No. 20-_____

In the

Supreme Court of the United States

ROBERT OLAN AND THEODORE HUBER
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether information about a proposed government regulation is "property" or a "thing of value" belonging to a federal, state, or local regulator such that its unauthorized disclosure can constitute fraud or conversion under federal criminal law.

2. Whether this Court's holding in *Dirks* v. *SEC*, 463 U.S. 646 (1983), requiring proof of "personal benefit" to establish insider-trading fraud, applies to Title 18 statutes that proscribe fraud in language virtually identical to the Title 15 anti-fraud provisions at issue in *Dirks*.

PARTIES TO THE PROCEEDING

Petitioners Robert Olan and Theodore Huber were defendants-appellants in the court of appeals.

Respondent United States of America was appellee in the court of appeals.

Respondents David Blaszczak and Christopher Worrall were defendants-appellants in the court of appeals.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

United States of America v. *David Blaszczak, Theodore Huber, Robert Olan, Christopher Worrall*, Nos. 2018-2811, 2018-2825, 2018-2867, and 2018-2878 (consolidated) (2d Cir.), consolidated judgment entered on December 30, 2019; and

United States of America v. *David Blaszczak, Theodore Huber, Robert Olan, Christopher Worrall,* No. 17 CR 357 (LAK) (S.D.N.Y.), judgments as to Robert Olan and Theodore Huber entered on September 21, 2018.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

FEDERAL STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

FEDERAL REGULATIONS

LEGISLATIVE MATERIALS

TABLE OF AUTHORITIES (continued)

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

INTRODUCTION

In recent years, this Court has been forced—again and again—to rein in overzealous enforcement of the federal criminal law by prosecutors whose charging decisions, particularly in fraud cases, reflect little regard for the statutory text enacted by Congress, principles of fair notice, and the federal-state balance. *E.g.*, *Kelly* v. *United States*, 140 S. Ct. 1565 (2020); *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016); *Bond* v. *United States*, 572 U.S. 844 (2014); *Skilling* v. *United States*, 561 U.S. 358 (2010). This is another such case. The government secured convictions here, which a divided Second Circuit panel affirmed, by interpreting federal fraud and conversion statutes in ways that vastly exceed the limits imposed by the statutes' language and this Court's precedents.

First, the panel majority endorsed the government's novel theory that individuals commit criminal fraud and conversion by disclosing or obtaining confidential government information about potential regulations, even though the information has no economic value to the government. As Judge Kearse explained in her dissent, however, and as this Court's recent decision in *Kelly* confirms, treating that kind of government information as property conflicts directly with *Cleveland* v. *United States*, 531 U.S. 12 (2000).

Second, the panel majority erased the personal-benefit requirement from criminal insider-trading law, concluding that individuals commit fraud by using confidential information in making investment decisions even absent any proof that the source of the information received a personal benefit in exchange for the disclosure. That decision is irreconcilable with four decades of this Court's precedents, from *Dirks* v. *SEC*, 463 U.S. 646 (1983), to *Salman* v. *United States*,

137 S. Ct. 420 (2016), which establish that trading on inside information is not fraudulent unless the person who provided the information disclosed it for a "personal benefit."

Both of those rulings cry out for review by this Court. Deeming the unauthorized disclosure of nonproprietary government information to be a theft of property stretches the concepts of fraud and conversion far beyond what the text of the relevant statutes will bear. The result is to criminalize not only the routine activities of investment analysts but also those of whistleblowers, journalists, and publishers. Indeed, if leaked government information constitutes government property, wire fraud and criminal conversion occur many times daily in Washington, D.C., and state capitols across the country.

In like manner, the Second Circuit's elimination of the personal-benefit requirement transforms the prohibition on insider-trading *fraud* into a sweeping and amorphous prohibition on all trading in material nonpublic information, no matter how obtained. For nearly 40 years, courts, prosecutors, and market participants have understood that the personal-benefit requirement this Court established in *Dirks* and reaffirmed in *Salman* marks "the line between permissible and impermissible disclosures and uses" of nonpublic information. *Dirks*, 463 U.S. at 658 n.17. The ruling below makes all of that precedent irrelevant—a true sea change in the law. That change deprives financial professionals of *Dirks*'s clear "guiding principle," *id.* at 657-658, thereby exposing them to imprisonment merely for doing their jobs and chilling the analysis of information on which the health of securities markets depends. And that change also creates bizarre anomalies, criminalizing conduct as to which the SEC—the

expert agency charged with regulating the securities markets—could not bring a civil enforcement action.

OPINIONS BELOW

The Second Circuit's opinion is published at 947 F.3d 19. The district court did not issue a written opinion on the questions presented.

JURISDICTION

The Second Circuit issued its opinion and entered judgment on December 30, 2019, Pet.App.1a, and denied rehearing on April 10, 2020, Pet.App.57a. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. Pet.App.58a.

STATEMENT

1. a. The Centers for Medicare & Medicaid Services ("CMS") establishes the rates at which Medicare and Medicaid reimburse healthcare providers for services. Each year, the agency reevaluates those rates in notice-and-comment proceedings and promulgates new price-setting regulations. C.A.App.474. CMS's reimbursement rates are a subject of great public interest. They determine the cost of healthcare services provided to tens of millions of Americans and affect many members of the healthcare industry.

During the period in which the events at issue occurred, CMS relied on an exchange of information with interested parties to better inform its rulemaking process. That dialogue occurred both before and after CMS formally proposed rules for public comment, including in private conversations. *E.g.*, C.A.App.515-

516, 779-781, 964. Information flowed in both directions: CMS gathered input about particular procedures and the equipment, cost, and time required to provide them, and it shared non-public information relevant to draft regulations, including pricing methodologies. C.A.App.862-864; see C.A.App.523, 641, 857, 2772-2774.

CMS exchanged information with patients, hospitals, and healthcare companies as well as with members of Congress, congressional staff, and industry analysts. C.A.App.527-528, 849, 2602. For example, industry analysts advocated positions to CMS and closely tracked CMS's actions and anticipated actions. Those analysts' publications openly referred to their "conversations with key officials and staff" at CMS and, on that basis, made predictions about what actions CMS was likely to take. C.A.App.2992-2994; see, *e.g.*, C.A.App.2957-2959, 2964-2971, 3006-3014; see also C.A.App.849 (CMS official: consultants "share information about CMS's policies and try to inform us about * * * policies that CMS should adopt").

CMS had a generally worded, internal non-disclosure policy for confidential information. But CMS's practice of selective disclosure made it exceedingly difficult for members of the public to know who was authorized to disclose such information or whether a particular piece of confidential information had been released on an authorized basis. C.A.App.477-478, 493, 538-539, 2043-2045.

b. Petitioners Olan and Huber were analysts at Deerfield, a healthcare-focused investment fund. Their job was to "ferret out and analyze information"—a role "necessary to the preservation of a healthy mar-

ket." *Dirks*, 463 U.S. at 658. They made recommendations to others at Deerfield but did not make trading decisions. C.A.App.553, 570.

Defendant David Blaszczak, a former CMS employee, was retained by various investor clients, including Deerfield, as a consultant. C.A.App.553, 570, 638, 812, 827. Deerfield's legal and compliance officers knew that he continued to speak to his former CMS colleagues and approved use by Deerfield's analysts of the information he provided. C.A.App.810-825, 983-986, 2035-2037; see C.A.App.821 (discussing that Blaszczak "spoke to officials at CMS"). Olan and Huber made no secret of the fact that Blaszczak transmitted information to Deerfield. They circulated the information by email to a large group that included in-house lawyers and compliance personnel; discussed Blaszczak's communications and shared investment recommendations with the general counsel and others; and memorialized their analysis in a permanent database that anyone at Deerfield could access. *E.g.*, C.A.App.553-560, 650-651, 821, 1995-1998.

c. It was in that context that the alleged unlawful tip underlying this prosecution occurred. On May 9, 2012, while CMS was considering its annual proposed reimbursement rule for radiation-oncology treatments, Blaszczak predicted to Deerfield analyst Jordan Fogel that CMS would cut those reimbursement rates "in half"—consistent with new, public information from a medical association about the length of those treatments. C.A.App.1985. Fogel relayed Blaszczak's prediction by email to a large group at Deerfield, including Huber and Olan. *Ibid.* Petitioners treated Blaszczak's prediction not as definitive "inside" information, but as legitimate intelligence. The following day, Deerfield placed an order to short

shares of a radiation-device manufacturer. C.A.App.2574.

The government alleged that Blaszczak based his prediction on confidential information he received from a CMS employee, defendant Christopher Worrall. Pet.App.4a. According to the government, information flowed from Worrall at CMS to Blaszczak, Worrall's former colleague, and then to Fogel and to petitioners. It is undisputed that Fogel, Olan, and Huber had no idea who Worrall was, much less what if any information he might have provided to Blaszczak, why he provided it, or whether he received any benefit in exchange for providing it. C.A.App.556, 1010.[1]

When the proposed rule issued, CMS proposed a lower reimbursement rate based on reduced treatment times, but applied it only to certain facilities not responsible for most radiation treatments. Blaszczak had incorrectly predicted that the reduction would apply across the board. C.A.App.578-579, 659-668, 2567-2570.

Deerfield made approximately $2.7 million in profits on the trades—an amount the firm considered disappointing. C.A.App.659, 2573-2578, 2587-2925. Because Olan's and Huber's compensation was based on seniority and overall firm performance, not particular trades, their share of those profits was miniscule. C.A.App.979, 2924.

2. a. The government charged Olan and Huber with violating Section 10(b) of the Securities Exchange

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[1] Olan and Huber also recognized that Blaszczak was "wrong at least as much as he was right." C.A.App.964-966; see C.A.App.606. They created analyses based on the view that CMS would not do what Blaszczak predicted (Olan put that chance at 85%, Huber at 80%). C.A.App.3056-3064; see C.A.App.966, 2973.

Act of 1934 and Rule 10b-5 (Title 15 fraud provisions), as it typically does when prosecuting alleged insider-trading fraud. To prove fraud by remote tippees such as Huber and Olan under those provisions, the government must show that the source of confidential information disclosed it in exchange for a personal benefit and that the tippees knew of the benefit. *Salman*, 137 S. Ct. at 423, 426-428. But here the government also charged the alleged insider trading in additional ways, bringing Title 18 charges for defrauding the government of its property in violation of the federal wire-fraud statute (18 U.S.C. 1343); conversion of government property (18 U.S.C. 641); Title 18 securities fraud (18 U.S.C. 1348); and conspiracy (18 U.S.C. 371, 1349).

In adding those Title 18 charges, the government sought to extend existing law in two ways. First, the government contended that confidential government information about proposed regulations—in this case, predictions about what reimbursement rates CMS would propose—constitutes government property under the wire-fraud, conversion, and Title 18 securities-fraud statutes. The government introduced no evidence that the information here had economic value to the government or that its disclosure caused the government economic loss, arguing only that disclosure could increase lobbying or otherwise make the regulatory process less smooth. C.A.App.504.

Second, the government contended that to establish insider trading under Title 18's fraud statutes—as opposed to under Title 15—it was not required to prove that the source of the information sought any personal benefit in exchange for disclosure, or that petitioners knew that the information was disclosed for such a benefit. The government contended that it

needed to prove only that Olan and Huber knew that the information originated in an unauthorized disclosure from a government source.

The government presented no evidence that Olan or Huber knew the identity of the source or the nature of the circumstances in which Blaszczak allegedly obtained confidential information about the proposed rule, let alone that they knew of any personal benefit to a CMS employee. *E.g.*, C.A.App.556, 1010.[2]

b. The district court instructed the jury that "information about CMS's proposed radiation oncology rule" was U.S. property for purposes of Section 641, Title 18 securities fraud, and wire fraud. Pet.App.64a-67a, 89a-91a.

The court also instructed that Olan and Huber could be guilty of Title 15 securities-fraud charges only if they had knowledge that a "tipper" at CMS "disclosed the information in violation of a duty of confidentiality and that it was disclosed in exchange for a personal benefit." Pet.App.82a-83a. Olan and Huber requested that the court give the same instruction with respect to the Title 18 fraud counts, but the court refused. Pet.App.9a.

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[2] The government relied principally on Fogel's testimony. Fogel, who cooperated, claimed that he intuited from Blaszczak's level of assurance that his information was confidential, describing this as a "subliminal wink-wink," C.A.App.662; see C.A.App.557, 582, 599—but admitted that Blaszczak often acted "as if he was certain when he really wasn't." C.A.App.661. Unable to provide anything more specific, Fogel responded "yes" to a vague question asking whether he discussed "illegal edge" with Huber and Olan. C.A.App.567. Moreover, Fogel was unreliable: he changed his statements, C.A.App.617, and lied to the government repeatedly, C.A.App.547-548, 601, 620-630, including about ongoing drug, gambling, and fraud crimes, C.A.App.549, 601-602, 621-628.

Olan and Huber moved for acquittal on multiple grounds, including that (1) the purportedly confidential CMS information was not property within the meaning of the Title 18 statutes, and (2) there was no evidence that they knew any CMS tipper disclosed information for a personal benefit and therefore no evidence of any fraud. Dkt.251 (S.D.N.Y.). The district court reserved decision.

The jury acquitted all defendants of all Title 15 charges—undoubtedly because no evidence established any personal benefit to any tipper, much less "tippee" knowledge of any such benefit—but convicted them of wire fraud and conversion. The jury also convicted petitioners of the Section 1348 and conspiracy charges. Pet.App.2a, 9a-10a, 87a-90a, 96a-108a. The district court denied the motions for acquittal orally at sentencing and sentenced both Olan and Huber to three years of imprisonment and a substantial fine. Pet.App.10a, 53a-56a.

3. On December 30, 2019, a divided panel of the Second Circuit affirmed, with Judge Kearse dissenting.

a. The panel majority endorsed the government's proposed expansion of federal criminal law. First, the majority held that confidential information regarding agency deliberations over a proposed regulation is government "property" under Sections 1343 and 1348 and a "thing of value" under Section 641. Analogizing to confidential proprietary information sold by a private business, the majority asserted that "CMS's right to exclude the public from accessing" regulatory information "implicates the government's role as property

holder," particularly given that the government "invests * * * resources into generating and maintaining * * * confidentiality." Pet.App.16a-17a.[3]

Second, the majority concluded that a Title 18 insider-trading conviction does not require proof of a tipper's benefit or tippee knowledge of that benefit. Eschewing any analysis of the statutory text, which mirrors that of Section 10(b)/Rule 10b-5, the majority stated that the personal-benefit test is "premised" on Section 10(b)'s "statutory purpose" rather than constituting (as this Court has long held) the very thing that makes insider trading "a scheme to defraud." Pet.App.22a. The majority also asserted that personal benefit is irrelevant to an "embezzlement theory of fraud." Pet.App.23a. The majority acknowledged that its decision permits the government to "avoid the personal-benefit test altogether" simply by charging insider trading under Title 18 rather than Title 15. Pet.App.25a.

b. Judge Kearse dissented. She concluded that a defendant who uses information about "the substance and timing" of "a planned CMS regulation" does not obtain government "property" or convert a "thing of value" to the government.[4] Pet.App.46a-47a.

As Judge Kearse explained, this Court's holding in *Cleveland* establishes that "property" does not encompass a regulatory "right[] of * * * control," and—"[l]ike the gaming licenses in question in *Cleveland* * * * —

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[3] As the majority explained, the court of appeals was required to adjudicate petitioners' sufficiency challenge on that issue by determining what the governing legal principle actually is, unconstrained by the jury instructions. Pet.App.13a (citing *Musacchio* v. *United States*, 136 S. Ct. 709, 715 (2016)).

[4] On that basis, Judge Kearse would have reversed or vacated all of Olan's and Huber's convictions. Pet.App.50a.

the predecisional CMS information has no economic impact on the government until after CMS has actually decided what regulation to issue and when the regulation will take effect." Pet.App.49a. She reasoned that "CMS is not a business; * * * it is a regulatory agency" that "adopts its preferred planned regulation" regardless of whether information about those plans becomes public. Pet.App.46a-47a; see *ibid.* ("CMS does not seek buyers or subscribers; it is not in a competition; it is an agency of the government that regulates * * * whether or not any information on which its regulation is premised is confidential"). Accordingly, she concluded, confidentiality does not "enhance[] the value of the information" to CMS, and disclosure does not "deprive[]" the agency "of anything that could be considered property." Pet.App.48a.

c. On April 10, 2020, the Second Circuit denied petitions for rehearing. Pet.App.57a. On July 14, 2020, following this Court's decision in *Kelly*, the Second Circuit stayed its mandate.[5]

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision in this case vastly expands the scope of federal criminal law in disregard of the statutory text, this Court's precedents, and fundamental, constitutionally based principles of interpretation.

The divided panel's holding that confidential government information about regulatory actions is property under the federal fraud and conversion statutes is irreconcilable with the text of those provisions, which

[5] Just hours after issuance of the 2-1 decision in this case, Judge Droney, who had joined Judge Sullivan in the majority, retired. Judge Walker subsequently joined the panel when it stayed the mandate.

criminalize conduct that causes *economic* loss. That holding directly conflicts with this Court's decisions in *Cleveland* and *Kelly*, both of which unanimously and unambiguously foreclose wire-fraud prosecutions for conduct that causes the government no economic harm. It resurrects the boundless "honest services" theory of fraud that this Court has repeatedly rejected. And it criminalizes a vast swath of routine behavior on the part of government officials and employees, journalists, and analysts. It gives the government a free hand to prosecute—and thus intimidate into silence—whistleblowers, the journalists with whom they speak, and the media entities that publish their disclosures. Indeed, one cannot read a daily newspaper without encountering examples of conduct that would be wire fraud and criminal conversion under the Second Circuit's interpretation of those provisions.

The panel's elimination of the personal-benefit requirement (and concomitant knowledge requirement for tippees) in Title 18 insider-trading cases is equally cavalier in its disregard for the statutory text and this Court's precedents, and equally pernicious in the consequences it threatens. This Court held four decades ago—and reaffirmed just four years ago in *Salman*—that insider trading constitutes fraud only when an insider or other fiduciary discloses confidential information in exchange for a personal benefit. By eliminating that requirement, the Second Circuit has radically expanded the scope of criminal insider trading in a manner that defies this Court's precedents and erases the clear line that separates prohibited insider trading from the analytical work that is not only lawful but "necessary to the preservation of a healthy market." *Dirks*, 463 U.S. at 658-659 & n.17.

Most fundamentally, it is the responsibility of Congress—not overzealous prosecutors or courts implementing their own views of sound public policy—to determine what is and is not a federal crime. The Second Circuit's decision transgresses that bedrock principle.

I. The Second Circuit's Ruling That Government Regulatory Information Constitutes The Government's "Property" And "Thing of Value" Warrants This Court's Review

1. a. The Second Circuit's decision on the meaning of "property" and "thing of value" in the federal fraud and conversion statutes directly conflicts with this Court's decisions in *Cleveland* and *Kelly*. Pet.App.44a-52a (Kearse, J., dissenting).[6] This Court's plenary review is warranted.

In *Cleveland*, this Court ruled that lying to obtain a state license is not federal criminal fraud because licenses are not government "property." 531 U.S. at 15. Emphasizing that the fraud statutes do not extend beyond "traditional concepts of property," the Court reasoned that if the government's "core concern is *regulatory*" rather than "economic," the object of that concern "is not 'property' in the government regulator's hands." *Id.* at 20-22, 24. The Court therefore concluded that a "government regulator" does not "part[] with 'property' when it issues a license," even if the government has "significant control" over licenses and "receives a sub-

[6] To violate Section 1343 (wire fraud) or Section 1348 (Title 18 securities fraud), a defendant must defraud someone of money or property. *McNally* v. *United States*, 483 U.S. 350, 358-360 & n.8 (1987). To violate the conversion statute as charged here, a defendant must convert a "thing of value." 18 U.S.C. 641.

stantial sum of money" for processing, issuing, or continuing them. *Id.* at 20-22. As the Court explained, the government's "intangible rights of allocation, exclusion, and control amount to no more and no less than [the State's] power to regulate," and licensing decisions therefore "implicate[] the Government's role as sovereign, not as property holder." *Id.* at 23-24.

In *Kelly*, which set aside convictions for rerouting traffic on the George Washington Bridge, this Court reaffirmed *Cleveland*'s holding that "a scheme to alter * * * a regulatory choice is not one to appropriate the government's property." 140 S. Ct. at 1572. The Court explained that "allocating lanes as between different groups of drivers" on the bridge is a "run-of-the-mine exercise of *regulatory* power" to allocate and control resources. *Id.* at 1572-1573 (emphasis added). And the Court emphasized that, although the scheme required "the time and labor of Port Authority employees," that sort of "incidental byproduct" is not enough to show that "property fraud" occurred—because "[e]very regulatory decision," including the allocation of licenses in *Cleveland*, involves some employee labor. *Id.* at 1573-1574.

The Second Circuit's decision cannot be reconciled with those decisions. It is difficult to imagine something more "quintessential[ly] * * * regulatory," *Kelly*, 140 S. Ct. at 1572-1573, than predictive information about what regulation the government may propose. The government has no "traditional" economic interest in such regulatory information, *Cleveland*, 531 U.S. at 24, which the government does not sell. And because the government can—and did—issue exactly the regulation it planned regardless of the public's advance knowledge, disclosure of information about a regula-

tion's contents does not deprive the government of anything of value to it. Pet.App.48a-49a (Kearse, J., dissenting). In short, the government's decision about how to allocate access to that information, and when to release it, no more constitutes government property than a decision about who should obtain a license or who should be able to drive in a particular lane of a public road. See *Kelly*, 140 S. Ct. at 1572. The unauthorized disclosure of such confidential government information simply is not a property crime.

The majority here undertook no analysis of whether such information is a "traditional" form of property. Pet.App.15a. Instead, it rested its conclusion "most significant[ly]" on the government's "'right to exclude'" others from learning that information. *Id.* at 16a. But *Cleveland* held that the "right to exclude *in [a] governing capacity* is not one appropriately labeled 'property.'" 531 U.S. at 24 (emphasis added). *Kelly* held the same thing, explaining that a regulatory exclusion of certain segments of the public from certain traffic lanes did not involve any government property right. See 140 S. Ct. at 1572-1573.

The majority also posited that the regulatory information here is property because the government "invests time and resources into generating and maintaining [its] confidentiality." Pet.App.17a. But *Cleveland* held that such ancillary economic costs, like the costs of processing a license, are not "sufficient to establish" a "property right." 531 U.S. at 22. And *Kelly* likewise concluded that "incidental" costs, such as employee time and compensation associated with making a regulatory change, are irrelevant to whether the government has been deprived of any property. See 140 S. Ct. at 1573-1574.

In light of those stark conflicts, the majority was able to rule the way it did only by arrogating to itself the power to limit this Court's decision in *Cleveland* to its facts. For instance, the majority said that *Cleveland* had little effect on the "existing legal landscape" and that "*Cleveland*'s 'particular selection of factors' did not establish 'rigid criteria for defining property but instead * * * provid[ed]" only "permissible considerations." Pet.App.15a-16a (citation omitted). Those characterizations cannot be reconciled with *Cleveland*, or with subsequent decisions of this Court that relied on *Cleveland*. See *Sekhar* v. *United States*, 570 U.S. 729, 737 (2013); see also *id.* at 740-741 (Alito, J., concurring in judgment) ("*Cleveland* * * * supports the conclusion that internal recommendations regarding government decisions are not property."). Among those, of course, is *Kelly*, which made *Cleveland* the centerpiece of its reasoning. See 140 S. Ct. at 1572-1574.

In short, under the Second Circuit's analysis, both *Cleveland* and *Kelly* would have come out the opposite way. And that conflict with *Cleveland* and (now) with *Kelly* is not, as the majority suggested, obviated by the earlier decision in *Carpenter* v. *United States*, 484 U.S. 19 (1987), which concluded that "[c]onfidential *business* information has long been recognized as property." *Id.* at 26 (emphasis added). As Judge Kearse's dissent explained, *Carpenter* addressed a business's self-evident *economic* interest in *selling* information, which a government regulator lacks. Pet.App.47a (unlike the "victim in *Carpenter* * * * CMS does not seek buyers or subscribers"; it "regulates"); see *Carpenter*, 484 U.S. at 25. Tellingly, *Cleveland* distinguished *Carpenter* on precisely that basis. See 531 U.S. at 19, 23.

Moreover, as Judge Kearse concluded, the majority's erroneous interpretation of *Cleveland* equally infects its ruling that regulatory information is a "thing of value" that can be converted. Pet.App.47a (Kearse, J., dissenting). "Thing of value" cannot have a broader meaning than "property," 18 U.S.C. 641 (referring to "thing of value" as "property" and requiring monetary value), and must be read in light of the other terms with which it keeps company ("record, voucher, money"). *E.g.*, *Yates* v. *United States*, 574 U.S. 528, 534-544 (2015). The majority cited no authority for the proposition that regulatory information is a property-like "thing of value" capable of being "converted" in violation of Section 641, and *Cleveland* and *Kelly* make clear that it is not.

b. The Second Circuit's decision also conflicts with this Court's decisions in an additional respect: it flouts bedrock principles of statutory interpretation that this Court has repeatedly said are mandatory.

This Court has explained that federal criminal statutes should not be read to authorize prosecutions raising "significant constitutional concerns," *McDonnell*, 136 S. Ct. at 2372, or otherwise encroaching into "wide expanses of the law which Congress has evidenced no intention to enter by way of criminal sanction," *Dowling* v. *United States*, 473 U.S. 207, 227 (1985); see *Cleveland*, 531 U.S. at 25-26. The decision below authorizes both of those things: it criminalizes any speech about the inner workings of federal, state, or local government that involves unauthorized disclosure of confidential government information. It thereby subjects journalists, whistleblowers, and others carrying out routine and beneficial activities to arbitrary federal prosecution and harsh criminal penalties. The Second Circuit inexplicably dismissed those

problems as mere "enforcement policy concerns." Pet.App.43a.

The Second Circuit also ignored this Court's insistence on construing criminal statutes narrowly and consistent with lenity to avoid an interpretation that "fails to give ordinary people fair notice of the conduct it punishes" or is "so standardless that it invites arbitrary enforcement." *Johnson* v. *United States*, 576 U.S. 591, 595 (2015). The Court has been particularly vigilant in enforcing those interpretive principles in fraud cases—for instance, limiting mail and wire fraud to traditional property, see *McNally*, 483 U.S. at 375; *Cleveland,* 531 U.S. at 24-25, and paring honest-services fraud to its "core" to avoid vagueness concerns, *Skilling*, 561 U.S. at 404; see *Yates*, 574 U.S. at 548 ("harsher" reading of criminal statute impermissible unless Congress has "spoken in language that is clear and definite") (citation omitted).

2. Review also is warranted because the Second Circuit's decision conflicts with decisions of other circuits, none of which has ever found government regulatory information like that at issue here to be property or a thing of value within the meaning of federal criminal law.

In *United States* v. *Tobias*, 836 F.2d 449 (9th Cir. 1988), the Ninth Circuit held that classified information is not a "thing of value" under the conversion statute. *Id.* at 451. Applying *Chappell* v. *United States*, 270 F.2d 274 (9th Cir. 1959), the court explained that "section 641 should not be read to apply to intangible goods[] like classified information," which would raise "[F]irst [A]mendment problems." 836 F.2d at 451.

Similarly, in *Pearson* v. *Dodd*, 410 F.2d 701 (D.C. Cir. 1969), a common-law conversion case involving information taken from a Senator's office, the D.C. Circuit set forth a "general rule" that "ideas or information are not subject to legal protection" as property that can be converted. *Id.* at 707-708. The court of appeals made exceptions only for information "sold as a commodity on the market," for "ideas * * * formulated with labor and inventive genius" (such as "literary works or scientific researches"), and for "instruments of * * * commercial competition," none of which were at issue. *Ibid.* (footnotes omitted); see *United States ex rel. Kasowitz Benson Torres LLP* v. *BASF Corp.*, 929 F.3d 721, 726-728 (D.C. Cir. 2019) (information not government "property" when government "does not acquire [the] information for its own economic benefit but to carry out its regulatory mission").

Those decisions are irreconcilable with the Second Circuit's decision here. Had the Ninth Circuit's rule or the D.C. Circuit's reasoning been applied in this case, petitioners' convictions would not have survived.

3. Finally, the Second Circuit's interpretation of "property" and "thing of value" will have untenable consequences.

a. First, that interpretation amounts to "a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Cleveland*, 531 U.S. at 24. If the ruling below is allowed to stand, then disclosure of confidential regulatory information by a whistleblower who reveals government malfeasance, a journalist who reports that revelation, and a reformer who publicizes it would constitute violations of the federal fraud and conversion statutes punishable by *decades* in prison. See, *e.g.*, Eugene Volokh,

Journalists Might Be Felons for Publishing Leaked Governmental "Predecisional Information," Reason (Jan. 27, 2020).[7]

Such disclosures are commonplace—indeed, stories about them are published daily. See, *e.g.*, Peter Bake & Eileen Sullivan, *U.S. Virus Plan Anticipates 18-Month Pandemic and Widespread Shortages*, New York Times (Mar. 17, 2020).[8] They are essential for keeping the government accountable to the people and shining light on practices that harm the public, violate the law, or both. See, *e.g.*, Matthias Gafni & Joe Garofoli, *Captain of aircraft carrier with growing coronavirus outbreak pleads for help from Navy*, San Francisco Chronicle (Mar. 31, 2020);[9] Maddie Bender, *She Blew the Whistle on Pathogens That Escaped From a Government Lab. Now She's Being Fired*, VICE (Feb. 27, 2020).[10] And there are serious First Amendment problems associated with characterizing information that the government has designated confidential—a designation that the government can place on even the most innocuous information—as a commodity that is "stolen" at the moment of disclosure. See, *e.g.*, *United States* v. *Truong Dinh Hung*, 629 F.2d 908, 924-925 (4th Cir. 1980) (opinion of Winter, J.); see also *Bond*, 572 U.S. at 866 ("narrow[er]" interpretation of criminal statute "call[ed] for" if "most sweeping reading"

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[7] *Available at* https://reason.com/2020/01/27/journalists-might-be-felons-for-publishing-leaked-governmental-predecisional-information/.

[8] *Available at* https://www.nytimes.com/2020/03/17/us/politics/trump-coronavirus-plan.html.

[9] *Available at* https://www.sfchronicle.com/coronavirus/article/aircraft-carrier-captain-outbreak-ship-navy-help-15169227.php.

[10] *Available at* https://www.vice.com/en_us/article/bvg5xm/whistleblower-biosafety-government-lab-pathogen-leak-washington.

would "fundamentally upset" constitutional constraints); John C. Coffee Jr., *Hush!: The Criminal Status of Confidential Information after* McNally *and* Carpenter *and the Enduring Problem of Overcriminalization*, 26 Am. Crim. L. Rev. 121, 140-141 (1988).

Notably, the decision below encompasses not only confidential *federal* government information but also confidential *state* and *local* government information, all of which is now government property in the Second Circuit. That transforms a local police officer's disclosure of a body-camera video, or a journalist's report on a governor's secret criteria for staff hiring, into serious federal crimes. By "subject[ing] to" federal prosecution "a wide range of conduct traditionally regulated by state and local authorities," the Second Circuit's decision seriously destabilizes the "federal-state balance." *Cleveland*, 531 U.S. at 24-25 (citation omitted); see, *e.g.*, *Kelly*, 140 S. Ct. at 1571, 1574 (barring federal government from "us[ing] the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking"); *Bond*, 572 U.S. at 862-863, 866.

The only thing now standing in the way of those kinds of charges in the Second Circuit is prosecutorial discretion. But, as this Court has repeatedly emphasized, reliance on such discretion is not a sufficient safeguard against abuse. See, *e.g.*, *McDonnell*, 136 S. Ct. at 2372-2373 ("[W]e cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'") (citation omitted); *Marinello* v. *United States*, 138 S. Ct. 1101, 1108-1109 (2018). That is especially true here, given that whistleblowers and journalists are often thorns in the government's side. See, *e.g.*, Oliver Darcy, *White House says it is creating 'very large' dossier on* Washington Post *journalist and*

others, CNN Business (Aug. 27, 2020);[11] Anne Marimow, *A rare peek into a Justice Department leak probe*, Wash. Post (May 19, 2013).[12]

b. Second, the Second Circuit's decision would eviscerate the limits this Court has placed on "honest-services" fraud prosecutions, which seek to punish employees who deprive their employers of the "intangible right" to honest conduct. *Skilling*, 561 U.S. at 399-402; see *McNally*, 483 U.S. at 360. Interpreting a statute specific to honest-services fraud that the government chose not to charge in this case, this Court limited such prosecutions to those in which the government can prove a bribe or kickback. The Court explained that a broader rule would "involve[] the Federal Government in setting standards of disclosure and good government for local and state officials." *Skilling*, 561 U.S. at 402 (citation omitted). But under the Second Circuit's approach, deprivations of honest services—even where no bribe or kickback is involved—can be charged as federal property crimes. See Brette M. Tannenbaum, Note, *Reframing the Right: Using Theories of Intangible Property to Target Honest Services Fraud after* Skilling, 112 Colum. L. Rev. 359, 363-364, 393-395 (2012). After all, faithless government employees often disclose confidential government information in the course of advancing their own personal interests and inevitably expend government "time and resources" in doing so. Pet.App.17a. The Second Circuit's decision thus accomplishes the end-run around

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[11] *Available at* https://www.cnn.com/2020/08/27/media/white-house-dossier-journalists/index.html.

[12] *Available at* https://www.washingtonpost.com/local/a-rare-peek-into-a-justice-department-leak-probe/2013/05/19/0bc473de-be5e-11e2-97d4a479289a31f9_story.html?utm_term=.907b3e250b3b.

limitations on honest-services fraud that this Court has sought to thwart. See, *e.g.*, *Kelly*, 140 S. Ct. at 1574.

c. Third, the decision below negates a host of carefully calibrated federal statutes—many enacted well after the statutes at issue here—penalizing disclosure of confidential or classified information. Those statutes impose penalties only as to disclosure of certain information by particular actors for particular purposes. See, *e.g.*, 18 U.S.C. 793 (confidential national-defense information); 18 U.S.C. 794 (similar); 18 U.S.C. 798 (classified information); 50 U.S.C. 783(a) (classified national-security information to foreign government); 18 U.S.C. 1030(a)(1) (national-defense or foreign-relations information accessed by computer). Moreover, the penalties they impose are often limited ones. See, *e.g.*, 18 U.S.C. 1905 (one-year maximum sentence under general statute criminalizing unauthorized disclosure by government employee).

Under the Second Circuit's interpretation, federal fraud and conversion statutes would indiscriminately cover the same ground—and much more. Moreover, the applicable statutory maximum would often be far more draconian. See, *e.g.*, 18 U.S.C. 1343 (20-year maximum sentence for wire fraud). The panel majority's overbroad reading thus allows prosecutors to override Congress's considered judgments about whether and how to criminally punish disclosures of government information. See *Truong Dinh Hung*, 629 F.2d at 927 & n.21 (opinion of Winter, J.) ("It would greatly disrupt th[at] network of carefully confined criminal prohibitions * * * if the courts permitted [the federal conversion statute] to serve as a criminal prohibition against the merely willful unauthorized disclosure of any classified information.").

d. All of those consequences speak directly to the deep concerns this Court has expressed in recent years about government misuse of the fraud statutes and overbroad federal criminal liability more generally. The Second Circuit's decision permits a dangerous "ballooning of federal power" that vastly expands the scope of the fraud and conversion statutes. *Kelly*, 140 S. Ct. at 1574; see, *e.g.*, *McDonnell*, 136 S. Ct. at 2372-2373; *Skilling*, 561 U.S. at 411; *Cleveland*, 531 U.S. at 25; *McNally*, 483 U.S. at 360; see also, *e.g.*, *Marinello*, 138 S. Ct. at 1106-1109; *Yates*, 574 U.S. at 548-549. This Court's plenary review of the question presented is thus more than warranted—it is urgently needed.

II. The Second Circuit's "Personal Benefit" Ruling Conflicts With This Court's Precedents And Disrupts An Exceptionally Important Area Of The Law

This Court held in *Dirks* and reaffirmed in *Salman* that tipping and tippee trading are not *fraudulent* unless the tipper acts for a personal benefit. That personal-benefit requirement, as *Dirks* explained, is "essential" for securities markets to function efficiently: it marks a clear line "between permissible and impermissible disclosures and uses" of nonpublic information, thereby ensuring that analysts are not inhibited from "ferret[ing] out" information for the benefit of the financial markets. *Dirks*, 463 U.S. at 658-659, 664 & n.17. Yet the Second Circuit has now given prosecutors an end run around *Dirks* and its progeny, essentially erasing the requirement that the tipper benefit personally (and that tippees know of that personal benefit). That renders decades of this Court's precedents a dead letter, creates nonsensical anomalies in insider-trading law, and threatens both individual liberty and the stability of the securities markets.

Moreover, left undisturbed, the decision will have outsized influence, because venue within the Second Circuit can lie over virtually any securities trade, and because other courts often follow the Second Circuit's lead in securities matters. The question of whether the personal-benefit requirement applies in Title 18 insider-trading fraud cases therefore calls out for this Court's review.

A. The Second Circuit's Decision Conflicts With This Court's Precedents

1. Congress has never enacted a criminal statute prohibiting insider trading. Instead, the government charges insider trading as a form of "fraud," using Section 10(b) of the Securities Exchange Act of 1934 as well as other similarly worded, general anti-fraud provisions. Read in conjunction with SEC Rule 10b-5, Section 10(b) broadly proscribes employing any "device, scheme, or artifice to defraud," or "fraud or deceit," "in connection with the purchase or sale" of securities. 15 U.S.C. 78j(b); 17 C.F.R. 240.10b-5. The mail- and wire-fraud statutes likewise proscribe using the mail or wires for any "scheme or artifice to defraud" or involving "false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341, 1343. That same language is repeated in Section 1348, a securities-fraud statute enacted in 2002 to combat large-scale accounting frauds.

This Court has repeatedly concluded that trading securities on the basis of material, nonpublic information is not inherently "deceptive" or "fraudulent," and that general anti-fraud offenses like Section 10(b)/10b-5 create no "general duty" to refrain from trading on the basis of such information. *Chiarella* v. *United States*, 445 U.S. 222, 233 (1980); see *O'Hagan*

v. *United States*, 521 U.S. 642, 655 (1997); *Dirks*, 463 U.S. at 654. Rather, the Court has held, what makes insider trading deceptive, and thus fraudulent, is breaching a duty to the source of information through use of the information for "personal benefit." *Dirks*, 463 U.S. at 661-664; see *Chiarella*, 445 U.S. at 230; *O'Hagan*, 521 U.S. at 653-655.

Dirks involved a financial analyst whose clients traded on confidential information he had received from a corporate whistleblower. This Court concluded that neither the whistleblower's disclosure nor the subsequent trades were fraudulent because the whistleblower acted to expose corporate wrongdoing, not for any personal benefit. 463 U.S. at 666-667. To determine whether a disclosure is fraudulent, the Court held, "the test is whether the insider personally will benefit, directly or indirectly, from his disclosure. *Absent some personal gain, there has been no breach of duty* * * * . And absent a breach by the insider, there is no derivative breach" by any trading tippee. *Id.* at 662 (emphasis added). Personal benefit is what "determin[es] whether the insider's purpose in making a particular disclosure is *fraudulent*." *Id.* at 663 (emphasis added). The Court further explained that the personal-benefit requirement is the "essential * * * guiding principle" by which market participants should conduct their affairs in order to navigate the line separating unlawful behavior from lawful trading. *Id.* at 664; see *id.* at 658-659 & n.17.

This Court's decisions after *Dirks* confirm that a personal benefit for the tipper is essential to proving fraud under *both* Title 18 and Title 15. In *Carpenter*, the Court affirmed the mail- and wire-fraud convictions of a reporter who "embezzled" his employer's con-

fidential business information by tipping others in exchange for a share of their trading profits. That was fraud, the Court said, because "a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information *for his own personal benefit*." 484 U.S. at 27-28 (emphasis added). Similarly, in *O'Hagan*, the Court extended *Carpenter*'s embezzlement-fraud theory to Title 15. See 521 U.S. at 654. Regardless of the particular section of the U.S. Code at issue, the Court explained, a fiduciary "defrauds" his principal when he "convert[s] the principal's information *for personal gain*." *Id.* at 653-654 (emphasis added).

Most recently, in *Salman*, the Court unanimously reaffirmed *Dirks*' core holdings: "[a] tipper breaches [his] fiduciary duty" only "when the tipper discloses the inside information for a personal benefit," and "the disclosure of confidential information without personal benefit is not enough" to prove fraud. 137 S. Ct. at 423, 427. The Court rejected the government's invitation to lower the burden of proof by replacing the personal-benefit test with a standard that would have deemed conduct fraudulent "whenever the tipper discloses confidential trading information for a noncorporate purpose." *Id.* at 426.

The Court's rulings in those cases confirm that the existence of a personal benefit for the tipper is critical not only to establishing the tipper's liability for fraud but also to establishing that a downstream tippee who has traded on the tipped information has engaged in fraud. As this Court has explained, a tippee owes no fiduciary duty to the original source of the information, and therefore can be liable only on a "constructive

trust" theory under which he inherits the tipper's fiduciary duty. *Dirks*, 463 U.S. at 659-661 & n.20; *Salman*, 137 S. Ct. at 423, 427. That theory does not apply unless the tipper "has breached his fiduciary duty * * * by disclosing the information to the tippee" in exchange for a personal benefit "and the tippee *knows* * * * that there has been a breach." *Dirks*, 463 U.S. at 660 (emphasis added); see *Salman*, 137 S. Ct. at 423. If the tippee lacks that knowledge, then he has not "participate[d]" in a fraudulent scheme, *Salman*, 137 S. Ct. at 427; he has simply traded using information in his possession, see *Dirks*, 463 U.S. at 657.

2. The Second Circuit's holding that proof of personal benefit is not required in criminal insider-trading cases brought under Title 18 fraud provisions directly conflicts with those precedents and represents a sea change in insider-trading law.

The provisions of Title 18 at issue here—Sections 1343 and 1348—proscribe schemes to "defraud" in language that is identical in relevant part to the language in the Title 15 securities laws. And under this Court's precedents, the meaning of criminal "fraud" does not change from statute to statute. See, *e.g.*, *Carpenter*, 484 U.S. at 25 n.6; *Pasquantino* v. *United States*, 544 U.S. 349, 355 n.2 (2005) ("identical language" in criminal fraud statutes is construed "*in pari materia*"); *O'Hagan*, 521 U.S. at 653-654 (insider-trading fraud under Title 15 is "fraud of the same species" as Title 18 fraud); see also, *e.g.*, *Branch* v. *Smith*, 538 U.S. 254, 281 (2003); *Sekhar*, 570 U.S. at 733. The Second Circuit's decision is thus irreconcilable with this Court's decisions holding that "fraud" exists in the insider-trading context only if the source of the information has received a personal benefit for the disclosure. See

Andrew N. Vollmer, *The Second Circuit's Blaszczak Decision:* Dirks *Besieged* (Jan. 11, 2020).[13]

Nothing in the Second Circuit's opinion justifies its radical departure from precedent or vast expansion of the insider-trading crime. First, the panel asserted that the personal-benefit requirement, as set forth in *Dirks*, is "premised" on Congress having "enacted the Title 15 fraud provisions with the limited 'purpose of * * * eliminat[ing] [the] use of inside information for *personal advantage*.'" Pet.App.22a (quoting *Dirks*, 463 U.S. at 662). That is wrong. Nothing in *Dirks* limits its holding to Title 15 or suggests that the Court intended to implement some statutory purpose unique to Section 10(b). On the contrary, *Dirks* held—and reiterated no fewer than *seven times*—that personal benefit is indispensable to proving *fraud*, because absent such a benefit there has been no deceit. See 463 U.S. at 663 (personal benefit "determine[s] whether the [tipper]'s purpose * * * is fraudulent" and whether "disclosure" of information "defraud[s]"); see also *id.* at 654, 662, 666-667 & n.27. The Court also described the personal-benefit requirement as "essential" to "guid[e]" traders and analysts in their "daily activities"—and that "guiding principle" would be meaningless if the requirement disappeared in fraud provisions outside Title 15. *Id.* at 664 & n.24.

Second, the Second Circuit asserted that "*Carpenter*'s formulation of embezzlement" fraud does not require the government to prove personal benefit. Pet.App.23a. That, too, is wrong. In *Carpenter*, the Court explained that embezzlement doctrine requires a fiduciary breach for *personal benefit*: a person who acquires information through a fiduciary relationship

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[13] *Available at* https://ssrn.com/abstract=3516082.

"is not free to exploit that knowledge or information *for his own personal benefit* but must account to his principal for any *profits derived therefrom*." 484 U.S. at 27-28 (emphasis added; citation omitted). And the Court reaffirmed that point when it applied *Carpenter* to Title 15 in *O'Hagan*, explaining that a "fiduciary who * * * secretly convert[s] the principal's information for personal gain * * * 'dupes' or defrauds the principal." 521 U.S. at 653-654 (quoting U.S. Br. 17).

Finally, the Second Circuit suggested that Section 1348 should be treated differently from other fraud statutes because it has a different purpose. But interpreting statutes using atextual speculation about statutory purpose is an impermissible "relic from a 'bygone era.'" *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). And even if Section 1348's purpose were relevant, it would not support the ruling below or obviate the conflict with this Court's precedents. Congress enacted that statute to combat large-scale accounting frauds like the one that engulfed Enron Corporation. Congress accomplished that goal by eliminating some "technical legal requirements" *incidental* to fraud that were found in existing anti-fraud provisions, such as "purchase or sale" of securities or use of the interstate wires. S. Rep. No. 107-146, at 2-6 & n.9, 30 (May 6, 2002). Nothing in Section 1348's legislative history suggests that Congress intended to alter the established meaning of "fraud" in tipping cases. To the contrary, Section 1348 retains the requirement "that a defendant knowingly engaged in a scheme or artifice to defraud," *id.* at 30, and under this Court's precedents, a tipper's personal benefit is precisely what converts otherwise innocent trading into "fraud."

B. The Second Circuit's Decision Creates Nonsensical Anomalies In Insider-Trading Law

The Second Circuit's decision wipes away a four-decade history of carefully crafted limits on the scope of fraud in the insider-trading context, rendering an enormous body of caselaw—including this Court's decisions in *Dirks* and *Salman*—a nullity. Since *Dirks*, the government has continued bringing criminal insider-trading cases under Title 15, and (until this case) it has understood that when it charges insider trading as criminal fraud under Title 18, the personal-benefit requirement continues to apply.[14] This Court and other courts have thus extensively explicated what that requirement means. But if charging criminal insider-trading as a violation of Sections 1343 and 1348 obviates the need to prove that the tipper received a personal benefit and that the tippee knew of the benefit, the government will never again charge that conduct under Title 15. That would represent the culmination of a long series of efforts by the government—thus far blocked by this Court—to dilute or eliminate the personal-benefit requirement. See pp. 26-28, *supra*; *United States* v. *Newman*, 773 F.3d 438 (2d Cir. 2014), *abrogated on other grounds by Salman*.

This case is not somehow distinct, as the government has contended, because it involves so-called "embezzlement" of information. The courts of appeals

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[14] See, *e.g.*, *United States* v. *Walters*, No. 16-Cr.-338 (S.D.N.Y.), Dkt.91, at 17, 19, 32 (to establish "wire fraud," government must prove insider "anticipated receiving a personal benefit") & Dkt.95, at 6; *United States* v. *Stewart*, No. 15-Cr.-287 (S.D.N.Y.), Dkt.109, at 20, 33 (same); cf. *United States* v. *Bogucki*, No. 18-Cr.-21 (N.D.

have universally required proof of personal benefit in Title 15 embezzlement (*i.e.*, "misappropriation") tipping cases. See, *e.g.*, *United States* v. *Martoma*, 894 F.3d 64, 73 n.5 (2d Cir. 2017); *United States* v. *Bray*, 853 F.3d 18, 25 (1st Cir. 2017); *United States* v. *Evans*, 486 F.3d 315, 323 (7th Cir. 2007); *SEC* v. *Yun*, 327 F.3d 1263, 1275 (11th Cir. 2003). And the government acknowledged in *Salman* that "*Dirks*'s personal-benefit analysis applies" in such "misappropriation cases." 137 S. Ct. at 425 n.2. Yet under the Second Circuit's ruling, proof of personal benefit would be required for cases involving "embezzlement" of information brought under Title 15 but not under Title 18, even though the two statutory proscriptions are supposed to be "the same" as to whether any fraud has been committed. *O'Hagan*, 521 U.S. at 654.

The effect of that anomaly will be an irrational disparity between criminal and civil insider-trading actions, subjecting conduct that the SEC cannot pursue civilly to severe criminal penalties. The SEC is the expert agency charged with rooting out fraud in the securities markets, but it is limited to civil enforcement of Title 15 provisions such as Section 10(b)/Rule 10b-5, and therefore bound by the personal-benefit requirement set forth in this Court's precedents interpreting those provisions. It would be bizarre if trading by a remote tippee that involves no personal benefit to the

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Cal.), Dkt.162, at 42 (same for misappropriation). The government's briefs in this Court have said the same thing. See U.S. Br. 14-17, *Carpenter* v. *United States*, 484 U.S. 19 (1987) (No. 86-422) ("essential characteristic of a fraudulent breach" is that the fiduciary "benefit himself"); U.S. Br. 24, *United States* v. *O'Hagan*, 521 U.S. 642 (No. 96-842) (prohibition on using "confidential information for personal gain" under Section 10(b) "parallels the similar inquiry" under mail-fraud statute).

tipper or knowledge of benefit by the tippee, and therefore does not trigger even the monetary penalties that arise from SEC enforcement action, nevertheless subjects the tippee to criminal liability and years of imprisonment.

That absurd legal landscape is not the one that Congress enacted or that this Court's many careful insider-trading decisions countenance. But it is exactly what will happen if the Second Circuit's decision is allowed to stand. Indeed, in this very case, Olan and Huber were *acquitted* of any violation of Title 15, which the jury was charged required proof of personal benefit, yet convicted under Title 18, as to which the district court refused to instruct that proof of personal benefit was required. C.A.App.1082-1101.

C. The Second Circuit's Decision Will Harm The Securities Markets And The People Who Make Those Markets Function

By allowing prosecutors to circumvent the personal-benefit requirement, the decision below also will have profound implications for securities analysts and traders who, until now, have justifiably ordered their conduct based on *Dirks*' "guiding principle."[15] The ab-

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[15] See Adam Pritchard, *2nd Circ. Ruling Makes Messy Insider Trading Law Worse*, Law360 (Jan. 27, 2020), *available at* www.law360.com/articles/1237586/2nd-circ-ruling-makes-messy-insider-trading-law-worse; Walter Pavlo, *Appeal Court's Rush On Insider Trading Decision Will Hurt Wall Street*, Forbes (Jan. 21, 2020), *available at* https://www.forbes.com/sites/walterpavlo/2020/01/21/appeal-courts-rush-on-insider-trading-decision-will-hurt-wall-street/#4fedf07e7891; Russell G. Ryan, *Insider trading law is irreparably broken*, Wash. Post (Jan. 27, 2020), *available at* https://www.washingtonpost.com/opinions/2020/01/27/insider-trading-law-is-irreparably-broken/.

sence of that principle will "produce[] unpredictable results" and "risk[] over-deterring activities related to lawful securities sales." *Pinter* v. *Dahl*, 486 U.S. 622, 654 n.29 (1988). And it will subject market actors to criminal prosecution for simply doing their jobs in ferreting out information.

That is particularly true for remote tippees like Olan and Huber, who were not alleged to even know who provided the information. C.A.App.556, 1010. Analysts routinely receive information, including rumors about how the government might act, from a wide variety of sources. It is imperative that they have a way of sorting out, *ex ante*, which information they can legally use to trade. But if criminal liability can be imposed even though such tippees have no knowledge that the tipper was acting for his own benefit rather than for a legitimate purpose, then there is no way that they can continue to carry out their necessary functions.

The breadth and indeterminacy of the Second Circuit's new standard for establishing a tipping crime also threatens bedrock separation-of-powers and due-process principles. As discussed above, this Court has insisted that criminal statutes—and especially the fraud statutes—be interpreted narrowly. See pp. 17-18, *supra*. The panel majority in this case has done the opposite.

The Second Circuit's decision will have nationwide effects because virtually all securities transactions touch New York. Given the government's considerable discretion as to where it files cases, see 18 U.S.C. 3237(a), the decision invites prosecutors to seize on the substantially lower burden of proof they now enjoy in

the Second Circuit by funneling all but slam-dunk insider-trading cases to that venue—achieving the government's long-sought goal of eliminating the personal-benefit requirement without legislation. Such forum shopping, together with the Second Circuit's prominence in securities law, see *Morrison* v. *Nat'l Australia Bank Ltd.*, 561 U.S. 247, 260 (2010), will inhibit further percolation of the question presented and ultimately destabilize securities markets.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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