No.

In the Supreme Court of the United States

JOSEPH P. NACCHIO,

PETITIONER,

v.

UNITED STATES OF AMERICA,

RESPONDENT.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Joseph P. Nacchio, the former CEO of Qwest Communications, was convicted of insider trading for selling Qwest stock while knowing internal Qwest predictions and interim operating results allegedly placing Qwest at risk of missing its year-end 2001 public revenue projections eight to twelve months in the future. The Tenth Circuit panel and *en banc* opinions affirming that conviction conflict with holdings of other circuits and raise several questions meriting review.

1. Whether the defendant is entitled to acquittal or a new trial because the Tenth Circuit, in conflict with the standards applied in other circuits, erred by upholding the jury instructions bearing on the materiality of the type of information at issue, and by holding that there was sufficient evidence that the defendant failed to disclose material information and knew it.

2. Whether the judgment must be reversed and remanded for a new trial because the Tenth Circuit approved the use of impermissible procedures for the exclusion of expert testimony under Rule 702 that conflict with decisions of other circuits.

3. Whether the Tenth Circuit's decision should be summarily reversed because it misapplied decisions of this Court, mischaracterized the district court's reasoning, failed to resolve all the issues presented, and held that Nacchio failed to address an issue that was a principal focus of his brief.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

Page

APPENDIX

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

STATUTES, RULES AND REGULATIONS

OTHER AUTHORITY

TABLE OF AUTHORITIES—Continued

OPINIONS BELOW

The Tenth Circuit's panel opinion is reported at 519 F.3d 1140. App.101a-68a. The court's order granting rehearing *en banc* is reported at 535 F.3d 1165. App.169a-70a. Its *en banc* opinion is reported at 555 F.3d 1234. App.1a-100a.

JURISDICTION

The Tenth Circuit's *en banc* opinion was issued on February 25, 2009. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The appendix reproduces the relevant statutes, regulations and rules.

INTRODUCTION

A sharply divided *en banc* Tenth Circuit recently reinstated the conviction of Joseph P. Nacchio, the former CEO of Qwest Communications, for insider trading. Nacchio built Qwest into a telecommunications giant but became a high-profile target after Qwest's stock collapsed amid the 2001 telecommunications meltdown and a subsequent accounting restatement. He was accosted on the streets, depicted by the Denver Post alongside North Korean dictator Kim Jong Il, and even the trial judge "s[aw] no reason why this man who grew up, the son of Italian immigrants … in New Jersey and New York, should ever have come out here to Colorado." App.349a.

After five years of investigating, the prosecution evidently concluded that it could not prove any wrongdoing behind the restatement or the decline in Qwest's share price, and decided instead to prosecute

Nacchio for insider trading. The case merits review for several reasons.

First, this is the first time an executive has *ever* been charged with insider trading when the allegedly material "inside" information consisted of internal corporate risk assessments about financial results for future quarters. The Tenth Circuit agreed it was a "close question" whether that information was immaterial as a matter of law, but ultimately held that Nacchio could be sent to prison because a Qwest manager allegedly warned him in December 2000 or January 2001 of some "risk" that Qwest *might* fall short of its year-end 2001 projections by up to 4.2%, eleven or twelve months later, in a highly uncertain economic climate.

This Court recognized in *Basic Inc. v. Levinson*, 485 U.S. 224, 232 n.9 (1988), that special standards may be necessary for assessing the materiality of "contingent or speculative information, such as earnings forecasts or projections," but declined to resolve the issue. In the ensuing two decades the lower courts have fractured. In several other circuits, the allegations against Nacchio would have been dismissed as a matter of law even in a civil case. The proper standard is a matter of great national importance and merits review.

Second, the Tenth Circuit affirmed the jury instructions only by holding that uninformative instructions are not reversible unless they affirmatively misstate the law, and that a defendant forfeits any challenge unless his own proposed instructions are perfect. Those holdings squarely conflict with holdings of this Court and multiple other circuits.

Third, the prosecution convinced the court to exclude the heart of Nacchio's defense—the proposed expert testimony of Professor Daniel Fischel. Fischel is the former dean of the University of Chicago Law School, and the nation's leading expert in securities matters. He has testified more than 200 times (including for the government) and had never before been excluded. The government somehow convinced the district court that expert testimony on materiality and stock price movements is irrelevant or unnecessary in securities cases, and that Fischel should be excluded without *voir dire* or a *Daubert* hearing because Nacchio's pre-trial summary notice under Federal Rule of Criminal Procedure 16 did not establish the admissibility of the testimony under Rule 702. All of that was clear error, as the panel held when granting a new trial.

The government then abandoned its prior arguments and convinced the *en banc* court to affirm, on the new ground that Nacchio failed to justify Fischel's methodology under *Daubert* in response to the government's motion. That analysis conflicts with decisions of this Court and other circuits holding that expert testimony cannot be excluded without a hearing unless the existing record allows the court to evaluate the expert's methodology.

Finally, at a minimum summary reversal is warranted. As the *en banc* dissenters explained in detail, the majority mischaracterized the district court's decision, ignored settled law, and ducked meritorious issues to gloss over obviously prejudicial errors by a district judge whose "sense of fairness toward this defendant" was very much in doubt, App.92a (McConnell, J., dissenting), and who openly displayed ethnic bias against the defendant and his counsel and recently resigned in disgrace in a lurid prostitution and obstruction of justice scandal.

STATEMENT OF THE CASE

Factual Background

1. Nacchio held 7.4 million $5.50 options expiring in June 2003. He did not want to sell and asked the board to extend the term. CAJA-1929-30.[1] For accounting reasons, the board could not. *Id.* To protect Qwest by spreading the sales over time, CAJA-1879, Nacchio announced in October 2000 that (so long as the price was reasonable, CAJA-2958) he would exercise and sell about a million options per quarter—but that he would not sell any of his vast holdings without a sunset problem, CAJA-1929. This announcement was months before the government alleges Nacchio received any material information. *E.g.*, CAJA-1392.

2. On September 7, 2000, Qwest raised its 2001 public revenue projections to $21.3-$21.7 billion. CAJA-4781. Qwest's business units then developed budgets designed to meet internal targets that were "set higher than the street numbers to encourage the employees to exceed the public values." CAJA-1918, 2138-39, 2373-77. The internal target was initially $22 billion, and later $21.8 billion. CAJA-2267, 2429-30.

Qwest had met or exceeded its public revenue targets for 17 straight quarters. CAJA-2259. Qwest's revenues came from "recurring" subscriber revenues (such as phone service) and sales of capacity on Qwest's fiber-optic network, known as indefeasible rights of use

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[1] "CAJA" refers to the joint appendix in the Tenth Circuit. "GX" refers to the government's trial exhibits.

or "IRUs."[2] Qwest's 2001 projections were initially based on growth in "recurring" revenues, CAJA-2177, 2600, and IRU sales.

3. In December 2000 or January 2001, the government's cooperating witness Robin Szeliga told Nacchio that when she "aggregated all the risk" in "the targets that had been assigned to the [business units]," she saw "a billion dollars of risk as it related to the target that we had set." App.229a-230a. The Tenth Circuit later held it was ambiguous whether Szeliga was talking about the $22 billion internal target (suggesting a possible $300 million, or 1.4%, shortfall from the $21.3 billion public projection) or instead was describing the contents of a memo, which Nacchio never saw, forecasting $1.2 billion in risk against a $21.6 billion baseline (a $900 million, or 4.2%, shortfall from the public projection). App.141a-43a.

Qwest's revenues met public expectations in the first and second quarters (during Nacchio's trades), and nearly equaled the internal targets. CAJA-2309-10. In April, although "recurring" revenue was off its internal target by 19%, App.277a, IRU sales in Grant Graham's global-business unit and Greg Casey's wholesale-markets unit were booming. Graham's first quarter sales were 61% *greater* than forecast, CAJA-5060; GX932, and by the end of the second quarter, these units achieved "non-recurring" revenues of $1.065 billion—98% of the company's *year-end* target. GX932; GX947.

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[2] This petition accepts the Tenth Circuit's phrasing, but IRU sales also "recurred" year-after-year, and historically dominated Qwest's revenues.

Because IRU sales were greater than projected but "recurring" revenue growth was disappointing, in early April Qwest's senior managers revised their projections. That "current estimate" or "Current View of 2001" projected that 2001 revenue would reach $21.56 billion, *comfortably above the low end of the public projection*. App.276a-77a. Graham, a cooperating witness for the government, testified that "[t]he representation of the [April 9] forecast" "provid[ed] our best belief of what things were going to happen." App.244a. Szeliga testified that Nacchio was told at this meeting that, as of April 9th, "*with all of the debates* … the internal current view of Qwest was that they would reach $21.5 billion by December 31st, 2001." App.236a; CAJA-3276-77 (COO confirming same).

The only quantifiable "risk" presented to Nacchio was in Casey's wholesale-markets forecast, which identified $350 million of budget "risk" due to "slowed" "capital spending among Carriers" and Casey's predictions about the economy. App.278a, 241a-42a; CAJA-2228-29. Graham disagreed, and Casey had been wrong before—his unit's fourth-quarter 2000 revenues were $276 million or almost 35% greater than he projected. CAJA-4939-40, 5049. Even if Casey's "risk" were treated as certain, it suggested a 0.4% shortfall.

4. On April 24, 2001, Nacchio and Szeliga reaffirmed Qwest's public projections in a conference call with analysts. App.281a-96a. Nacchio disclosed, however, that he was "not pleased with the performance of [the consumer and small business] unit,"App.286a—known to the market as the main driver of "recurring" revenues—and that Qwest had to reduce its reliance on that sector for year-end revenue

projections. Although the Tenth Circuit later held that "[a] reasonable jury" could conclude that Nacchio knew "recurring revenue was off its target by 19%," and "that he acted upon this nonpublic information when deciding to trade," App.155a, on the April 24 call Nacchio *told the market* that although Qwest had projected growth of 8-9% in the consumer and small business sector, they had achieved only 6.3%—disclosing a 21% shortfall—and that "we are [now] going to be talking somewhere between 6 and 8 percent" for the year. App.294a-95a. (The prosecution's analyst witnesses understood that disclosure loud and clear. CAJA-3636, 4935.) Nacchio said there was "softness" in the economy, but Qwest could "hold the numbers" if "the economy strengthen[s] in the second half." App.289a-90a. Szeliga confirmed at trial that she was "still confident in our guidance" at that point. CAJA-2240; App.292a-94a.

5. Two days later Qwest's April trading window opened. Nacchio sold 1.2 million shares before the window closed on May 15, but still not enough to catch up to the target he had set in October 2000. CAJA-4765. He then entered into an automatic plan to exercise 10,000 options per day so long as the stock price was above $38. CAJA-2000, 3044, 5158-59. Qwest's General Counsel, who knew everything Nacchio knew, "represented and warranted" that Nacchio had no material nonpublic information by approving the plan. CAJA-5157, 5172, 2201, 2222. After May 29, Qwest's stock fell below $38. CAJA-4761-63. Nacchio never sold another share and ended the year with more vested options than he had at the beginning. CAJA-4764-65.

6. *No one* told Nacchio the projections had to be reduced until August 15, 2001. App.232a-34a. After conducting an internal review, on September 10, 2001, Qwest issued a press release lowering its projections. CAJA-4933. Its stock price *increased* 10%. CAJA-4763. Nonetheless, Qwest stock declined dramatically throughout 2001 commensurate with the telecommunications index.

PROCEDURAL HISTORY

District Court Proceedings

1. Nacchio proposed instructions explaining that forward-looking statements are not materially misleading unless they lack "a reasonable basis," and that "data, assumptions, and methods" or "internal projections" need not be disclosed unless they are "so certain that they show the published figures to have been without a reasonable basis." App.341a-48a; CAJA-4162-64, 4180-82. The government also proposed instructions, drawn from this Court's opinion in *Basic*, clarifying that the materiality of predictive information requires a balancing of "probability" and "magnitude." App.338a-40a.

The district court held that those principles are "wholly inappropriate" "for this type of insider trading case." App.272a. It instructed the jury that "[i]nformation may be material even if it relates not to past events but to forecasting and forward-looking statements so long as a reasonable investor would consider it important in deciding to act or not to act with respect to the securities transaction at issue." App.274a.

2. After Judge Nottingham excluded under the Classified Information Procedures Act critical evidence regarding Nacchio's expectations of substantial IRU

revenues from clandestine government agencies, Nacchio's defense rested almost entirely on Fischel's expert testimony. Nacchio gave the prosecution notice, compliant with Rule 16, on March 29, 2007. App.300a-29a.

On April 3, the government filed a "Motion To Exclude Testimony By Daniel Fischel," arguing: (1) that Fischel's testimony was "irrelevant" and "would not assist the jury"; and (2) that "Defendant still has not complied with the [Rule 16] expert disclosure rules," and "[b]ased on that disclosure, Professor Fischel should be excluded." App.297a-99a. The prosecution repeatedly (but incorrectly) argued that the disclosure requirements under Criminal Rule 16 were the same as Civil Rule 26, and that Fischel's methodology was not sufficiently disclosed to permit *Daubert* evaluation. *E.g.*, CAJA-368, 408, 418-21.

Less than 24-hours later,[3] Nacchio responded by explaining that the testimony was relevant, App.333a-34a, and that he had disclosed everything required by Rule 16. App.330a-33a. Just before Judge Nottingham adjourned that day, he said he had not "look[ed] at" the issue, and was informed that Fischel would testify in the morning. App.247a.

The next morning, he told the government "I know you want a ruling, Mr. Stricklin, but—who is going to [cross]-examine Mr. [Fischel]?" App.251a. The court

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3 That 24 hours included a full trial day and the second night of Passover. Nacchio had requested a brief adjournment so his lawyers could observe the holiday with their families, but the judge, after consulting with his "Jewish friends," Supp. App. 68, adjourned only one hour early on the first night so "[y]ou can go to eat gefiltefish [sic]," App.245a.

then expressed concern with the government's choice: "Really? Mr. Wise has taken a shot at him before." *Id.*

When the defense called Fischel, the court excused the jury. App.252a. Before either party could speak, he excluded Fischel's testimony on the grounds that Nacchio's Rule 16 notice had not established the reliability of Fischel's methodology under Rule 702. *E.g.*, App.253a ("[T]he deficiencies under *Daubert* and *Kumho Tire* in these disclosures are so egregious."). As the court later explained, it excluded Fischel because "[a]ny suggestion *that the Government was in possession of Fischel's … methodology* is simply disingenuous" because "*[t]he March 29, 2007[] disclosure* [Nacchio's Rule 16 notice] contained no methodology or reliable application of methodology to the case. It was precisely that [nondisclosure] … that led the Court … to exclude much of Fischel's proposed testimony." App.269a. He also held that the proposed testimony was irrelevant, unnecessary, and unlikely to assist the jury because this was like "a simple negligence case." App.249a.

The defense asked: "Your Honor, may I be heard?" The court responded: "No." App.258a-259a. Although the court said it needed more information regarding methodology to make a reliability determination, it refused to let counsel speak or Fischel (who was in the courtroom) testify to the evidentiary foundation. The court then remarked that the trial was "way ahead of time" and "is going to be completed easily within probably half the time that … was allotted to it," App.266a-67a, and excused the jury for the entire afternoon Thursday and until Monday morning.

Over the weekend, Nacchio filed a motion to reconsider and hold a *Daubert* hearing. App.336a-37a.

On Monday, Fischel gave a brief factual summary under FRE 1006 of the dates and amounts of Nacchio's trades. CAJA-3980. The defense again asked to elicit opinion testimony or for the requested *Daubert* hearing. CAJA-4064. With Fischel sitting in the witness chair, the court stated that "[t]here is no more disclosure or substantially no more disclosure than we originally had" in "the original expert report," and that "even if it were reliable, the Court remains of the conclusion that the testimony is of no relevancy." App.269a. It then again said "we're moving much faster than ever anticipated," and excused the jury until the following afternoon. App.269a-70a.

The government exploited that ruling in its closing argument, emphasizing its two analysts' unrebutted materiality testimony, CAJA-4278, 4501, and telling the jury that when the allegedly undisclosed information was disclosed "the stock price does drop," CAJA-4478. Nacchio was unable to show the jury Fischel's econometric analyses proving otherwise. App.112a; 7a.

Nacchio was acquitted of 23 counts covering trades in January-March, but convicted of 19 counts covering trades in April-May, and was sentenced to 72-months' imprisonment, fined $19 million, and ordered to forfeit $52 million.

Proceedings In The Tenth Circuit

1. The panel majority opinion, written by Judge McConnell, held that the district court misinterpreted Rule 16, which does not require a defendant to establish reliability under *Daubert*. App114a-19a. "Even reading the district court's ruling as a freestanding *Daubert* ruling rather than a finding that the Rule 16 disclosure was inadequate, such a ruling

would have been an abuse of discretion on this record, which is devoid of any factual basis on which a *Daubert* ruling could be made." App.119a-24a. The majority also reversed the district court's additional conclusions that the economic analysis was irrelevant and unhelpful, explaining that such testimony is "routine" in securities cases and endorsed by the commentary to Rule 702. App.124a-26a.

2. The panel rejected Nacchio's remaining arguments. It held that securities precedents articulating a high threshold for materiality of uncertain predictions were inapposite, since "Mr. Nacchio is being prosecuted for concealing true information while trading, not for making misleading statements." App136a.

The panel held that materiality "revolves around interpreting" Szeliga's December/January warning about a "'billion dollars of risk as it related to the target that we had set.'" App.141a (quoting App.230a). It acknowledged that on cross-examination Szeliga testified that she told Nacchio the risk related to the internal target, and therefore forecast only a 1.4% shortfall from the public numbers. App.141a-42a. But the panel concluded that "on re-direct examination, Ms. Szeliga corrected herself (*without saying so*), stating that the risk was closer to $1.2 billion and that it was against the public target at the time, not the private [internal] one." App.142a (emphasis added). It pointed to testimony where the government simply asked Szeliga to add and subtract numbers on a memo that would have indicated a 4.2% risk. *Id.* (citing App.239a-41a). The panel acknowledged that "Ms. Szeliga testified that Mr. Nacchio never saw the memo," but nonetheless accepted the government's (unsupported) assertion that "she was talking to him about its contents." App.143a.[4] It concluded that "[g]iven Ms. Szeliga's [unstated] clarification on re-direct, the jury was entitled to believe that the higher figure was accurate." *Id.*

The panel said it was "a close question" whether a 4.2% shortfall was immaterial as a matter of law, App.143a, but concluded it was close enough to the SEC's 5% "guideline[] for the materiality of errors in reported revenues" because of "[s]pecial factors"—namely, Nacchio's assertion at a sales conference that a "skittish" and "mercurial" stock market could punish Qwest for even a small shortfall. App.140a, 143a.

The panel concluded that the "reasonable basis" instruction Nacchio proposed was confusing and inapposite in insider trading cases. The panel recognized that "it is important to give a jury enough guidance to sort out material information from noise," and that the district court's instruction was "not particularly informative," but held there was no reversible error because the instructions did not affirmatively "misstate[] the law." App.132a-34a.

4. The court granted rehearing *en banc* limited to whether the exclusion of Fischel was erroneous. App.169a-70a.

The *en banc* majority declined to consider the district court's Rule 16 and relevance errors. The majority acknowledged that the government "framed

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[4] The court ignored Szeliga's testimony that she "discussed the billion dollar risk with Mr. Nacchio … not this—not the specifics of this memo," App.238a, and her unambiguous testimony that "a month into the year" "I thought we had a billion dollars of risk built into the stretch targets" (*i.e.*, the higher internal targets), App.232a.

its challenge to Professor Fischel's expert testimony as an objection to the sufficiency of Mr. Nacchio's Rule 16 disclosure," App.15a-16a, but found it significant that the motion argued that Nacchio's Rule 16 notice "had not established the admissibility of the evidence," under *Daubert* and Rule 702, App.8a. It held that the motion required Nacchio to "marshal his FRE 702 arguments," App.38a, and "set[] forth all available arguments for the testimony's admissibility," App.25a n.13, and that the district court could summarily exclude Fischel without permitting argument, *voir dire*, or a hearing.

The majority refused to consider whether the district court's misapprehensions concerning Rule 16 and relevance might have affected its discretionary decision to proceed in this manner, App.18a n.9, 46a n.21, and repeatedly relied on *Sprint/United Management Co. v. Mendelsohn*, 128 S. Ct. 1140 (2008), to presume that Judge Nottingham's ruling "rested on *Daubert* grounds," App.15a-16a, 11a n.6, 19a, while ignoring the *judge's own statement* that *Daubert* was *not* "the main bas[is] on which the Court rested its decision," and that Rule 16 *was* "one of multiple bases." App.350a.

The *en banc* court remanded to the panel to address unresolved sentencing and forfeiture issues.

Judge McConnell, joined by Chief Judge Henry and Judges Kelly and Murphy, dissented. They explained that in criminal cases an expert's methodology is almost always elicited on the stand, that the district court never ordered any different procedure here, and that Nacchio was entitled to respond to the government's motion by pointing out that Rule 16 simply does not require disclosures sufficient to satisfy

Daubert. Even if a *Daubert* challenge *had* been squarely presented, the dissenters reasoned that it was still a flagrant abuse of discretion and a violation of due process for the district court to exclude the testimony without permitting *voir dire* or a hearing—and that the *en banc* court's reasoning conflicted with other circuits. The dissenters criticized the majority's "unprecedented holding" that defendants are entitled to *no* notice about how a district court will resolve *Daubert* issues, which "will apply in all future cases, until … the Supreme Court intercedes." App.74a. Finally, the dissenters explained that the court's misunderstandings of Rule 16 and relevance obviously infected its discretion, requiring a remand under *Koon v. United States*, 518 U.S. 81 (1996), and criticized the *en banc* court for ducking the issue. App.86a-92a.

Chief Judge Henry and Judge Kelly dissented in even more emphatic terms. App.93a-100a.

5. On March 5, 2009, Nacchio filed a Rule 33 motion for a new trial, explaining that Szeliga recently clarified in sworn deposition testimony that the "risk" she described to Nacchio was only a 1.4% shortfall in year-end revenues. The district court's consideration of that motion does not deprive this Court of jurisdiction. *United States v. Cronic*, 466 U.S. 648, 667 n.42 (1984).

REASONS FOR GRANTING THE WRIT

1. Even in civil securities cases, the SEC and other circuits have recognized that the materiality of risks or predictions about future events must be assessed under special rules and with great caution, because of the danger that a jury guided only by vague standards will find "fraud by hindsight." The Tenth Circuit's holding that such safeguards are inappropriate in

insider trading cases squarely conflicts with other circuits (which apply the same principles in trading cases), and introduces an illogical discontinuity into the law. Either the Tenth Circuit has opened a huge loophole for securities plaintiffs to evade settled law by re-pleading "false statement" cases as "insider trading" cases, or it believes (again contrary to settled law) that individuals must disclose more than the company when both sell stock.

More broadly, the standards governing the materiality of predictive information are highly unsettled and important. Other circuits regard uncertain internal predictions as not just immaterial but misleading, and would have punished Nacchio *for disclosing them.* Corporate executives deserve comprehensible standards, not capricious imprisonment.

2. Nacchio correctly identified a defect in the instructions, and proposed an alternative based on Seventh Circuit cases. The panel's holdings that Nacchio forfeited any challenge because his proposal was imperfect, and that the instructions given were acceptable merely because they did not "misstate" the law, conflict with decisions of this Court and other circuits.

3. The *en banc* court's *Daubert* analysis conflicts with decisions of several other circuits and merits review. Litigants are entitled to notice and an opportunity to lay an appropriate foundation for expert testimony. The Tenth Circuit's holding misunderstands the burden of proof on a motion *in limine*, and severely undermines the careful distinctions between the civil and criminal expert rules.

4. At a minimum, summary reversal is appropriate. The Tenth Circuit seriously misunderstood this Court's decisions in *Koon* and *Sprint*, mischaracterized the district court's decision, failed to resolve all the issues presented on appeal, and inexplicably held that Nacchio failed to address an issue that was a principal focus of his brief.

I. THE TENTH CIRCUIT'S MATERIALITY ANALYSIS MERITS REVIEW

A. The Tenth Circuit's Holding Conflicts With Other Circuits

The Tenth Circuit's materiality analysis conflicts with several other circuits, which have held that internal predictions and interim operating results are immaterial as a matter of law unless they establish a very strong likelihood that the company's eventual reported performance will be substantially below what the market is expecting.

1. The First Circuit has held that such information is material only if it establishes a "likelihood" of an "extreme departure" from market expectations, and the end of the reporting period is very close.

In *Shaw v. Digital Equipment Corp.*, the company sold stock while knowing of allegedly "material facts portending the unexpectedly large losses for the third quarter of fiscal 1994 that were announced later." 82 F.3d 1194, 1201-02 (1st Cir. 1996). The First Circuit held that "soft" information like internal *predictions* is always immaterial. *Id.* at 1211 n.21. Turning to the "hard" intra-quarterly operating results the company had in hand, the First Circuit "conceptualize[d]" the company "as an individual insider transacting in the company's securities," noted that whether "[p]resent, known information that strongly implies an important future outcome … must be disclosed (assuming the existence of a duty), poses a classic materiality issue," and held that the company could continue selling stock *without disclosing interim operating results* unless "the [seller] is in possession of nonpublic information indicating that the quarter in progress at the time of the public offering will be an extreme departure from the range of results which could be anticipated based on currently available information." *Id.* at 1203, 1210. That standard was satisfied in *Shaw* because the results were dire and the quarter-end was only eleven days away. But the First Circuit emphasized that claims based on information supposedly presaging results 4-6 months in the future have been dismissed because the omissions should be "deemed immaterial as a matter of law." *Id.* at 1210-11.

In *Glassman v. Computervision Corp.*, 90 F.3d 617 (1st Cir. 1996), the company knew that "as of week seven of the third quarter … [sales] were only about *24% of Computervision's internal forecasts* for those weeks." *Id.* at 630. Although the end of the quarter was only five weeks away, and the stock later dropped 30% when quarterly results were announced, the First Circuit held that the company could sell its stock without disclosure because "the undisclosed hard information … did not indicate a 'substantial likelihood that the quarter would turn out to be an extreme departure from publicly known trends and uncertainties.'" *Id.* at 631 (citation omitted); *see also In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (Alito, J.) (citing *Shaw* and *Glassman* as examples of "claims of omissions or misstatements that are obviously so unimportant that courts can rule them immaterial as a matter of law").

Other circuits reach similar results (in cases where the company was buying or selling stock) by holding that internal financial projections are immaterial unless the company knows them to be true "to a certainty." *Krim v. BancTexas Group, Inc.*, 989 F.2d 1435, 1449 (5th Cir. 1993); *see also Walker v. Action Indus., Inc.*, 802 F.2d 703, 708-10 (4th Cir. 1986) (collecting case law, and holding that company had no duty to disclose dramatic increase in first quarter "actual orders" and "projected sales" because longer term consequences were still "uncertain"), *cert. denied*, 479 U.S. 1065 (1987). The Seventh Circuit holds that internal projections *never* have to be disclosed, unless projections have been released and "the internal estimates are so certain that they reveal the published figures as materially misleading" and lacking in any "reasonable basis."[5] *Wielgos v. Commonwealth Edison Co.*, 892 F.2d 509, 515-16 (7th Cir. 1989) (Easterbrook, J.); *see also Walker*, 802 F.2d at 708 (concluding that Second Circuit agrees with the Seventh). *Vaughn v. Teledyne, Inc.*, 628 F.2d 1214, 1221 n.7 (9th Cir. 1980) ("partial disclosure of financial projections *makes* them material facts.").

2. Nacchio would be entitled to acquittal under any of those standards. Szeliga's forecast of 4.2% "risk" to the 2001 projections is "soft" information about highly uncertain events nearly a year in the future. The combined estimates from the business units *always* exceeded the public projections, and *no one* at Qwest

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[5] The "reasonable basis" language comes from SEC safe harbors precluding any theory of securities liability premised on an assertion that public projections are materially misleading, if those projections have a reasonable basis. 17 C.F.R. §§230.175(a), 240.3b-6(a).

advised Nacchio to reduce the projections until months after his last trade. The IRU risk Casey identified in April was small and based on his inherently uncertain predictions about the broader economy. *Supra* 6; *Krim*, 989 F.2d at 1449 (economic forecasts not material); *Wielgos*, 892 F.2d at 515 (securities laws require disclosure of *firm-specific* information).

The "hard" interim operating results that Nacchio had in April or May 2001 did not "indicate a 'substantial likelihood that the quarter would turn out to be an extreme departure from publicly known trends and uncertainties.'" *Glassman*, 90 F.3d at 631. Qwest *met* expectations in the first and second quarters. In *Glassman*, the company knew five weeks before the end of the quarter that its sales *for that quarter* were running at only 24% of internal projections, and the First Circuit held that knowledge was immaterial as a matter of law. Qwest's "recurring" revenue growth was disappointing but its other revenue sources were running above budget, and that shift *was disclosed*. *Supra* 5-7. Nacchio also knew (and Casey did not) about Qwest's prospects to receive substantial IRU revenues from classified government contracts. CAJA-2396-2400.

The panel was unpersuaded—and erroneously held that the court's exclusion of the classified information was harmless—because it believed that negative and positive information cannot offset each other. "If an insider trades on the basis of his perception of the net effect of two bits of material undisclosed information, he has violated the law in two respects, not none." App.128a. That might be fair, except that the sole theory of materiality charged or tried in this case was that Nacchio knew, "from early in 2001 through

September 2001, that the business units were underperforming with regard to their specific internal budgets, and that *such under-performance would inhibit Qwest's ability to meet its 2001 financial guidance issued on September 7, 2000*." App.219a (emphasis added). The panel understood that the charge was solely that Nacchio knew of material undisclosed risks *to the projections*, App.103a-04a, 109a, 143a, and held that Szeliga's "risk" prediction could be material, despite the SEC's guidance in SAB 99, only because the "skittish" and "mercurial" stock market would react negatively to any shortfall *as compared to the projections*. App.143a-44a.

Finally, even if any "risk" of a 4.2% shortfall eight months in the future were treated as a certainty, that is not "an extreme departure" and did not "forebod[e] disastrous [year]-end results." *Shaw*, 82 F.3d at 1210. As the Tenth Circuit acknowledged, that risk was less than the threshold for materiality of errors in *already reported* revenues under SEC guidelines. Other circuits have held that shortfalls in this range are immaterial. *See In re Apple Computer, Inc.*, 127 Fed. Appx. 296, 304 (9th Cir. 2005) ("[A] revenue estimate that was missed by approximately 10% was immaterial as a matter of law").

3. The Tenth Circuit erroneously held that the case law discussed above applies only in *false statement* cases. Many of these cases involved stock sales or purchases by the company in addition to allegedly misleading statements. In *Shaw* and *Glassman* the companies were *selling stock* without disclosing the dire shortfalls they were experiencing. The First Circuit expressly "conceptualize[d]" the company "as an individual insider transacting in the company's

securities." *Shaw*, 82 F.3d at 1203. In *Wielgos*, the company was similarly accused of *selling stock* with a registration statement incorporating cost projections lower than the company's own internal estimates. 892 F.2d at 512. And the Seventh Circuit has rejected insider trading claims against individuals based on internal predictions. *See Freeman v. Decio*, 584 F.2d 186, 198-200 (7th Cir. 1978). This Court explained in *Basic* that the materiality standard does not vary "depending on who brings the action or whether insiders are alleged to have profited." 485 U.S. at 240 n.18. The Tenth Circuit's distinction wrongly suggests that if the plaintiffs in cases like *Glassman* and *Wielgos* had just accused the company of insider trading rather than misleading statements they would have won. These are crucial substantive rules, not mere pleading issues.

Perhaps the Tenth Circuit was confused by the fact that the "reasonable basis" safe harbor directly applies only to claims that public projections are materially misleading. But the relevance of *Wielgos*, and the point of Nacchio's proposed instructions, is that under Seventh Circuit precedent an internal projection is categorically immaterial and need not be disclosed. (The First Circuit agrees, *Shaw*, 82 F.3d at 1211 n.21.) The only exception is *if* a public projection has been made *and* "the internal estimates are so certain that they reveal the published figures as materially misleading"—which brings into play the SEC's regulations about when a public projection can be deemed misleading for purposes of *any* theory of securities liability. *Wielgos*, 892 F.2d at 515-16. As a matter of law, therefore, Szeliga's risk assessment could be material only if it reveals that publicly issued projections lack any reasonable basis.[6] Yet the district court wrongly told the jury that Qwest's disclosure obligations were *irrelevant*, which also decimated Nacchio's scienter defense. App.274a-75a.

The only real way to distinguish "company trading" cases like *Shaw*, *Glassman*, *Wielgos*, etc., from individual insider trading cases would be if companies do not have the same duty to disclose material information before trading that individuals have. The consensus has been that corporations do have that duty,[7] but a circuit split has developed. *See J&R Mktg., SEP v. GMC*, 549 F.3d 384, 396-97 (6th Cir. 2008) (declining "to impose upon issuers the same duty faced by those who engage in insider trading"). If the Tenth Circuit has implicitly joined the Sixth, that conflict too merits review.

Finally, in at least the Seventh and Ninth Circuits an internal projection *cannot* be released unless it is "reasonably certain," a standard plainly not met here. *Panter v. Marshall Field & Co.*, 646 F.2d 271, 291-93 (7th Cir.), *cert. denied*, 454 U.S. 1092 (1981); *Vaughn*,

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[6] The panel unfairly accused Nacchio of conflating the duties to "disclose or abstain." App.136a-37a. The two sometimes converge in omissions cases but are distinct in many common fact patterns.

[7] *See Shaw*, 82 F.3d at 1203 ("Courts … have treated a corporation trading in its own securities as an 'insider' for purposes of the 'disclose or abstain' rule."); *N.J. Carpenters Pension & Annuity Funds v. Biogen IDEC Inc.*, 537 F.3d 35, 56 n.21 (1st Cir. 2008) (same); *McCormick v. Fund Am. Cos.*, 26 F.3d 869, 876 (9th Cir. 1994) (collecting "[n]umerous authorities" holding that corporate issuers and individual insiders are subject to same rules); Loewenstein & Wang, *The Corporation As Insider Trader*, 30 Del. J. Corp. L. 45, 77 (2005) (same); *id.* at 58 n.48, 62 nn.57-58, 66 n.74 (collecting authorities); 7 Loss & Seligman, *Securities Regulation* 3499 (3d ed. rev. 2003) (same).

628 F.2d at 1221. The Tenth Circuit is sending Nacchio to prison for selling stock without disclosing conflicting predictions (worries, really) by his employees that other circuits would regard as misleading and punish him for disclosing. This is terribly unfair, particularly when criminal conviction requires proof that the defendant *knew* the information was material, App.147a, and vividly illustrates the depth of confusion in the lower courts.

4. The Tenth Circuit suggested in a footnote that "in this case the parties have focused solely on the magnitude of the shortfall, should it occur," not "the probability that the event will occur." App.144a n.10 (citing App.361a). That clear error should be ignored (or summarily reversed). The Tenth Circuit was citing section I.B.2.b., a *one-page* section of Nacchio's brief—but overlooked section I.B.2.a., titled: "*At the time of the trades, the information available to Nacchio did not reveal, to* any *degree of certainty, that Qwest would fail to meet its year-end numbers eight months in the future*," App.356a-60a—a *five-page section* (nearly 10% of Nacchio's brief), that argued that the information was too uncertain to be material, citing (*inter alia*) *Shaw* and *Wielgos*.

B. The Materiality Issues Present Questions Of National Importance

In the more than twenty years since this Court last addressed the issue in *Basic*, "[f]orward looking information probably has been the most prolific subject of securities fraud litigation." 3 *Bromberg and Lowenfels on Securities Fraud & Commodities Fraud* §6:5 (2d ed. 2008). The materiality of such information is a question of great national importance that "[n]either the Securities and Exchange Commission

(SEC) nor the [lower] courts have answered … with either uniformity or clarity." Gulati, *When Corporate Managers Fear a Good Thing Is Coming to an End: The Case of Interim Nondisclosure*, 46 U.C.L.A. L. Rev. 675, 678 (1999).[8]

As a practical matter, the Tenth Circuit's reasoning puts companies and executives in an impossible position. Every corporation produces a constant stream of conflicting opinions, estimates, and projections. A high threshold for the materiality of internal forecasts (or of interim operating data alleged to be material only because of what it supposedly portends for the future) is essential to basic corporate functioning. Companies cannot bare their internal debates and forecasting process to the public and to

[8] Commentators agree the governing standards are "uncertain," *id.* at 728-29, "unresolved," Gwyn & Matton, *The Duty to Update the Forecasts, Predictions, and Projections of Public Companies*, 24 Sec. Reg. L.J. 366, 366 (1997), an "endemic hazard" that makes it "especially difficult" for managers to determine what is material, Rosen, *Liability for "Soft Information": New Developments and Emerging Trends*, 23 Sec. Reg. L.J. 3, 3, 43 (1995), "a controversial topic" that has "troubled" courts because of the "concern[] over imposing potentially enormous liability [including, in this case, *imprisonment*] for failure to disclose such potentially uncertain information," Hiler, *The SEC and the Courts' Approach to Disclosure of Earnings Projections, Asset Appraisals, and Other Soft Information: Old Problems, Changing Views*, 46 Md. L. Rev. 1114, 1129, 1195 (1987), that "[t]he confusion has turned to a hopeless clutter," Langevoort & Gulati, *The Muddled Duty to Disclose Under Rule 10b-5*, 57 Vand. L. Rev. 1639, 1641-42 (2004), and that "[i]t is difficult to state precisely what the law is … because there are inconsistent holdings and dicta in the cases to support both plaintiffs and defendants on a number of key issues," Schneider, *Soft Disclosure: Thrusts & Parries When Bad News Follows Optimistic Statements*, 26 Rev. Sec. & Commodities Reg. 33, 33 (1993).

competitors, and investors would not be well served if they tried. *See TSC Indus., Inc. v. Northway*, 426 U.S. 438, 448-49 (1976) ("[B]ury[ing] the shareholders in an avalanche of trivial information … is hardly conducive to informed decisionmaking."); *Walker*, 802 F.2d at 710 (disclosure of internal projections would be "impractical" and likely to mislead); *Wielgos*, 892 F.2d at 516 (such a requirement would prevent companies from raising capital).

The practical effect of the Tenth Circuit's holding will be that corporate insiders cannot buy or sell company shares *ever*. That will reduce the value of company stock and options in compensation, and deprive the market of information (executive trading decisions) that actually *is* useful to investors. It will also seriously discourage companies from issuing projections at all. Nacchio's inside information was supposedly "material" here *only* because Qwest had first made public projections. *Supra* 13, 20-21. If making a projection can render internal forecasts and interim results "material," and subject executives to criminal liability, without reasonable safeguards like those applied in *Shaw* and *Wielgos*, companies will not do it.

II. THE TENTH CIRCUIT'S INSTRUCTIONAL ANALYSIS CONFLICTS WITH OTHER CIRCUITS

1. The Tenth Circuit acknowledged that the skeletal materiality instruction was "not particularly informative," but held there could be no reversible error unless it affirmatively "misstated the law." App.133a-34a.

That is the wrong standard. "A trial judge's duty is to give instructions sufficient to explain the law," *Kelly* *v. South Carolina*, 534 U.S. 246, 256 (2002), and an instruction is erroneous if it does not "contain[] an adequate statement of the law to guide the jury's determination," *United States v. Park*, 421 U.S. 658, 675 (1975). Other circuits have held that reversible error occurs when a facially correct instruction is "'incomplete[],'" *United States v. Escobar-de Jesus*, 187 F.3d 148, 164 n.10 (1st Cir. 1999) (citation omitted), *cert. denied*, 528 U.S. 1176 (2000), or "'inadequate to guide the jury's deliberations,'" *United States v. Marsh*, 894 F.2d 1035, 1040 (9th Cir. 1989) (citation omitted), *cert. denied*, 493 U.S. 1083 (1990). *See also United States v. Dotson*, 895 F.2d 263, 264 (6th Cir.) (reversing "correct … but not sufficient" instruction), *cert. denied*, 498 U.S. 831 (1990); *Kisor v. Johns-Manville Corp.*, 783 F.2d 1337, 1340 (9th Cir. 1986); *United States v. Holley*, 502 F.2d 273, 276 (4th Cir. 1974); *United States v. Gordon*, 290 F.3d 539, 545 (3d Cir.), *cert. denied*, 537 U.S. 1063 (2002); *United States v. Hastings*, 918 F.2d 369, 373 (2d Cir. 1990).

2. The Tenth Circuit held that Nacchio's "reasonable basis" instruction was confusing and did not accurately state the law as the court of appeals viewed it. Even if his proposed fix was not perfect, Nacchio correctly identified that the instructions gave inadequate guidance on materiality in these circumstances.

In at least seven circuits, "'[t]he fact that counsel did not tender perfect instructions does not immunize from scrutiny on appeal a failure to instruct the jury adequately concerning the issues in the case.'" *Heller Int'l Corp. v. Sharp*, 974 F.2d 850, 856 (7th Cir. 1992) (citation omitted); *see also Webster v. Edward D. Jones & Co.*, 197 F.3d 815, 820 (6th Cir. 1999) ("'[E]ven if an incorrect proposed instruction is submitted which raises an important issue of law involved in light of proof adduced in the case, it becomes the duty of the trial court to frame a proper instruction on the issue raised ….'") (citation omitted); *Wilson v. Maritime Overseas Corp.*, 150 F.3d 1, 10 (1st Cir. 1998) (same); *Bueno v. City of Donna*, 714 F.2d 484, 490 (5th Cir. 1983) (same); *Walker v. AT&T Techs.*, 995 F.2d 846, 849 (8th Cir. 1993) (same); *United States v. Jones*, 909 F.2d 533, 538-39 (D.C. Cir. 1990) (Ginsburg, R., J.) (same); *Posttape Assocs. v. Eastman Kodak Co.*, 537 F.2d 751, 757 (3d Cir. 1976) (same).

III. THE TENTH CIRCUIT'S *DAUBERT* ANALYSIS CONFLICTS WITH OTHER CIRCUITS AND MERITS REVIEW

1. The Tenth Circuit held the government's motion was based on "Nacchio's failure to carry his burden to demonstrate that Professor Fischel's testimony was admissible." App.21a, 24a-25a & n.13, 22a n.11, 33a & n.16. It cites no case or rule requiring Nacchio to establish reliability in response to a motion to exclude, concedes that Nacchio's expectation of establishing reliability on the stand "may have been reasonable," but still concludes the district court had no "obligation to provide specific notice" that the *Daubert* issue would be resolved in some other way. App.21a-22a & n.10.

Of course Nacchio bore the ultimate burden of laying a sufficient foundation for admissibility at trial. But when a litigant moves *in limine* to exclude evidence *the movant* bears the burden of producing facts sufficient to require a hearing or exclusion. The posture is like summary judgment, where the movant has the *prima facie* burden to prove the absence of a triable dispute. Such motions should be *denied* without a hearing if the movant relies only on the opponent's ultimate burden of proof. *See United States v. Stoddart*, 48 Fed. Appx. 376, 380 (3d Cir. 2002) (upholding denial of motion to suppress without a hearing where defendant "merely relies upon the government's 'burden of proof to establish adequate *Miranda* warnings'") (citation omitted); *United States v. Howell*, 231 F.3d 615, 621 (9th Cir. 2000) (same), *cert. denied*, 534 U.S. 831 (2001). A motion to exclude certainly cannot be *granted* on such a thin basis.

The government never made even a *prima facie* showing of unreliability; it simply argued that Fischel's methodology was undisclosed. The district court could have accelerated Nacchio's burden by clearly ordering him to proffer the grounds for Fischel's admissibility in writing. Contrary to the *en banc* court's reasoning, however, the mere filing of a motion pointing out that the foundation has not yet been laid *does* not alert the defendant that he may be precluded from laying that foundation at the usual time—on the stand.

This Court has explained that when a movant "call[s] sufficiently into question" the reliability of expert testimony, the court must hold "appropriate proceedings" to "investigate reliability," which can include "special briefing" or "other proceedings," where the judge is to "ask questions." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 149, 151-52 (1999). None of that would be necessary if the expert could be excluded merely because the proponent had not yet proven reliability.

The Third Circuit has reversed district courts for granting *Daubert* motions without a hearing, when the record was insufficient to allow an assessment of reliability.[9] If merely filing a motion notifies the proponent that he must establish reliability before the court rules, then all those cases would have come out the other way. The Third Circuit consistently holds that "failure to hold a hearing"—regardless of whether the proponent requests one—constitutes "an abuse of discretion where the evidentiary record is insufficient to allow a district court to determine what methodology was employed by the expert in arriving at his conclusions." *Murray v. Marina Dist. Dev. Co.*, No. 07-1147, 2008 WL 2265300, at *2 (3d Cir. June 4, 2008) (unpublished); *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 417-18 (3d Cir. 1999) (explaining that it was "immaterial" that the proponent had not requested a hearing before the exclusion).

Other circuits agree. The Sixth Circuit has reversed the exclusion of an expert because "a district court should not make a *Daubert* determination when the record is not adequate to the task." *Jahn v. Equine Servs., PSC*, 233 F.3d 382, 393 (6th Cir. 2000); *see also Busch v. Dyno Nobel, Inc.*, 40 Fed. Appx. 947, 961 (6th

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[9] *See, e.g., In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 854-55 (3d Cir. 1990) (reversing exclusion because the district court did not "provide[] the [proponents] with sufficient process for defending their evidentiary submissions" and "should have been given an opportunity to be heard on the critical issues before being effectively dispatched from court"), *cert. denied*, 499 U.S. 961 (1991); *Padillas v. Stork-Gamco, Inc.*, 186 F.3d 412, 418 (3d Cir. 1999) (reversing exclusion of expert without hearing where report did not disclose methodology because that did not "establish that [the expert] may not have 'good grounds' for his opinions, but rather, that they are insufficiently explained and the reasons and foundations for them inadequately and perhaps confusingly explicated" and thus the proponent must have an "opportunity to respond to the court's concerns") (citation omitted).

Cir. 2002) ("district court … is charged with the responsibility of ensuring that the record before the court is adequate"). The First Circuit has explained that "courts will be hard-pressed in all but the most clearcut cases to gauge the reliability of expert proof on a truncated record" and "must be cautious—except when defects are obvious on the face of a proffer—not to exclude debatable scientific evidence without affording the proponent of the evidence adequate opportunity to defend its admissibility." *Cortes-Irizarry v. Corporacion Insular de Seguros*, 111 F.3d 184, 188 (1st Cir. 1997). The advisory committee notes to Rule 702's 2000 amendments endorse *Cortes-Irizarry* and *In re Paoli Railroad Yard PCB Litigation* as examples of how courts should "consider[] challenges to expert testimony under *Daubert*."

Commentators agree that *Kumho Tire* and basic evidentiary principles require a movant seeking to exclude expert testimony to establish serious reasons for doubting its reliability, on an adequate evidentiary record.[10] This is an important and recurring issue on which the lower courts are divided.

2. The Tenth Circuit's decision also transforms criminal expert practice. Criminal defendants have *no* obligation under Rule 16 to offer disclosures sufficient to justify the admissibility of an expert's testimony under *Daubert*, and ordinarily may establish the

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[10] Goodwin, *The Hidden Significance of Kumho Tire*, 52 Baylor L. Rev. 603, 626-32 (2000) (movant must establish a "threshold level of unreliability" by "call[ing] [reliability] sufficiently into question"); Berger, *Procedural Paradigms for Applying the* Daubert *Test*, 78 Minn. L. Rev. 1345, 1365 (1994) ("[T]he evidence should be presumed to be admissible until the opponent discharges its burden to show the contrary.").

reliability of expert testimony by questioning the witness. App.114a-24a. But the Tenth Circuit has now held that the government can force defendants to supply such disclosures—the equivalent of a civil expert report and "all available arguments for the testimony's admissibility," App.25a n.13—simply by filing a motion pointing out that the defendant has not yet disclosed what the rules did not require him to disclose. The government will exploit this loophole in every case, collapsing the civil and criminal expert rules and threatening the constitutional principle that a defendant cannot be forced to prematurely disclose his defense. The consequences for the administration of justice merit review.

IV. SUMMARY REVERSAL IS WARRANTED

This case merits plenary review, but at a bare minimum should be summarily reversed.

1. Even if the judge was entitled to exclude Fischel under *Daubert*, doing so without permitting a hearing, *voir dire*, or argument was an exercise of discretion. The *en banc* court granted rehearing on whether the district court abused its discretion. App.46a n.21. Nacchio pointed out that "'[t]he abuse-of-discretion standard includes review to determine that the discretion was not guided by erroneous legal conclusions,'" and that the court's discretion was obviously infected by its erroneous belief that Nacchio had committed an egregious Rule 16 violation, and that the proposed testimony was irrelevant and unhelpful. *En Banc* Reply Br. at 22-23.

The *en banc* court held that this argument either was not within the *en banc* grant or that it is frivolous and does not "merit analytical attention." App.46a n.21. Both suggestions are flatly inconsistent with settled law. App.86a-92a (McConnell, J., dissenting). The *en banc* court also cannot take for itself, and away from the panel, the authority and responsibility to decide whether the district court abused its discretion—and then simply refuse to consider one aspect of that issue such that it falls through a crack between the decisions and cannot be resolved. When an appellate court simply refuses to resolve a material issue, it departs from the usual course of judicial proceedings and calls for this Court's supervisory power.

2. The *en banc* court repeatedly cites *Sprint* to presume that the district court's order excluding Fischel "rested on *Daubert* grounds," App.15a-16a, 11a n.6, 19a, and not on its misinterpretation of Rule 16, notwithstanding the district judge's express statement that *Daubert* was *not* "the main bas[is] on which the Court rested its decision." App.350a. In *Sprint* this Court reversed the Tenth Circuit for presuming that an ambiguous district court opinion rested on erroneous grounds, and held that "[a] remand directing the district court to clarify its order … would have been the better approach." 128 S. Ct. at 1146. The *en banc* court here committed the very same error in reverse. This Court often summarily reverses when a court of appeals simply misunderstands this Court's recent precedents, *e.g.*, *Nelson v. United States*, 129 S. Ct. 890 (2009); *Spears v. United States*, 129 S. Ct. 840 (2009), or when the court of appeals reverses when it should have remanded, *e.g.*, *INS v. Ventura*, 537 U.S. 12 (2002); *Major League Baseball Players Ass'n v. Garvey*, 532 U.S. 504 (2001).

3. The panel's footnoted suggestion that Nacchio did not argue that Szeliga's prediction was immaterial

because of its uncertain nature is inexplicable plain error that warrants summary reversal. *Supra* 24; *see Dye v. Hofbauer*, 546 U.S. 1, 3-4 (2005) (summary reversal where circuit held that defendant failed to raise argument when "[t]he fourth argument heading in his brief" plainly "sets out the … claim"). Any attention to the uncertainties inherent in Szeliga's forecast should have led the panel to conclude that it was immaterial as a matter of law—since that was a "close question" on magnitude grounds alone. App.143a.

4. Finally, a brief review of the record, App.252a-59a, 268a-69a, will demonstrate that the panel and *en banc* dissent correctly described the basis of the district court's decision to exclude Fischel, and confirm their conclusion that an appalling injustice was done here. It cannot possibly be within a judge's discretion to exclude a criminal defendant's only substantive witness because he needs more information to assess methodology while simultaneously prohibiting counsel and the witness from providing it, and to then excuse the jury for much of the next four court days because "we're moving much faster than ever anticipated" and need "to slow down just for a little bit." App.269a-270a. This was a "draconian decision" that "flies in the face of the truth-finding goals of trial, the constitutional safeguards to a full defense, [and] the liberal thrust of the rules of evidence," App.99a (Henry, CJ, dissenting), and the *en banc* majority's zeal to defend it on grounds contrary to the district court's express language (and to call Nacchio, his lawyers, and Judge McConnell and the dissenters "disingenuous," App.27a), is alarming. With respect, and appreciation for the limits of this Court's role, the administration of justice would benefit

from a reminder that unpopular high-profile defendants are still entitled to basic fairness. *See Moore v. United States*, 129 S. Ct. 4 (2008) (summarily reversing when circuit mischaracterized basis for district court's ruling).

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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