No. 14-29

In the Supreme Court of the United States

DOUGLAS F. WHITMAN, PETITIONER

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

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
LESLIE R. CALDWELL
Assistant Attorney General
DAVID M. LIEBERMAN
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

Petitioner was convicted of insider trading in violation of Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78j(b), and Rule 10b-5, 17 C.F.R. 240.10b-5, for trading on the basis of material nonpublic information that was disclosed by corporate insiders in violation of their duty of trust and confidence. The questions presented are:

1. Whether, after instructing the jury that the government was required to prove that petitioner traded "on the basis of material nonpublic information," the district court erred by further instructing that a person trades "on the basis of" inside information "if the material nonpublic information was at least a factor in his trading decisions."

2. Whether the district court erred in relying on federal rather than state law in instructing the jury that, for purposes of Rule 10b-5's prohibition on insider trading, the officers, employees, and agents of a company have "a legal duty, known as a duty of trust and confidence, not to disclose to anyone outside the company financial or other nonpublic information about the company."

3. Whether the district court abused its discretion under Federal Rule of Evidence 804(b)(1) when it refused to admit an unavailable witness's testimony from an earlier civil deposition conducted by the Securities and Exchange Commission.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases—Continued: Page

In the Supreme Court of the United States

No. 14-29

DOUGLAS F. WHITMAN, PETITIONER

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

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is not published in the *Federal Reporter* but is reprinted in 555 Fed. Appx. 98. The opinion of the district court (Pet. App. 24a-43a) is reported at 904 F. Supp. 2d 363.

JURISDICTION

The judgment of the court of appeals was entered on February 19, 2014. A petition for rehearing was denied on April 22, 2014 (Pet. App. 44a). The petition for a writ of certiorari was filed on July 8, 2014. 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, petitioner was convicted on two counts of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371, and two counts of securities fraud, in violation of 15 U.S.C. 78j(b), 78ff, 17 C.F.R. 240.10b-5 (Rule 10b-5), and 18 U.S.C. 2. He was sentenced to 24 months of imprisonment, to be followed by one year of supervised release. He was also ordered to forfeit $935,306 and to pay a $250,000 fine. The court of appeals affirmed. Pet. App. 1a-16a.

1. Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*, makes it illegal to "use or employ, in connection with the purchase or sale of any security * * * , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [Securities and Exchange Commission (SEC)] may prescribe." 15 U.S.C. 78j(b).[1] Rule 10b-5(a), adopted pursuant to that authority, prohibits the use of "any device, scheme, or artifice to defraud" in connection with a securities trade. 17 C.F.R. 240.10b-5(a)

Insider trading is one of the deceptive devices prohibited by Section 10(b) and Rule 10b-5. Under the "classical theory" of insider trading, a corporate insider violates Rule 10b-5 by "trad[ing] in the securities of his corporation on the basis of material, nonpublic information." *United States* v. *O'Hagan*, 521 U.S. 642, 651-652 (1997). Such trading is a "deceptive device" because of the "'relationship of trust and confidence'" between corporate insiders and the corporation's

[1] In 2010 after the events at issue here, Congress made a technical amendment to Section 10(b). See Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 762(d)(3), 124 Stat. 1761. This brief cites the current version of the statute.

shareholders. *Id.* at 652 (quoting *Chiarella* v. *United States*, 445 U.S. 222, 228 (1980)). That relationship "gives rise to a duty to disclose [inside information] or to abstain from trading because of the necessity of preventing a corporate insider from taking unfair advantage of uninformed stockholders." *Ibid.* (brackets, ellipses, and internal quotation marks omitted) (quoting *Chiarella*, 445 U.S. at 228-229). The duty to disclose or abstain "applies not only to officers, directors, and other permanent insiders of a corporation, but also to attorneys, accountants, consultants, and others who temporarily become fiduciaries of a corporation." *Ibid.* It also extends to a "tippee" who receives material nonpublic information from an insider (or from another tippee in a chain leading back to an insider) if the tippee knows or should know that the insider's disclosure breached the duty of trust and confidence barring the insider from trading on the information directly. *Dirks* v. *SEC*, 463 U.S. 646, 659-661 (1983).

Under the "misappropriation theory" of insider trading, a person violates Rule 10b-5 "when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information." *O'Hagan*, 521 U.S. at 652. Whereas the classical theory "premis[es] liability on a fiduciary relationship between company insider and purchaser or seller of the company's stock," the misappropriation theory rests on the "fiduciary-turned-trader's deception of those who entrusted him with access to confidential information." *Ibid.* The misappropriation theory thus "outlaws trading on the basis of nonpublic information" by "outsiders" to the corporation who act fraudulently. *Id.* at 652-653.

In 2000, the SEC promulgated Rule 10b5-1 to define the circumstances in which a purchase or sale qualifies as one made "on the basis of" inside information for purposes of Rule 10b-5's prohibition on insider trading. 17 C.F.R. 240.10b5-1. In general, Rule 10b5-1 provides that a trade is "on the basis of" material nonpublic information "if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale." 17 C.F.R. 240.10b5-1(b).

2. Petitioner was the president and manager of the hedge fund Whitman Capital, LLC and the principal portfolio manager of Whitman Partners L.P. From 2006 to 2009, petitioner conspired with others to obtain material nonpublic information from insiders at public companies and to profit from that information by trading on it. The proceeds of his illegal trades totaled nearly $1 million. Gov't C.A. Br. 2, 4-13.

At petitioner's trial, his co-conspirators described his receipt and use of inside information. Roomy Khan, petitioner's neighbor, testified that she relayed confidential financial information from Sunil Bhalla, a senior vice president and general manager at Polycom, Inc., to petitioner. Gov't C.A. Br. 4-7; C.A. App. 719. For instance, Bhalla told Khan that Polycom's quarterly earnings for the fourth quarter of 2005 would beat analysts' expectations. C.A. App. 711-714, 719-722. Khan shared this information with petitioner, who purchased over 132,000 shares of Polycom stock. *Id.* at 1024-1025. After Polycom publicly announced its financial results, its stock price increased by more than $2.50 per share. Over the next few days, petitioner sold his shares, netting approximately $344,254. *Id.* at 1029-1030. In later conversations, petitioner encouraged Khan to obtain additional inside information from Bhalla. *Id.* at 2077.

Khan also testified that she gave petitioner confidential information about Google, Inc. Gov't C.A. Br. 7-10. In the summer of 2007, an employee at Google's investment relations firm disclosed to Khan that Google's earnings would fall short of analysts' projections. C.A. App. 733-744, 747. On July 18, 2007, Khan shared that information with petitioner, and, when the market opened the next day, petitioner purchased over 2700 put options on Google's stock—the first time in more than two years that he had traded in Google securities. *Id.* at 751, 753-754, 1031-1032, 1038-1040, 1140-1144. Google announced its earnings that evening, and its stock price dropped almost $40 per share. Petitioner exercised or sold all of his options, netting nearly $600,000 in profits. *Id.* at 1033, 1036, 1145-1147. The next day, petitioner sent flowers to Khan with a note reading: "Thank you from Whitman Capital." *Id.* at 1209-1213.

Petitioner also received confidential information about Marvell Technology Group, Ltd. Beginning in 2007, Karl Motey, a research analyst hired by petitioner, obtained revenue numbers, guidance projections, and gross margin information from two Marvell insiders. Gov't C.A. Br. 10-11; C.A. App. 239-243, 246-250, 290-298, 304-323. Motey shared that confidential information with petitioner, C.A. App. 244-245, 251-253, 309-321, 351-352, 499-506, who traded on some of the information. For example, in October 2008, after petitioner learned that Marvell's revenue projections would likely be adjusted downward, Whitman Capital promptly sold its Marvell stock. Gov't C.A. Br. 12; C.A. App. 304-310, 591-592. Petitioner executed additional trades in January and March 2009 after receiving similar information. C.A. App. 310-321, 1014-1024.

Finally, petitioner traded confidential information with his friend Wes Wang. On several occasions, petitioner forwarded tips about Google or Marvell to Wang in exchange for inside information about Cisco, which Wang obtained from a neighbor. Gov't C.A. Br. 9-10, 13.

3. A grand jury indicted petitioner on two counts of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371, and two counts of securities fraud, in violation of 15 U.S.C. 78j(b), 78ff, 17 C.F.R. 240.10b-5, and 18 U.S.C. 2. The government alleged that petitioner was liable as a tippee who knowingly traded on the basis of inside information disclosed by corporate insiders in violation of their duty of trust and confidence. Pet. App. 28a-29a & n.2.

a. During trial, petitioner sought to introduce Bhalla's testimony from a deposition taken in connection with a civil enforcement suit brought by the SEC. During that deposition, Bhalla had denied disclosing confidential Polycom information to Khan. C.A. App. 126, 131. Bhalla was unavailable to testify at petitioner's trial because he had invoked his Fifth Amendment right against compelled self-incrimination. The district court held that Bhalla's deposition was not admissible under the exception to the hearsay rule in Federal Rule of Evidence 804(b)(1), which authorizes admission of an unavailable declarant's testimony from a prior proceeding if it is "offered against a party who had * * * an opportunity and similar motive to develop it" at the prior proceeding. Fed. R. Evid. 804(b)(1)(B). The court found that although in some cases the SEC and a United States Attorney's Office might properly be considered the same party for purposes of Rule 804(b)(1), this was not such a case because there was "no suggestion that the U.S. Attorney's Office had any role in the conduct of Bhalla's deposition." C.A. App. 1578. In the alternative, the court held that even if the SEC and the United States Attorney's Office were properly considered to be the same party, petitioner had failed to demonstrate that the SEC had a similar motive to examine Bhalla at the deposition as the prosecutors would have had at petitioner's criminal trial. *Id.* at 1578-1579. The court explained that because of the differing purpose of a civil deposition, the examination conducted by the SEC was "very different * * * from the kind of examination that one would undertake if either it were a trial or if one had reason to believe that it might be used at a trial." *Id.* at 1579.

b. The district court instructed the jury that the government was required to prove, among other things, that petitioner traded on the basis of material nonpublic information about a company "knowing that the information had been obtained from an insider of the company who had provided the information in violation of that insider's duty of trust and confidence." C.A. App. 2030. The court further instructed that "an insider is an officer, employee or agent of a company who has access to nonpublic information" and that such an insider "has a legal duty, known as a duty of trust and confidence, not to disclose to anyone outside the company financial or other nonpublic information about the company." *Id.* at 2030-2031.

Petitioner objected to these instructions, arguing that a corporate insider's duty of confidentiality is exclusively a matter of state law; that California is the relevant State in this case because it is the State in which the relevant conduct occurred; that California law imposes a duty of confidentiality only on "upper-level employees"; and that the insiders at issue here were too junior to be subject to the relevant California duty. Pet. App. 32a. The district court rejected that argument, holding that "the duty in question is imposed and defined by federal law." *Id.* at 33a. The court noted that all of this Court's decisions addressing insider trading have treated the relevant duty as a matter of federal law because "they have described it and defined it without ever referencing state law." *Ibid.* The court also observed that petitioner had "failed to point to a single case where any federal court has expressly held that the duty was defined by state law." *Ibid.* The court therefore concluded that while courts may consider "general principles of state fiduciary law" in formulating the relevant duty, insider-trading cases are governed by a federal standard that has been developed by this Court's decisions and by SEC regulations further specifying the scope of Rule 10b-5's prohibition on insider trading. *Id.* at 34a-35a (citing 17 C.F.R. 240.10b5-2).

c. The district court also instructed the jury that to convict petitioner of insider trading, it had to find that he traded "on the basis of material nonpublic information." C.A. App. 2030. The court explained that a person trades "on the basis of" inside information if "the material nonpublic information was at least a factor in his trading decisions." *Id.* at 2033. Petitioner had requested that the jury be required to find that inside information was a "significant factor" in his trading decisions. *Id.* at 1629.

d. The jury convicted petitioner on all counts. Pet. App. 17a. The district court sentenced him to an aggregate term of 24 months in prison, to be followed by one year of supervised release. *Id.* at 2a, 19a-20a.

4. The court of appeals affirmed in an unpublished summary order. Pet. App. 1a-16a.

a. As relevant here, the court of appeals first rejected petitioner's challenge to the district court's exclusion of Bhalla's deposition. Pet. App. 6a-8a. The court "assum[ed] *arguendo* that the SEC lawyers and the trial prosecutors [could] be treated as the same party," but agreed with the district court that they had "differing motivations to develop testimony" in their respective proceedings. *Id.* at 7a. The SEC attorney conducting Bhalla's civil deposition made only "general inquiries," "rarely" "pressed the witness," and allowed "Bhalla's testimony to stand unquestioned." *Ibid.* The court thus found no abuse of discretion in the district court's "careful review of the circumstances" or in its conclusion that "the SEC deposition was taken with an investigatory motive that differed from the adversarial motive that would be present at trial." *Id.* at 7a-8a.

b. The court of appeals next rejected petitioner's contention that the district court should have looked to state law to determine whether corporate insiders breached a duty of trust and confidence in disclosing inside information. Pet. App. 15a. The court explained that it had "recently settled any uncertainty about this issue, holding that 'the fiduciary-like duty against insider trading under section 10(b) is imposed and defined by federal common law'" developed under Section 10(b) and Rule 10b-5, not solely by state law.

Ibid. (quoting *Steginsky* v. *Xcelera Inc.*, 741 F.3d 365, 371 (2d Cir. 2014)).

c. The court of appeals also rejected petitioner's argument that the jury should have been required to find that inside information was a "significant factor" in his trades. Pet. App. 15a-16a. Petitioner conceded, and the court agreed, that the court's decision in *United States* v. *Royer*, 549 F.3d 886 (2008), cert. denied, 558 U.S. 934, and 558 U.S. 935 (2009), foreclosed that claim. *Royer* held that a jury need only find that a defendant traded securities while in "knowing possession" of material nonpublic information. *Id.* at 899. The instructions given here were more favorable to petitioner because they required the jury to find not only that he traded while in knowing possession of inside information, but also that the information was "at least a factor" in his trading decisions. Pet. App. 15a-16a.

ARGUMENT

Petitioner renews his contentions that the court of appeals' knowing-possession standard is inconsistent with Section 10(b) (Pet. 10-18); that any fiduciary-like duty against insider trading must arise under state law (Pet. 18-25); and that Bhalla's deposition testimony was admissible under Rule 804(b)(1) (Pet. 26-31). The court of appeals correctly rejected those arguments, and its decision neither conflicts with any decision of this Court nor implicates any square conflict among the courts of appeals. In addition, this case would be a poor vehicle for considering each of the issues petitioner seeks to raise. No further review is warranted.

1. Petitioner first challenges (Pet. 10-18) the court of appeals' holding that a defendant may violate Sec-

tion 10(b) and Rule 10b-5 by buying or selling securities while in "knowing possession" of inside information. This Court has recently declined to consider that question, see *Rajaratnam* v. *United States*, 134 S. Ct. 2820 (2014) (No. 13-1001); see also *Royer* v. *United States*, 558 U.S. 934, and 558 U.S. 935 (2009) (Nos. 08-10328 and 08-10357); *Teicher* v. *United States*, 510 U.S. 976 (1993) (No. 93-138), and the same result is warranted here. The decision below is consistent with Section 10(b) and with the SEC's governing regulation. Although two other courts of appeals have required proof that the defendant "used" inside information, those courts have not considered the matter in light of Rule 10b5-1 and will therefore be required to reexamine the issue if it arises again. Even if the question otherwise warranted review, this would be a poor vehicle in which to consider it. This case does not implicate any disagreement among the courts of appeals because the jury found that inside information was "at least a factor" in petitioner's trading decisions, Pet. App. 15a, not merely that he traded while in knowing possession of such information. And in light of the overwhelming evidence that petitioner's trades were the direct result of his receipt of inside information, any error in the instruction was harmless.

a. Section 10(b) and Rule 10b-5 do not require proof that inside information was a causal factor in a defendant's trading decisions, beyond the defendant's awareness of the information when trading.

i. Section 10(b) makes it unlawful to use a deceptive device "in contravention of such rules and regulations as the [SEC] may prescribe as necessary or appropriate in the public interest or for the protection of investors." 15 U.S.C. 78j(b). In 2000, pursuant to that rulemaking authority, the SEC promulgated Rule 10b5-1 to define "when a purchase or sale constitutes trading 'on the basis of' material nonpublic information in insider trading cases." 17 C.F.R. 240.10b5-1. The rule provides that a trade is "on the basis of" inside information "if the person making the purchase or sale was aware of the material nonpublic information" at the time of the transaction. 17 C.F.R. 240.10b5-1(b). The rule also establishes an affirmative defense that applies where a trade resulted from a binding contract, instruction, or written plan adopted before the trader became aware of the material nonpublic information. 17 C.F.R. 240.10b5-1(c).

As in other circumstances in which Congress has authorized the SEC to "prescribe legislative rules" implementing a statutory provision, courts must accord Rule 10b5-1 "'controlling weight unless [the rule] is arbitrary, capricious, or manifestly contrary to the statute.'" *United States* v. *O'Hagan*, 521 U.S. 642, 673 (1997) (describing the SEC's power under 15 U.S.C. 78n(e) and quoting *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 844 (1984) (*Chevron*)); see *SEC* v. *Zandford*, 535 U.S. 813, 819-820 (2002). The Second Circuit first articulated its knowing-possession standard before Rule 10b5-1 was adopted. *United States* v. *Teicher*, 987 F.2d 112, 120, cert. denied, 510 U.S. 976 (1993). But in adhering to that approach, the court of appeals has deferred to the SEC's rule, explaining that Rule 10b5-1 is "entitled to deference" under *Chevron* and that the court's knowing-possession standard is equivalent to the rule's "aware[ness]" test. *United States* v. *Royer*, 549 F.3d 886, 899 (2d Cir. 2008), cert. denied, 558 U.S. 934, and 558 U.S. 935

(2009); accord *United States* v. *Rajaratnam*, 719 F.3d 139, 159-161 (2d Cir. 2013), cert. denied, 134 S. Ct. 2820 (2014).

Rule 10b5-1 is a permissible "regulation[]" giving content to the conduct prohibited by Section 10(b). 15 U.S.C. 78j(b). As the SEC explained, "[w]henever a person purchases or sells a security while aware of material nonpublic information that has been improperly obtained, that person has the type of unfair informational advantage over other participants in the market that insider trading law is designed to prevent." 64 Fed. Reg. 72,600 (Dec. 28, 1999). The rule thus "comports with the oft-quoted maxim," recognized by this Court, "that one with a fiduciary or similar duty to hold material nonpublic information in confidence must either 'disclose or abstain' with regard to trading." *Teicher*, 987 F.2d at 120 (quoting *Chiarella* v. *United States*, 445 U.S. 222, 227 (1980)). Moreover, the rule "reflects the common sense notion that a trader who is aware of inside information when making a trading decision inevitably makes use of the information." 65 Fed. Reg. 51,727 (Aug. 24, 2000). "Unlike a loaded weapon which may stand ready but unused, material information can not lay idle in the human brain." *Teicher*, 987 F.2d at 120.

The knowing-possession standard is consistent with other statutes governing insider trading. Congress has not sought to define the scope of the insider trading activities prohibited by Section 10(b) and Rule 10b-5. But on two occasions before the SEC promulgated Rule 10b5-1, Congress provided additional remedies for insider-trading violations and, consistent with the view later adopted by the SEC, described insider trading as buying or selling securities "while in possession of material, nonpublic information." 15 U.S.C. 78u-1(a)(1) (providing civil penalties); 15 U.S.C. 78t-1(a) (creating a private right of action).[2]

ii. Petitioner acknowledges the SEC's rule only in a passing footnote, see Pet. 18 n.2, and neither petitioner nor his amicus identifies any sound reason to conclude that Rule 10b5-1 is "arbitrary, capricious, or manifestly contrary to" Section 10(b). *O'Hagan*, 521 U.S. at 673 (quoting *Chevron*, 467 U.S. at 844).

First, petitioner asserts (Pet. 12-13) that the decision below conflicts with this Court's insider-trading opinions indicating that the defendant had "exploit[ed]," *Chiarella*, 445 U.S. at 233 n.16, "take[n] advantage of," *id.*, at 227, or "use[d]," *O'Hagan*, 521 U.S. at 656, the confidential information in the trading decision. See also Horwich Amicus Br. 3-5. But none of those opinions addressed the question presented here, and all of them predated Rule 10b5-1. Moreover, this Court has also described the prohibition on insider trading as imposing a duty "to disclose material nonpublic information before trading or to abstain from trading altogether"—a formulation that supports the knowing-possession standard. *Dirks* v. *SEC*, 463 U.S. 646, 653-654 (1983) (footnote omitted); see *Chiarella*, 445 U.S. at 226-229.

Second, petitioner erroneously contends (Pet. 13) that the decision below conflicts with common law decisions recognizing a "causation" element in securi-

[2] The legislative history of these provisions confirms that Congress understood that Section 10(b) and Rule 10b-5 prohibit "trading while in possession of material, nonpublic information." H.R. Rep. No. 910, 100th Cong., 2d Sess. 8 (1988); see H.R. Rep. No. 355, 98th Cong., 1st Sess. 2-3 (1983).

ties fraud cases. The knowing-possession standard establishes that an insider-trading violation may occur when a person trades while in knowing possession of inside information. That type of fraud is analogous to the "common law" rule that "one who fails to disclose material information prior to the consummation of a transaction commits fraud" if "he is under a duty to [disclose it]." *Chiarella*, 445 U.S. at 227-228 & n.9 (citing 3 Restatement (Second) of Torts § 551(2)(a), at 119 (1976)). Rule 10b5-1's knowing-possession standard addresses the question of when the possession of improperly obtained inside information gives rise to a duty to disclose or abstain from trading, and it answers that question by imposing the duty when the trader is aware of the information in question.

Third, petitioner wrongly asserts (Pet. 13-14) that the knowing-possession standard transforms insider trading into a "strict liability" offense. To satisfy Section 10(b), the government must prove that the defendant acted with "intent to deceive, manipulate, or defraud." *Aaron* v. *SEC*, 446 U.S. 680, 686 n.5 (1980) (quoting *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 194 n.12 (1976)). In adopting Rule 10b5-1, the SEC recognized that "[s]cienter remains a necessary element for liability" and stated that "Rule 10b5-1 does not change this." 65 Fed. Reg. at 51,727. The knowing-possession standard is entirely consistent with the scienter requirement. Although an insider-trading violation *may* occur when a person trades while in knowing possession of inside information, no violation occurs unless the defendant acts with intent to defraud by failing to disclose information that he knows he has a duty to disclose. The same point refutes petitioner's argument (Pet. 14) that the knowing-possession test resurrects the equal "information" theory rejected by this Court in *Dirks* and *Chiarella*. This Court made clear that the rejection of the "information" theory meant that "only some persons, under some circumstances, will be barred from trading *while in possession of material nonpublic information*." *Dirks*, 463 U.S. at 646 (discussing *Chiarella*, 445 U.S. at 235 n.20) (emphasis added). The requirements of a fiduciary (or similar) duty, a breach of that duty, and scienter distinguish the Second Circuit's standard from a pure "information" rule.

Consistent with these principles, the jury found that petitioner acted "with an intent to defraud." C.A. App. 2030; see *id.* at 2033 ("good faith on the part of the defendant is a complete defense"). The instructions in this case also illustrate other requirements that prevent the imposition of strict liability on persons who innocently or inadvertently acquire inside information and then trade. The defendant must recognize the importance and confidential character of the information; the jury had to find that petitioner "knowingly" traded on the basis of material nonpublic information. *Id.* at 2030; see *id.* at 2034 (instructing jury that petitioner was not liable if his trades were "not based upon anything he recognized, understood or believed was material nonpublic information"). The jury also had to find that petitioner "kn[ew] that the information had been obtained from an insider of the company who had provided the information in violation of that insider's duty of trust and confidence." *Id.* at 2030; see *Dirks*, 463 U.S. at 660. In addition, the jury had to find that petitioner acted "willfully," which the district court defined as "deliberately and with a bad purpose." C.A. App. 2033. Only a "willful[]" violation of Rule 10b-5 gives rise to criminal penalties, and a person may not be subject to imprisonment for violating an SEC rule "if he proves that he had no knowledge of [the] rule." 15 U.S.C. 78ff(a). These last "two sturdy safeguards" further ensure that innocent conduct will not be subject to criminal penalties and "do[] much to destroy any force in the argument that application of the [statute] in circumstances such as [petitioner's] is unjust." *O'Hagan*, 521 U.S. at 665-666 (internal quotation marks omitted; second pair of brackets in original).

Fourth, petitioner and his amicus assert that the decision below will threaten the securities industry by criminalizing the everyday activities of legitimate traders and analysts. Pet. 15-17; Horwich Amicus Br. 7-11. But that claim rests on the erroneous premise that a knowing-possession standard creates a strict liability offense. As explained above, trading while in possession of material nonpublic information does not trigger criminal liability absent showings of awareness of the information's nature, intent to deceive, and willfulness. Experience bears this out. Rule 10b5-1 has been in place since 2000, and the knowing-possession standard has been endorsed by the Second Circuit—home to much of the securities industry—since *Teicher* was decided in 1993. If petitioner were correct (Pet. 17) that this standard "has created an especially untenable situation for research analysts" and "cast a shadow over the entire industry," one would expect some evidence of a disruption during this time. Petitioner musters none.

b. No disagreement exists among the courts of appeals on the question presented because no circuit has held that Rule 10b5-1 exceeds the SEC's rulemaking authority under Section 10(b). Petitioner notes (Pet. 10-11) that the Ninth and Eleventh Circuits previously disagreed with the knowing-possession standard articulated in *Teicher* and instead required proof that the defendant "used" inside information. See *United States* v. *Smith*, 155 F.3d 1051, 1066-1069 (9th Cir. 1998), cert. denied, 525 U.S. 1071 (1999); *SEC* v. *Adler*, 137 F.3d 1325, 1332-1339 (11th Cir. 1998). But *Smith* and *Adler* predated Rule 10b5-1—indeed, the SEC adopted the rule to resolve the conflict between those decisions and *Teicher*. 65 Fed. Reg. at 51,727 & n.97.

"A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). Neither *Smith* nor *Adler* found that the "use" test was unambiguously compelled by Section 10(b). To the contrary, *Adler* called the issue "a difficult and close question" and observed that the SEC could reverse its holding by "promulgat[ing] a rule adopting the knowing possession standard." 137 F.3d at 1337 & n.33; see *Smith*, 155 F.3d at 1067 (concluding that the "weight of authority supports a 'use' requirement," but not finding the statute unambiguous). Now that the SEC has acted on *Adler*'s invitation, both courts will be required to reexamine the issue in light of the deference owed to the expert agency Congress has charged with implementing Section 10(b) through "rules carrying the force of law." *United States* v. *Mead Corp.*, 533 U.S. 218, 226-227 (2001).[3]

c. Even if *Smith* and *Adler* created a conflict warranting this Court's review, that conflict would not be implicated in this case. The district court did not instruct the jury that it could convict based on "knowing possession" of inside information, but rather required proof that "the material nonpublic information was at least a factor in [petitioner's] trading decisions." C.A. App. 2033. That instruction is consistent with the "use test" adopted by the Ninth and Eleventh Circuits. *Adler*, 137 F.3d at 1337; see *Smith*, 155 F.3d at 1070 n.28 (requiring proof "that the suspect used the information"). Petitioner mistakenly insists (Pet. 11) that, under the Ninth Circuit's approach, "the inside information must have been a 'significant factor' in the decision to trade." The district court in *Smith* had instructed the jury that inside information must be a "significant factor" in the decision to buy or sell. 155 F.3d at 1070 n.28. The Ninth Circuit reject-

---

[3] Petitioner also cites (Pet. 10-11, 18 n.2) *United States* v. *Anderson*, 533 F.3d 623, 630-631 (8th Cir.), cert. denied, 555 U.S. 997 (2008), *SEC* v. *Ginsburg*, 362 F.3d 1292, 1297-1298 (11th Cir. 2004), and *SEC* v. *Lipson*, 278 F.3d 656, 660 (7th Cir. 2002). But those decisions did not consider Rule 10b5-1 because the conduct at issue occurred before the rule became effective in October 2000, see 65 Fed. Reg. at 51,716, and because the government had not challenged the "use" standard. *Anderson*, 533 F.3d at 627-628; *Ginsburg*, 362 F.3d at 1296-1298. Indeed, *Lipson* expressly reserved the issue. 278 F.3d at 660. There is thus no merit to petitioner's assertion (Pet. 18 n.2) that these decisions demonstrate that the circuit conflict "has continued to persist after th[e] rule was adopted." No court of appeals has held that Rule 10b5-1 exceeds the SEC's authority or adopted the "use" standard in a case in which the rule applied.

ed the defendant's challenge to that instruction, but did not mandate the "significant factor" language and had no occasion to consider whether the "significant" qualifier is required. *Ibid.*

d. In any event, this case would be a poor vehicle in which to take up the question presented because any error was harmless. Given the overwhelming evidence that inside information influenced petitioner's trading decisions, it is "clear beyond a reasonable doubt that a rational jury would have found [petitioner] guilty" even under his preferred standard. *Neder* v. *United States*, 527 U.S. 1, 18 (1999).

Although petitioner insists (Pet. 15) that he did not rely on inside information when executing the charged trades, he effectively acknowledged that he had traded based on inside information. For example, when a friend asked petitioner whether he traded in Google securities, petitioner responded that he had done so "for a while," explaining that "Roomy [Khan] had a mole there for a while." C.A. App. 2084. Petitioner then lamented that Khan had "lost the mole" because she "didn't have enough sense to go out and buy [the mole] some really nice present." *Ibid.* In the same conversation, petitioner acknowledged that "what [Khan] w[as] getting from [the mole]"—inside information on Google that Khan then passed on to petitioner—"was illegal." *Ibid.* Previously, petitioner had sent Khan flowers and a thank-you note the day after he made nearly $600,000 by trading based on inside information about Google's financial results that Khan had received from her "mole." *Id.* at 1209-1213.

The jury also heard evidence that petitioner sought out inside information. For example, in August 2008, petitioner told Khan that "[c]alling [Bhalla] and getting a good call on Polycom and being able to short it" would make Khan "and [her] neighbors"—presumably a reference to petitioner himself—"feel better." C.A. App. 2063, 2077. When Khan protested that she was worried that she would get in "big trouble" if she traded in Polycom based on inside information, petitioner advised her to "[u]se a skype phone number" to call Bhalla so her call would be harder to trace. *Id.* at 2077. In May 2009, petitioner gave similar advice to his research analyst Motey, encouraging him to use Skype when communicating with his contacts at Marvell so that "people don't know when you're calling." *Id.* at 2058, 2061.

Finally, petitioner repeatedly traded on inside information soon after receiving it, further confirming that the inside information was a significant factor in his trading decisions. See, *e.g.*, C.A. App. 714, 717-719, 1024-1025 (petitioner began purchasing Polycom shares shortly after Khan told him that the company's quarterly revenues exceeded expectations); *id.* at 753-754, 1030-1033 (petitioner purchased options on Google stock the day after learning from Khan that Google's earnings per share would fall short of estimates); *id.* at 304-310, 591-592, Gov't C.A. Br. 12 (Whitman Capital sold its Marvell stock shortly after Motey learned that company revenue projections would be adjusted downward).

2. Petitioner next contends (Pet. 18-25) that the district court erred in relying on federal law in instructing the jury that "an officer, employee or agent of a company who has access to nonpublic information * * * has a legal duty, known as a duty of trust and confidence, not to disclose to anyone outside the company financial or other nonpublic information about

the company that the company treats as confidential." C.A. App. 2030-2031. Petitioner argues that the duty of trust and confidence at issue in insider-trading cases can arise only from state law. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision by another court of appeals. Moreover, this case would be a poor vehicle in which to take up the question presented because the district court's instruction was consistent with the relevant state law.

a. An insider's duty not to trade on material nonpublic information or disclose such information to others for trading purposes is a matter of federal law. In recognizing that duty, this Court relied on the SEC's seminal decision in *In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961) (*Cady, Roberts*). See *Chiarella*, 445 U.S. at 228. This Court agreed with the SEC that an insider's duty to disclose inside information or refrain from trading arises from "(i) the existence of a relationship affording access to inside information intended to be available only for a corporate purpose, and (ii) the unfairness of allowing a corporate insider to take advantage of that information by trading without disclosure." *Id.* at 227; see *Dirks*, 463 U.S. at 653. This Court later held that the disclose-or-abstain obligation extends to tippees as well, reasoning that "[n]ot only are insiders forbidden by their fiduciary relationship from personally using undisclosed corporate information to their advantage, but they also may not give such information to an outsider for the same improper purpose of exploiting the information for their personal gain." *Dirks*, 463 U.S. at 659.

This Court has sometimes been guided by general common law principles in defining the duty to disclose or abstain, but it has consistently adopted and applied uniform federal standards and has never suggested that the existence of an insider-trading violation necessarily depends on the law of a particular State. To the contrary, the Court endorsed the SEC's *Cady, Roberts* decision, which reasoned that a departure from common-law standards was appropriate because Section 10(b) and Rule 10b-5 are "aimed at reaching misleading or deceptive activities, whether or not they are precisely and technically sufficient to sustain a common law action for fraud and deceit." 40 S.E.C. at 910; cf. *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 388-389 (1983) (observing that "the antifraud provisions of the securities laws are not coextensive with common-law doctrines of fraud," because "an important purpose of the federal securities statutes was to rectify perceived deficiencies in the available common-law protections").

Accordingly, the disclose-or-abstain duty recognized by this Court has departed in significant ways from state law. Most obviously, this Court recognized that only "*some* jurisdictions" imposed an obligation to disclose or abstain on corporate insiders, yet endorsed the nationwide application of that duty under Rule 10b-5. *Dirks*, 463 U.S. at 653-654 (emphasis added). Moreover, this Court has held that certain corporate "outsiders," such as "an underwriter, accountant, lawyer, or consultant working for the corporation," become fiduciaries subject to the disclose-or-abstain rule because "they have entered into a special confidential relationship" with the corporation. *Id.* at 655 n.14; accord *O'Hagan*, 521 U.S. at 652. That conclusion went beyond the requirements of state laws, which typically imposed a duty to disclose or abstain only on "officers, directors and controlling stockholders." *Cady, Roberts*, 40 S.E.C. at 912. Similarly, *Dirks* developed and applied a federal standard for determining whether a tippee has inherited a fiduciary duty as a result of an insider's breach. The Court thus held that "the test is whether the insider personally will benefit, directly or indirectly, from his disclosure" and concluded that "[a]bsent some personal gain, there has been no breach of duty to stockholders." 463 U.S. at 662. The Court did not suggest that the scope of an insider's duty was wholly dependent on state law, nor did it examine the law of the State at issue in *Dirks*.

The SEC, too, has treated the duties of trust and confidence relevant to insider-trading violations as a matter of federal law. This case involves the duty owed by a corporate insider to the corporation's shareholders under the classical theory of insider trading, but in addressing the "closely-related question of what constitutes a duty of trust and confidence under the misappropriation theory," Pet. App. 33a-34a & n.5, the SEC has promulgated a regulation establishing federal standards for the circumstances that give rise to a duty of confidentiality. See 17 C.F.R. 240.10b5-2.

The duty of trust and confidence that governs insider trading cases is thus a "federal rule, based on a body of case law developed over time," that is the product of "statutory interpretation pursuant to congressional direction." *Burlington Indus.* v. *Ellerth*, 524 U.S. 742, 755 (1998). Petitioner's contrary approach, which would make the application of the insider-trading laws wholly dependent on "idiosyncratic differences in state law," "would thwart the goal of promoting national uniformity in securities markets." *Steginsky* v. *Xcelera Inc.*, 741 F.3d 365, 371 (2d Cir. 2014). A federal standard is also the only approach consistent with the insider-trading prohibition's role in protecting investors on national securities markets. See 18 Donald C. Langevoort, *Insider Trading: Regulation, Enforcement and Prevention* § 3:2 n.4, at 3-4 (2006) (explaining that the case for a "uniform" federal approach "seems clear"). And a rule that made Section 10(b)'s prohibition on insider trading entirely dependent on state law would also run afoul of this Court's admonition that "in the absence of a plain indication of an intent to incorporate diverse state laws into a federal criminal statute, the meaning of the federal statute should not be dependent on state law." *United States* v. *Turley*, 352 U.S. 407, 411 (1957).

Petitioner and his amicus contend that the decision below conflicts with this Court's decisions holding that, in certain circumstances, federal courts should incorporate state law to fill gaps in the federal securities statutes. Pet. 20-22; Bainbridge Amicus Br. 3-5, 9-12. But the cases on which petitioner and his amicus principally rely addressed circumstances in which "a gap in the federal securities laws must be bridged by a rule that bears on *the allocation of governing powers within the corporation*." *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 108 (1991) (emphasis added); see *id.* at 101 (incorporating the state-law requirement that shareholders make a demand on the board of directors before filing a derivative action under the Investment Company Act of 1940 (ICA), 15 U.S.C. 80a-1 *et seq.*); *Burks* v. *Lasker*, 441 U.S. 471, 486 (1979) (incorporating the state-law rule that disinterested directors may dismiss a derivative action brought under the ICA). In this case, in contrast, the scope of the disclose-or-abstain rule goes to the heart of the prohibition on insider trading in Section 10(b) and Rule 10b-5, a prohibition that reflects the fact that a "significant purpose of the Exchange Act was to eliminate the idea that use of inside information for personal advantage was a normal emolument of corporate office." *Dirks*, 463 U.S. at 653 n.10 (citation omitted). The continued application of a federal standard in this context poses no threat of improper encroachment on state authority. And contrary to petitioner's contention (Pet. 23) a federal standard, developed through this Court's decisions and SEC regulations, also better serves the interest of clarity and certainty than a rule of liability based solely on standards that vary from State to State.

b. The decision below does not conflict with any decision by another court of appeals. Indeed, as petitioner's amicus has conceded, the state-law inquiry that petitioner advocates "is essentially unheard of in federal insider trading jurisprudence." Stephen M. Bainbridge, *Incorporating State Law Fiduciary Duties into the Federal Insider Trading Prohibition*, 52 Wash. & Lee. L. Rev. 1189, 1212 (1995) (Bainbridge). In alleging (Pet. 18-19) a "clear circuit split" on this question, petitioner principally relies on cases that did not involve claims of insider trading at all. See *SEC* v. *Tambone*, 597 F.3d 436, 447-448 (1st Cir. 2010) (en banc); *Fortson* v. *Winstead, McGuire, Sechrest & Minick*, 961 F.2d 469, 471 (4th Cir. 1992); *Barker* v. *Henderson, Franklin, Starnes & Holt*, 797 F.2d 490, 492-496 (7th Cir. 1986). Those decisions concluded that Section 10(b) and Rule 10b-5 do not impose federal disclosure obligations in certain other contexts.

But none of them held that state law governs the duty to disclose or abstain in insider trading cases. To the contrary, in insider trading cases, the First, Fourth, and Seventh Circuits—like the decision below—look to the scope of the duty recognized in this Court's precedents, without regard to state law. See, *e.g.*, *United States* v. *Bryan*, 58 F.3d 933, 953 (4th Cir. 1995); *SEC* v. *Maio*, 51 F.3d 623, 631-633 (7th Cir. 1995); *SEC* v. *Cherif*, 933 F.2d 403, 409 (7th Cir. 1991), cert. denied, 502 U.S. 1071 (1992); *Roeder* v. *Alpha Indus.*, 814 F.2d 22, 26 (1st Cir. 1987).[4]

The two insider-trading cases that petitioner cites (Pet. 19-20) are not to the contrary. In *SEC* v. *Sargent*, 229 F.3d 68 (1st Cir. 2000), the court actually relied on federal rather than state law. *Sargent* discussed the Massachusetts rule that shareholders in closely held corporations have fiduciary duties to each other, but it based its decision on the standard set forth in this Court's decision in *O'Hagan* because the Massachusetts duty did not extend to the information at issue. *Id.* at 75-76. In *Jordan* v. *Duff & Phelps, Inc.*, 815 F.2d 429 (7th Cir. 1987), cert. dismissed, 485 U.S. 901 (1988), the court did state at one point that the disclose-or-abstain duty in insider-trading cases is "based on state law." *Id.* at 436. But it did so only in

[4] The Eighth and Tenth Circuit decisions on which petitioner relies (Pet. 19-20) are distinguishable on the same ground. Those cases did not involve claims of insider trading. See *SEC* v. *Cochran*, 214 F.3d 1261, 1262-1263 (10th Cir. 2000); *Camp* v. *Dema*, 948 F.2d 455, 460 (8th Cir. 1991). And in deciding cases involving such claims, both courts of appeals have applied federal standards without regard to state law. See, *e.g.*, *Anderson*, 533 F.3d at 628; *Garcia* v. *Cordova*, 930 F.2d 826, 828-829 (10th Cir. 1991); *Laventhall* v. *General Dynamics Corp.*, 704 F.2d 407, 412 (8th Cir.), cert. denied, 464 U.S. 846 (1983).

dicta—the court was considering whether the duty could be modified by contract, but it found no agreement to modify the duty in that case. *Id.* at 435-437. And the court's dicta contradicted the holding of the Seventh Circuit decision that recognized the fiduciary duty at issue in *Jordan*, which made clear that "Congress ha[d] established its own standard which is to be measured by federal law interpreting [Section 10(b) and Rule 10b-5] unhindered by restrictive applications of state common law." *Kohler* v. *Kohler Co.*, 319 F.2d 634, 642 (7th Cir. 1963); see *Jordan*, 815 F.2d at 431, 436 (citing *Kohler*).

c. This case would be a poor vehicle in which to take up the question presented because the district court's instruction was consistent with the relevant state law. Petitioner argued below that California law governed because the events at issue took place in California. But as petitioner's amicus has explained, "[l]ong-standing choice-of-law rules direct that questions of breaches of fiduciary duty by corporate officers and directors are governed by the law of the state of incorporation." Bainbridge 1267 n.320; accord *Walton* v. *Morgan Stanley & Co.*, 623 F.2d 796, 798 n.3 (2d Cir. 1980). Here, both Google and Polycom were incorporated in Delaware. Gov't C.A. Br. 83.[5] And "Delaware has long imposed" a duty against "mislead[ing] any stockholder by use of corporate information to which the latter is not privy * * * even upon persons who are not corporate officers or directors, but who nonetheless are privy to matters of

---

[5] Marvell was incorporated in Bermuda rather than Delaware, but petitioner never asked the district court to instruct the jury based on Bermudan law or argued that it differed from Delaware law in this respect. Gov't C.A. Br. 83.

interest or significance to their company." *Weinberger* v. *UOP, Inc.*, 457 A.2d 701, 711 (Del. 1983); see *Brophy* v. *Cities Serv. Co.*, 70 A.2d 5, 7 (Del. Ch. 1949).[6]

3. Finally, petitioner contends (Pet. 26-31) that the district court abused its discretion in refusing to admit Bhalla's deposition testimony. The court of appeals correctly rejected that argument, and its factbound nonprecedential decision does not conflict with any decision by another court of appeals or otherwise warrant this Court's review. Moreover, this case would be a poor vehicle in which to take up the proper application of Rule 804(b)(1) because any error was harmless.

a. Under Rule 804(b)(1), an unavailable declarant's testimony at a prior proceeding is admissible if it is "offered against a party who had * * * an opportunity and similar motive to develop it" in the prior proceeding. Fed. R. Evid. 804(b)(1)(B). The court of appeals correctly found no abuse of discretion in the district court's conclusion that the SEC's motive in its deposition of Bhalla was not "similar" to the motive the United States Attorney's Office would have had in cross-examining him at petitioner's criminal trial. The civil enforcement action was brought against Bhalla and two other individuals; neither petitioner nor Khan

---

[6] In addition, as the government argued below, petitioner's claim would fail even if California law applied. Two of the tippers involved were senior executives, not mere ordinary employees. Gov't C.A. Br. 84 n.24. And in any event, California law provides that all employees owe a duty of loyalty to their employers and must maintain the confidentiality of corporate information. See, *e.g.*, *Blickman Turkus, LP* v. *MF Downtown Sunnyvale, LLC*, 76 Cal. Rptr. 3d 325, 349 n.8 (Cal. Ct. App. 2008); *Huong Que, Inc.* v. *Luu*, 58 Cal. Rptr. 3d 527, 535 (Cal. Ct. App. 2007).

was a defendant in that proceeding. Gov't C.A. Br. 38. As the court of appeals explained, moreover, "the SEC attorney asked Bhalla only two leading questions" and "[t]he rest of the examination consisted of general inquiries" that "elicited long, descriptive answers from Bhalla that, unsurprisingly, asserted innocence." Pet. App. 7a. "A prosecutor seeking to rebut a trial defense would have pressed the witness, but the SEC examiner rarely did." *Ibid.* The character of the examination reflected the fact that "the SEC deposition was taken with an investigatory motive that differed from the adversarial motive that would be present at trial." *Ibid.*

Petitioner contends (Pet. 28) that the SEC and the United States Attorney's Office necessarily had "similar motives" because they were investigating the same conduct and had the same law enforcement objective. But that argument defines the relative motive at an impermissibly abstract level. Under Rule 804(b)(1), the question is not whether the SEC and the United States Attorney's Office shared a similar interest in enforcing federal securities laws, but whether the SEC's motive to develop Bhalla's testimony at his civil deposition could be equated to the United States Attorney's motive in this criminal proceeding.

Petitioner also asserts (Pet. 29-30) that, under the reasoning adopted by the decision below, "any testimony" given during civil enforcement proceedings brought by the SEC "could be excluded in a subsequent criminal proceeding" and suggests that this could invite improper coordination between prosecutors and SEC attorneys. That suggestion overlooks the narrow and case-specific scope of the court of appeals' holding. The court applied a deferential abuse-of-discretion standard and tethered its decision to "the facts of this case." Pet. App. 7a-8a. Indeed, the court expressly acknowledged that in other circumstances, "a civil deposition may well mirror the testimony that would be elicited at trial, or other evidence may suggest that the lawyer taking the deposition had a 'similar motive' to develop the testimony as the same party would later have at trial." *Ibid.* But whatever the result on other facts, the district court correctly found that this case did not remotely involve the "tandem" litigation strategy that petitioner posits (Pet. 30) because no evidence indicated that "the U.S. Attorney's Office had any role in the conduct of Bhalla's deposition." C.A. App. 1578.

b. Petitioner contends (Pet. 26-28) that this Court should grant review to resolve an asserted conflict between the decision below and *United States* v. *Sklena*, 692 F.3d 725 (7th Cir. 2012). But the decision below is an unpublished summary order; it therefore could not create any conflict in binding authority warranting this Court's review. See 2d Cir. R. 32.1.1(a). In any event, *Sklena* is distinguishable. In that case, the Seventh Circuit held that a district court abused its discretion by excluding testimony by the defendant's co-conspirator in a deposition taken in connection with a parallel civil action against the defendant and the co-conspirator by the Commodity Futures Trading Commission (CFTC). 692 F.3d at 729-734. The court ruled that the CFTC and the Department of Justice (DOJ) were properly treated as the same party for purposes of Rule 804(b)(1), and then held that, under the circumstances present there, the CFTC and DOJ "had essentially the same incentive to develop [the co-conspirator's] factual testimony about the events" in question. *Id.* at 732.

Several relevant distinctions between *Sklena* and this case refute any claim of conflict. First, the defendant in *Sklena* was also a defendant in the parallel civil action. Second, the Seventh Circuit noted that the CFTC "is required by statute to report on its litigation activities directly to [DOJ]." 692 F.3d at 731 (citing 7 U.S.C. 13a-1(a), (f) and (g)). The court concluded that this "statutory control mechanism" would have allowed prosecutors to "ensure[] that the CFTC lawyers included questions of interest to the United States when they deposed [the co-conspirator]." *Ibid.* No similar "statutory control mechanism" applies to the SEC. Cf. 15 U.S.C. 77t(b). Finally, the testimony at issue here involved Bhalla's blanket assertions of innocence, which the SEC attorney taking the deposition had no motive to cross-examine or develop further. Pet. App. 7a. In *Sklena*, in contrast, the testimony was the co-conspirator's factual account of a series of fast-paced commodities trades made over the span of a few minutes. 629 F.3d at 727. The Seventh Circuit concluded that the CFTC and DOJ lawyers had a similar motive to "develop [the co-conspirator's] factual testimony" about the trades; it did not find any absence of a motive to cross-examine the witness or develop his testimony. *Id.* at 732.

The absence of a conflict is further confirmed by the factbound nature of the similar-motive inquiry. See *United States* v. *Salerno*, 505 U.S. 317, 326 (1992) (Blackmun, J., concurring) (the "similar-motive inquiry" is "inherently a *factual* inquiry"). *Sklena* recognized that point, noting that the similar-motive inquiry "depends on a number of factors." 692 F.3d at

732. And the decision below likewise emphasized that it rested on "the facts of this case" and expressly left open the possibility that different facts would call for a different result. Pet. App. 7a-8a. Nothing suggests that the Second and Seventh Circuits would reach differing conclusions about the proper application of the similar-motive test if they were presented with the same set of circumstances.

c. This case would also be a poor vehicle in which to consider the proper application of Rule 804(b)(1) because any error in excluding Bhalla's deposition testimony was harmless. Bhalla categorically denied disclosing inside information to Khan. C.A. App. 126, 128, 131. But petitioner himself admitted at trial that Khan relayed confidential information to him that she had obtained from Bhalla. *Id.* at 1387-1391. The jury also heard a recorded telephone conversation in which petitioner urged Khan to contact Bhalla and "get[] a good call on Polycom." *Id.* at 2077. Finally, Khan testified that Bhalla provided her with inside information, and that testimony was corroborated by evidence that Khan and petitioner each purchased large numbers of Polycom shares and options shortly after the date that Khan received the tip from Bhalla. Gov't C.A. Br. 5. In light of this evidence, no reasonable jury could have credited Bhalla's blanket denial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
LESLIE R. CALDWELL
Assistant Attorney General
DAVID M. LIEBERMAN
Attorney

SEPTEMBER 2014