No. 08-1172

In the Supreme Court of the United States

JOSEPH P. NACCHIO, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the jury's finding that the inside information on which petitioner sold stock was material.

2. Whether the district court correctly instructed the jury on materiality.

3. Whether the district court abused its discretion in excluding, under Fed. R. Evid. 702, the proposed opinion testimony of one of petitioner's witnesses.

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OPINIONS BELOW

The panel opinion of the court of appeals (Pet. App. 101a-168a) is reported at 519 F.3d 1140. The en banc opinion (Pet. App. 1a-100a) is reported at 555 F.3d 1234.

JURISDICTION

The judgment of the court of appeals was entered on February 25, 2009. The petition for a writ of certiorari was filed on March 20, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Colorado, petitioner was convicted of 19 counts of insider trading, in violation of 15 U.S.C. 78j(b) and 78ff, and Securities and Exchange Commission (SEC) Rules 10b-5, 17 C.F.R. 240.10b-5,

and 10b5-1, 17 C.F.R. 240.10b5-1. Pet. App. 1a-2a, 130a. He was sentenced to 72 months of imprisonment, to be followed by two years of supervised release. He was also ordered to forfeit $52 million and fined $19 million. *Id.* at 109a. The court of appeals affirmed his convictions. *Id.* at 1a-100a.

1. a. Petitioner was the chief executive officer of Qwest Communications International (Qwest), a large telecommunications company. Pet. App. 101a.[1] In September 2000, petitioner publicly announced aggressive revenue targets for 2001 based on his professed strategy that Qwest must "grow [or] die." *Id.* at 102a.

Other senior executives of the company—including the heads of Qwest's three main business units and Robin Szeliga, then head of financial planning and later chief financial officer—told petitioner that those targets were unrealistic and that the company faced large shortfalls, or "gaps." Gov't C.A. Br. 5. Qwest analysts calculated a revenue shortfall for 2001 of almost $1 billion, or 4.2%, below the bottom of the target revenue range petitioner had announced. *Id.* at 5-6; C.A. App. 4936. Szeliga warned petitioner about this shortfall, and petitioner understood the ramifications; he predicted around the same time that a shortfall of even $50 million—less than one-tenth the projected gap—would result in a 15-20% drop in Qwest's stock price. Pet. App. 102a, 141a-143a.

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[1] "Pet. App." refers to the appendix filed with the certiorari petition; "C.A. App." to the appendix petitioner filed in the court of appeals; "Gov't App." to the appendix the government filed at the panel stage in the court of appeals; "Gov't En Banc App." to the appendix that the government filed at the en banc stage; "Gov't C.A. Br." to the government's panel brief in the court of appeals; and "Gov't En Banc Br." and "Gov't En Banc Reply Br." to the government's en banc briefs.

Senior executives also warned petitioner about serious flaws in the assumptions underlying the 2001 revenue targets. Qwest had historically relied heavily on "one-time" or "non-recurring" revenue from long-term leases of space on its fiber optics network known as indefeasible rights of use (IRUs). Because Qwest recorded all the revenue from IRUs at the start of the lease, such transactions did not yield revenues in future quarters. The company's 2001 plan required an "aggressive pivot" or "shift" away from IRUs and toward "recurring revenue" sources, which consisted primarily of consumer phone subscribers. Pet. App. 102a-103a. Recurring sources were more valuable because they produced a monthly stream of income that compounded in subsequent quarters as new subscribers were added. Gov't C.A. Br. 6-7.

Qwest's ability to meet its 2001 targets depended on a doubling of recurring revenue growth from the previous year. Pet. App. 103a; Gov't C.A. Br. 7. But Qwest had a poor "track record" in growing recurring revenue, C.A. App. 4990, and petitioner knew the shift was "unnatural" and probably not "achievable," *id.* at 2604. Petitioner had also been told by his executives that this shift had to occur by April 2001; if Qwest failed by then to enlist enough new subscribers, the company would not benefit from sufficient compounding to meet public targets. Pet. App. 103a. Petitioner agreed that it was "absolutely critical" the shift take place by April 2001. *Ibid.*

b. That month, petitioner received Qwest's first-quarter 2001 results, which confirmed that the company had failed to make the necessary shift. Gov't C.A. Br. 8-9. Qwest had fallen 19% behind in recurring revenue growth and had been forced to rely on IRUs to make its

first-quarter targets. Pet. App. 104a; Gov't C.A. Br. 10. Qwest's senior executives told petitioner that, because the company had not gathered subscribers "at the rate expected," the revenue gaps for the second half of 2001 would "snowball" unless they could be "filled by IRUs." *Id.* at 8-9. And petitioner also learned that IRUs could not cover the shortfall because Qwest was "draining the pond" of IRUs in the second quarter and none would remain for the third and fourth quarters. Pet. App. 104a; Gov't C.A. Br. 9. Petitioner was "visibly disappointed" with this information. C.A. App. 2493, 3260.[2]

c. Throughout early 2001, investors persistently sought a "breakdown" of Qwest's revenues between IRUs and recurring sources. Gov't C.A. Br. 10-11; Pet. App. 105a. Several of Qwest's executives advocated disclosing the fact that the company had made its first-quarter targets by relying heavily on IRU sales, which comprised 39% of growth. Gov't C.A. Br. 10. The executives considered the IRUs an "over significant" source of income and told petitioner that investors needed to have such a breakdown "to make an informed decision whether to buy or sell the stock." C.A. App. 1799, 2759. Several executives believed the information important enough that they should not sell their own Qwest shares. *Id.* at 1622, 2765. Indeed, Szeliga sold stock during this

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[2] Petitioner suggests (Pet. 6) that these results did not impact Qwest executives' views about the viability of year-end targets. That is incorrect. The company's internal "estimate" did not change after these reports only because Qwest's practice was to "plug in" placeholder numbers "so that everything totaled up." C.A. App. 2508, 2653. In any event, the jury was entitled to credit the substantial evidence refuting petitioner's version of events. See, *e.g.*, *id.* at 2211 (testimony of chief financial officer that the April results were "exactly what we didn't want to have happen").

period but later pleaded guilty to insider trading because she knew at the time that petitioner had not accurately conveyed to investors the composition of Qwest's revenue. *Id.* at 2246, 2309.

Petitioner, who had "final say" about what Qwest told the public, rejected these calls for disclosure. Pet. App. 105a. When he was informed that Qwest's stock price would fall if the heavy reliance on IRUs were disclosed, petitioner said of investors: "[S]crew them, go tell them to buy." *Id.* at 149a. On an April 24, 2001, conference call accompanying announcement of first-quarter earnings, petitioner told investors that Qwest was "very pleased" with the quarter's results. *Id.* at 280a-281a. "[L]et me be perfectly clear," petitioner announced: "we will meet our numbers." *Id.* at 282a, 283a. Petitioner did not inform investors that Qwest had attempted but failed to make the shift to recurring revenue that was essential to achieving its public targets, that recurring revenue growth from multiple business units was far less than anticipated, that IRUs comprised 39% of first-quarter growth, and that the pool of IRUs available for later quarters was dwindling. Gov't C.A. Br. 9-11.[3]

d. On April 26, 2001, two days after petitioner made those "very bullish" statements, C.A. App. 3579, Qwest's trading window for its executives opened. Petitioner ex-

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[3] Contrary to petitioner's suggestion (Pet. 6-7), he did not disclose any of that information by commenting vaguely during the analyst call about the performance of one segment of one of Qwest's units (which he represented would in any event "make [its] numbers"). Pet. App. 295a. And although Szeliga stated on that call that she was "still confid[e]nt in [Qwest's] guidance," *id.* at 293a; Pet. 7, she testified at trial that her comments omitted precisely the "important information" that undermined the guidance, C.A. App. 2240.

ercised 860,000 stock options in four days, then another 470,000 options over the next few weeks. Gov't C.A. Br. 12-13 & n.5. He sold all of the shares for between $37 and $42 each, Pet. App. 108a, realizing roughly $52 million, Gov't C.A. Br. 4.

e. After his trades, petitioner delayed disclosure of Qwest's inability to meet its public targets, telling his executives that he wanted to "spin" the magnitude of IRU sales because investors would be unpleasantly surprised and Qwest's "stock price would go down." C.A. App. 1652-1653. Petitioner "trickled out" some information about Qwest's heavy reliance on IRUs without disclosing crucial details, including the fact that IRUs could not fill the anticipated gaps in the third and fourth quarters. Pet. App. 144a; Gov't C.A. Br. 15. When investors learned the composition of first-quarter income, they were indeed "very surprised by the magnitude" of the IRUs and the slow growth in recurring revenues. Pet. App. 144a. Throughout this period, Qwest's stock price steadily fell. Gov't C.A. Br. 31-32.

Petitioner eventually decided to lower public targets in September 2001, but only after agreeing with his general counsel to delay that disclosure to convey the false impression that the reduction was not based on the IRU sales. Pet. App. 148a-149a. Qwest then missed even those lowered targets. Gov't C.A. Br. 32. After Qwest announced that it had not met its third-quarter numbers, the company's stock fell to $12 per share—less than one-third the price investors had paid for petitioner's shares earlier that year. *Ibid.*[4]

[4] Petitioner observes (Pet. 8) that after he reduced public revenue targets on September 10, 2001, Qwest's stock price rose 10%. But that simple assertion ignores the context. The price of Qwest stock had fallen steadily throughout the summer as petitioner slowly released the

2. In 2005, a grand jury charged petitioner with 42 counts of insider trading. Pet. App. 203a-211a. After extensive motions practice, the case proceeded to trial in March 2007. *Id.* at 4a.

3. On March 16, 2007, the Friday before opening statements, the defense disclosed pursuant to Federal Rule of Criminal Procedure 16 its intention to call Professor Daniel Fischel as an expert witness. The government moved for disclosure of the "bases and reasons" for Fischel's opinions, as Rule 16 required, and also for information about his methods sufficient to "test" them for reliability under Federal Rule of Evidence 702. Pet. App. 4a-5a; Gov't App. 39, 42.

The district court granted the motion. It agreed that the defense disclosure failed to comply with Rule 16 and noted the government's objections under Rule 702, among other rules, to the skeletal information the defense had provided. The court ordered the defense to "produce an expert disclosure compliant with the federal rules described herein," which specifically included Rule 702. Pet. App. 5a (emphasis omitted). In granting the defense extra time to comply, the court made clear that it expected the second disclosure to be "pretty close to what is required in the civil area." *Id.* at 6a. The court also noted the government's concern that the expert's testimony raised issues under *Daubert* v. *Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and *Kumho*

IRU information, Gov't C.A. Br. 31-32, and petitioner's September 10th announcement continued to omit important facts, C.A. App. 2445-2446. Immediately after petitioner lowered Qwest's targets, moreover, the stock market closed for several days following the September 11, 2001 terrorist attacks. Indeed, at trial the defense told the jury this 10% rise showed "nothing"—only that the movement of a company's stock price is "not exactly a science." *Id.* at 1493.

Tire Co. v. *Carmichael*, 526 U.S. 137 (1999). In response, the defense assured the court that it was "forewarned." Pet. App. 6a (emphasis omitted).

Two weeks into the government's presentation of evidence, the defense filed another disclosure purporting to provide the information the court had ordered. Pet. App. 300a-311a. The government then moved to exclude the proposed testimony, C.A. App. 362-424, arguing both that the revised disclosure failed to comply with Rule 16 and that exclusion was independently warranted under Rule 702, among other rules, *id.* at 363. In particular, the motion explained why each opinion should be excluded on Rule 702 reliability grounds, discussed *Daubert* and *Kumho Tire*, and emphasized that the defense, as the proponent, had the burden of showing reliability. *Id.* at 370-418. The government principally sought exclusion of the testimony, but in the alternative requested disclosure of any materials supporting Fischel's opinions and, in the event the court were inclined to admit the testimony, a hearing to test reliability. *Id*. at 421-422.

The defense promptly (though without any deadline) filed an opposition, asserting that the government's motion was "without merit." Pet. App. 330a. The defense represented that the revised disclosure—which it called its "expert report"— went "further than required" and outlined the "factual support" for each opinion. *Id*. at 330a-334a. The opposition addressed the government's Rule 16 arguments, but it also included a separate section, entitled "Professor's Opinions Are Proper Under Rule 702," which purported to identify Fischel's methodology and argued that exclusion on Rule 702 grounds was unwarranted. *Ibid*.

The opposition did not request a hearing, even though the court's standing rules required "[a]ny party opposing [a] motion [to] * * * state whether that party believes an evidentiary hearing is necessary." Gov't En Banc Br. Addendum at 8 (para. 17); Pet. App. 39a. Nor did the opposition seek a continuance or leave for further briefing. *Id.* at 330a-335a; see *id.* at 8a-9a. Although the court suggested that it might rule on admissibility before Fischel testified, the defense never indicated that it believed additional proceedings were necessary. *Id.* at 22a n.11.

When the defense called Fischel as its third witness, the district court dismissed the jury, stating that it "need[ed] to make some legal rulings." Pet. App. 252a; see *id.* at 9a. The district court then excluded Fischel's opinions on several independent grounds. "Most convincingly," the court concluded, the defense had failed to "comply with Rule 702 or Daubert and establish that Fischel's testimony [was] the product of reliable principles and methods." *Id.* at 253a. Discussing the requirements of *Daubert* and *Kumho Tire*, the court deemed the defense's reliability submissions "woefully inadequate to satisfy Rule 702." *Id.* at 254a.

The defense sought to challenge the ruling, but the court explained that "[a]ny argument that you wish to make could have been put in the response" to the motion and that the court's practice was to permit argument before announcement of a ruling, "[n]ot, the Court rules, and then it's an interactive process where you get to argue" afterward. Pet. App. 258a-259a. The court did, however, entertain a subsequent motion seeking to offer Fischel as a rebuttal expert on the grounds that government witnesses had offered expert opinions, that the revised Rule 16 disclosure constituted an adequate ex-

pert report, and that the defense had provided the government Fischel's methodology. Gov't En Banc Reply Br. 25-28. The court denied that motion, noting that the government had presented no expert testimony and reiterating that the reliability of Fischel's methodology had not been established. *Id.* at 28. The court nevertheless permitted Fischel to present extensive summary evidence about petitioner's trading patterns. Pet. App. 259a; C.A. App. 3981-4064.

4. In their requested jury instructions, both parties proposed definitions of materiality following the "reasonable investor" standard of *Basic Inc.* v. *Levinson*, 485 U.S. 224 (1988), and *TSC Industries, Inc.* v. *Northway, Inc.*, 426 U.S. 438 (1976). Pet. App. 338a; C.A. App. 753. Consistent with those requests, the district court instructed the jury that, to prove materiality, the government had to establish that the inside information would have been "of such importance" to "a reasonable investor" that "it could reasonably be expected to cause" the investor "to act or not to act with respect to" Qwest's stock. Pet. App. 273a-274a.

The government proposed an additional materiality instruction focusing on the "probability" and "magnitude" of future events and the "total mix" of information. Pet. App. 339a-340a. The defense opposed that instruction, arguing that it would "provide no assistance in the context of this case," and the district court rejected it. Doc. 424, Ex. 6, at 4. The defense proposed instructions modeled on an SEC rule intended to provide a "safe harbor" against charges of making false or misleading statements for companies that make forward-looking public announcements. Those instructions would have focused the jury's attention on whether Qwest had a "duty to correct" the revenue targets it had

publicly announced in September 2000 and whether those targets were "reaffirmed without a reasonable basis or * * * other than in good faith." Pet. App. 342a. The court rejected the instructions as inapposite. *Id.* at 272a.

5. The jury found petitioner guilty on 19 counts corresponding to his trades on and after April 26, 2001, but acquitted him on 23 counts relating to previous trades. The district court sentenced petitioner principally to 72 months of imprisonment, ordered him to forfeit $52 million, and fined him $19 million.

6. On appeal, a panel of the Tenth Circuit unanimously concluded that the evidence was sufficient to support a finding of materiality and that the court had properly instructed the jury. Pet. App. 128a-145a. The court remanded for a new trial, however, on the ground that the district court erred in excluding Fischel's expert testimony. *Id.* at 110a-127a.

a. In rejecting petitioner's sufficiency challenge, the panel framed the question as whether, under the standard of *Basic* and *TSC Industries*, a rational jury could find that the inside information petitioner possessed at the time of his trades would have been "significant to the reasonable investor." Pet. App. 139a (quoting *Basic*, 485 U.S. at 240) (alterations omitted). The panel concluded that the evidence cleared that threshold because, viewed in the light most favorable to the government, it showed that petitioner knew by April 2001 that Qwest's plans "had gone wrong" in such a way that the company "would not meet its public projections." *Ibid.* (emphasis omitted).

The panel rejected petitioner's argument that the inside information he possessed must be deemed immaterial because it did not portend a significant impact on

Qwest's stock price. Pet. App. 139a. Reasoning that the jury could find that petitioner knew of a 4.2% shortfall from the 2001 targets, *id.* at 141a-143a, the court "t[ook] [its] cue" from an SEC staff bulletin discussing a "rule of thumb" among accountants that information indicating a deviation of less than 5% from public accounting statements "is unlikely to be material," *id.* at 140a (quoting 64 Fed. Reg. 45,151 (1999)). The court noted that such a rule of thumb is a "sensible starting place" but quoted the bulletin's direction that the rule "cannot appropriately be used as a substitute for a full analysis of all relevant considerations." *Ibid.* (quoting 64 Fed. Reg. at 45,151). Reviewing the "special circumstances of this case," the court concluded that a reasonable jury could have concluded that the information was material. *Id.* at 143a-144a. Among those "[s]pecial factors," *id.* at 140a, the court emphasized petitioner's own prediction that "the 'skittish market' was so 'mercurial' that even a [0.2%] shortfall could create a 15-20% drop in stock price," *id.* at 143a (citation omitted).

b. The court upheld the jury instructions on materiality after reviewing them "as a whole de novo to determine whether they accurately informed the jury of the governing law." Pet. App. 132a (citation omitted). The panel rejected petitioner's argument that the district court was required to instruct the jury about when corporate announcements are misleading. *Id.* at 134a. The panel explained that petitioner's proposed instruction was "nonsensical" because it focused on Qwest's *public* statements when "the materiality issue in the case was whether the *inside* information was material." *Id.* at 134a-135a. Even if the language petitioner offered were less confusing, the panel reasoned, petitioner would not have been entitled to an instruction based on the SEC

rule providing a safe harbor for companies that make forward-looking statements with a reasonable basis. *Id.* at 135a-137a. The panel explained that the safe-harbor provision does not concern the materiality standard and is intended to encourage good-faith corporate disclosures, not to "shelter[] those who keep predictions quiet." *Id.* at 136a-137a.

c. In a divided ruling, the panel held that the district court erred in excluding Fischel's opinion testimony. Pet. App. 110a-127a. The panel characterized the district court's decision as resting on the incorrect view that Federal Rule of Criminal Procedure 16 required petitioner to disclose his expert methodology in pretrial discovery. *Id.* at 112a-119a. Because Rule 16 imposes no such requirement, the panel held, the court had no warrant to exclude the testimony. *Id.* at 119a. The panel also concluded in the alternative that even if the decision rested on *Daubert* grounds rather than Rule 16, the court abused its discretion because it lacked a sufficient record to evaluate the reliability of Fischel's methodology. *Id*. at 119a-124a. The panel therefore vacated petitioner's convictions and remanded for a new trial. *Id.* at 156a.

Judge Holmes dissented. In his view, the exclusion of Fischel's testimony rested on Rule 702 and resulted from a sound exercise of the district court's discretion in conducting the gatekeeping function required by that rule. Pet. App. 156a-168a.

7. The court of appeals granted rehearing en banc limited to the issue of whether Fischel's expert testimony was properly excluded. Pet. App. 169a-170a. The en banc court concluded that the district court had not abused its discretion on that point, vacated the contrary

portion of the panel decision, and reinstated petitioner's convictions. *Id.* at 1a-100a.

a. The en banc court reasoned that the district court's exclusion ruling rested squarely on *Daubert* and Rule 702 reliability grounds. Pet. App. 15a-20a. Based on a detailed analysis of the events leading to that ruling, the majority observed that the district court had elected to resolve the *Daubert* issues on the basis of written submissions before Fischel took the witness stand. *Id.* at 20a-30a. Emphasizing that district courts have "considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable,'" *id.* at 22a (quoting *Kumho Tire*, 526 U.S. at 152), the majority reasoned that the procedure the district court selected was well within the permissible bounds of discretion and that, although the court could have decided the *Daubert* issues on the basis of oral testimony, it was not required to choose that course, *id.* at 21a n.10. The majority also concluded that, on the particular record in this case, petitioner had both notice of the need to show reliability prior to calling Fischel as a witness and multiple opportunities to meet that burden or, if he deemed it necessary, to request further proceedings. *Id*. at 20a-36a. Because petitioner attempted but failed to carry his burden under *Daubert*, the court held, the district court's resolution of that issue on the existing record was not an abuse of discretion. *Id.* at 36a-50a.

b. Writing for four dissenters, Judge McConnell adhered to the position expressed in his panel opinion that the district court abused its discretion in excluding Fischel's expert testimony. Pet. App. 52a-92a. The dissent agreed with the basic legal principles announced in the majority decision, but it construed the record as in-

dicating that petitioner did not have sufficient notice of the need to establish Fischel's reliability prior to calling him as a witness. *Id.* at 64a-74a. Chief Judge Henry and Judge Kelly issued separate dissents expressing similar views. *Id.* at 93a-100a.[5]

ARGUMENT

Petitioner renews his contentions that the evidence was insufficient to prove materiality (Pet. 17-26), that the jury instruction on materiality was inadequate (Pet. 21-24, 26-28), and that the district court abused its discretion in excluding Fischel's expert testimony (Pet. 28-32). The court of appeals correctly rejected those contentions, and its factbound decision does not conflict with any decision of this Court or another court of appeals. Further review is unwarranted.

1. Petitioner's challenge to the sufficiency of the evidence supporting materiality does not merit this Court's review.

a. The court of appeals correctly held that a rational jury could find that the inside information petitioner possessed was material. The court adhered to the established principles set forth in this Court's decisions, conducting a "fact-specific" evaluation of "the signifi-

[5] On April 7, 2009, the district court (per Judge Krieger) denied petitioner's motion for bail pending this Court's review of the Tenth Circuit's decision on the ground that, *inter alia*, his petition for certiorari did not present "any substantial question of law or fact." No. 05-CR-00545, 2009 WL 961483, at *16 (D. Colo.). On April 13, 2009, the Tenth Circuit also denied petitioner's bail application, concluding that he had failed to establish "a reasonable chance that the Supreme Court will grant his petition." No. 07-1311, slip op. 2 (denial of emergency application for release). The following day, Justice Breyer denied a similar application in this Court. No. 08A888 (denial of application for bail and temporary stay).

cance the reasonable investor would place on the withheld . . . information," Pet. App. 131a (quoting *Basic Inc.* v. *Levinson*, 485 U.S. 224, 240 (1988)), and assessing whether "the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available," *ibid.* (quoting *TSC Indus., Inc.* v. *Northway*, 426 U.S. 438, 449 (1976)). The court recognized that, as to future events, materiality "will depend at any given time upon a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity." *Ibid.* (quoting *Basic*, 485 U.S. at 238).

Applying those settled standards to the "special circumstances of this case," Pet. App. 144a, the court properly rejected petitioner's contention that the inside information at issue was "necessarily immaterial to investors," *id.* at 143a. As the court of appeals observed, the evidence supported the findings that petitioner "knew in late 2000 that there were risks associated with his projections"; that he also knew that "[i]f certain things went wrong, Qwest would not meet its public projections"; and that, "[b]y April 2001, [petitioner] had learned that those things *had* gone wrong or at least were much more likely to." *Id.* at 139a. The jury could reasonably conclude that this high likelihood, if not certainty, that Qwest would fail to meet its public guidance constituted material information.

Additional evidence supported the materiality finding. The jury heard petitioner's own prediction in early 2001 that a shortfall of only $50 million—less than one-tenth the gap Qwest analysts actually projected—would case a 15-20% drop in the company's stock price. The jury could also find that petitioner "trickled out" disclo-

sure of Qwest's heavy reliance on IRUs in first-quarter earnings to blunt its impact, and that petitioner deliberately delayed reduction of Qwest's public targets so that investors would not suspect that he had known such a move was necessary based on the IRU sales information. In addition, other Qwest executives testified that they believed in 2001 that the information was sufficiently important that petitioner should disclose it, and that absent such disclosure, they should abstain from trading. Pet. App. 143a-144a (citations omitted).

b. There is no merit to petitioner's contention that, because this case involved "internal projections," Pet. 17, the Tenth Circuit erred in failing to evaluate the evidence under a more stringent materiality standard.

Petitioner argues that "internal predictions and interim operating results are immaterial as a matter of law," subject to a limited exception for those projections that "establish a very strong likelihood that the company's eventual reported performance will be substantially below what the market is expecting." Pet. 17.[6]

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[6] Petitioner refers to, but does not seriously defend (Pet. 22-23), the different standard on which he requested a jury instruction. Under the standard he proposed, which was a loose adaptation of an SEC safe harbor protecting corporations from false-statement liability for forward-looking filings, an undisclosed "projection" could be material only if it related to an earlier public statement and (retroactively) rendered that statement without a "reasonable basis." Such a rule would be inconsistent with petitioner's stated position in this Court; it would treat an internal projection that did not relate to an earlier announcement as necessarily immaterial even if the projection "establish[ed] a very strong likelihood that the company's eventual performance will be substantially below what the market is expecting." Pet. 17. In any event, the court of appeals correctly rejected petitioner's attempt to convert an SEC rule unrelated to materiality of inside information and designed to protect corporations that *disclose*

That standard finds no support in this Court's decisions, which have emphasized the "inherently fact-specific" character of the materiality analysis and rejected the application of rigid or "bright-line rule[s]." *Basic*, 485 U.S. at 236; *TSC Indus, Inc.*, 426 U.S. at 450 (reasoning that because the determination of materiality "requires delicate assessments of the inferences a 'reasonable shareholder' would draw from a given set of facts and the significance of those inferences to him," such "assessments are peculiarly ones for the trier of fact").

Indeed, petitioner's standard conflicts with the holding in *Basic* that, where forward-looking information is concerned, materiality depends on a contextual *balance* between the probability of the contemplated event and its anticipated magnitude. *Basic*, 485 U.S. at 238. Under that standard, even "a relatively improbable event of sufficient magnitude could potentially be material." *Castellano* v. *Young & Rubicam*, 257 F.3d 171, 185 (2d Cir. 2001). The rule petitioner urges would distort *Basic*'s framework into a two-part test requiring that the information be *both* highly probable *and* of "extreme" magnitude. Pet. 17. That fundamentally different standard is incompatible with this Court's recognition that investors are capable of "grasp[ing] the probabilistic significance" of contingent information. *Basic*, 485 U.S. at 234.[7]

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projections into a materiality standard that would shield insiders who *conceal* such information while trading in the company's stock. Pet. App. 136a-137a.

[7] Contrary to petitioner's characterization (Pet. 2), this Court in *Basic* did not "recognize[]" that "special standards may be necessary" to determine the materiality of "earnings forecasts or projections"; the Court simply observed that the information at issue was not of that kind. *Basic*, 485 U.S. at 232 n.9. As explained below, moreover, the evi-

Petitioner does not explain why the *Basic* framework fails accurately to gauge "the significance the reasonable investor would place on" internal projections. Instead, he argues (Pet. 24-26) that a departure from the ordinary standard is necessary to protect "basic corporate functioning." Pet. 25. In particular, petitioner contends that the *Basic* framework will prohibit insiders from "sell[ing] company shares *ever*" and force companies either to bury investors in useless information or to disclose nothing at all for fear of suit. Pet. 26; see Chamber of Commerce Amicus Br. 13-24.

These policy-driven assertions are at bottom a challenge to the wisdom of the rule subjecting corporations or insiders to liability. They have little, if anything, to do with the materiality standard under the rule governing insider trading, which turns on what information a reasonable investor would deem important. In any event, the SEC has already adopted safe harbors that balance such concerns. Under Rule 10b5-1(c), an executive may enter an automatic trading plan when he is not aware of material nonpublic information, and he may then continue selling under the plan even if he later becomes aware of inside information. 17 C.F.R. § 240.10b5-1(c). And the reasonable-basis provisions on which petitioner himself relies (Pet. 19 & n.5)—along with a safe harbor Congress more recently enacted as part of the Private Securities Litigation Reform Act of 1995, 15 U.S.C. 78u-5—amply protect companies that do make good-faith but ultimately inaccurate projections.[8]

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dence in this case included hard operating data, not just "soft" predictions.

[8] The considerations for companies (as opposed to insiders) selling stock are not presented in this case, nor is any analogy (Pet. 23) an easy one, because SEC rules provide companies selling their stock with both

c. Petitioner is incorrect in contending (Pet. 17-19, 21-23) that the courts of appeals disagree about the standard for determining the materiality of forward-looking corporate information.

Petitioner principally relies on the First Circuit's decisions in *Shaw* v. *Digital Equipment Corp.*, 82 F.3d 1194, 1210 (1996), and *Glassman* v. *Computervision Corp.*, 90 F.3d 617, 632 (1996), but those cases did not adopt petitioner's elevated materiality standard. In *Shaw*, which concerned mid-quarter operating data, the court noted that any attempt to resolve the materiality issue under "bright-line rules" would be "contrary to *Basic*," and it therefore framed the inquiry as whether "a reasonable investor would likely consider the interim performance important to the overall mix of information available." 82 F.3d at 1210. The court simply concluded that petitioner's allegations—that the company possessed information "indicating that the quarter in progress * * * will be an extreme departure from the range of results that could be anticipated" based on public disclosures—were sufficient to satisfy the fact-specific materiality threshold. *Ibid.*[9]

Glassman did not rest on the materiality standard for insider trading, but rather appears to represent an interpretation of the applicable regulatory duties of disclosure. The court "recognize[d] that investors may find information about a firm's internal projections and fore-

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additional disclosure obligations (17 C.F.R. Pts. 210, 229) and selling protections (17 C.F.R. 240.10b5-1(c)(2)).

[9] In a footnote, *Shaw* stated that the suit was "sustainable only to the extent it relates to the nondisclosure of 'hard' material information, as opposed to "'soft' information in the nature of projections." 82 F.3d at 1211 n.21. As explained below, see pp. 23-24, *infra*, the evidence in this case included such "hard" information.

casts to be important," and thus that such information may be material, 90 F.3d at 631 (citing *Virginia Bankshares, Inc.* v. *Sandberg*, 501 U.S. 1083, 1090-1091 (1991)), but it construed the governing SEC regulations at that time not to require disclosure in the particular circumstances. *Glassman*, 90 F.3d at 631. To the extent *Glassman* addressed materiality, the decision—while quoting from *Shaw*, *id.* at 632 n.24—in the end reaches a factbound holding that the specific information at issue could not be considered material because it was "not particularly predictive" and "remote in time and causation from the ultimate events of which it supposedly forewarn[ed]." *Id.* at 632. See *United States* v. *Smith*, 155 F.3d 1051, 1064-1065 (9th Cir. 1998) (explaining that *Glassman* and other decisions held only "that, *in the circumstances presented in those individual cases*, the disputed information was not sufficiently certain or significant to be considered material."), cert. denied, 525 U.S. 1071 (1999).

In any event, First Circuit rulings subsequent to *Shaw* and *Glassman* refute petitioner's assertion that that court's decisions conflict with the decision below. In *SEC* v. *Happ*, 392 F.3d 12 (2004), the First Circuit applied the same settled standard articulated in the decision below to uphold a finding of materiality where an insider traded on information that the corporation was facing mid-quarter "difficulties""potentially" indicating a shortfall from public earnings targets in future quarters. *Id.* at 22. The court rejected the argument petitioner advances here: that "[m]erely being told of 'difficulties' * * * is too generic and too true of all public companies to constitute material information." *Id.* at 21. More recently, in *ACA Financial Guaranty Corp.* v. *Advest, Inc.*, 512 F.3d 46 (1st Cir. 2008), in an opinion by

Judge Lynch (the author of the opinions in *Shaw* and *Glassman*), the First Circuit held that, because "[m]ateriality is usually a matter for the trier of fact," a 2.5% discrepancy between public announcements and internal budget figures could not be deemed "immaterial as a matter of law." *Id.* at 65. These decisions indicate that, contrary to petitioner's contentions, the First Circuit has not adopted a heightened materiality standard for internal corporate information or a categorical rule of immateriality for performance shortfalls below a certain numerical threshold.

The decisions of the Fourth and Fifth Circuits on which petitioner relies (Pet. 19-20) also do not conflict with the decision below.[10] Although *Walker* v. *Action Industries, Inc.*, 802 F.2d 703 (4th Cir. 1986), expressed policy concerns similar to those petitioner cites, that decision was based on an outdated regulatory background and preceded this Court's decision in *Basic*. *Krim* v. *BancTexas Group, Inc.*, 989 F.2d 1435 (5th Cir. 1993), cert. denied, 479 U.S. 1065 (1987), correctly recognized that the test for materiality is whether the information "would have altered the way a reasonable investor would have perceived the total mix of information available." *Id.* at 1445. The reference in that decision to whether the company knew the information "to a certainty" concerned the issue of scienter, not materiality. *Id.* at 1449. Since *Krim*, the Fifth Circuit has confirmed that it does not apply any categorical or heightened rule

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[10] Petitioner's reliance (Pet. 19, 22) on *Wielgos* v. *Commonwealth Edison Co.*, 892 F.2d 509 (7th Cir. 1989), is misplaced because that decision was based not on materiality but rather on the SEC safe harbor for forward-looking announcements. That safe harbor is inapposite here. See *supra* n.6. To the extent *Wielgos* addressed materiality, it articulated the *Basic* standard. 892 F.2d at 517.

of the kind petitioner urges. See *Mercury Air Group, Inc.* v. *Mansour*, 237 F.3d 542, 547 (2001) ("[M]ateriality of predictions is analyzed on a case-by-case basis," and "ordinarily a reasonable investor may deem a significant decrease in projected income material.").[11]

d. Even if there were a circuit conflict regarding the standard for determining the "materiality of risks or predictions about future events," Pet. 15, this case would not present a suitable vehicle to resolve it. That is so for two reasons.

First, the evidence at trial was not limited to "internal predictions." Pet. 16. The principal materiality theory underlying the jury's verdict was that Qwest's 2001 business plan depended on an "aggressive" shift from IRUs to recurring revenues by April 2001 and that if Qwest failed in that effort, it could not generate the compounding effect on which its public targets depended. By April 2001, petitioner learned that "things *had* gone wrong," Pet. App. 139a: Qwest failed to make the necessary shift to recurring revenues, and remaining IRU customers that could have filled third and fourth quarter gaps were already accounted for. Gov't C.A. Br.

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[11] Decisions of other circuits also accord with the Tenth Circuit's approach. See, *e.g.*, *United States* v. *Anderson*, 533 F.3d 623, 626, 629-630 (8th Cir.) (upholding a jury finding of materiality in an insider-trading prosecution where the defendant CEO sold stock with knowledge of interim sales forecasts indicating that the company probably would not meet year-end targets), cert. denied, 129 S. Ct. 518 (2008); *United States* v. *Smith*, 155 F.3d at 1064-1065 (holding that *Basic*'s "fact-intensive" reasonable-investor test governs materiality of "earnings forecasts or projections"; "We have never held—nor even hinted—that forward-looking information or intra-quarter data cannot, as a matter of law, be material.") (citation and emphasis omitted); *Rothberg* v. *Rosenbloom*, 771 F.2d 818, 820-821 (3d Cir. 1985) (upholding finding that internal mid-year sales reports were material).

6-11, 14, 27-29; see pp. 3-5, *supra*. That information took the form of hard facts based on past performance and completed first-quarter results; it was not "soft" projections reflecting only the "worries" of other employees. Pet. 19, 24.

Second, even if the information at issue were characterized purely as "projections" or "risks" (Pet. 15, 19), petitioner could not prevail under the heightened materiality standard he advocates. On the evidence at trial, a jury could find that the information petitioner possessed "establish[ed] a very strong likelihood that the company's eventual reported performance [would] be substantially below what the market [was] expecting." Pet. 17.

Petitioner understood based on the information he received in April 2001 that it was highly likely, if not certain, that the company could not achieve its year-end targets. C.A. App. 2649-2650 (anticipated recurring revenue growth was "absolutely not going to happen"). And as the court of appeals explained, the jury could conclude that even a 4.2% shortfall from public guidance did "forebode disastrous year-end results." Pet. 21 (alterations omitted). Petitioner himself predicted a 15% to 20% drop in Qwest's stock price if the company missed targets by as little as *0.2%*. Pet. App. 143a. Later events bore out his prediction: the stock price fell steadily as petitioner "trickled out" some of his inside information and as Qwest missed its (lowered) targets. *Id*. at 144a; see Gov't C.A. Br. 31-33.

2. Petitioner's contentions based on the jury instructions regarding materiality (Pet. 21-24, 26-28) also do not merit review.

Petitioner argues that the court of appeals held, in conflict with other courts, that a jury instruction cannot

constitute reversible error "unless it affirmatively 'misstated the law.'" Pet. 26 (citation omitted). The court of appeals reached no such sweeping conclusion. Rather, the court "review[ed] the instructions as a whole de novo to determine whether they accurately informed the jury of the governing law," Pet. App. 132a, while noting that petitioner had failed to request instructions that would have furnished greater detail on materiality and that the instructions he did request were not correct statements of the law, *id.* at 133a-134a. The court emphasized the "importan[ce] [of] giv[ing] a jury enough guidance to sort out material information from noise," *id.* at 132a, and then concluded that the jury had properly been instructed on the *Basic* standard, *id*. at 134a.

There is thus no merit to petitioner's argument that the court of appeals adopted a rule under which the "adequa[cy]" of instructions is irrelevant. Pet. 27. Indeed, both before and after the decision below, the Tenth Circuit has routinely stated that it "review[s] jury instructions as a whole to determine whether they adequately state the applicable law." *United States* v. *McConnel*, 464 F.3d 1152, 1158 (10th Cir. 2006), cert. denied, 549 U.S. 1361 (2007); see *United States* v. *Gallant*, 537 F.3d 1202, 1233 (10th Cir. 2008), cert. denied, 129 S. Ct. 2026 (2009).

Petitioner is similarly incorrect in attributing to the court the broad holding that a defendant who tenders an "imperfect" request to charge "forfeit[s] any challenge" to the jury instructions. Pet. 16; Pet. 27-28. That is not what the court held. The court reasoned that petitioner's proposed instruction based on an SEC safe harbor was "nonsensical," but that even if the charge had been crafted differently, petitioner was not entitled to such an instruction because the safe harbor for certain

disclosures does not inform the determination of whether *undisclosed* information is material. Pet. App. 134a-137a. That conclusion was neither erroneous nor contrary to the decision of any other court.

3. There is no warrant for this Court's review of the decision below upholding the exclusion of Fischel's testimony.

a. The en banc Tenth Circuit correctly held that the district court did not abuse its discretion in excluding Fischel's testimony on Rule 702 reliability grounds. Under *Kumho Tire*, district courts have "considerable leeway in deciding * * * whether or when special briefing or other proceedings are needed to investigate reliability" under Rule 702. *Id.* at 152. Based on its extensive review of the record, the court of appeals concluded that the district court had exercised that leeway by directing petitioner to establish reliability through written disclosures. The record contains ample support for that conclusion. The court of appeals also correctly read the record as indicating petitioner's knowledge that, independent of the obligations imposed by Rule 16, the district court expected him to address and establish the reliability of Fischel's methodology in advance of testimony. Finally, the court of appeals correctly held that because, among other reasons, petitioner directly addressed the Rule 702 challenge in his responsive filings, described those filings as an "expert report," and did not indicate that any further proceedings were warranted, the district court acted within its discretion in deciding the reliability issue on the existing record.

b. The district court's exclusion of Fischel's testimony and the court of appeals' affirmance of that ruling are inextricably bound to the unique procedural history and record in this case. The crux of the disagreement

between the en banc majority and the principal dissent concerned the particular facts, not the governing law. The opposing opinions agreed that, although live testimony might be the ordinary means of testing reliability under Rule 702, district courts enjoy broad discretion to adopt a different procedure, compare Pet. App. 21a n.10 with *id.* at 64a; that a court does not abuse its discretion in deciding the reliability issue without a hearing where the record is sufficient, compare *id.* at 45a-46a with *id.* at 56a; and that a defendant may claim "unfair surprise" when a court excludes expert testimony on Rule 702 grounds without adequate notice, compare *id.* at 28-30a with 64a-65a. Those principles are well established among the courts of appeals. See *id.* at 40a & n.18.

The opinions below diverged only on the application of those principles to the district-court record. The majority concluded that the district court did, in fact, adopt a procedure for determining reliability through written submissions; that petitioner was on notice of the need to address the issue in the designated manner; and that the record was sufficient to permit a Rule 702 reliability determination. The dissent construed the record as pointing in the opposite direction. Petitioner's contention that the dissent's view of the record was correct does not present a question worthy of this Court's attention.

Because the decision below is narrow and factbound, petitioner and its *amicus* are incorrect that the decision will "transform[] criminal expert practice" (Pet. 31) or "result in the effective elimination of Rule 16" (Nat'l Ass'n of Crim. Def. Lawyers Amicus Br. 10). The court of appeals did not hold categorically that in every case the government's "mere filing of a motion" to exclude expert testimony compels the defendant to satisfy its

burden under Rule 702 before the witness testifies. Pet. 29. The court simply identified the government's motion as one of a number of factors that, on the particular record in this case, combined to ensure that petitioner was on notice of the court's intent to resolve the Rule 702 issue on written submissions. Pet. App. 24a-26a.[12] Significantly, the district court's rules specifically provide that a party opposing a motion state whether a hearing is necessary. See p. 9, *supra*. And the government, in its motion to exclude Fischel's testimony under Rule 702, specifically requested a *Daubert* hearing, but only if the court were inclined to deny its motion to exclude. C.A. App. 421-422. Notwithstanding the rule and the government's contingent request for a hearing, petitioner made no such request.

Nor did the court of appeals disagree with the general proposition that "a district court should not make a *Daubert* determination when the record is not adequate to the task." Pet. 30 (citation omitted). Rather, the

[12] Petitioner's characterization appears to rest on footnoted dicta in the en banc decision stating that "[t]he only notice to which [petitioner] was entitled was notice of the fact that the admissibility of his expert witness's testimony had been challenged by a government motion." Pet. App. 22a n.11. Immediately after that statement, however, the court emphasized that petitioner was sufficiently apprised that Rule 702 proceedings had commenced "[o]nce he had responded to that motion and [reliability] was thus at issue," *ibid.*, and the balance of the footnote explains that petitioner did in fact receive exactly the type of notice he believes necessary. Any suggestion that the en banc court deemed notice beyond the government's motion irrelevant is belied by the court's careful analysis of all the circumstances that *collectively* notified petitioner of the need to address *Daubert*. *Id.* at 20a-30a. In any event, a single statement of dicta in a footnote would not warrant this Court's review. See *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) ("This Court reviews judgments, not statements in opinions.") (citation omitted).

court concluded that the record in this case was "sufficiently developed" to permit such a determination. Pet. App. 45a-46a. Indeed, the court explicitly recognized that "it would be an abuse of discretion for the district court to unreasonably limit the evidence upon which it based its *Daubert* decision." *Id.* at 33a.

4. There is no merit to petitioner's contention (Pet. 32-35) that purported analytical errors in both Judge McConnell's panel opinion and the decision of the en banc Tenth Circuit call for summary reversal. The court of appeals did not err on any of the four grounds petitioner identifies, much less do so in a manner that could render summary reversal appropriate.

a. First, petitioner contends (Pet. 32-33) that the court of appeals erred in addressing only the district court's Rule 702 ruling and in failing to review all of the grounds that the district court identified as reasons to exclude Fischel's testimony. The court of appeals properly concluded, however, that those other grounds were "separate" and "distinct" from the district court's "stand-alone" reliability holding, Pet. App. 46a-48a & n.21, which the district court explained was the "primar[y]" basis for its decision, *id.* at 258a. See *id.* at 253a (district court explaining that Fischel's opinions were "excludable on a number of rationales"). The court of appeals' "prudent[ial] * * * restraint" in "elect[ing] not to opine on the Rule 16" or relevance issues, Pet. App. 46a n.21, after affirming the district court's decision on independent and adequate grounds, was entirely consistent with the usual course of judicial proceedings. See, *e.g.*, *Morse* v. *Frederick*, 127 S. Ct. 2618, 2641-2642 (2007) (Breyer, J., concurring in the judgment in part and dissenting in part) ("[T]he cardinal principle of judi-

cial restraint is that if it is not necessary to decide more, it is necessary not to decide more.") (citation omitted).[13]

b. Second, petitioner contends (Pet. 33) that the decision below rests on a "misunderstand[ing]" of this Court's decision in *Sprint/United Management Co.* v. *Mendelsohn*, 128 S. Ct. 1140 (2008). Contrary to petitioner's characterization, the court of appeals did not presume that the district court's exclusion ruling rested on Rule 702; rather, the court found that to be the "more natural[]" reading of the record after careful review. Pet. App. 12a n.6. The court of appeals cited *Sprint/United Management* only for the "further" proposition that a reviewing court should not presume that the trial judge ruled on legally erroneous grounds. *Id*. at 20a. That proposition does not in any sense conflict with *Sprint/United Management*.

c. Third, petitioner argues (Pet. 34) that the panel erred "inexplicabl[y]" in failing to acknowledge a portion of petitioner's appellate brief contending that the undisclosed information was immaterial because it was "uncertain[]." But Judge McConnell recognized that materiality of future events depends "upon a balancing of both"

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[13] In any event, it is not at all clear, nor was it undisputed below, that the alternative bases for the district court's ruling were incorrect. In particular, the district court appeared correctly to conclude that many of Fischel's opinions did not constitute expert testimony but were instead "nothing more than closing argument." Pet. App. 255a. Among other "expert" opinions, Fischel would have testified that if petitioner had traded on the basis of inside information, he would have sold more stock; that petitioner's decision to sell Qwest shares could be explained by a desire to diversify his stock holdings; and that his trades were innocent because executives at other companies were also selling stock. Gov't En Banc Br. 44-51. As the district court noted, those opinions amounted to "conclusions which the jury [could] draw after hearing the arguments back and forth." Pet. App. 257a.

their "probability" and "magnitude." Pet. App. 131a (quoting *Basic*, 485 U.S. at 238). Indeed, the panel specifically noted that it did "not disregard [the probability] component of the materiality analysis." *Id.* at 144a n.10. The accompanying analysis confirms that the court understood, addressed, and rejected petitioner's claim that Qwest's problems were insufficiently concrete to justify a materiality finding. *Id.* at 141a-144a; see *id.* at 139a ("By April 2001, Mr. Nacchio had learned that those things *had* gone wrong, or at least were much more likely to.").

d. Finally, petitioner frames his factbound challenge to the exclusion of Fischel's expert testimony as a basis for summary reversal, contending that the ruling constitutes an "appalling injustice." Pet. 34. After careful and detailed review of the evidence, the record, and the procedural history of this case, a majority of the en banc court of appeals squarely rejected petitioner's effort to "recast an unremarkable district court evidentiary ruling" and "run-of-the-mill lament of unfair surprise" as an "invidious act of judicial hubris." Pet. App. 26a. For the reasons set forth above, see pp. 26-29, *supra*, the record amply supports the en banc court's conclusion.

More broadly, the record refutes petitioner's effort to attribute his conviction and unsuccessful appeal to a denial of "basic fairness" resulting from his status as an "unpopular high-profile defendant." Pet. 34-35. The district court took great care to protect petitioner from any bias arising from his notoriety, employing a jury-questionnaire procedure and conducting voir dire that the defense described as "painstaking." Gov't C.A. Br. 21 n.6 (citation omitted). The court held the government to the same procedural rules it applied to the defense. C.A. App. 4084-4085 ("Same rule applies to you as ap-

plies to the defense. You had a chance to make your argument."). Although petitioner complains of unfairness in the exclusion of his expert witness, the district court granted *petitioner's* motion to exclude two government experts because of untimely disclosure, Gov't En Banc Br. 8, and also to bar certain other government witnesses from offering any opinion testimony on materiality, Gov't En Banc Reply Br. 25. The jury carefully considered the evidence presented at trial, deliberating for six days and acquitting petitioner of 23 counts arising from trades before April 2001. And the court of appeals meticulously weighed petitioner's claims of factbound error in lengthy opinions that followed two separate oral arguments. Summary reversal is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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