Nos. 13-1491 and 13-1493

In the Supreme Court of the United States

ANTHONY CUTI, PETITIONER

v.

UNITED STATES OF AMERICA

WILLIAM TENNANT, 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

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QUESTION PRESENTED

Whether the district court abused its discretion in admitting, as fact or lay-opinion testimony, certain witnesses' statements about the effect of petitioners' fraud on their company's accounting, where the witnesses had directly participated in the accounting.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a)[1] is reported at 720 F.3d 453. The unpublished summary order disposing of petitioners' remaining contentions in the court of appeals (Pet. App. 21a-27a) is not published in the Federal Reporter but is reprinted in 528 Fed. Appx. 84.

[1] Unless otherwise noted, citations to the petition and petition appendix are to the petition and appendix in No. 13-1491.

JURISDICTION

The judgment of the court of appeals was entered on June 26, 2013. Petitions for rehearing were denied on January 13 and January 15, 2014 (13-1491 Pet. App. 29a-30a; 13-1493 Pet. App. 39-40). On March 26, 2014, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari in No. 13-1491 to and including June 13, 2014, and the petition was filed on that date. The petition for a writ of certiorari in No. 13-1493 was filed on April 14, 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 Cuti was convicted on one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371; one count of securities fraud, in violation of 15 U.S.C. 78j(b) (2006), 15 U.S.C. 78ff, 17 C.F.R. 240.10b-5, and 18 U.S.C. 2; two counts of making false statements in certain Securities and Exchange Commission (SEC) filings, in violation of 15 U.S.C. 78m(a) (2006), 15 U.S.C. 78ff, 17 C.F.R. 240.13a-1, and 18 U.S.C. 2; and one count of making false statements in another SEC filing, in violation of 15 U.S.C. 78*o*(d) (2006), 15 U.S.C. 78ff, 17 C.F.R. 240.15d-1 and d-13. Pet. App. 2a n.1. The district court sentenced Cuti to three years of imprisonment, to be followed by three years of supervised release. Gov't C.A. Br. 2. Petitioner Tennant was convicted on one count of securities fraud, in violation of 15 U.S.C. 78j(b) (2006), 15 U.S.C. 78ff, 17 C.F.R. 240.10b-5, and 18 U.S.C. 2. Pet. App. 2a n.1. The court sentenced Tennant to time served, to be followed three years of supervised release. Gov't

C.A. Br. 2-3. The court of appeals affirmed. Pet. App. 1a-27a.

1. Petitioner Cuti is the former chief executive officer, and petitioner Tennant is the former chief financial officer, of Duane Reade, a publicly-traded company that operated retail drug stores in the New York City area. Pet. App. 3a. From 2000 to 2004, petitioners engaged in several schemes to inflate the company's earnings in statements filed with the SEC. *Id.* at 3a-4a. The schemes involved the company effectively making payments to itself and then reporting those payments as earnings. *Ibid.* In the principal scheme, petitioners "inflated earnings by fraudulently selling real estate concessions that were virtually worthless and surreptitiously repaying the purchasers through payments disguised as expenses." *Id.* at 3a.

In 2000, for example, petitioners entered into an arrangement with a commercial real-estate brokerage, under which the brokerage paid $806,000 for certain rights in eight real-estate leases "that Duane Reade had already sold, assigned away, or planned to abandon." Pet. App. 3a. The brokerage also paid "another $890,000 for options to buy out Duane Reade from three leases that were of minimal value" to the brokerage. *Id.* at 3a-4a. Petitioners then repaid the brokerage "using a sham consulting agreement and padded brokerage fees." *Id.* at 4a. "The revenue immediately recognized from these transactions helped Duane Reade bridge a gap between its true earnings and analysts' expectations for the fourth quarter of 2000." *Ibid.*

Defendants engaged in similar "sham transactions" at other times. Pet. App. 4a. For example, in January 2000, petitioners generated an additional $400,000 of

immediate "income" in exchange for canceling a landlord's contractual obligation to pay Duane Reade a $500,000 construction-cost allowance. C.A. App. A1123, A2407-A2418. The arrangement was based on the falsified premise that Duane Reade had lost profits as the result of a delayed occupancy certificate. *Id.* at A2407-A2418. On another occasion, a landlord agreed to pay Duane Reade a $500,000 "late delivery" fee, notwithstanding that the premises had in fact been delivered on time, in exchange for $500,000 worth of Duane Reade stock. *Id.* at A1537-A1538; C.A. Supp. App. 21; C.A. Exh. 261-309.

At trial, it was undisputed that under generally accepted accounting principles, as applied both by Duane Reade's outside auditor and by Tennant's successor as chief financial officer, revenue would be recognized from a transaction like those described above only if (1) the transaction resulted from arms' length negotiation, (2) the transaction had value, (3) no side agreements existed, and (4) the transaction created no further obligations for Duane Reade. Pet. App. 4a-5a. Although their transactions did not meet those requirements, petitioners caused the company to book revenue from them anyway, by "conceal[ing] their fraudulent conduct from the company's internal accountants, [its outside auditor], the SEC, and the investing public." *Id.* at 4a. At one point, the outside auditor grew sufficiently concerned about the amount of revenue that Duane Reade was booking from these sorts of transactions that it required the company to include in its financial statements to the SEC "a note stating that the company had no side agreements with or other obligations to the transaction counterparties." *Ibid.* Notwithstanding that such side agree-

ments did in fact exist, the company provided such a note. *Ibid.*; Gov't C.A. Br. 18.

2. A grand jury in the Southern District of New York indicted Cuti on one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371; one count of securities fraud, in violation of 15 U.S.C. 78j(b) (2006), 15 U.S.C. 78ff, 17 C.F.R. 240.10b-5, and 18 U.S.C. 2; two counts of making false statements in certain SEC filings, in violation of 15 U.S.C. 78m(a) (2006), 15 U.S.C. 78ff, 17 C.F.R. 240.13a-1, and 18 U.S.C. 2; and one count of making a false statement in another SEC filing, in violation of 15 U.S.C. 78*o*(d) (2006), 15 U.S.C. 78ff, 17 C.F.R. 240.15d-1 and d-13. C.A. App. A59-A72. The grand jury indicted Tennant on one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371, and one count of securities fraud, in violation of 15 U.S.C. 78j(b) (2006), 15 U.S.C. 78ff, 17 C.F.R. 240.10b-5, and 18 U.S.C. 2. *Id.* at A59-A67.

At trial, the government called Kevin Hallinan, the lead auditor from Duane Reade's outside auditing company, and John Henry, who was Tennant's successor as Duane Reade's chief financial officer. Pet. App. 4a. Hallinan and Henry testified "as to how they had accounted for the proceeds from the fraudulent transactions; how they would have accounted for the transactions had they been aware of the full facts; and how the material information that was withheld from them led to misstatements in the company's financial statements." *Ibid.* "To demonstrate the impact of [petitioners'] deception on the preparation and review of the company's financial statements, the government presented Hallinan and Henry with information that [petitioners] had withheld, such as side letters to the

transactions, and asked how the withheld information would have affected their accounting." *Id.* at 5a. The witnesses testified in response to those questions "that if they had been aware of the withheld information, they would not have recognized the full amount of the transaction proceeds as immediate revenue." *Ibid.* The district court overruled petitioners' objections to "the use of 'what if-you-had-known' questions as eliciting inadmissible expert opinion testimony from fact witnesses." *Ibid.*

The jury convicted Cuti on all five counts with which he was charged. Pet. App. 2a n.1. It convicted Tennant on the substantive securities-fraud count, but acquitted him of the conspiracy count. *Ibid.* The district court sentenced Cuti to three years of imprisonment, and it sentenced Tennant to time served. *Ibid.*

3. The court of appeals affirmed. Pet. App. 1a-27a. The court rejected petitioners' contention that the district court had impermissibly permitted Hallinan and Henry to provide expert testimony without being qualified as experts. *Id.* at 6a-14a. It held, on two independent grounds, that "under these circumstances," the district court had "not abuse[d] its discretion in admitting the challenged testimony." *Id.* at 13a-14a.

First, the court of appeals determined that the testimony "was properly admitted as factual testimony" and thus was not subject to Federal Rule of Evidence 701's limitations on lay-opinion testimony. Pet. App. 10a. The court reasoned that the hypothetical questions asked of the witnesses were limited by "the factual foundation laid in earlier admitted testimony and exhibits, the factual nature of the hypotheticals,

and the witnesses' reasoning." *Id.* at 8a. "These limitations left little room for the witnesses to engage in speculation and ensured that their testimony fell near the fact end of the fact-opinion spectrum." *Ibid.*

The court emphasized that Hallinan and Henry were each "a certified and experienced accountant personally familiar with the accounting of the transactions at issue"; that the "hypothetical questions utilized facts that had been independently established in the record" (namely, the true nature of petitioners' transactions); and that "since the applicable accounting rules were explained in detail, the reasoning process that the witnesses employed in answering the hypotheticals was straightforward and transparent to the jurors, who could readily discern whether the responses given were reliable." Pet. App. 8a. The court added that "nothing in the prosecution's questions or in the answers they elicited * * * prevented the defense from challenging the factual accuracy of the disputed testimony" and that Cuti had effectively cross-examined Hallinan. *Id.* at 9a. And the court additionally observed that other circuits had "permitted the use of hypothetical questions to inquire into the effect of a fraud" and that "'what-if-you-had-known' questions that present withheld facts to a witness are especially useful to elicit testimony about the impact of fraud." *Ibid.*

Second, the court of appeals "alternatively h[e]ld" that even if the testimony was opinion testimony, it was "admissible as lay opinion under Federal Rule of Evidence 701, which permits a lay witness to give an opinion if it is limited to 'one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to deter-

mining a fact in issue; and (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702 [the expert-testimony rule].'" Pet. App. 10a (quoting Fed. R. Evid. 701). The court determined that the evidence was rationally based on the witnesses' perception because the witnesses "were not testifying to the existence of facts, but simply acknowledging that knowledge of such facts, already admitted into evidence, would have caused them to alter their accounting treatment." *Ibid.* The court also concluded that the "testimony was plainly helpful to the jury within the meaning of Rule 701(b)." *Ibid.* And the court found that the testimony had not been expert testimony because, although it involved accounting rules, "those rules or their interpretation were not in question in this case." *Id.* at 11a. Rather, "[t]he only issue was whether the withheld facts would have altered the rules' application." *Ibid.*

ARGUMENT

Petitioners contend (Pet. 18-32) that the district court abused its discretion by admitting the disputed testimony from Hallinan and Henry without qualifying them as expert witnesses under Federal Rule of Evidence 702. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. This case is also an unsuitable vehicle for reviewing the question presented, both because the court of appeals rested its decision, in the alternative, on the fact-bound holding that this case did not involve opinion testimony and because any error was harmless. Further review is not warranted.

1. Although the question presented presupposes that Hallinan and Henry provided "opinion testimo-

ny," Pet. i, the primary holding of the court of appeals was that the opinion-testimony rules do not apply, because the witnesses provided factual testimony, see Pet. App. 7a-10a. That holding is correct.

As the court of appeals recognized, "[t]he distinction between statements of fact and opinion is, at best, one of degree." Pet. App. 7a (quoting *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 168 (1988)); see, *e.g.*, Fed. R. Evid. 701 advisory committee's note (1972) (acknowledging the "practical impossibility of determining by rule what is a 'fact'"). The distinction, however, governs the applicability of Rule 701, which is entitled "Opinion Testimony by Lay Witnesses" and applies only to "testimony in the form of an opinion" rather than to factual testimony. Fed. R. Evid. 701.[2] Here, the court of appeals properly determined that Hallinan's and Henry's testimony "fell near the fact end of the fact-opinion spectrum," Pet. App. 8a, and thus was not opinion testimony for purposes of Rule 701.

The court of appeals correctly concluded that a witness may testify directly from personal knowledge

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[2] Petitioners note (Pet. 27) that, at the time of trial, Rule 701 referred to both "opinions" and "inferences." The Rule could not reasonably have been referring to "inferences" in such a broad sense as to include factual inferences, or Rule 701 would have governed nearly all testimony. See, *e.g.*, *United States* v. *Giovannetti*, 919 F.2d 1223, 1226 (7th Cir. 1990) ("All knowledge is inferential."). Rather, courts applying the Rule did "not ma[k]e substantive decisions on the basis of any distinction between an opinion and an inference," and the reference to "inference[s]" was accordingly removed as unnecessary in 2011. Fed. R. Evid. 701 advisory committee's note (2011). In any event, any argument based on the former language of Rule 701 would lack prospective importance and would not warrant this Court's review.

"to the fact of what he did not know and how, if he had known that independently established fact, it would have affected his conduct or behavior." Pet. App. 9a; see Fed. R. Evid. 602. It is fact, not opinion, for someone to explain his own state of mind. See *United States* v. *Morton*, 391 F.3d 274, 276-277 (D.C. Cir. 2004); *United States* v. *Giovannetti*, 919 F.2d 1223, 1226 (7th Cir. 1990). It is therefore fact, not opinion, for a witness to explain the reasons for his own actions—*e.g.*, that he stopped at a traffic light because it was red, rather than green. Contrary to petitioners' suggestion (Pet. 27-28), such testimony does not become opinion testimony simply because one of the questions eliciting it could be characterized as "hypothetical." If the answer to the question "What was the significance of the light being red as opposed to green?" is factual, then so are the answers to the series of questions, "What did you do when you saw the light was red?" and "What would you have done if it had been green?" Calling the latter form of question "counterfactual" (Pet. i) cannot obscure that the question calls upon a witness to explain his own actions.

The same principle logically applies even when the witness's testimony explains a more complex decision, such as the decision here about how to account for certain transactions that petitioners had arranged. The purpose of Hallinan's and Henry's testimony was to "demonstrate the impact of [petitioners'] deception on the preparation and review of the company's financial statements." Pet. App. 5a. Hallinan and Henry—"the very witnesses responsible for [the] accounting"—could reasonably provide factual testimony on that point by describing what they would have done differently had they known the true facts, which were

independently established by other evidence. *Id.* at 8a. Such testimony was particularly appropriate because petitioners "did not dispute" that the relevant accounting rules had been "appropriately and consistently applied," *id.* at 5a; the testimony was "straightforward and transparent to the jurors, who could readily discern whether the responses given were reliable," *id.* at 8a; and petitioners could and did engage in effective cross-examination, *id.* at 9a.

Decisions cited by petitioners for the proposition that "answers to hypothetical questions [are] opinion testimony" (Pet. 28) do not involve situations like this case, in which the witnesses were asked "how * * * withheld information would have affected" their own actions, Pet. App. 5a. See *United States* v. *Henderson*, 409 F.3d 1293, 1300 (11th Cir. 2005) (assuming that treating physician's "hypothesis" about cause of injury was expert opinion), cert. denied, 546 U.S. 1169 (2006); *Certain Underwriters at Lloyd's, London* v. *Sinkovich*, 232 F.3d 200, 203-204 (4th Cir. 2000) (concluding that answers to certain hypothetical questions by non-expert who "did not have any first-hand knowledge of the accident" should be expert opinions); *United States* v. *Parker*, 991 F.2d 1493, 1500 (9th Cir.) (concluding that hypothetical question about bird eggs, based on non-first-hand witness's own bird-raising experiences, should be expert opinion), cert. denied, 510 U.S. 839 (1993); *Teen-Ed, Inc.* v. *Kimball Int'l, Inc.*, 620 F.2d 399, 402-404 (3d Cir. 1980) (concluding that accountant's testimony about multi-step calculation of lost profits, reflecting assumptions about how many sales might have been made in the absence of a breach of contract, should be lay opinion); *Tribble* v. *Evangelides*, 670 F.3d 753, 758-759 (7th Cir.

2012) (concluding that testimony that, in context, called upon the witness to "*summarize* her experiences in Branch 50 and *draw conclusions* about how, in general, she believed it operated" should be expert opinion). Indeed, as the court of appeals observed, "'what-if-you-had-known' questions" like the ones at issue here are not uncommon and "are especially useful to elicit testimony about the impact of fraud." Pet. App. 9a (citing cases). The existence of this threshold, case-specific holding characterizing the witnesses' testimony as factual renders this an inappropriate vehicle for addressing the scope of the expert-opinion-testimony rules.

2. Assuming *arguendo* that the disputed testimony was opinion testimony, the court of appeals correctly held, in the alternative, that it was admissible as lay opinion under Rule 701. Rule 701 permits a non-expert witness to provide "testimony in the form of an opinion" so long as the testimony is "rationally based on the witness's perception"; "helpful to clearly understanding the witness's testimony or to determining a fact in issue"; and "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702 [the expert-testimony rule]." Fed. R. Evid. 701(a)-(c).

The testimony of Hallinan and Henry met all three requirements. First, the testimony was "rationally based on the [witnesses'] perception," Fed. R. Evid. 701(a), because the witnesses, as Duane Reade's accountant and auditor, Pet. App. 4a, were "personally familiar with the accounting of the transactions at issue," *id.* at 8a, and were testifying about how petitioners' deceptive practices affected that accounting, *id.* at 10a. Although some of the questions posed to

the witnesses were phrased as hypotheticals, the substance of the witnesses' testimony concerned the effect of the deception on petitioners' own actions. *Ibid.*; see *id.* at 8a.[3] Second, the "testimony was plainly helpful to the jury within the meaning of Rule 701(b)," *id.* at 10a, because it explained to the jury how the truth "would have affected th[e] accounting under the * * * undisputed accounting rules" that were consistently applied to Duane Reade, *id.* at 8a.

Third, the testimony was "not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701(c). Although both witnesses certainly possessed specialized knowledge of accounting, see Pet. App. 8a, "those rules [and] their interpretation were not in question in this case," *id.* at 11a. Rather, the witnesses' testimony focused on whether they themselves "would have acted differently" in their accounting of Duane Reade had they "been aware of additional information" that petitioners had deliberately withheld from them. *Id.* at 12a. Testimony about how a person following a fixed and "undisputed" (*id.* at 8a) set of rules acted or would act in response to different situations is a "process of reasoning familiar in everyday life" that is properly the subject of lay, rather than expert, testimony. *Id.* at 12a (quoting Fed. R. Evid. 701 advisory

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[3] Petitioners attempt to portray the decision below as erroneous largely by focusing (Pet. 12-15) on a small number of questions and answers they believe to have been particularly problematic. The court of appeals acknowledged that the district court in some instances erred in not requiring certain questions to be rephrased. But it "examined the record and f[ound] any missteps in this regard to be minor relative to the witnesses' entire testimony and harmless to the outcome of the trial." Pet. App. 13a.

committee's note (2000)). As the court of appeals concluded, the witnesses' "reasoning process" in response to the disputed questions "was straightforward and transparent to the jurors, who could readily discern whether the responses given were reliable." *Id.* at 8a; see *id.* at 12a ("These witnesses testified based only on their experiences with matters pertinent to this case, and their reasoning was evident to the jury.").

Contrary to petitioners' contention (Pet. 22), the drafters of the Federal Rules specifically contemplated that testimony based on a witness's "particularized knowledge" of certain business operations would be admissible under Rule 701. As petitioners note (*e.g.*, Pet. 3), the Rule was amended in 2000 for the purpose of ensuring that the expert-witness rules would not "be evaded through the simply expedient of proffering an expert in lay witness clothing." Fed. R. Evid. 701 advisory committee's note (2000). The advisory note accompanying that amendment observed, however, that "most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. * * * Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business." *Ibid.*; see *ibid.* (favorably citing *Lightning Lube, Inc.* v. *Witco Corp.*, 4 F.3d 1153 (3d Cir. 1993), as having found "no abuse of discretion in permitting the plaintiff's owner to give lay opinion as to damages, as it was based on his knowledge and participation in the

day-to-day affairs of the business"). "The amendment," the advisory note continued, "does *not* purport to change this analysis." *Ibid.* (emphasis added); see *ibid.* (approving of case allowing lay witnesses with experience using amphetamines to identify a substance as amphetamine).

The testimony provided by Hallinan and Henry in this case—which focused on how they themselves accounted for or would have accounted for certain transactions, based on their personal experience as accountants for Duane Reade, Pet. App. 8a, 12a—was precisely the sort of testimony just described and was therefore admissible under Rule 701. Testimony based on such "particularized knowledge" (Fed. R. Evid. 701 advisory committee's note (2000)) is distinct from testimony based on "specialized knowledge" (Fed. R. Evid. 702(a)), which must be presented as expert testimony. "The business owner has knowledge of his own business *in the particular*; a narcotics officer who draws on his broad experience, acquired from his observations outside of this particular case, relies on his *specialized* knowledge of drug trafficking to draw conclusions about the particular case." *United States* v. *Oriedo*, 498 F.3d 593, 603 n.10 (7th Cir. 2007); see, *e.g.*, *United States* v. *Wilson*, 605 F.3d 985, 1026 (D.C. Cir.) (per curiam) ("An individual testifying about the operations of a drug conspiracy because of knowledge of that drug conspiracy has 'particularized' knowledge and should be admitted as a lay witness; an individual testifying about the operations of a drug conspiracy based on previous experiences with other drug conspiracies has 'specialized' knowledge and—provided his testimony meets the rule's enumerated requirements—should be admitted

as an expert."), cert. denied, 131 S. Ct. 841, and 131 S. Ct. 843 (2010).

This case did not involve a situation in which the government called an accountant unfamiliar with Duane Reade and asked whether, under generally accepted accounting principles, the company should have recognized immediate income from real-estate-concession transactions that involved side agreements. See Pet. 26 (noting that parties "frequently hire accountants to offer expert testimony about proper accounting methods" under generally accepted accounting principles). Instead, the government asked Duane Reade's own accountant and auditor, who had particularized knowledge of Duane Reade's accounting and made relevant decisions based on undisputed accounting principles, whether the existence of side agreements would have affected their income-recognition decisions. That testimony, even if properly characterized as opinion testimony, was admissible under Rule 701.

3. The circuit decisions cited by petitioner (Pet. 18-24) as examples of testimony excluded under Rule 701 do not conflict with the court of appeals' case-specific conclusion that "under these circumstances the contested testimony was admissible." Pet. App. 13a. That other circuits sometimes consider particular testimony to be expert testimony does not suggest that they would have viewed Hallinan's and Henry's testimony as such. As circuits on whose decisions petitioner relies have recognized, the question whether opinion testimony is lay or expert turns on a context-specific analysis of both the topic of the testimony and the perspective of the witness. See *Wilson*, 605 F.3d at 1026; *Oriedo*, 498 F.3d at 603 n.10.

The court of appeals decisions cited by petitioners, unlike the decision below, all involved witnesses whose testimony involved technical expertise outside the realm of their particularized experience. See *James River Ins. Co.* v. *Rapid Funding, LLC*, 658 F.3d 1207, 1214-1215 (10th Cir. 2011) (testimony of company officer involving "technical judgment," "professional experience" as a "licensed real estate broker," and a "technical report by an outside expert"); *Lifewise Master Funding* v. *Telebank*, 374 F.3d 917, 929-930 (10th Cir. 2004) (testimony of company president based on insufficient "personal knowledge," outside his "experience as a businessperson and president of the company," and "'enter[ing] into the realm of rolling averages, S-Curves, and compound growth rates that appear to be an amalgam of logic, hope, and economic jargon'") (citation omitted); *Randolph* v. *Collectramatic, Inc.*, 590 F.2d 844, 846-848 (10th Cir. 1979) (testimony of plaintiff without specific experience in pressure-cooker design about defective design of pressure cooker); *United States* v. *Conn*, 297 F.3d 548, 554 (7th Cir. 2002) (testimony of federal agent "in light of his training and experience" that firearms were not collector's items), cert. denied, 538 U.S. 969 (2003); *United States* v. *Smith*, 640 F.3d 358, 365 (D.C. Cir. 2011) (testimony of federal agent, "based on his experience investigating drug crimes," about slang terms used by particular drug crew); *Wilson*, 605 F.3d at 1026 (testimony of former drug dealer with "no firsthand experience with" particular drug crew, "based entirely on his own experience as a drug dealer elsewhere," about drug crew's taped phone conversations); *United States* v. *Figueroa-Lopez*, 125 F.3d 1241, 1246 (9th Cir. 1997) (testimony of police officer,

"based upon [his] training and experience," that a person behaved like an experienced drug dealer), cert. denied, 523 U.S. 1131 (1998); *United States* v. *White*, 492 F.3d 380, 403-404 (6th Cir. 2007) (testimony of auditors that "relied to a significant degree on specialized knowledge acquired over years of experience as Medicare auditors"); *United States* v. *Ganier*, 468 F.3d 920, 924-927 (6th Cir. 2006) (testimony of federal agent, which "would require [the agent] to apply knowledge and familiarity with computers and the particular forensic software well beyond that of the average layperson," about results of a forensic analysis that he had conducted to determine what searches had previously been run on certain computers). These decisions do not demonstrate that the courts in question would have excluded Hallinan's and Henry's testimony about how petitioners' deceptions affected Hallinan's and Henry's own actions in accounting for particular transactions.

4. This case would be a poor vehicle for review because any error in admitting the disputed testimony was harmless. Although the court of appeals here did not need to reach the harmless-error issue, see Gov't C.A. Br. 91-93 (arguing harmless error), other courts of appeals have concluded that an error in admitting expert testimony is harmless where the witness would have qualified as an expert and the lack of expert-witness disclosure did not unfairly prejudice the other party. See *Smith*, 640 F.3d at 366; *White*, 492 F.3d at 405, 407; *United States* v. *Hamaker*, 455 F.3d 1316, 1332 (11th Cir. 2006); *Figueroa-Lopez*, 125 F.3d at 1247. The circumstances of this case would support a such a harmless-error determination.

Petitioners do not contend that Hallinan and Henry would have failed to qualify as experts in accounting under Federal Rule of Evidence 702, or that their testimony would have been inadmissible had they been qualified as experts. See C.A. App. A1484-A1487 (Hallinan's background); *id.* at A2331-A2334 (Henry's background). Petitioners do suggest (Pet. 30-31) that expert witnesses who have personal knowledge of the facts may harbor biases that district courts should evaluate under Rule 702 and that admitting expert testimony in the guise of lay testimony would "allow[] litigants to avoid disclosure requirements that enable opponents to prepare effective cross-examination, seek preclusion of improper or irrelevant testimony * * * , or obtain another expert to challenge the proffered opinion." Pet. 31 (citing Fed. R. Civ. P. 26(a)(2); Fed. R. Crim. P. 16(a)(1)(G)). But their only specific claim of prejudice here is an assertion (*ibid.*) that their belief that the government would not call any expert witnesses left them unprepared to defend the company's accounting. Petitioners, however, received before trial material detailing Henry's and Hallinan's "descriptions of how the undisclosed information and documents, and [petitioners'] misrepresentations, would have affected [the witnesses'] accounting treatment and review of the transactions at issue." Gov't C.A. Br. 91-92. Petitioners thus had the opportunity to determine whether or how to present their own rebuttal evidence on that subject, and their determination would not reasonably have been affected by whether Henry's and Hallinan's own testimony was admitted as lay or expert.

The challenged testimony also did not prejudice petitioners because, in light of the all the other evidence,

it did not affect the outcome. The jury heard evidence (to which petitioners did not object) that (1) immediate recognition of real-estate-concession income is not allowed if any side agreement exists, C.A. App. A2366-A2368; (2) that petitioners had entered into side agreements with the other parties to the real-estate-concession transactions, see Govt. C.A. Br. 11-16 (summarizing the evidence); Pet. App. 4a; and (3) that petitioners hid these side agreements from Hallinan and Henry and even made false representations about whether such agreements existed, see Gov't C.A. Br. 17-20; see Pet. App. 4a. These facts would necessarily have led the jury to conclude that the information petitioners withheld from Hallinan and Henry was material to the accounting, even if they had not testified on that specific point.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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