No. 07-494

In the Supreme Court of the United States

TIMOTHY J. RIGAS AND JOHN J. RIGAS, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the government was required to prove that petitioners had violated Generally Accepted Accounting Principles, or to call an expert accounting witness, in order to convict them of securities fraud and conspiring to commit securities fraud.

2. Whether petitioners' bank fraud convictions require reversal under *Yates* v. *United States*, 354 U.S. 298 (1957).

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-63a) is reported at 490 F.3d 208.

JURISDICTION

The judgment of the court of appeals was entered on May 24, 2007. A petition for rehearing was denied on July 12, 2007 (Pet. App. 73a-74a). The petition for a writ of certiorari was filed on October 10, 2007. 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 New York, petitioners were convicted on one count of conspiring to commit securities fraud, to commit bank fraud, and to make and cause to be made false statements in filings with the

United States Securities and Exchange Commission (SEC), in violation of 18 U.S.C. 371; 15 counts of securities fraud, in violation of 15 U.S.C. 78j(b); 15 U.S.C. 78ff (2000 & Supp. V 2005); and two counts of bank fraud, in violation of 18 U.S.C. 1344. Timothy J. Rigas was sentenced to 240 months of imprisonment, and John J. Rigas was sentenced to 180 months of imprisonment. The court of appeals affirmed petitioners' convictions on every count except one of the bank fraud counts. The court reversed their convictions on that count and remanded for entry of acquittals and for resentencing. Pet. App. 1a-63a.

1. Adelphia Communications Company (Adelphia) was one of the largest cable television providers in the country. On March 27, 2002, Adelphia publicly disclosed that it had approximately $2.2 billion in liabilities that it had not previously reported on its balance sheet. That day, Adelphia's stock price fell by approximately 25% to $20.39. By May 2002, the price had plummeted to $1.16 per share. In June 2002, Adelphia filed for bankruptcy, wiping out more than $4 billion in shareholder value. The following month, petitioners (and others) were arrested and charged with looting the company and orchestrating a scheme to defraud the company's shareholders, bondholders, and bank lenders. As alleged in the indictment and proved at trial, petitioners' conduct involved fraudulent stock purchases, sham transfers of debt, fraudulent misrepresentations of Adelphia's operating performance, defrauding Adelphia's bank lenders, and looting Adelphia's cash management system. Pet. App. 4a-5a, 9a-19a; Gov't C.A. Br. 6-7.

a. Petitioner John Rigas founded Adelphia, which was a holding company for companies providing cable television service to subscribers in communities throughout the United States. In 1986, John Rigas took Adelphia public, but the Rigas family retained sufficient stock ownership to maintain control of Adelphia and its Board of Directors. John and his sons occupied four of the seven seats on the Board, and John served as its Chairman. John was also Adelphia's President and Chief Executive Officer, and his son Timothy was its Executive Vice-President and Chief Financial Officer. Pet. App. 5a-6a; Gov't C.A. Br. 12.

After Adelphia went public, the Rigas family continued to own privately a number of other, separate cable companies. Adelphia managed those companies, which were often referred to as the Rigas Managed Entities (RMEs) in Adelphia's public filings. Although those filings disclosed the existence of the management relationships, they did not disclose the amount of the management fees charged to, or paid by, the RMEs, or the fact that cash generated by the RMEs was commingled with cash generated from Adelphia's operations. Petitioners used the business relationship between Adelphia and the RMEs to carry out and to conceal their fraudulent scheme. Pet. App. 6a; Gov't C.A. Br. 10-12.

b. Adelphia's business was "cash flow negative" during the period relevant to this case, which meant that the company did not generate enough cash revenue to pay its costs of operations, capital expenditures, and interest. Between 1999 and 2001, Adelphia spent $1.5 billion to $2 billion per year in capital expenditures to upgrade its cable systems. Between 1998 and 2002, Adelphia also paid over $5 billion in cash, and issued more than 72 million shares of new common stock, to acquire other cable entities in order to lower expenses through operating efficiencies. Adelphia raised new capital from three basic sources in order to offset its operating losses and fund its rebuilding and acquisition plans: (1) bank loans; (2) public sales of newly issued common and preferred stock; and (3) public sales of notes and convertible debentures. Pet. App. 6a-7a; Gov't C.A. Br. 12-15.

Adelphia's disclosed bank borrowings increased from approximately $827 million in March 1998 to approximately $5.4 billion in September 2001. Generally, for each loan, a group of Adelphia subsidiaries served as the borrowers and pledged their assets as collateral. In 1999, Timothy Rigas proposed a co-borrowing arrangement to the Adelphia Board of Directors. Under the arrangement, a group of Adelphia subsidiaries and one or more RMEs would form a borrowing group for a particular loan agreement, each borrower would be able to borrow under the agreement, and each would be jointly and severally liable for all the borrowings. Timothy led the Board to believe that the arrangement would benefit both Adelphia and the RMEs by lowering borrowing costs and eliminating competition between the public and private companies for bank financing. Under the arrangement, petitioners caused Adelphia to enter into three separate co-borrowing agreements, which provided a combined, total borrowing capacity of approximately $5.5 billion. Pet. App. 7a-8a; Gov't C.A. Br. 15-16.

Between August 1998 and January 2002, Adelphia raised more than $9.3 billion from public sales of securities. Adelphia's sale of common stock and convertible debentures threatened to dilute the Rigases' ownership interest in, and operating control over, the company. To solve that problem, petitioners persuaded Adelphia's Board to sell stock and convertible debentures to the Rigas family whenever it sold similar securities to the public. Petitioners claimed that they needed to maintain voting control in order to prevent a default under the bank credit agreements and that their securities purchases represented their "public vote of confidence" in Adelphia through the investment of new money. Pet. App. 7a-8a; Gov't C.A. Br. 7, 16-18.

The Rigas family fraudulently purchased $1.6 billion in Adelphia securities in nine separate offerings between 1998 and 2002. The purchase agreements required the Rigas family to pay for the stock purchases at the closing date in "immediately available funds." Adelphia's public filings and press releases suggested that the Rigases paid for the stock in cash. The Rigases, however, lacked sufficient cash to pay for the purchases. In order to complete the transactions, petitioners borrowed funds to pay Adelphia, but then caused Adelphia to use that cash to pay off other Rigas family debts. In later transactions, petitioners did not pay cash at all, but rather caused debt owed by Adelphia under the co-borrowing agreements to be "reclassified," *i.e.*, moved from Adelphia's books to the books of one of the RMEs. The debt "reclassifications" were a sham—the RMEs did not actually assume the debt; it was simply transferred from Adelphia's financial statements to the RMEs' financial statements. But, even if the RMEs had actually assumed Adelphia's debt, Adelphia would still have been worse off than if the Rigases had paid cash for the stock, for two reasons. First, under the co-borrowing agreements, Adelphia was still jointly and severally liable for the debt. Second, if Adelphia had received cash, it could have used the cash to pay down its debts and thus increased its borrowing capacity. Pet. App. 9a-10a; Gov't C.A. Br. 18-28.

c. Petitioners masked other debt owed to Adelphia by the Rigas family, the RMEs, and non-cable entities owned by the Rigas family (RNCEs) by reporting it on Adelphia's books on a net basis, as a single "related party receivable," rather than itemizing each item owed. This technique concealed the actual amount of cash advanced to the RMEs and RNCEs and the fact that Adelphia had advanced cash to RNCEs that it did not manage. When the net related party receivable reached $200 million, Timothy Rigas and James Brown, Vice President of Finance, discussed moving some of Adelphia's debt, such as debt under co-borrowing agreements, to the books of an RME in exchange for a corresponding reduction in the amount that the RME owed Adelphia. The purpose of this debt reclassification was to avoid disclosing the full net party receivable balance. Adelphia and the RMEs did not enter into formal assumption agreements; the reclassifications were set forth only in general ledger journal entries. Moreover, the journal entries themselves showed that the RMEs did not actually assume debt from Adelphia; each time debt was transferred from Adelphia to an RME, Adelphia booked a payable to the RME in an equal amount. After the initial $200 million reclassification, debt was reclassified on a quarterly basis. Over the course of the conspiracy, more than $2.8 billion of debt was reclassified, including the reclassifications related to the stock purchases. Pet. App. 11a-12a; Gov't C.A. Br. 29-33.

d. Petitioners also manipulated key indices of Adelphia's operating performance in order to satisfy investors, to comply with covenants under Adelphia's bond indentures, and to obtain better interest rates under Adelphia's various bank loans. First, with the knowledge and approval of John Rigas, Timothy Rigas directed or approved quarterly earnings press releases that fraudulently inflated Adelphia's basic subscriber number and basic subscriber growth rate. Second, during road shows, investor conferences, and shareholder meetings, Timothy fraudulently inflated the percentage of cable systems that Adelphia had upgraded during its rebuilding program. Third, with John Rigas's knowledge, Vice President of Finance Brown artificially inflated Adelphia's Earnings Before Interest, Taxes, Depreciation, and Amortization (EBITDA), which investors commonly use to evaluate the earnings from the operations of cable companies. Brown did this by: (i) fraudulently inflating management fees owed by a particular RME to Adelphia while recording a corresponding fictitious interest expense that Adelphia owed the RME; and (ii) having Adelphia enter into "wash transactions" with two separate equipment suppliers, Motorola and Scientific Atlanta, in which Adelphia increased the amount it paid for digital converter boxes (reported by Adelphia as capital expenses), and the suppliers agreed to pay Adelphia the amount of the increase for advertising and marketing support (reported by Adelphia as revenue). Pet. App. 12a-17a.

e. The co-borrowing agreements entered into by Adelphia subsidiaries and RMEs required minimum leverage ratios of debt to EBITDA and tied interest rates to the leverage ratios. Although the EBITDA manipulations described above were carried out at the level of the Adelphia parent company, the government maintained at trial, based on Brown's testimony, that the manipulations flowed down to Adelphia subsidiaries and triggered lower interest rates than if EBITDA had been reported accurately. Moreover, when Brown, Timothy Rigas, and Assistant Treasurer Michael Mulcahey saw that the EBITDA of a particular borrowing group was too low to meet a desired leverage ratio, they would manipulate that EBITDA by artificially moving expenses between companies or recording fictitious income to one company from another. Pet. App. 17a-18a; Gov't C.A. Br. 46-48.

f. Before and during the conspiracy, petitioners took well over $200 million from Adelphia's cash management system (CMS), including more than $3 million to fund production of a film by a Rigas family member and approximately $200 million to pay off Rigas family margin loans. The looting was facilitated by the intentional and systematic commingling of Adelphia's cash with cash from the RMEs and RNCEs. All that was required to authorize a cash transfer for the benefit of the Rigas family was the approval of Brown or a Rigas family member. No promissory notes were ever signed. Nor were the cash transfers reported as compensation or loans, as required by the SEC, or disclosed to investors as related party transactions. In Adelphia's financial statements and annual reports, all related party transactions with the Rigas family and the RNCEs were lumped together and "netted out" against transactions with the RMEs, in order to obscure the amounts owed by the Rigas family to Adelphia. Including the reclassified co-borrowing debt, the net receivables owed to Adelphia from Rigas family entities totaled approximately $3.2 billion. Pet. App. 18a-20a; Gov't C.A. Br. 50-53, 58-62.

2. On July 30, 2003, a grand jury sitting in the Southern District of New York returned a superseding indictment charging petitioners (and others) with conspiring to commit securities, wire, and bank fraud, to make and cause to be made false statements in SEC filings, and to falsify business records, in violation of 18 U.S.C. 371 (Count One); securities fraud, in violation of

15 U.S.C. 78j(b); 15 U.S.C. 78ff (2000 & Supp. V 2005) (Counts Two through 16); wire fraud, in violation of 18 U.S.C. 1343 (Supp. V 2005); 18 U.S.C. 1346 (Counts 17 through 21); and bank fraud, in violation of 18 U.S.C. 1344 (Counts 22 and 23). Pet. App. 79a-174a.

3. On July 8, 2004, following a lengthy trial, a jury found petitioners guilty of all the substantive securities and bank fraud charges and of conspiring to commit securities and bank fraud and to make and cause to be made false statements in SEC filings. The jury acquitted petitioners of conspiring to commit wire fraud and of the substantive wire fraud charges. Pet. App. 3a, 20a; Gov't C.A. Br. 2.[1]

On June 20, 2005, the district court sentenced John Rigas to 180 months of imprisonment, to be followed by six months of supervised release, and sentenced Timothy Rigas to 240 months of imprisonment, to be followed by two years of supervised release. The court did not impose a fine or restitution on either petitioner because the Rigas family had reached a settlement with the government under which the family agreed to forfeit more than $1 billion in assets. Gov't C.A. Br. 3 & n. *.

4. The court of appeals affirmed petitioners' convictions on all counts except one bank fraud count (Count 23). The court reversed the convictions on that count and remanded the case for entry of acquittals on that count and for resentencing. Pet. App. 1a-63a.

a. Petitioners' primary claim on appeal was that they could not be convicted of securities fraud or conspiracy to commit securities fraud unless the government proved, through the testimony of an accounting expert,

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[1] The jury deadlocked on whether petitioners conspired to falsify the books and records of a public corporation. Pet. App. 3a n.1.

that they had violated Generally Accepted Accounting Principles (GAAP). Pet. C.A. Br. 40-44, 49-67. The court of appeals rejected that argument. Pet. App. 21a-26a. Citing *United States* v. *Simon*, 425 F.2d 796, 805-806 (2d Cir.) (Friendly, J.), cert. denied, 397 U.S. 1006 (1969), the court noted "the long-held view in [the Second] Circuit that GAAP neither establishes nor shields guilt in a securities fraud case." Pet. App. 22a; see *id.* at 22a-23a (observing that *Simon* had been "unequivocally reaffirmed" by *United States* v. *Ebbers*, 458 F.3d 110 (2d Cir. 2006), cert. denied, 127 S. Ct. 1483 (2007)). The court explained that "[m]aking GAAP compliance determinative of securities fraud charges would require jurors to 'accept the accountants' evaluation whether a given fact was material to overall fair presentation.'" *Id.* at 22a (quoting *Simon*, 425 F.2d at 806). Thus, the court explained, although "compliance with GAAP is relevant * * * as evidence of whether a defendant acted in good faith," the government need not prove that a defendant failed to comply with GAAP in order to establish securities fraud. *Ibid.*

The court rejected petitioners' contention that the rule in *Simon* is inapplicable here because it applies only when no specific provision of GAAP addresses the accounting practice at issue. Pet. App. 23a-25a. Specifically, petitioners argued that Financial Accounting Statement Number 5 (FAS 5), which deals with loss contingencies, addresses how Adelphia should have accounted for and disclosed the debt under the co-borrowing agreements. *Id.* at 21a; Pet. C.A. Br. 54-56. Petitioners contended that, because FAS 5 applied to the co-borrowed debt, the government could not establish that petitioners committed securities fraud unless the government proved non-compliance with FAS 5 or, at a minimum, offered expert testimony on the subject. *Ibid.*; Pet. C.A. Reply Br. 11-17 & n.14. The court rejected that argument, finding that noncompliance with GAAP was "not essential to the securities fraud alleged" in this case. Pet. App. 23a. The court explained that, even if petitioners had complied with GAAP, the jury could have found that they had intentionally misled investors based on the evidence that petitioners had reclassified co-borrowed debt—for which Adelphia was jointly and severally liable—rather than pay for securities in "immediately available funds," and based on the testimony that the specific purpose of the debt reclassifications was to mislead investors about the amount of money that the Rigas family and RMEs owed Adelphia. *Id.* at 23a-24a. "As a result," the court explained, "the jury could find that investors were misled into believing that Adelphia had been infused with more cash, when, in reality, debt for which Adelphia remained jointly and severally liable was moved onto the RMEs' books." *Id.* at 24a-25a. Whether GAAP authorized the debt reclassifications thus "was not the issue." *Id.* at 25a.

The court of appeals also rejected petitioners' related claim that the district court should have required the prosecution to call an expert witness to testify regarding FAS 5. Pet. App. 25a. The court concluded that the claim was foreclosed by *Ebbers*, which held that "[t]he government is not required in addition to prevail in a battle of expert witnesses over the application of individual GAAP rules." *Ibid.* (quoting *Ebbers*, 458 F.3d at 125-126). The court observed that, although the district court had "opined that an expert might be helpful," the prosecution believed it could explain the fraud through the testimony of other witnesses. *Ibid.* Therefore, the court of appeals held, the district court "did not err by not requiring the prosecution to call accounting experts." *Ibid.*

In rejecting petitioners' arguments about GAAP, the court of appeals distinguished *United States* v. *Lake*, 472 F.3d 1247 (10th Cir. 2007), on which petitioners relied. Pet. App. 25a-26a. The court explained that the defendants in *Lake* had been charged with wire fraud premised on the filing of allegedly false reports with the SEC. The government argued that the reports were false because they failed to disclose the defendants' personal use of corporate aircraft. The Tenth Circuit reversed the convictions because the government did not show that the SEC required the disclosure of the aircraft use, and thus there was no evidence from which the jury could infer that the reports were false. The court of appeals explained that "*Lake* is inapposite here" because, although SEC rules on what had to be included in the reports in *Lake* necessarily determined whether the reports were false, "GAAP rules do not govern whether Adelphia's disclosures regarding the Co-Borrowing Agreements were false and fraudulent, and a violation of GAAP is not an element of the offenses charged." *Id.* at 26a.

b. Petitioners also attacked their bank fraud convictions. Pet. C.A. Br. 81-101. Those convictions were based on allegations that petitioners had misrepresented the EBITDA of Adelphia and its subsidiaries in order to obtain lower interest rates by artificially depressing the leverage ratio of borrowing groups involved in two co-borrowing agreements. Pet. App. 17a-18a, 171a-172a. As relevant here, petitioners claimed that the evidence was not sufficient to prove that the misrepresentations made to the banks were material. Pet. C.A. Br. 94-101. The court of appeals held that the evidence was sufficient to support the convictions on Count 22, which concerned the Century (CCH) co-borrowing agreement, but that the evidence was insufficient to support the convictions on Count 23, which concerned the Olympus (OCH) co-borrowing agreement. Pet. App. 44a-57a.

The court first explained that "[petitioners'] misrepresentations were material only if they tended to affect interest rates"—that is, "only if the jury could have concluded that the fraudulent leverage ratio resulted in the co-borrowers being in a different interest category than they would have been had the accurate leverage ratio been reported." Pet. App. 53a, 55a. Applying that standard to the evidence on Count 22, the court noted that the CCH agreement provided that a higher interest rate would be charged on term loans if the leverage ratio was higher than 5.0. *Id.* at 56a. The court further noted that defendant Mulcahey "testified that he reduced management fees from the CCH Co-Borrowing Group by $6 million to 'put the borrowing group in a better position as far as the [interest] on the agreement.'" *Ibid.* (brackets in original). And that testimony was confirmed by handwritten notes dated October 1, 2001, which stated that the actual leverage ratio for the CCH borrowing group was 5.01, even though the ratio reported to the banks was 4.98. *Ibid.* The court therefore concluded that the evidence was sufficient to support the convictions on Count 22. *Ibid.* With respect to Count 23, the court found that "[t]he evidence supporting the leverage ratio/interest rate manipulation scheme appear[ed] to boil down to Brown's conclusory opinion that bank debt compliance documents were manipulated in 2000 and 2001." *Id.* at 57a. The court held that Brown's testimony was insufficient to prove that petitioners made material misrepresentations to the banks regarding the OCH co-borrowing agreement, and the evidence was therefore insufficient to support the convictions on Count 23. *Ibid.*

5. Petitioners filed a petition for panel rehearing, contending that their convictions on Count 22 should be reversed in light of the court's reversal on Count 23. Pet. for Reh'g 1. The court of appeals denied the petition. Pet. App. 73a-74a.

ARGUMENT

1. Petitioners' primary contentions (Pet. 20-26) are that the government was required to prove a violation of GAAP in order to convict them of securities fraud and that the court of appeals' decision to the contrary conflicts with *United States* v. *Lake*, 472 F.3d 1247 (10th Cir. 2007). The court of appeals correctly rejected those contentions, and they do not warrant further review.

a. The court of appeals correctly concluded that the government was not required to prove that petitioners violated GAAP in order to establish that they committed securities fraud. Pet. App. 21a-26a. As the court of appeals explained, a violation of GAAP is not generally an element of a securities fraud offense. *Id.* at 22a-23a, 26a. "[E]ven where improper accounting is alleged, the statute requires proof only of intentionally misleading statements that are material." *United States* v. *Ebbers*, 458 F.3d 110, 125 (2d Cir. 2006) (citing 15 U.S.C. 78ff (2000 & Supp. V 2005)), cert. denied, 127 S. Ct. 1483 (2007). GAAP is a set of accounting principles, not laws, see *id.* at 125 n.2, and statements may be materially misleading even when they comply with particular requirements of GAAP. Indeed, "GAAP itself recognizes that technical compliance with particular GAAP rules may lead to misleading financial statements, and imposes an overall requirement that the statements as a whole accurately reflect the financial status of the company." *Id.* at 126.

As the court of appeals noted (Pet. App. 23a), good faith compliance with GAAP may be relevant to show that a particular defendant lacked the requisite intent to defraud. See *Ebbers*, 458 F.3d at 125; *United States* v. *Simon*, 425 F.2d 796, 806 (2d Cir.), cert. denied, 397 U.S. 1006 (1969). But compliance with GAAP does not shield a defendant from criminal liability. Such a rule would allow fraudsters to hide behind technical compliance with particular GAAP rules in order to avoid criminal liability for fraudulent and misleading conduct. See *Ebbers*, 458 F.3d at 126. See also *United States* v. *Sarno*, 73 F.3d 1470, 1482 n.6 (9th Cir. 1995) (holding, in false statements prosecution under 18 U.S.C. 1014 (1994), that "[a]dherence to GAAP would obviously qualify as weighty exculpatory evidence; it does not, however, necessarily shield one from criminal liability"), cert. denied, 518 U.S. 1020, and 519 U.S. 859 (1996).

Furthermore, as the court of appeals explained, GAAP's "requirements [we]re not essential to the securities fraud alleged" in this particular case. Pet. App. 23a. The gravamen of the securities fraud alleged in the indictment was not that petitioners had failed to comply with GAAP, but that they had engaged in a systematic course of conduct designed to: (1) give the false appearance that Adelphia's operating performance was consistently in line with investors' expectations; (2) hide Adelphia's growing debt burden by making it appear as if "Adelphia was systematically deleveraging through, among other means, sales of equity securities to the Rigas family;" and (3) obscure the fact that petitioners were using Adelphia funds and other assets for their personal benefit and that of other Rigas family members. See *id.* at 102a-103a. That course of conduct involved defrauding investors by making false and misleading statements regarding: Adelphia's "off-balance sheet" debt; the extent and circumstances of reductions in Adelphia's debt through sales of securities to the Rigas family and the public; Adelphia's operating performance; Adelphia's compliance with certain debt covenants under the co-borrowing agreements and Adelphia's bond indentures; and the unauthorized and undisclosed use and conversion of Adelphia's funds and assets by the Rigas family. See *id.* at 103a-104a; see also Gov't C.A. Br. 67-68.

Contrary to petitioners' suggestion (Pet. 23-25), the fraud allegations based on Adelphia's accounting and disclosures about the co-borrowing did not depend on whether the accounting and disclosures complied with GAAP. The government's proof established that the accounting and disclosures were false and misleading not because they failed to comply with GAAP, but because the debt reclassifications lacked any basis in economic reality and were designed to mislead investors. As the court of appeals noted, "[t]he jury heard testimony that the debt reclassifications were specifically designed to mislead investors about the amount of money the Rigas family and their other companies owed Adelphia." Pet. App. 23a-24a. The evidence also showed that the RMEs did not actually "assume" any debt from Adelphia. No paperwork, agreements, or documents supported the purported assumptions of debt; Adelphia recorded a corresponding payable to the RMEs in the amount of the purported "assumption" of debt; and Adelphia remained jointly and severally liable to the banks for the reclassified debt. See Gov't C.A. Br. 68-69; pp. 4-5, *supra*. Moreover, Adelphia's financial statements falsely suggested that Adelphia had received "proceeds" from the Rigases' securities purchases and used those proceeds to pay down Adelphia's debts. See Gov't C.A. Br. 70; Pet. App. 24a. "As a result, the jury could [have found] that investors were misled into believing that Adelphia had been infused with more cash, when, in reality," all that had occurred was that "debt for which Adelphia remained jointly and severally liable was moved onto the RMEs' books." *Id.* at 24a-25a. A showing that the statements were in compliance with GAAP would not cure those misleading impressions. Thus, as the court of appeals concluded, whether Adelphia's disclosures complied with GAAP had little or no bearing on the case. *Id.* at 25a.

b. Contrary to petitioners' contention (Pet. 20-21, 25-26), the court of appeals' decision does not conflict with the Tenth Circuit's decision in *Lake*. The defendants in *Lake* were convicted of wire fraud based on the filing of allegedly false reports with the SEC. 472 F.3d at 1253-1255. The "government's sole challenge to the reports" was that they "failed to disclose the defendants' personal use of corporate aircraft." *Id.* at 1258. The Tenth Circuit reversed the convictions because the government did not show that the SEC required that the reports disclose the aircraft use, and thus there was no evidence from which the jury could infer that the reports were false. *Id*. at 1258-1263.

As the court below explained, that holding in no way conflicts with the holding here that the government was not required to prove a GAAP violation. Pet. App. 25a-26a. The charges in *Lake* turned on whether SEC-required reports were false, and the government claimed that the reports were false only because they failed to disclose the defendants' personal aircraft use. Therefore, in order to show that the reports were false, the government had to prove that the SEC required the reports to include the disclosure. Here, by contrast, the government did not argue at trial that Adelphia's financial statements were false and misleading because FAS 5 or other GAAP provisions required disclosure of the full amount of Adelphia's liability under the co-borrowing arrangements, including debts assumed by RMEs. Instead, the government argued that the purported assumptions of debt were a sham and that Adelphia's financial statements falsely suggested that Adelphia had received actual "proceeds" from the Rigases' securities purchases. Therefore, as the court of appeals explained, "GAAP rules [did] not govern whether Aldephia's disclosures regarding the Co-Borrowing Agreements were false and fraudulent," and the government was not required to prove a failure to comply with FAS 5 or any other aspect of GAAP. *Id.* at 26a.

c. Petitioners also incorrectly contend (Pet. 19-20, 32-34) that the court of appeals erred because, according to them, it ruled that their convictions could be sustained based on frauds other than the false and misleading disclosures about the co-borrowing agreements. Petitioners argue that this purported ruling conflicts with *Yates* v. *United States*, 354 U.S. 298 (1957), which held that a general verdict that might have rested on any one of several bases must be set aside if one of those bases was legally invalid. *Id.* at 311-312. That argument is mistaken. The court of appeals did not hold that the co-borrowing fraud theory was legally invalid. Rather, the court held that the co-borrowing theory was valid because it did not depend on a showing that petitioners failed to comply with GAAP. See Pet. App. 21a-26a. Because the court of appeals correctly held that the co-borrowing theory was not legally invalid, *Yates* is inapposite.

Moreover, to the extent that petitioners contend that the co-borrowing theory was invalid because the government failed to prove non-compliance with GAAP, *Yates* is inapposite for another reason as well. In *Griffin* v. *United States*, 502 U.S. 46 (1991), this Court held that, notwithstanding *Yates*, a general verdict resting on several alternative bases need not be set aside if one of those bases was merely insufficiently supported in the record, as long as at least one of the other bases was sufficiently supported. *Id.* at 56-57. As we have shown, the securities fraud allegations were supported by ample evidence at trial separate and apart from any possible violation of GAAP. See pp. 15-17, *supra*. Although petitioners now argue (Pet. 33-34) that the government's failure to establish a GAAP violation was somehow a legal error, that argument contradicts their position in the district court, where they characterized the GAAP issue as a failure of proof. See Gov't C.A. Br. 64 n.* (explaining that defense counsel argued that, because it was the government's "burden to prove that [GAAP] * * * required disclosures of the amount of co-borrowing," the government had "simply not proved any of the allegations of wrongdoing with regard to the co-borrowing") (quoting Tr. 8743-8744) . A simple failure of proof would implicate *Griffin*, not *Yates*. Petitioners' reliance on *Yates* is therefore misplaced, and further review is not warranted.

2. a. Nor is review warranted of petitioners' related contention (Pet. 26-32) that the government was required to call an expert accounting witness to support its allegations of securities fraud. That contention rests on the erroneous premise that the government was re-

quired to prove a violation of GAAP in order to secure a conviction on the securities fraud counts. See Pet. 27 (arguing that "courts have routinely required expert testimony to demonstrate the existence of a GAAP violation or irregularity"). As discussed above, the court of appeals correctly held that there is no such requirement. See pp. 14-15, *supra*. Accordingly, petitioner's derivative contention that the government was required to call an expert accounting witness likewise lacks merit. See Pet. App. 23a ("The government was not required to present expert testimony about GAAP's requirements because these requirements are not essential to the securities fraud alleged here.").

For that reason, the civil cases cited by petitioner (Pet. 27-28) present no conflict with the court of appeals' decision here. In all of those cases, liability depended on proof of a violation of GAAP or Generally Accepted Auditing Standards (GAAS). And petitioners cite no criminal securities fraud case in which a court has required the government to call an expert accounting witness.

Petitioners do cite three criminal cases outside the securities context in which the courts mentioned the government's failure to call an expert witness in the course of reversing criminal convictions. See Pet. 31 & n.24. But those cases, two of which are over 40 years old, involved technical issues that a jury was likely to need expert testimony to resolve. And none of the cases imposed a categorical requirement that expert testimony was required in every case that raised the issue. Instead, they held that the government had been unable, under the facts of the particular cases, to meet its burden of proof in the absence of expert or similar testimony.[2]

Here, in contrast, the court of appeals correctly concluded that the government was able to explain petitioners' fraudulent scheme to the jury through the testimony of non-expert witnesses, such as Adelphia's former Vice President of Finance (James Brown) and an accountant/manager in Adelphia's treasury department (James Helms). See Pet. App. 25a. There was no need for an expert witness to testify about an accounting issue that lay at the periphery of petitioners' fraudulent scheme.

b. Review of petitioners' expert witness claim is unwarranted for the additional reason that they did not raise the claim in the district court. Although the trial judge suggested that an expert witness might be helpful to the government's case, see Pet. App. 25a, the court

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[2] *United States* v. *Klaw*, 350 F.2d 155 (2d Cir. 1965), involved the question whether allegedly obscene material "appeal[ed] to the prurient interest." *Id.* at 167. The court held that there was no evidence that material had prurient appeal. In passing, the court observed that "[i]t may be difficult to find expert and other witnesses properly qualified to inform the jury about what does or does not appeal to the prurient interest," but "it would not seem impossible." *Ibid.* The court did not, however, hold that expert testimony was required. *Cook* v. *United States*, 362 F.2d 548 (9th Cir. 1966), involved the question whether drugs possessed by the defendants were "in fact narcotic drugs." *Id.* at 549. The court did not hold that expert testimony was required; rather, the court in the course of holding that the government "made no attempt to prove the narcotic character of the drugs," merely noted that "no qualified witness" was "called to establish or testify" that the drugs were narcotic. *Ibid.* *United States* v. *Katz*, 178 F.3d 368 (5th Cir. 1999), involved the question whether post-puberty models in an allegedly pornographic film were over the age of 18. The court held that whether expert testimony was required "must be determined on a case by case basis." *Id.* at 373.

did not rule that expert testimony was required, and petitioners never asked the court to do so. Consequently, as the government argued below, see Gov't C.A. Br. 65 & n.*, petitioners' claim is subject to plain-error review. See Fed. R. Crim. P. 52(b). Petitioners therefore would be entitled to relief only if they could show that failure to call an accounting witness was plain error that affected their substantial rights, and only if the error seriously affected the fairness, integrity, or public reputation of the sentencing proceedings. *United States* v. *Olano*, 507 U.S. 725, 732 (1993). Petitioners' inability to cite any criminal securities fraud cases requiring the government to present expert accounting testimony precludes them from establishing that any error was "plain." See *United States* v. *Lejarde-Rada*, 319 F.3d 1288, 1291 (11th Cir. 2003) ("[W]here the explicit language of a statute or rule does not specifically resolve an issue, there can be no plain error where there is no precedent from the Supreme Court or this Court directly resolving it."). Moreover, because compliance with GAAP was not determinative of the securities fraud proved in this case, petitioners also cannot satisfy the other requirements for relief under the plain error standard.

3. Petitioners also contend (Pet. 34-37) that the reversal of their bank fraud convictions on Count 23 requires reversal of their bank fraud convictions on Count 22. That contention lacks merit.

a. As a threshold matter, petitioners concede (Pet. 34) that their bank fraud claim is not, standing alone, sufficiently important to warrant a grant of certiorari. They ask this Court to review their claim only if the Court reviews the other claims presented in their petition, so that the Court would thereby "take the entire case." Pet. 34.[3] As shown above, review of petitioners' other claims is not warranted. Accordingly, review of their bank fraud claim is not warranted as well.

b. In any event, petitioners' bank fraud claim lacks merit. The theory of bank fraud presented by the government at trial was that petitioners and their co-defendants had filed loan compliance certifications with Adelphia's banks that lied about the true leverage ratio of the co-borrowing group by inflating the EBITDA that was used to calculate the ratio, and by taking out expenses, such as management fees, from EBITDA. See Pet. App. 50a (quoting government's summation to the jury). Assessing the sufficiency of the evidence on the bank fraud counts, the court of appeals held that "[petitioners'] misrepresentations were material only if they tended to affect interest rates"—that is, "only if the jury could have concluded that the fraudulent leverage ratio resulted in the co-borrowers being in a different interest category than they would have been had the accurate leverage ratio been reported." *Id.* at 55a. The court found the evidence of materiality sufficient on Count 22 primarily because co-defendant Mulcahey testified that he had reduced management fees from the CCH co-borrowing group by $6 million in order to reduce the applicable interest rate on the loan, and because documen-

[3] In fact, the Court would not be "tak[ing] the entire case" even if it granted review on all of the questions presented by the petition. Petitioners' conspiracy convictions would still be valid even if they prevailed on all the issues they ask this Court to review. The jury returned a special verdict on the conspiracy charges and expressly found that petitioners not only conspired to commit securities and bank fraud but also conspired to make false statements in SEC filings. The conviction for conspiracy to make false filings would not be undermined by a decision in favor of petitioners on any of the claims they have presented to this Court.

tary evidence showed that the actual leverage ratio was 5.01, when the ratio reported to the banks was 4.98—slightly below the 5.0 threshold that would have triggered a higher interest rate on the term loan component of the CCH co-borrowing agreement. *Id.* at 56a.

Petitioners contend (Pet. 34-36) that their convictions on Count 22 must nonetheless be reversed because the court of appeals rejected an alternative theory on which the materiality of the misrepresentation proven in Count 22 could have been based—that the EBITDA manipulations involving Adelphia's sham marketing agreements with Motorola and Scientific Atlantic "trickled down" to the Adelphia subsidiaries that were in the borrowing group, thereby affecting the leverage ratios. According to petitioners, "it is impossible to tell whether the jury verdict rested solely on the infirm theory," Pet. 36, and reversal is therefore required under *Yates*.

Petitioners are mistaken for two reasons. First, the court of appeals did not reject the "trickle down" theory on Count 22. On the contrary, although the court focused on the management-fee evidence, it stated in a footnote "that the evidence presented by the government at trial as to the aggregate *effect of the EBITDA trickle-down* and the direct management expense schemes was sufficient to allow the jury to convict Defendants on Count Twenty-Two." Pet. App. 56a n.40 (emphasis added). Second, even on Count 23, the court did not reject the trickle-down theory as legally infirm. Rather, the court held that the evidence supporting the theory was insufficient. *Id.* at 56a-57a. Thus, even if one assumes *arguendo* that the court implicitly rejected the trickle-down theory on Count 22, it would have done so on the basis of insufficient evidence. Consequently, *Griffin*, rather than *Yates*, would apply, and there would be no basis to reverse petitioners' convictions. See pp. 18-19, *supra*. Review of petitioners' bank fraud claim is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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