No.

IN THE

Supreme Court of the United States

CHARLES W. MCCALL,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Federal criminal securities laws require the government to prove that a defendant acted "willfully." Here, the government contended that petitioner "recklessly disregarded" certain "yellow flags" pointing to accounting improprieties at his company. Applying controlling Ninth Circuit law—consistent with the Sixth Circuit, but in conflict with the Second and Eighth Circuits—the district court instructed the jury that "reckless disregard" for the truth of a financial statement suffices to meet the *mens rea* requirement. The district court further instructed that "[r]eckless disregard occurs when a statement is knowingly made *without regard* to its truth or falsity"—that is, when a defendant is merely *indifferent* to the truth or falsity of the statement.

The questions presented are:

1. Whether petitioner's convictions must be reversed because "reckless" conduct does not meet the *mens rea* requirement under the federal criminal securities laws. 15 U.S.C. §§ 77x, 78ff.

2. Alternatively, whether petitioner was entitled to an instruction defining "recklessness" to mean at least what it means in *civil* securities fraud cases—*i.e.*, "an intentional and extreme departure from standards of ordinary care that presents a danger of misleading buyers and sellers that is either known to the defendant or so obvious that he must have been aware of it."

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The order of the United States Court of Appeals for the Ninth Circuit, denying rehearing and amending its initial memorandum order (App., *infra*, 3a–4a), is not reported. The Ninth Circuit's initial memorandum order (App., *infra*, 1a–2a) is not reported. The judgment of the United States District Court for the Northern District of California (Alsup, J.) (App., *infra*, 5a–20a) is not reported.

JURISDICTION

The memorandum order of the Ninth Circuit was entered on July 5, 2011. App., *infra*, 1a–2a. Petitioner timely filed a petition for panel rehearing and rehearing en banc, which was denied on October 20, 2011 (with amendments to the July 5 memorandum order). App., *infra*, 3a–4a. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Petitioner was convicted on three counts of securities fraud, in violation of Sections 10(b) and 32 of the Securities Exchange Act of 1934, as amended (15 U.S.C. §§ 78j(b), 78ff), App., *infra*, 22a, 24a, and SEC Rule 10b-5 (17 C.F.R. § 240.10b-5), App., *infra*, 25a; one count of making a false registration statement to the SEC, in violation of Sections 17(a) and 24 of the Securities Act of 1933, as amended (15 U.S.C. §§ 77q(a), 77x), App., *infra*, 21a–22a; and one count of circumventing internal accounting controls, in violation of Sections 13 and 32 of the Securities

Exchange Act of 1934, as amended (15 U.S.C. §§ 78m(b)(2)(B), (b)(5), 78ff), App., *infra*, 22a–24a.

STATEMENT

Charles McCall's securities-law convictions rest on the dubious proposition that when a corporate executive signs a public company's financial report he "willfully violates" the securities laws' anti-fraud provisions if he "recklessly disregarded" the truth or falsity of any material misstatement contained in that report. That is the law in the Ninth and Sixth Circuits, but the Second and Eighth Circuits have reached the opposite conclusion. Indeed, the Eighth Circuit has held that it is "clear" that a "reckless violation of the securities laws *cannot result in criminal liability*." *United States* v. *O'Hagan*, 139 F.3d 641, 647 (8th Cir. 1998) (emphasis added). Resolving that conflict—on a fundamental legal question under the securities laws—is reason enough to grant this petition.

But there is more. Although petitioner objected to any recklessness instruction at all, he asked, in the alternative, that the district court at least give the jury the proper definition of recklessness that governs *civil* securities-fraud liability. Indeed, petitioner requested the same "reckless disregard" instruction he had received from a different district judge at his first trial (where he was acquitted of a conspiracy count and convicted of *nothing*):

> Reckless [disregard] as to the truth or falsity [of a statement] involves not merely simple or even gross or inexcusable negligence, but requires an intentional and extreme departure from standards of ordinary care that presents a danger of

> misleading buyers and sellers that is either known to the defendant or so obvious that the defendant must have been aware of it.

Def's Proposed Jury Instructions (Dkt. 878) 28–29 n.2, No. 3:00–cr–00505-WHA (N.D. Cal. Oct. 12, 2009); see also Tr. 2687–88.[1] The district court refused. Instead, the court told petitioner's jury that:

> Reckless disregard occurs when a statement is knowingly made *without regard* to its truth or falsity.

Tr. 3132 (emphasis added).

On the basis of that unprecedented—and, with respect, utterly indefensible—definition of recklessness, petitioner now stands convicted, imprisoned for ten years, and fined $1 million. App., *infra*, 5a–9a, 16a–17a. Recklessness simply is not the same thing as willfulness; the courts below incorrectly accepted the former as a perfect substitute for the latter. And, even if there are circumstances in which reckless conduct can amount to a "willful" violation of the securities laws, it is critically important that this Court provide guidance about *how* such a recklessness standard must be defined. To dilute even the *civil* standard of recklessness cannot be squared with the ordinary understanding of *mens rea* in criminal prosecutions. At a minimum, the downright watery standard the district court

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[1] At McCall's first trial, the district court used the phrase "reckless indifference." At his second trial, the district court replaced that phrase with "reckless disregard." Nothing in this case should turn on any distinction between the two phrases. For simplicity's sake, we refer to the instructions at both trials as "reckless disregard" instructions.

adopted here—*indifference* to truth or falsity—has no business forming the basis of federal securities convictions.

1. *Background and Trial.* McCall was Chairman and CEO of HBO & Company ("HBOC"), a health-care software company that merged into McKessonHBOC (where McCall remained Chairman). In April 1999, investors learned that HBOC had improperly accelerated (*i.e.*, booked too early) some of its sales revenue by backdating purchase orders and recording sales that were contingent on side-letter agreements giving customers a right to return their purchased software for a full refund. HBOC's co-presidents—who were McCall's subordinates and had responsibility for HBOC's day-to-day operations—directed members of their sales team to withhold those side-letter agreements and backdated contracts from the company's auditors. The resulting accounting errors led to material misstatements in public financial reports—most of which McCall signed and announced in his capacity as the company's CEO.

The *only* contested issue at trial was whether McCall acted "willfully." The government's evidence that McCall in fact *knew* that side-letter agreements and backdated contracts had been improperly accounted for was razor-thin. In fact, this was McCall's *second* trial on the same charges after his first jury acquitted him of conspiracy to commit securities fraud and failed to reach a verdict on substantive securities-fraud, circumvention, and false-books-and-records counts.

Because the evidence of *actual* knowledge was, at most, equivocal, the government sought a second

path to conviction: It contended that McCall recklessly disregarded a series of "yellow flags"—suspicious circumstances that should have alerted him to the accounting irregularities. See, *e.g.*, Tr. 1680–87, 1716–28, 2317, 2799–800. The government then argued in summation that petitioner's failure to react appropriately to those "yellow flags" showed that he was not a "truly innocent person." Tr. 2799–800, 2804–08, 2820–23. McCall, for his part, vigorously resisted the government's recklessness theory. He maintained that he did not recognize the putatively suspicious circumstances as "yellow flags" at the time, but rather had relied (mistakenly, and perhaps even negligently) on his subordinates' assurances that HBOC's revenue accounting was sound. See*, e.g.*, Tr. 521–22, 912–13, 1684, 1690, 1701–06, 1716–31, 2149–61, 2189–92, 2322, 2468.

2. *The Jury Instructions*. At both trials, the government requested a recklessness instruction. Petitioner objected to any such instruction, but he acknowledged (at Tr. 2687) that the Ninth Circuit had held recklessness to be sufficient to establish *mens rea* in criminal securities cases. Petitioner therefore requested (at Tr. 2688) the same instruction on recklessness that his first jury had received—the definition that is routinely given in *civil* securities-fraud cases:

> Reckless [disregard] as to the truth or falsity [of a statement] involves not merely simple or even gross or inexcusable negligence, but requires an intentional and extreme departure from standards of ordinary care that presents a danger of misleading buyers and sellers that is either

> known to the defendant or so obvious that the defendant must have been aware of it.

Def's Proposed Jury Instructions (Dkt. 878) 28–29 n.2, No. 3:00–cr–00505-WHA (N.D. Cal. Oct. 12, 2009); see also *Hollinger* v. *Titan Capital Corp.*, 914 F.2d 1564, 1569 (9th Cir. 1990) (en banc); *infra* pp. 18–19 (collecting cases).

But a different district judge was now presiding at the re-trial. In that new judge's view, if "an officer of [a] company" makes a false statement without "a reasonable basis one way or the other, * * * then *the element of intent* is satisfied." Tr. 2690–91 (emphasis added). As the second district judge put it:

> I can easily see the scenario where the corporate officer tells the marketplace a number of facts knowing he has no basis, pro or con, and he's just gambling as to whether or not they turn out to be true. If they turn out to be false, yes, he didn't know for sure they were false, but * * * *that's intent*. * * * I think that—if it ever gets to the Supreme Court, they won't have any trouble with that concept.

Tr. 2696 (emphasis added). The district court therefore instructed the jury that:

> Reckless disregard occurs when a statement is knowingly made *without regard* to its truth or falsity.

Tr. 3132 (emphasis added).

Based on that instruction, the government argued in summation that reckless disregard was an "alternative theory" for finding willfulness on all counts. Tr. 2849–50, 2852. By contrast, having been

deprived of the requested instruction on "reckless disregard," defense counsel was unable to argue to the jury what he had argued with evident success at the first trial:

> [T]he instructions go out of their way to talk about [the fact that] we are not talking about negligence or gross negligence or inexcusab[le] negligence or any of those civil concepts. We are talking about deliberate conduct.

2006 Tr. 3095 (McCall's first-trial closing argument).

The second jury thereafter convicted petitioner on the four securities-fraud counts and the circumvention-of-internal-controls count, and acquitted him of falsifying the company's books and records. App., *infra*, 5a–7a. The district court sentenced McCall to the statutory maximum term of imprisonment on each count of conviction (ten years under 15 U.S.C. § 78ff, and five years under 15 U.S.C. § 77x), to run concurrently, and a $1 million fine. *Ibid.*

3. *The Proceedings on Appeal*. On appeal to the Ninth Circuit, petitioner contended that, if recklessness is *ever* sufficient to prove *mens rea* in a criminal securities-fraud case, his conviction was nevertheless infirm for three principal reasons: (1) petitioner was entitled to the instruction he requested on "reckless disregard" because that instruction stated his theory of defense, was indisputably accurate, and was amply justified by the evidence; (2) his requested reckless-disregard instruction was law of the case established at the first trial; and (3) the district court's unprecedented

"without regard" instruction diluted "reckless disregard" to (at most) a simple-negligence standard.

The panel affirmed in a three-paragraph order. App., *infra*, 1a–2a. After dispensing with two evidentiary issues that McCall does not press in this petition, the court held that it was "'clear beyond a reasonable doubt that a rational jury would have found [McCall] guilty' without the reckless disregard instruction." App., *infra*, 2a (alteration in original). Advancing a theory that the government itself declined to urge, the panel surmised that petitioner's jury must have relied on actual knowledge, not reckless disregard, in light of its decision to convict on the circumvention-of-internal-controls count.

McCall petitioned for panel rehearing and rehearing en banc. After calling for a response from the government, the panel revised its opinion by adding two sentences and a handful of words, but otherwise affirmed. The panel now held that the district court's refusal to give petitioner's requested instruction on reckless disregard was permissible because "McCall's defense theory was adequately covered by the combination of the reckless disregard instruction and the good faith instruction." App., *infra*, 3a. The panel did not explain how the district court's "without regard" definition of "reckless disregard" could possibly substitute for petitioner's request that the jury be told that only an "extreme departure from standards of ordinary care" would suffice. Nor did the panel explain how the plain vanilla "good faith" instruction—that a simple "mistake" or "carelessness" is insufficient to convict (Tr. 3139)—covered petitioner's requested instruc-

tion. The panel then ordered petitioner not to file any further rehearing petitions. App., *infra*, 4a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Resolve Whether "Recklessness" Is Sufficient To Establish *Mens Rea* In Federal Criminal Securities Cases

In sustaining an aggressive government theory of criminal liability under the securities laws, this Court once said that it was "[v]ital to our decision" that Congress still has provided "two sturdy safeguards" to avoid overcriminalization. *United States* v. *O'Hagan*, 521 U.S. 642, 665 (1997). One of those "sturdy safeguards" is the willfulness requirement, which according to this Court "does much to destroy" an argument that it "is unjust" to punish those who act with the requisite intent. *Id*. at 666 (internal quotation marks omitted). But just how sturdy a safeguard the willfulness requirement is has become the subject of sharp disagreement in the circuits—and is the question at the heart of this case.

A. The Circuits Are Split On Whether Recklessness Suffices To Prove *Mens Rea* Under the Criminal Securities Laws

The Ninth Circuit—joining the Sixth Circuit—has held that the "willfulness" element under the federal securities laws is satisfied by the same conduct that establishes recklessness in civil securities-fraud cases. In the present case, for example, the district court's *mens rea* instruction applied the Ninth Circuit's longstanding rule that "recklessness is adequate to support a conviction for securities fraud." *United States* v. *Tarallo*, 380 F.3d 1174, 1189 (9th

Cir. 2004), amended by 413 F.3d 928 (2005); see also *United States* v. *Farris*, 614 F.2d 634, 638 (9th Cir. 1979) ("[R]eckless disregard for truth or falsity is sufficient to sustain a finding of securities fraud."). The Sixth Circuit has come to the same conclusion. See *United States* v. *DeSantis*, 238 F.3d 424 (6th Cir. 2000) ("In the alternative [to a knowing misrepresentation or omission], the intent requirement is satisfied if the defendant recklessly misrepresented or omitted a material fact.").

By contrast, the Eighth Circuit, on remand from *O'Hagan*, 521 U.S. 642, held that this Court's decision in that case had made it "*clear*" that a "*reckless violation of the securities law cannot result in criminal liability*; instead, the defendant must act *willfully*." *United States* v. *O'Hagan*, 139 F.3d 641, 646–47 (8th Cir. 1998) (emphasis added). In light of the basic principle that "willfulness" is one of the "two sturdy safeguards Congress has provided regarding scienter" in criminal cases (521 U.S. at 665), the Eighth Circuit concluded that a merely "reckless violation of the securities law" does not "result in criminal liability." 139 F.3d at 647. Accordingly, the Eighth Circuit explained, recklessness is simply not sufficient to demonstrate that "the defendant * * * act[ed] willfully." *Ibid*.[2]

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[2] In reaching the opposite conclusion in *Tarallo*, the Ninth Circuit acknowledged that the Eighth Circuit's decision "might be read as contrary to our holding." 380 F.3d at 1189 n.5. The Ninth Circuit sought to reconcile the two approaches with a cryptic remark that, even in the Eighth Circuit, a defendant "'willfully' violate[s] § 78ff by *willfully acting with reckless indifference* to the truth." *Ibid.* (emphasis added). Putting aside the circularity of using the term "willfully" to define what it means to act "willfully," the Eighth Circuit expressly *disclaimed*

More recently, the Second Circuit reached the same conclusion. *United States* v. *Gansman*, 657 F.3d 86, 91 n.7 (2d Cir. 2011). Holding that the defendant was entitled to his defense-theory instruction on intent, the court carefully *distinguished* between recklessness and willfulness in the securities laws—a distinction the Ninth Circuit has squarely rejected. The Second Circuit described the securities laws' statutory scheme, and explained that, "[t]o impose criminal sanctions, the government must prove * * * that the defendant's conduct was willful. Civil liability, on the other hand, may attach if the government proves * * * that the defendant's conduct *was merely reckless, rather than willful*." *Ibid.* (emphasis added); see also *United States* v. *Knueppel*, 293 F. Supp. 2d 199, 203 n.8 (E.D.N.Y. 2003) ("In *O'Hagan*, the Supreme Court upheld a criminal conviction * * * noting that criminal penalties require a showing of willful (*and not just reckless*) violation of the securities laws." (emphasis added)).[3]

This Court has previously recognized the need for its guidance concerning liability for reckless conduct under the securities laws. It granted certiorari in *Central Bank of Denver, N.A.* v. *First Interstate Bank*

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the Ninth Circuit's definition by holding that a "reckless violation of the securities law *cannot result in criminal liability*" because "***instead***, the defendant must act *willfully*." *O'Hagan*, 139 F.3d at 647 (emphasis added).

[3] Before this Court's decision in *O'Hagan*, several circuits, besides the Sixth and Ninth, had held that "reckless disregard" or "reckless indifference" was sufficient to constitute *mens rea* in a criminal securities case. See, *e.g.*, *United States* v. *Boyer*, 694 F.2d 58, 59–60 (3d Cir. 1982) (collecting cases). To our knowledge, none of these circuits has addressed whether this Court's more recent *mens rea* decisions alter that interpretation.

of Denver, N.A., No. 92–854, cert. granted, 508 U.S. 959 (1993), opinion at 511 U.S. 164 (1994), to decide whether reckless conduct was sufficient to prove aiding-and-abetting liability in *civil* securities cases. The Court ultimately had no occasion to answer that question, concluding that aiding-and-abetting liability does not exist under *any* theory of scienter. The need for guidance persists, especially in criminal cases, where there is an additional "willfulness" requirement and the stakes for defendants are exponentially higher.

As one commentator recently observed, this Court "has never identified the scienter required for a criminal conviction for securities fraud," leaving what can only be called a "scienter mess." Samuel W. Buell, *What Is Securities Fraud?*, 61 Duke L.J. 511, 548, 556 (2011). A leading treatise likewise acknowledges that "[r]esolution of the availability of a recklessness standard * * * must await Supreme Court determination." 4 Thomas Lee Hazen, Law of Securities Regulation § 12.8[3] (6th ed. 2009). Indeed, Professor Buell added, "a criminal conviction for securities fraud might require" any one of *eight* different *mens rea* standards "[d]epending on which federal court one asks." 61 Duke L.J. at 556–57. The Court should grant the petition and resolve this crucial question.

B. Recklessness Cannot Constitute Criminal *Mens Rea* Under The Federal Securities Laws

The Ninth and Sixth Circuits' position is wrong. For starters, it reads "willfulness" out of the criminal securities laws, thereby conflating civil securities fraud with criminal securities fraud.

In *civil* actions to enforce the securities laws' primary anti-fraud provisions in Section 17(a)(1) of the 1933 Act, Section 10(b) of the 1934 Act, and Rule 10b-5, plaintiffs must allege and prove the defendant's scienter. *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 193 & n.12 (1976); *Aaron* v. *SEC*, 446 U.S. 680, 687–96 (1980). In particular, the plaintiff must demonstrate that the defendant had "a mental state embracing intent to deceive, manipulate, or defraud." *Hochfelder*, 425 U.S. at 193 n.12. Although this Court has never directly addressed whether recklessness suffices to prove scienter in civil cases, it has recognized the circuits' general agreement that forms of extreme, severe, and deliberate reckless conduct can satisfy the civil scienter standard. See *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 n.3 (2007); see also *Matrixx Initiatives, Inc.* v. *Siracusano*, 131 S. Ct. 1309, 1323 (2011); *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 379 n.4 (1983); *Aaron* v. *SEC*, 446 U.S. at 685–86; *Ernst & Ernst* v. *Hochfelder*, 425 U.S. at 193 n.12.

By contrast, Congress enacted a separate, additional element to establish that a defendant's misstatements are *criminal*, requiring proof that the defendant "*willfully* violate[d]" the securities laws or regulations. 15 U.S.C. §§ 77x, 78ff (emphasis added). That willfulness requirement is the only statutory element distinguishing criminal from civil liability under the securities laws. "As a general matter, * * * in order to establish a 'willful' violation of a statute, 'the Government must prove that the defendant acted *with knowledge* that his conduct was unlawful.'" *Bryan* v. *United States*, 524 U.S. 184, 191–92 (1998) (quoting *Ratzlaf* v. *United States*, 510 U.S. 135, 137 (1994)) (emphasis added).

The Ninth and Sixth Circuits' contrary view reads "willfulness" out of the statute. Those circuits require no greater culpability of the *criminal* defendant than the scienter standard already requires in *civil* cases. The word "willful[ness]" must be interpreted in its context (see, *e.g.*, *Ratzlaf*, 510 U.S. at 140–41), and in the securities-law context Congress imposed a scienter requirement—arguably covering reckless behavior—for *civil* liability, but distinguished *criminal* liability by enacting "willfully" as an additional *mens rea* requirement. It follows that "willfulness" requires more than recklessness—or it means nothing at all.

That is precisely the lesson of *Ratzlaf*, which involved the antistructuring provision of the Money Laundering Control Act of 1986, Pub. L. 99–570, tit. I, subtit. H, § 1354(a), 100 Stat. 3207–22 (codified as amended at 31 U.S.C. § 5324). The statutory scheme in *Ratzlaf* is similar to the securities laws, in that it sets out blanket prohibitions on certain conduct alongside a separate provision that imposes criminal penalties for "willfully violating" those underlying prohibitions. See *Ratzlaf*, 510 U.S. at 140 (quoting 31 U.S.C. § 5322(a)).

Ratzlaf had conceded that he violated the underlying antistructuring provision—including its built-in scienter requirement. *Ibid.* But this Court recognized that a violation of the substantive statutory prohibition was not, standing alone, sufficient for a *criminal* conviction because—as is true here—"[t]he statutory formulation (§ 5322) under which Ratzlaf was *prosecuted* * * * calls for proof of 'willful[ness]' on the actor's part." *Ibid.* (emphasis added). This Court explained that the

Ninth Circuit and district court had treated that additional willfulness requirement "essentially as surplusage—as words of no consequence." *Ibid.* "Judges should hesitate so to treat statutory terms in any setting," and such "resistance should be heightened when the words describe an element of a criminal offense." *Id.* at 140–41; see also *Safeco Ins. Co. of Am.* v. *Burr*, 551 U.S. 47, 60 (2007) ("[I]n the criminal law 'willfully' typically narrows the otherwise sufficient intent, *making the government prove something extra*, in contrast to its civil law usage." (emphasis added)).

A recklessness standard for criminal scienter is also impracticable and unjust. Indeed, even in the *civil* securities-fraud context, courts and commentators have repeatedly noted that "recklessness" "is an untidy, case-by-case concept," *Helwig* v. *Vencor, Inc.*, 251 F.3d 540, 551 (6th Cir. 2001), that "'belies'" bright-line tests "'for when the scienter threshold has been crossed,'" *Dolphin & Bradbury, Inc.* v. *SEC*, 512 F.3d 634, 639 (D.C. Cir. 2008). Yet even in civil securities cases, reasonable certainty is essential. See generally *Janus Capital Group, Inc.* v. *First Derivative Traders*, 131 S. Ct. 2296 (2011); *Stoneridge Inv. Partners* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148 (2008). When criminal sanctions are at stake, uncertainty about what constitutes culpable conduct is all the more intolerable. Permitting jurors to assess guilt or innocence on some sliding scale is hopelessly disruptive to proper law enforcement and the normal operation of capital markets. Cf. Francis X. Shen *et al.*, *Sorting Guilty Minds*, 86 N.Y.U. L. Rev. 1306 (2011) (concluding, based on an empirical

study, that jurors are particularly bad at identifying "reckless" conduct).[4]

Long-standing precepts of criminal culpability strengthen the point. In *Hartzel* v. *United States*, 322 U.S. 680 (1944), for example, the Court confronted a requirement that a defendant acted "willfully" to violate the Espionage Act of 1917, and explained that a "requirement of a specific intent springs from the statutory use of the word 'willfully,'" which "when viewed in the context of a highly penal statute * * * must be taken to mean deliberately and with a specific purpose to do the acts proscribed by Congress. * * * Thoughtlessness, carelessness *and even recklessness* are not substitutes for the more specific state of mind which the statute makes an essential ingredient of the crime." 322 U.S. at 686, 689 (emphasis added). Once again, that is precisely how the statute is naturally interpreted here: The willfulness requirement, which triggers the securities

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[4] In the present case, we know *to a certainty* that petitioner's jury *in fact* struggled with the recklessness instruction. In response to the district court's routine post-trial survey, Juror Number Five stated (in a comment made part of the record) that confusion about the court's "reckless disregard" instruction had required jurors to ask the foreperson (a Stanford-Law-educated, practicing attorney) for "clarif[ication]." Jury Survey (Dkt. 1029), 3:00–cr–00505-WHA (N.D. Cal. Dec. 9, 2009). A brief, post-trial evidentiary hearing examined the possibility that the jury had received prejudicially extraneous legal instruction (see Fed. R. Evid. 606(b)(2)), and revealed that the foreperson had told her fellow jurors that a person acts with "reckless disregard" when he or she "drives * * * under the influence," because the person "*should have realized* that what they were doing could cause damage." 12/8/09 Tr. (Dkt. 1031) 51 (emphasis added). The phrase "should have realized" is, of course, a classic formulation of negligence.

laws' "highly penal" consequences, sets a standard of deliberate and purposeful conduct for which "recklessness" is not a "substitute[]." See also Model Penal Code § 2.02(8) (defining "willfulness" to include purposeful and knowing misconduct—but not recklessness).

The lesson of these and other cases is clear: permitting simple recklessness to trigger "[l]engthy prison sentences for financial crimes" under the securities laws "swim[s] against a considerable tide of cases insisting on knowledge or intent for white-collar and regulatory crime offenses carrying significant prison sentences." Buell, 61 Duke L.J. at 560; see also *id.* at 573 (the law abhors criminal liability for non-violent reckless conduct, and economic crimes generally require proof of "some form of specific intent"). This Court should grant review to resolve whether a diluted culpability standard should apply to the criminal securities laws.

II. This Court Should Clarify That Any Criminal Recklessness Standard Must Be At Least As Exacting As The Prevailing Standard For Civil Liability

If this Court were to conclude that reckless misstatements violate the criminal securities laws, then this case squarely presents a second question of critical importance to criminal-securities-fraud cases: whether the definition of "recklessness" is at least as exacting in criminal cases as it is in civil cases. Plaintiffs in civil securities-fraud cases must prove an "extreme," "severe," or "deliberate" degree of recklessness. If convictions for reckless behavior are permitted at all under the criminal securities laws,

the definition of "recklessness" cannot be lower than that.

Yet petitioner got far less than a civil-case definition of recklessness—and that made all the difference in the world. McCall's primary defense was that, even if he *should* have done more to follow up on "yellow flags" indicating fraud, his conduct was, at worst, grossly or inexcusably negligent. McCall sought an instruction—the very one he received at his first trial—that would have squarely presented the legal basis for that defense:

> Reckless [disregard] as to the truth or falsity [of a statement] involves not merely simple or even gross or inexcusable negligence, but requires an intentional and extreme departure from standards of ordinary care that presents a danger of misleading buyers and sellers that is either known to the defendant or so obvious that the defendant must have been aware of it.

Def's Proposed Jury Instructions (Dkt. 878) 28–29 n.2, No. 3:00–cr–00505-WHA (N.D. Cal. Oct. 12, 2009); see also Tr. 2687–88. That instruction was precisely what defendants routinely receive in civil securities fraud cases, in the Ninth Circuit (*e.g.*, *Hollinger*, 914 F.2d at 1569), and elsewhere (*Miss. Pub. Employees' Ret. Sys.* v. *Boston Scientific Corp.*, 649 F.3d 5, 20 (1st Cir. 2011); *ECA, Local 134 IBEW Joint Pension Trust of Chicago* v. *JP Morgan Chase Co.*, 553 F.3d 187, 198 (2d Cir. 2009); *Institutional Investors Group* v. *Avaya, Inc.*, 564 F.3d 242, 267 n.42 (3d Cir. 2009); *Pub. Employees' Ret. Ass'n of Colo.* v. *Deloitte & Touche LLP*, 551 F.3d 305, 313 (4th Cir. 2009); *R2 Invs. LDC* v. *Phillips*, 401 F.3d 638, 643 (5th Cir. 2005); *Frank* v. *Dana Corp.*, 646 F.3d 954,

959 (6th Cir. 2011); *Sundstrand Corp.* v. *Sun Chem. Corp.*, 553 F.2d 1033, 1045 (7th Cir. 1977); *SEC* v. *Shanahan*, 646 F.3d 536, 543–44 (8th Cir. 2011); *Dronsejko* v. *Thornton*, 632 F.3d 658, 665, 668 (10th Cir. 2011); *Thompson* v. *RelationServe Media, Inc.*, 610 F.3d 628, 634 (11th Cir. 2010); *Dolphin & Bradbury, Inc.* v. *SEC*, 512 F.3d 634, 639 (D.C. Cir. 2008)). And McCall's requested instruction was well justified by the evidence at trial—which focused on "yellow flags," along with the steps (or missteps) that McCall took in response to them. Had it been given, McCall's reckless-disregard instruction would have enabled him to argue—just as he did to his properly instructed *first* jury (which did not convict him on any counts)—that "gross negligence or inexcusab[le] negligence or any of those civil concepts" could not be used to find "willfulness." 2006 Tr. 3095 (McCall's first-trial closing argument).

But on re-trial with a new judge the district court's definition of recklessness precluded that entire, and crucial, line of defense. Yet far from rejecting the district court's "without regard" definition, the court below held that this unprecedented instruction, coupled with the boilerplate good-faith instruction, was an adequate substitute for petitioner's requested definition of reckless disregard. See App., *infra*, 3a. That is just not so. First, the "reckless disregard instruction" that McCall received included *literally nothing* to alert the jury that, to be criminally culpable, McCall's "reckless disregard" had to be "an *intentional* and *extreme* departure from the standards of ordinary care" that presented so egregious and obvious a "danger" of misleading investors that he either *knew* or *must have been aware* of it. Indeed, the district

court's gloss on "reckless disregard" dramatically *diluted* even the scienter standard required in *civil* securities-fraud cases. After all, acting "without regard" to something means (at most) acting in *disregard* of it, and so the jury received a definition of reckless disregard that removed the concept of *recklessness* entirely. Nor did the word "knowingly" rescue the misguided instruction: The instructions stated that the term "knowingly" meant only that "a defendant is aware of the act and does not act or fail to act through ignorance or mistake or accident." Tr. 3131. All the jury had to find, under the court's instruction, was that McCall *knew that he didn't know* that the financial statements were true in all material respects. That's a far cry from premising criminal liability on an "extreme departure from standards of ordinary care."

The "good faith instruction" likewise added nothing to the mix. It told the jury only that McCall could not be convicted if his misstatements resulted from an honest "mistake" or merely "careless" conduct. Tr. 3139. Such an instruction did nothing to alert the jurors that even McCall's gross or inexcusable negligence falls short of criminal *willfulness*. There are many levels of culpability—"gross" and "inexcusable" negligence among them—between making a good-faith, honest mistake and engaging in an "extreme departure from standards of ordinary care." As this Court recognized in another context, a "good faith" standard of conduct is thus "*far less stringent* than that of * * * reckless disregard for the truth." *Monitor Patriot Co.* v. *Roy*, 401 U.S. 265, 272 (1971) (emphasis added).

This Court should grant review on the second question presented so that, in the event it concludes that reckless conduct can meet the *mens rea* element in criminal securities cases, it then can address the requirements for a proper definition of "reckless disregard."

III. This Case Is An Appropriate Vehicle For Resolving The Questions Presented

This case presents two important and recurring questions about the interpretation of the criminal securities law.[5] For petitioner, the answers to these questions were dispositive: There is every reason to believe that McCall's second jury convicted where his first jury could not precisely because the district court refused to give petitioner's "reckless disregard" instruction, and instead watered down the *mens rea* element with the unprecedented "without regard" definition. As the previous district judge remarked at petitioner's first trial, "the definition of what is reckless disregard is an important instruction in this case" because the government "in large measure [was] going to rely on the recklessness standard" in presenting its case to the jury. 2006 Tr. 2689, 2709.

We are fully mindful that the Ninth Circuit sidestepped these issues, issuing a three-paragraph, unpublished ruling that might not ordinarily attract this Court's review. But we respectfully submit that

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[5] Criminal prosecution for securities fraud is on the rise, particularly in light of the recent financial crisis. The Federal Bureau of Investigation recently reported a 47% increase over the past decade in the number of agents assigned to investigate securities, commodities, and investment fraud, with more than 1,700 pending cases. Federal Bureau of Investigation, Today's FBI Facts & Figures 37 (2011).

the panel's decision—which rests on an utterly inexplicable theory for how the reckless-disregard instruction was harmless beyond a reasonable doubt—should be reviewed nonetheless. The panel surmised (1) that petitioner's conviction on the circumvention-of-internal-controls count shows that the jury *must have* found "actual knowledge," rather than reckless disregard, (2) that this supposed actual-knowledge finding *must have been* about the misuse of side-letter agreements, and finally (3) that those same side-letter agreements *must have* provided the jury's factual basis for *each* of McCall's four securities-fraud convictions. That theory is completely untethered from the record, which doubtless explains both why the government has never advanced it (even when invited to do so at the rehearing stage), and why the panel's opinion offers absolutely no support for this conjecture.

First, the panel ignored the near-certain taint of the erroneous reckless-disregard instruction on *all* the counts in the case. There is every reason to believe the jury premised the circumvention conviction on a finding the McCall acted recklessly, rather than with "actual knowledge." The four securities-fraud counts were without doubt the main counts in the case—the circumvention count was an additional charge premised on much (but, importantly, not *all*) of the same proof and argument. Briefly stated, the government alleged that McCall had notice of "yellow flags" suggesting financial misstatements and yet signed off on public filings and related releases (the securities-fraud counts) and auditor representation letters (the circumvention count). An error as to the core instruction on securities fraud very likely affected the jury's

consideration of the circumvention count. See, *e.g.*, *United States* v. *Black*, 625 F.3d 386, 390 (7th Cir. 2010) ("If a count is submitted to the jury under an instruction apt to poison the jury's consideration of other counts as well, the defendant may be entitled to a new trial.").

Given the high probability of spillover taint, it is passing strange to premise a harmless-error conclusion on the circumvention conviction. What is more, the instructions virtually impelled the jury to apply the reckless-disregard instruction to the circumvention count. Willfulness was an element common to all counts, and the government told the jury that "reckless disregard" served as an "alternative theory" for finding willfulness on each of those counts. Tr. 2849–50, 2852. And the jury instructions expressly spread the taint of the erroneous recklessness instruction across all the counts in the case. They told the jury that if petitioner made statements with "reckless disregard" for the truth, then he had a "purpose to defraud." In the same breath, they added that if petitioner had a "purpose of undertaking an act [he knew] to be wrongful," then he acted "willfully." Tr. 3131–32; see also Tr. 2691 (government explaining to the district court that "reckless disregard * * * work[s] directly together with the willful standard"); Tr. 2693 ("emphasizing," again, that "they work together"). In short, both through the instructions and the government's arguments, the impermissible recklessness instruction tainted the circumvention count, just as it did all the other counts. It follows that petitioner's circumvention conviction cannot be used to infer *anything* about the jury's reasoning.

Second, even if the circumvention conviction *was* premised on McCall's actual knowledge of *something*, that something was *not* necessarily the misuse of side-letter agreements. Take one example: One of the government's most emphatic arguments at trial was that, at an April 1999 audit committee meeting (after all of the relevant public statements), McCall remained silent despite knowing, by then, that the company's CFO was "lying" about whether a particular sales contract had been backdated. Tr. 2835. The jury could have found—at the government's urging (Tr. 2835–37)—that McCall knew that the CFO was lying to the Board's audit committee, and convicted him for circumventing internal accounting controls on that basis alone. It need not, therefore, have found that McCall actually knew about a side-letter agreement in advance of any materially false financial statement implicated by *any* of the securities-fraud counts.

Finally, the panel also ignored the fact that there are *four different* securities-fraud counts in the case—three of which refer to distinct and specific financial statements that McCall signed in August, October, and November 1998. The jury could have found circumvention if it believed McCall knew about *one* side letter, but still determined there was insufficient evidence that he knew about others. As a result, it is scarcely "'clear beyond a reasonable doubt'" (App., *infra*, 2a) that *none* of the fraud convictions turned on recklessness—on the contrary; each of them easily could have. For example, if the jury found that McCall knew about *an April 1999* side letter (despite McCall's impassioned defense that he did not), that would have been enough to support the circumvention conviction. But that finding could not

possibly explain the fraud verdicts premised on three financial statements McCall signed *back in 1998*. And, because any of those specific fraud counts could have been based on finding recklessness, that same recklessness finding could readily have provided the jury's basis for convicting on the fraud count charging an overall scheme. The panel's harmless-error pirouette cannot insulate from review the two crucial questions presented.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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