No. _____

In The

Supreme Court of the United States

CORDELL LESTER SMITH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Evidence 1002, the so-called best evidence rule, states that, "[t]o prove the content of a writing," the writing itself "is required." This case asks the Court to resolve a circuit split concerning whether Rule 1002 applies when, as frequently occurs in both criminal and civil trials, a lay witness seeks to testify to a fact he learned from reading a document. The question presented is:

> Did the Fourth Circuit correctly hold—consistent with the First Circuit, but in conflict with the Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits—that Rule 1002 permits a lay witness to testify to facts he learned exclusively from reading documents that have not been offered into evidence, so long as the facts exist independently of those documents?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Cordell Smith respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The court of appeals' opinion (App. 1a-7a) is published at 566 F.3d 410. The district court's ruling from the bench (App. 15a-16a) on Smith's objection under Federal Rule of Evidence 1002 is unreported.

JURISDICTION

The court of appeals entered its judgment on May 26, 2009. On June 23, 2009, the court denied a timely petition for panel rehearing and rehearing en banc. App. 25a. On September 9, 2009, the Chief Justice extended the time to file this petition until November 20, 2009. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

RULE INVOLVED

Federal Rule of Evidence 1002 provides:

> To prove the content of a writing, recording, or photograph, the original writing, recording, or photograph is required, except as otherwise provided in these rules or by Act of Congress.

STATEMENT

This case concerns a circuit split on an easily overlooked but crucially important evidentiary issue: the so-called best evidence rule. Codified as Federal Rule of Evidence 1002, the best evidence rule provides that a writing, recording, or photograph is itself required "to prove [its] content." Courts have long interpreted that rule to preclude

witnesses from testifying to facts they learned by reading documents that are not in evidence. Their reason is simple: "The elementary wisdom of the best evidence rule rests on the fact that the document is a more reliable, complete and accurate source of information as to its contents and meaning than anyone's description * * * ." *Gordon* v. *United States*, 344 U.S. 414, 421 (1953).

Despite that elementary wisdom, petitioner was convicted of a federal crime based on a lay witness's testimony that unseen documents—shown neither to petitioner nor to the jury—proved an indispensable element of that crime. The Fourth Circuit then upheld the admission of that testimony over petitioner's Rule 1002 objection. The court of appeals held that Rule 1002 did not apply because the witness's testimony sought to prove facts "existing independently" of the documents from which he claimed to have learned them. App. 6a.

A. District Court Proceedings

A jury convicted Smith of three charges: possessing with intent to distribute crack cocaine, in violation of 21 U.S.C. § 841; using and carrying one or more firearms during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. § 924(c)(1); and possessing one or more firearms, having been previously convicted of a felony, in violation of 18 U.S.C. § 922(g). The district court then sentenced Smith to 197 months' imprisonment.

The § 922(g) charge required proof that at least one of four firearms that the government attributed to Smith had crossed state lines. To supply that proof, the government called Special Agent Andrew Cheramie of the Bureau of Alcohol, Tobacco,

Firearms and Explosives ("ATF"), to testify that the firearms found in Smith's North Carolina apartment were manufactured in states other than North Carolina. The government claimed that Cheramie was competent to give that testimony because he was "an expert in the analysis of the location of where firearms are manufactured." App. 4a.

During *voir dire*, however, Cheramie did not claim that his testimony about where Smith's firearms had been manufactured would be based on any specialized knowledge or analysis. In fact, Cheramie did not claim to have any expertise relating to firearm manufacturing in general or any personal knowledge relating to the manufacture of Smith's firearms in particular. Instead, he stated that he learned where Smith's firearms had been manufactured by looking them up in published materials on firearms, a reference book, and an ATF file memorializing discussions between ATF agents and firearm manufacturers. App.13a-15a. His testimony, therefore, would merely repeat what he had read:

> Q: So what you do is you take – you look at the gun, you read on it who manufactured it[,] [r]ead the serial number[,] [t]ake a look at pictures that match what the gun is, and then you look up who manufactured it and when.
>
> A: Essentially, yes.

App. 14a.

Following *voir dire*, Smith's counsel objected to Cheramie's testimony on the ground that it "violate[d] the best evidence rule, Rule 1002." App. 15a. This was "a classic best evidence rule" violation, he explained, because "[t]he witness is essentially

repeating things that he's read in documents." *Ibid.* Defense counsel also argued that the testimony was "not in the nature of an expert opinion" because it restated "information the jury can see for themselves" in the items that Cheramie had read, but which the government had not offered into evidence. *Ibid.*

The district court agreed that Cheramie was not an expert but admitted his testimony over Smith's objection. It stated that "the court will not designate the witness as an expert in interstate nexus," but that Cheramie could testify based on his "training and experience" concerning whether the firearms traveled in interstate commerce. App. 15a-16a.

Cheramie then testified "based on [his] training and experience"—*i.e.*, the experience of looking up firearms in written materials—that Smith's four firearms were made in Montana; Prescott, Arizona; New Haven, Connecticut; and Hamden, Connecticut. App.16a-18a. Cheramie conceded, meanwhile, that he was "not the expert in the manufacture of firearms." App. 19a. Nevertheless, the government never showed Smith or the jury the materials underlying his testimony.

B. Court Of Appeals Proceedings

Smith appealed his § 922(g) conviction, on Rule 1002 grounds, and his sentence, on the ground that the district court impermissibly presumed the reasonableness of the United States Sentencing Guidelines. With respect to the § 922(g) conviction, Smith argued that Cheramie's testimony sought to prove "'the content'" of the materials he had read, for purposes of Rule 1002, because Cheramie "had no independent, first-hand knowledge of where the firearms were manufactured." Pet. C.A. Br. 21. As support,

Smith cited cases holding that Rule 1002 precludes using oral testimony "to prove some fact known to a witness only because he read it." *Id.* at 27 (discussing *United States* v. *Horning*, 409 F.2d 424 (4th Cir. 1969); *United States* v. *Bennett*, 363 F.3d 947 (9th Cir. 2004)).

The Fourth Circuit rejected that argument and affirmed Smith's § 922(g) conviction. It concluded that the government never sought "to prove the content of any writing or recording" within the meaning of Rule 1002, even though Cheramie's testimony depended on "consult[ing] books and computer databases." App. 6a. In the court's view, the government "sought only to prove *the fact* that the firearms were manufactured in States other than North Carolina." *Ibid.* That fact, the court observed, "exist[ed] independently of the content of" any document. *Ibid.* It did not matter, under the court's analysis, that Cheramie claimed to have *learned* that fact by reading documents.

The Fourth Circuit also vacated Smith's sentence and remanded his case to the district court for resentencing. App. 7a. On remand, Smith was again sentenced to 197 months' imprisonment. The Fourth Circuit is holding Smith's appeal of that judgment in abeyance, pending the disposition of this petition.

REASONS FOR GRANTING THE PETITION

This case raises an evidentiary question that arises frequently in both civil and criminal cases: may a lay witness testify to a fact that she claims to have learned from a document that has not been offered into evidence? The Fourth Circuit below ruled

that such testimony does not implicate Rule 1002 because it seeks ultimately to prove the fact that the witness learned, rather than "the content" of the document from which she learned it. That decision entrenches an existing circuit conflict, misinterprets Rule 1002, and invites confusion and unfairness in the lower courts.

Eight courts of appeals, in construing Rule 1002 or its common law antecedent, have rejected the view endorsed by the decision below. Applying the "elementary wisdom" that someone's description of a document is a poor substitute for the document itself, *Gordon*, 344 U.S. at 421, those courts bar witnesses from describing the contents of documents, even when those descriptions are intended to prove facts existing independently of the documents. That majority position correctly reasons that when a witness lacks firsthand knowledge of a fact, but instead learned that fact from a document, the witness's testimony about that fact seeks "[t]o prove the content" of the document for purposes of Rule 1002. Numerous commentators have endorsed that view. In contrast, only the First Circuit has joined the Fourth Circuit in rejecting it.

This Court's review is necessary to correct the First and Fourth Circuits' misinterpretation of Rule 1002. Because petitioner's § 922(g) conviction hinged on a lay witness's claims about documents that were never introduced at trial, this case is an ideal vehicle for making that correction.

I. The Circuits Are Divided On Whether Testimony Designed To Prove Facts Gleaned From The Contents Of A Writing, Recording, Or Photograph Violates Rule 1002

The circuits are split on whether a party may use a witness's description of a document—rather than the introduction of that document into evidence—to prove a fact memorialized in the document. Eight circuits have held that Rule 1002 or its common law antecedent prohibits such testimony. The First Circuit and the Fourth Circuit below, however, have held that Rule 1002 permits such testimony.

A. The Second, Third, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits hold that the best evidence rule precludes a witness from testifying to a particular fact "when the knowledge from which the witness testifies is derived from [a] writing." *Allen* v. *W.H.O. Alfalfa Milling Co.*, 272 F.2d 98, 99 (10th Cir. 1959) (citing *Shreve* v. *United States*, 77 F.2d 2 (9th Cir. 1935)); see also *United States* v. *Ross*, 321 F.2d 61, 69-70 (2d Cir. 1963); *Acumed LLC* v. *Advanced Surgical Servs., Inc.*, 561 F.3d 199, 222 (3d Cir. 2009); *United States* v. *Marshall*, 762 F.2d 419, 424-25 (5th Cir. 1985); *Waterloo Furniture Components, Ltd.* v. *Haworth, Inc.*, 467 F.3d 641, 648-49 (7th Cir. 2006); *United States* v. *Rohalla*, 369 F.2d 220, 222-24 (7th Cir. 1966); *Wright* v. *Farmers Co-Op of Ark. & Okla.*, 681 F.2d 549, 553 (8th Cir. 1982); *United States* v. *Bennett*, 363 F.3d 947, 954 (9th Cir. 2004); *United States* v. *Ross*, 33 F.3d 1507, 1514 n.9 (11th Cir. 1994).

Under those decisions, parties seek "to prove the content of a writing, recording, or photograph," for purposes of Rule 1002, in two categories of cases. First, certain

cases, such as will and contract disputes, "require knowledge of the exact contents of a writing, recording, or photograph" under "the governing principles of substantive law." 2 KENNETH S. BROUN, MCCORMICK ON EVIDENCE § 234 (6th ed. 2006). Second, certain cases involve disputes about a fact that "may be proved without resort to a writing," but which a party "*chooses* to prove" using a writing. *Ibid.* "'Rule 1002 applies'" to those cases even though the party's strategic aim is to prove "pertinent events [that] occurred *independent* of a writing, recording, or photograph but are nonetheless evidenced by the contents of such an item.'" *Acumed*, 561 F.3d at 222 (quoting 31 CHARLES ALAN WRIGHT & VICTOR JAMES GOLD, FEDERAL PRACTICE AND PROCEDURE § 7184, at 388 (2008)) (emphasis added).

Cases falling into that second category follow one simple rule: when a witness's testimony concerns a fact *existing* independently of a writing, it is admissible only if the witness's knowledge was "*gained* independently of the written matter." *Allen*, 272 F.2d at 100 (emphasis added). By the same token, testimony is admissible under Rule 1002 "[i]f [the] witness's testimony is based on his first-hand knowledge of [the] event as opposed to his knowledge of the document." *Waterloo Furniture Components*, 467 F.3d at 648-49; see also *Bennett*, 363 F.3d at 953 ("[T]he rule does apply when a witness seeks to testify about the contents of a writing, recording or photograph without producing the physical item itself—particularly when the witness was not privy to the events those contents describe."); *Spartan Grain & Mill Co.* v. *Ayers*, 517

F.2d 214, 220 (5th Cir. 1975) (explaining that the best evidence rule applies to an "attempt[] to prove the existence of [a fact] by the contents of a document").[1]

The cases applying that rule are legion. See, *e.g.*, *Acumed*, 561 F.3d at 222-23 (holding that Rule 1002 required exclusion of testimony about certain clauses in defendant's contracts, even though those contracts were not part of a contract dispute, where the defendant offered the testimony to prove its practice of insisting on those clauses during contract negotiations); *Ross*, 321 F.2d at 70 (holding that testimony based on a witness's review of a list, when offered to prove that defendant was salesman number 24, implicated the best evidence rule); *Marshall*, 762 F.2d at 424-25 (holding that testimony based on a witness's review of store records was inadmissible, under Rule 1002, to prove that lawnmowers were missing); *Spartan Grain & Mill*, 517 F.2d at 220 (holding that testimony based on a witness's review of a lab report was inadmissible, under the best evidence rule, to prove that chickens had been infected with leukosis); *Rohalla*, 369 F.2d at 222-24 (holding that the best evidence rule barred a government agent's testimony that he saw an Edsell car bearing a particular license plate, looked up the license plate in a book published by the Secretary of State, and learned that it belonged to a different car); *Wright*, 681 F.2d at 553 (holding that a transcript offered to prove the content of a conversation implicated Rule 1002, where the person who prepared the transcript relied on a tape recording of the conversation);

[1] As the Fourth Circuit observed (App. 5a-6a), the term "best evidence rule" can be misleading. Under Rule 1002, someone who witnessed an event cannot be precluded from testifying about it based on a claim that a recording of the event is better evidence of what happened.

Bennett, 363 F.3d at 954 (holding that a law enforcement officer's testimony about information he read on a GPS unit was inadmissible, under Rule 1002, to prove the route taken by a boat); *United States* v. *Workinger*, 90 F.3d 1409, 1415 (1996) (holding that a transcript offered "to reflect the content of the conversation that took place" implicated Rule 1002 because a secretary prepared the transcript by listening to a tape of the conversation, and the tape was not offered into evidence); *Ross*, 33 F.3d at 1514 n.9 (holding that Rule 1002 applied to attempts to use transcripts to prove the contents of a recorded conversation about defendant's drug activities, where "the knowledge of the government's witnesses resulted exclusively from having listened to the recordings, not from personal observations of the conversations").

B. Two circuits—the First and the Fourth—have rejected the predominant interpretation of Rule 1002. Those courts have held that Rule 1002 permits a witness to testify to facts he *learned* from reading documents that have not been offered into evidence, so long as the facts "exist[] independently of the content of any book, document, recording, or writing." App. 6a; *United States* v. *Donato-Morales*, 382 F.3d 42, 45 n.2 (1st Cir. 2004). They reason that a witness's testimony does not seek "to prove the content" of a document for purposes of Rule 1002 if its ultimate aim is to prove "*the fact*" that the witness learned from the document. App. 6a.

Under that position, any layperson can suddenly become competent to testify at a trial by reviewing a writing, recording, or photograph that would be admissible if offered into evidence. Taking that position to extraordinary lengths, the First and

Fourth Circuits have held that the government may rely on a lay witness's testimony, instead of offering into evidence the documents underlying that testimony, even when a criminal conviction is at stake. The decision below upheld petitioner's § 922(g) conviction even though it hinged on a lay witness's testimony about what he read when he looked up Smith's firearms in written materials. Likewise, *Donato-Morales* upheld a larceny conviction where the government proved that the defendant had underpaid for a VCR by calling a security officer to testify about the contents of "the scanner that the officer used to determine the price." 382 F.3d at 45 n.2.

Those decisions directly contradict the majority position that Rule 1002 applies when a lay witness claims that "the 'content' of [a document], in turn, [is] evidence" of some fact existing independently of the document. *Bennett*, 363 F.3d at 953. The minority position also contradicts prior decisions by the First and Fourth Circuits themselves. Compare *Donato-Morales*, 382 F.3d at 45 n.2 (holding that testimony about an item's price, which hinged on the witness's review of a price scanner, did not violate the best evidence rule), with *United States* v. *Horning*, 409 F.2d 424, 426 (4th Cir. 1969) (holding that a witness's testimony about the price of stolen tools, which hinged on the witness's review of a product catalog, violated the best evidence rule), and *Sylvania Elec. Prods., Inc.* v. *Flanagan*, 352 F.2d 1005, 1007-08 (1st Cir. 1965) (holding that summaries of tally sheets, combined with plaintiff's testimony that the summaries were accurate, were inadmissible under the best evidence rule to prove the work hours recorded in the tally sheets).

II. The First And Fourth Circuits' Decisions Are Incorrect

The minority position is wrong, and clearly so. It fails to apprehend that a lay witness who lacks personal knowledge of a fact, but who purportedly learned that fact from a document, cannot testify to that fact *except* by testifying to "the content" of the document. Because lay witnesses must testify from personal knowledge, a lay witness is not competent to testify directly to facts she learned from a document. See FED. R. EVID. 602; *Kemp* v. *Balboa*, 23 F.3d 211, 213 (8th Cir. 1994). That witness possesses personal knowledge only of *the contents* of the document. Thus, even if the witness's "ultimate[]" aim is to prove some fact memorialized in a document, the witness's "proximate[]" aim is to prove the document's content. *Workinger*, 90 F.3d at 1415.

The First and Fourth Circuits have confronted neither that logic nor the authorities endorsing it. In *Donato-Morales*, the First Circuit relegated its discussion of Rule 1002 to a footnote that cited no cases. The decision below, meanwhile, claimed to rely on *United States* v. *Sliker*, 751 F.2d 477 (2d Cir. 1984). See App. 6a. *Sliker*, however, stands only for the proposition that Rule 1002 does not preclude testimony about a document's *existence*. See *Sliker*, 751 F.2d at 484 (holding that oral testimony seeking to establish the "fact of insurance" did not violate Rule 1002); *United States* v. *Jones*, 958 F.2d 520, 521 (2d Cir. 1992) (explaining that *Sliker* "held that oral testimony about an insurance policy was properly admitted to prove the existence of insurance, in contrast to proving the terms of the policy").

The decision below also cited *McCormick on Evidence*. App. 6a. But that treatise, like many other commentaries, supports the majority position.[2] What is more, two of the authors of *McCormick on Evidence* have sought the parties' consent to file an *amicus curiae* brief in this Court supporting petitioner.

III. The Question Presented Is Important

Despite receiving less attention than other rules of evidence, Rule 1002 stands for an important principle: if a witness claims to know something only because she read it somewhere, the jury must be provided with the materials that the witness read, so that it can judge for itself the testimony's accuracy.

Eight courts of appeals faithfully apply that principle by excluding, under Rule 1002, lay testimony or other evidence based solely on information learned from writings, recordings, or photographs not offered into evidence. Litigants and criminal defendants in those circuits do not risk losing judgments or suffering criminal convictions based on testimony that is merely an account of what a witness saw or read

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[2] See, *e.g.*, 2 MCCORMICK ON EVIDENCE § 234 ("[O]ral testimony as to what a witness had previously seen in [a] record will be rejected unless the original is unavailable"); 6 JACK A. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 1002.05 (Joseph M. McLaughlin, ed., 2d ed. 2009) (Rule 1002 applies "when the witness was not privy to the events" she learned from a document (citing *Acumed*, 561 F.3d at 222-23, and *Bennett*, 363 F.3d at 953)); CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE UNDER THE RULES 890 (6th ed. 2008) ("As long as defendant chose to rely on the report as proof that the light was red for [a particular car], the Best Evidence doctrine required defendant to offer the report itself."); 14 AM. JUR. PROOF OF FACTS 2d 173 § 14 (1977) ("The reported cases show that proponents of computer-produced evidence occasionally founder on the best evidence rule by presenting oral testimony based on the witness' review of computer printouts without actually introducing the printouts themselves into evidence.").

in a writing, recording, or photograph. Instead, "the proponent must produce the original (or a duplicate * * *) or explain its absence." *Bennett*, 363 F.3d at 953 (citing FED. R. EVID. 1002, 1003, 1004). That requirement, which barely burdens the proponent, achieves a substantial degree of fairness for the proponent's adversary.

The minority position, however, needlessly promotes unfairness. It deems lay witnesses competent to testify to facts they did not learn firsthand but instead learned from documents. Such testimony will be admitted so long as the documents are admissible—though not offered into evidence—and memorialize facts "existing independently" of the documents. Those hurdles are easy to clear: many documents are admissible under the hearsay and authentication rules, and most documents other than wills and deeds memorialize independent facts. That is why, under the majority position, the "most common" way in which parties "bring[] the Best Evidence doctrine into play" is "using a writing under an exception to the hearsay doctrine" to prove some independent fact. CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, 5 FEDERAL EVIDENCE § 10:18 & n.17 (3d ed. 2009 Supp.). But, under the minority position, that same tactic skirts the best evidence rule entirely.

Thus, opportunities to exploit the minority position are as numerous as the means of satisfying the hearsay and authentication rules. To take just a few examples, a lay witness lacking relevant firsthand knowledge could nevertheless testify to: facts described in an adversary's e-mail messages (FED. R. EVID. 801(d)(2)); information contained in telephone logs or other business records (FED. R. EVID. 803(6)); the details of a criminal defendant's supposed confession (FED. R. EVID. 804(b)(3)); or the events

depicted in a photograph or videotape (FED. R. EVID. 901). Likewise, in the Fourth Circuit below, the government argued that the materials Agent Cheramie read were admissible hearsay, thus implying that his testimony could not have been excluded on grounds other than Rule 1002. See 3/25/2009 Oral Argument CD at 30:30 to 31:06; *cf. United States* v. *Simmons*, 773 F.2d 1455, 1458-59 (4th Cir. 1985) (upholding, under the residual exception to the hearsay rules, the admission of an ATF trace form indicating where a firearm had been manufactured).

Lay testimony does not warrant such latitude. In American courts, when a party calls for the writing, recording, or photograph on which lay testimony relies, "[t]rust me" is not an appropriate response. *Workinger*, 90 F.3d at 1415. Not every witness is honest, and even honest witnesses are fallible. Moreover, as this Court recognized last Term, even the most routine, "bare-bones" documents can be inaccurate or fraudulent. *Melendez-Diaz* v. *Massachusetts*, 129 S. Ct. 2527, 2537 (2009). But a document's inaccuracy or fraudulence can remain hidden if someone's testimony is offered in its stead. The circuit split on whether such testimony is admissible warrants this Court's review. See *Williamson* v. *United States*, 512 U.S. 594, 596 (1994) ("In this case we clarify the scope of the hearsay exception for statements against penal interest.").

If this Court does not intercede, the minority position will invite confusion and unfairness in trial courts. Indeed, even before the decisions in this case and *Donato-Morales*, lower courts occasionally made the kind of mistake that the minority position now fosters. See, *e.g.*, *Travelers Insurance Co.* v. *United States*, 46 Fed. Cl. 458, 463

(Fed. Cl. 2000) (holding that Rule 1002 does not "prevent the introduction in evidence of * * * facts that exist independently of the document"); *Doe* v. *United States*, 805 F. Supp. 1513, 1517 (D. Haw. 1992) (holding that the oral testimony about test results memorialized in transmittal forms did not violate Rule 1002 because the United States was "not seeking to prove that the 12 transmittal forms said the HIV results were negative," but instead "to prove what the 12 test results actually were).

IV. This Case Is An Ideal Vehicle For Resolving The Question Presented

If this Court is ever to resolve the circuit split concerning Rule 1002, this is the case in which to do it. First, unlike in some evidentiary disputes, the contested issue here is outcome-determinative. Agent Cheramie's testimony was the government's only evidence that Smith's firearms traveled in interstate commerce, and Cheramie did not claim to possess any firsthand knowledge regarding that fact. Smith was therefore convicted of violating § 922(g) based on testimony about the content of materials that neither Smith nor the jury ever saw. Admitting that testimony would be reversible error in the eight circuits that follow the majority position.

Second, the record forecloses the only conceivable alternative ground for admitting Cheramie's testimony: the expert-opinion exception to Rule 1002. Under that exception, an expert may "give an opinion based on matters not in evidence." FED. R. EVID. 1002 advisory committee's note. Here, however, the district court ruled that Cheramie was not an expert, and neither the government's appellate brief nor the Fourth Circuit's opinion questioned that ruling. And for good reason: Cheramie's testimony purported to relay facts he read, not opinions he formed. Moreover, the

expert-opinion exception does not authorize witnesses to bypass Rule 1002 by inventing a field of expertise—here, the putative field of "interstate nexus" (App. 15a)—that exists solely for the purpose of testifying in court. See FED. R. EVID. 703 advisory committee's note (explaining that Rule 703 "would not warrant admitting in evidence the opinion of an 'accidentologist' as to the point of impact in an automobile collision based on the statements of bystanders").

In fact, far from explaining the decision below, the expert-opinion exception confirms that it is incorrect. Rule 1002 would not need an expert-opinion exception if, as the Fourth Circuit held, it permitted *any* witness to testify to facts gleaned from reading documents. Under that holding, doctors and lay witnesses alike may testify to the contents of medical records and laboratory reports because those documents memorialize facts—such as a patient's medical condition or a drug's chemical composition—that exist independently of any document.

That holding cannot be correct. For that reason, and because the correct interpretation of Rule 1002 is well established, the Court might wish to consider summary reversal as an alternative to plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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