of no use to the defendant when the witness is unavailable or simply refuses to appear" and because "the Confrontation Clause imposes a burden on the prosecution to present its witnesses, not on the defendant to bring those adverse witnesses into court." *Ibid.*

This case is different. The government satisfied its burden to "present its witnesses" by calling Blanchard to testify, and there was thus no risk that he was "unavailable" or might "refuse[] to appear." *Melendez-Diaz*, 557 U.S. at 324. Indeed, petitioner cross-examined Blanchard for "nearly five days." Pet. App. 11a. The court of appeals' identification of petitioner's ability to recall Blanchard as support for its determination that any error in the denial of his request for recross-examination was harmless is not inconsistent with

Melendez-Diaz, which involved a different type of Confrontation Clause issue and which did not address harmless-error analysis at all. See 557 U.S. at 329 n.14.

c. Even if the question presented otherwise warranted this Court's review, this case would not be an appropriate vehicle in which to consider it because the court of appeals' consideration of petitioner's ability to recall Blanchard was not necessary to its determination that any error was harmless. The court explained that "all of the subjects on which [petitioner] requested recross-examination were either effectively dealt with on cross-examination or cumulative of other evidence introduced at trial." Pet. App. 10a. It also noted that petitioner's cross-examination afforded him "an extensive opportunity to examine Blanchard" on all relevant issues. *Id.* at 11a. Petitioner presumably disagrees with those factbound conclusions, but he does not ask this Court to review them—and he does not explain how the denial of recross-examination could be prejudicial where, as here, it would have been duplicative or cumulative.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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