No. 15-628

In the Supreme Court of the United States

BASSAM YACOUB SALMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, under *Dirks* v. *SEC*, 463 U.S. 646 (1983), a tipper personally benefits, and thereby breaches his fiduciary duty, by disclosing confidential information to a tippee as a gift for use in securities trading.

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OPINIONS BELOW

The court of appeals' published opinion (Pet. App. 1-17) is reported at 792 F.3d 1087, and its memorandum (Pet. App. 18-25) is reprinted at 618 Fed. Appx. 886. The order of the district court (Pet. App. 34-52) is available at 2013 WL 6655176.

JURISDICTION

The judgment of the court of appeals was entered on July 6, 2015. A petition for rehearing was denied on August 13, 2015 (Pet. App. 53). The petition for a writ of certiorari was filed on November 10, 2015, and was granted on question 1 only on January 19, 2016. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant provisions are reproduced in an appendix to this brief. App., *infra*, 1a-11a.

STATEMENT

Following a jury trial in the United States District Court for the Northern District of California, petitioner was convicted of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371, and securities fraud, in violation of 15 U.S.C. 78j(b) (2006) and 15 U.S.C. 78ff, 17 C.F.R. 240.10b-5, and 18 U.S.C. 2. Am. Judgment 1. He was sentenced to 36 months of imprisonment, to be followed by three years of supervised release, and was ordered to pay $738,539.42 in restitution. *Id.* at 2-3, 5. The court of appeals affirmed. Pet. App. 1-25.

1. a. In 2002, Maher Kara (Maher) joined the healthcare investment banking group at Citigroup, where he worked as a vice president and later as a director. Pet. App. 4; see J.A. 47, 67-68. In those roles, he handled highly confidential information about mergers and acquisitions involving Citigroup clients. Pet. App. 4.

Citigroup had policies and procedures, and implemented "very regular" trainings, to ensure that Maher and other investment bankers kept that information confidential. J.A. 71; see J.A. 35-39, 41-47, 49-51, 54-56, 71-78, 100-101. Maintaining confidentiality was important both to the "reputation" of Citigroup itself and to the business interests of its clients. J.A. 42; see J.A. 41-43, 55-56. For instance, if a Citigroup client sought to acquire another company, and Citigroup personnel leaked news of the planned purchase, that leak could increase the target company's stock price and make the acquisition more expensive and difficult. See J.A. 39-53, 70-76, 171-173.

Maher has an older brother named Mounir Kara, also known as Michael (Michael). The brothers were extremely close. Pet. App. 4-7; see, *e.g.*, J.A. 158, 195, 215-217, 320-323. Michael helped pay Maher's business-school tuition, was the best man and "stood in for their deceased father at Maher's wedding," and taught Maher basic science to aid him in his work. Pet. App. 6; see, *e.g.*, J.A. 89-91, 104-107, 174-175, 195, 217-218. Maher cared for his brother as Michael struggled to cope with their father's death in 2004. See, *e.g.*, J.A. 90-91, 146-147, 263-264.

After Maher joined the healthcare group at Citigroup, he "began to discuss aspects of his job" with Michael. Pet. App. 4. At first, the discussions were fairly general. J.A. 79-81. But they eventually became more specific and focused on particular companies about which Maher had confidential knowledge, and "Maher began to suspect that Michael was trading on the information," although "Michael initially denied it." Pet. App. 4; see J.A. 80-81, 84-85.

Ultimately, "Michael became more brazen and more persistent in his requests for inside information, and Maher knowingly obliged." Pet. App. 4. From late 2004 to 2007, Maher conveyed to Michael highly confidential corporate information—in particular, information about pending mergers and acquisitions—to which Maher had access through his work at Citigroup, and did so with the understanding that Michael was using that information to make securities trades. *Ibid.*; see, *e.g.*, J.A. 57, 78-83, 97-98, 115-125, 247-248, 277-279, 295-296, 309-313; see also J.A. 82-83 (Maher "fully expected" Michael was trading on the information); J.A. 299-301 (Maher tells Michael "[y]ou may want to take a position in" an upcoming acquisition).

Maher testified that he tipped Michael "with the intent that [Michael] benefit from information about companies or stocks" and "knew" the information "would benefit" Michael. J.A. 57; see J.A. 80-82 (Maher explaining that he tipped Michael "to get him off my back, and to benefit him"). Maher, in his own words, "knowingly, willfully acted to benefit [his] brother," J.A. 119, and he did so to "fulfill[] whatever needs [Michael] had," J.A. 82; see J.A. 118-119 (Maher testifies "[i]t would benefit [Michael], and benefit me directly"). On one occasion in 2007, for example, Michael called Maher asking for a "favor" and for "information"; when Michael refused Maher's offer of money, Maher, worried about "what [Michael] had done," tipped him about an upcoming acquisition of a company called Biosite. J.A. 124-128; see Pet. App. 6; J.A. 309-314, 331-333; see also J.A. 124 (Michael told Maher "I owe somebody" and "Please, I need this"). Although Maher regretted that tip and asked Michael not to trade, Maher thought that Michael "was going to trade on [the information]." J.A. 125; see J.A. 165.

As Michael testified, Maher's information gave Michael an extraordinary trading advantage. It "provide[d] * * * [him] timely information that the average person does not have access to" and "would never have or dream of" having. J.A. 250-251; see J.A. 192-193. To avoid detection, Maher often purposely tipped Michael about acquisitions on which Maher himself was not directly working, in an attempt to make it more difficult to trace the information back to Maher, and the brothers used code words in their emails. J.A. 116-118, 124-125, 128-131, 226-248.

b. In 2003, Maher became engaged to marry petitioner's sister. Pet. App. 4. The Kara and Salman families—and Michael and petitioner in particular—formed a warm relationship. *Id.* at 4-5; see, *e.g.*, J.A. 60-62, 85-86, 106-107, 133-138, 283-286. As Michael explained at trial, he and petitioner "[a]bsolutely" became friends. J.A. 223.

Late in 2004, Michael began sharing with petitioner (and others) the inside information that he obtained from Maher. Pet. App. 5; see J.A. 130-131, 266-280; see also J.A. 257-259 (Michael testifies that when information about "a major deal" came from Maher, petitioner was "first on [Michael's] phone list"). Michael also encouraged petitioner to trade on that information, as Michael himself was doing. Pet. App. 5; see J.A. 254-259.

Petitioner followed that advice. See, *e.g.*, J.A. 262-263, 276, 357-358 (petitioner executed same trades as Michael). But although petitioner had his own brokerage account, J.A. 366, he did not use it to make the trades. Rather, petitioner "arranged to deposit money, via a series of transfers through other accounts, into a brokerage account held jointly in the name of his wife's sister and her husband, Karim Bayyouk." Pet. App. 5; see, *e.g.*, J.A. 318, 349-358. Petitioner conveyed the inside information to Bayyouk, who executed the trades, and the two split the profits—an amount that ultimately totaled more than $1.5 million. Pet. App. 5, 19; see, *e.g.*, J.A. 349-357 (petitioner used $300,000 for down payment on house).

Nearly $1 million of those profits came from Maher's tip to Michael in 2007 that Biosite was about to be acquired by a Citigroup client. J.A. 52-54, 122-128; 9/17/13 Tr. 335, 341, 456-465; 9/24/13 Tr. 1510-1511. Within hours of the tip, Michael called petitioner, who called Bayyouk, and Bayyouk bought over $100,000 of Biosite options. J.A. 309-313, 365-366; 9/25/13 Tr. 1571-1576, 1657. The acquisition was publicly announced before the next trading day, 9/17/13 Tr. 344—and that announcement caused the price of Biosite stock to increase significantly, thus allowing petitioner and Bayyouk to realize an overnight windfall. 9/18/13 Tr. 675-678; see 9/25/13 Tr. 1568-1569; see also 9/24/13 Tr. 1423-1424 (Bayyouk lied to SEC about Biosite trades). Petitioner then paid Michael a kickback of approximately $10,000 to thank him for the information on Biosite and other companies. J.A. 317-318; 9/23/13 Tr. 1140-1142.

c. Petitioner "knew full well that Maher Kara was the source of the information" that formed the basis for those trades. Pet. App. 5. Petitioner, who had experience trading securities, J.A. 346-347, was aware that Maher worked as an investment banker at Citigroup, see, *e.g.*, J.A. 88, 104, 106-107, 222-224, 377-378. Because petitioner was risking hundreds of thousands of dollars, he wanted to "know how solid [Michael's] information was." J.A. 340; see J.A. 339. It was also important to Michael that petitioner know that Maher was the tipper; Michael hoped it would make Maher seem more powerful and prosperous in the eyes of the Salman family. See J.A. 257-260.

Accordingly, Michael repeatedly informed petitioner that "Maher is the source of all of this information." J.A. 286; see J.A. 256-257 (petitioner "[d]irect[ly]" asked Michael where the inside information came from, and Michael responded "Maher"); see also Pet.

App. 5; J.A. 252-253, 265-266, 382-383. In one instance, Michael told petitioner that he would "check with Maher" to learn when a target corporation was likely to be acquired. J.A. 300-302.

Petitioner also knew that Maher's disclosures were illicit. In 2005, Michael saw papers on petitioner's desk relating to the trading and angrily warned petitioner to be careful with the information "because it was coming from Maher." Pet. App. 5-6; see J.A. 284-286. Petitioner agreed on the need to "protect" Maher and offered to shred the papers. Pet. App. 6; see J.A. 284-287.

Finally, petitioner knew about the close relationship between Maher and Michael. Pet. App. 6. The Kara and Salman families were intertwined, and petitioner "would have had ample opportunity to observe Michael and Maher's interactions at their regular family gatherings." *Ibid.* For example, petitioner attended Maher's wedding, where Michael brought Maher to tears by giving a toast describing "how he spoke to [Maher] nearly every day" and explaining that Maher was "his 'mentor,' his 'private counsel,' and 'one of the most generous human beings he knows.'" *Id.* at 6-7; see J.A. 155-159.

2. a. Petitioner was charged with four counts of securities fraud and one count of conspiracy to commit securities fraud. J.A. 389, 392; Pet. App. 35-36.

The district court instructed the jury that petitioner could be found guilty of securities fraud only if the government established beyond a reasonable doubt that petitioner "willfully used a device or scheme to defraud someone or engaged in any act, practice, or course of business that operates or would operate as a fraud or deceit upon any person." J.A. 393; see J.A.

394 (instructing that "'[w]illfully' means intentionally undertaking an act for the wrongful purpose of defrauding or deceiving someone"). The court also instructed the jury that to establish that petitioner engaged in such fraud or deceit the government had to prove beyond a reasonable doubt that (1) the insider, Maher, "intentionally breached [a] duty of trust and confidence" owed to his employer or its clients "by disclosing confidential, material, non-public information" and by "personally benefit[ting] in some way, directly or indirectly," from that disclosure; and (2) petitioner knew that he was trading on the basis of inside information and that the information had been improperly disclosed by Maher for "personal benefit." J.A. 396-397; see J.A. 393-395.

The district court instructed the jury that "[p]ersonal benefit includes not only monetary gain * * * but also a reputational benefit or the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend. The benefit does not need to be financial or tangible in nature." J.A. 398-399. Petitioner did not object to that instruction. Compare 11-cr-625 Docket entry No. 191, at 7, with J.A. 398-399.

b. The jury found petitioner guilty on all counts. Pet. App. 7. Petitioner moved for a new trial, arguing (among other things) that the government adduced insufficient evidence that petitioner knew that Maher personally benefited. *Id.* at 34, 49. The district court denied the motion. *Id.* at 47-52. The court noted the "substantial" evidence of petitioner's knowledge, including the steps petitioner took to hide his trading to "protect" Maher and petitioner's awareness that Michael and Maher "were brothers with a very close relationship." *Id.* at 50-52.

3. The court of appeals affirmed. Pet. App. 1-25. The court rejected petitioner's argument, based on the Second Circuit's decision in *United States* v. *Newman*, 773 F.3d 438 (2014), cert. denied, 136 S. Ct. 242 (2015), that "the evidence was insufficient to find either that Maher Kara disclosed the information to Michael Kara in exchange for a personal benefit, or, if he did, that [petitioner] knew of such benefit." Pet. App. 9.

The court of appeals explained that, under this Court's decision in *Dirks* v. *SEC*, 463 U.S. 646 (1983), a "tippee" who receives confidential inside information is liable if "the insider personally will benefit, directly or indirectly, from his disclosure" and "the tippee knows or should know that there has been such a breach" of fiduciary duty. Pet. App. 11 (brackets omitted) (quoting *Dirks*, 463 U.S. at 660, 662). The court emphasized *Dirks*'s recognition that an insider personally benefits from disclosing confidential information when he "makes a gift of confidential information to a trading relative or friend." *Id.* at 12 (emphasis omitted) (quoting *Dirks*, 463 U.S. at 664). And the court found that "Maher's disclosure of confidential information to Michael, knowing that he intended to trade on it, was precisely the 'gift of confidential information to a trading relative' that *Dirks* envisioned." *Ibid.* (quoting *Dirks*, 463 U.S. at 664).

In ruling that petitioner had knowledge of the personal benefit, the court of appeals noted Michael's testimony "that he directly told [petitioner] that it was Michael's brother Maher who was, repeatedly, leaking the inside information that Michael then conveyed to [petitioner], and that [petitioner] later agreed that they had to 'protect' Maher from exposure." Pet. App. 12. The court stated that, given "the Kara brothers' close relationship, [petitioner] could readily have inferred Maher's intent to benefit Michael." *Ibid.*; see *id.* at 25. Accordingly, the court concluded, "there can be no question that, under *Dirks*, the evidence was sufficient for the jury to find that Maher disclosed the information in breach of his fiduciary duties and that [petitioner] knew as much." *Id.* at 12.

The court of appeals rejected petitioner's argument that "because there is no evidence that Maher received any * * * tangible benefit [of a pecuniary or similarly valuable nature] in exchange for the inside information, or that [petitioner] knew of any such benefit, the Government failed to carry its burden." Pet. App. 15. "To the extent [the Second Circuit's decision in] *Newman* can be read to go so far," the court stated, that decision would "depart from the clear holding of *Dirks*." *Id.* at 15-16 (citing *Dirks*, 463 U.S. at 664).

Finally, the court of appeals noted that the evidence of securities fraud in this case was strong and direct. Pet. App. 17. Because Maher "testified that he disclosed the material nonpublic information for the purpose of benefitting and providing for his brother Michael," the court observed, "the evidence that Maher Kara breached his fiduciary duties could not have been more clear." *Id.* at 16; see, *e.g.*, *ibid.* ("the Government presented direct evidence that the disclosure was intended as a gift of market-sensitive information"); *id.* at 17 ("jury had more than enough facts" to conclude that Maher "knew that there was a potential (indeed, a virtual certainty) that Michael would trade on" the inside information Maher provided). If such evidence were insufficient to establish a violation of the securities laws, the court concluded, "a corporate insider or other person in possession of confidential and proprietary information would be free to disclose that information to her relatives, and they would be free to trade on it, provided only that she asked for no tangible compensation in return." *Id.* at 16.

SUMMARY OF ARGUMENT

Under *Dirks* v. *SEC*, 463 U.S. 646 (1983), a tippee of confidential information from a corporate insider can be liable for securities fraud when the insider has personally benefited, in breach of his fiduciary duty, by disclosing the information for securities trading. *Dirks* made clear that the requisite personal benefit exists not only when the insider will reap a pecuniary gain from disclosure, but also when "an insider makes a gift of confidential information to a trading relative or friend." *Id.* at 664.

The essential quality of a gift of confidential corporate information—and the reason why a gift of such information for trading breaches the insider's fiduciary duty—is that it serves personal, not corporate, purposes. Thus, when the objective facts show that information was provided as a gift for securities trading, and no corporate purpose exists for the disclosure, the personal-benefit test is satisfied. Personal gifts, of course, inherently provide tangible and intangible benefits to the giver, and personal benefit is particularly clear when an insider gives information for trading to a close friend or relative. That is doubtless why *Dirks* gave those instances as exemplars of gift liability. But courts need not inquire into the nature or closeness of any relationship between the insider who makes a gift of confidential information and his beneficiary.

Dirks's pronouncement about gifts has governed the securities markets for more than three decades. And Congress has endorsed that holding by repeatedly amending the insider-trading laws in ways that build on this Court's insider-trading decisions without alteration. Nothing justifies paring back those settled standards.

Petitioner nevertheless invites this Court to upend insider-trading law. He first asks the Court to repudiate insider-trading liability. Br. 21-24. Alternatively, he would rewrite *Dirks* to require proof that an insider provided a tip "in exchange for pecuniary gain" to trigger liability, thus eliminating gift liability. Br. 19. This Court should reject those contentions.

The proscription of insider trading under Section 10(b) and Rule 10b-5 targets a well-recognized form of deception in connection with securities transactions. It does not reflect judge-made law unmoored from the text of the statute. And petitioner's claim that *Dirks* should be revised to require that a tipper obtain a "pecuniary gain" is fundamentally unsound. *Dirks* expressly held that a tipper breaches his fiduciary duty by providing information for trading *both* when he expects "pecuniary gain" *and* when he "makes a gift." 463 U.S. at 663-664. Petitioner makes scant effort to grapple with the language of *Dirks*, let alone refute the Court's logical and common-law basis for treating gifts of confidential information as breaching the insider's fiduciary duty and harming both the corporation and its shareholders.

Instead, petitioner mischaracterizes gift liability to suggest that it is impermissibly vague or overbroad.

Neither suggestion has merit. The line between a corporate purpose and a personal one is readily intelligible to courts and citizens and was selected by *Dirks* precisely to provide necessary guidance. An insider's gift of confidential information falls on the personal side of the line. And the requirement to prove scienter is an additional strong safeguard. See *United States* v. *O'Hagan*, 521 U.S. 642, 665-666 (1997). Experience confirms the workability and necessity of the *Dirks* principle.

Petitioner's "pecuniary gain" limitation would seriously harm investors and damage confidence in the fairness of the nation's securities markets. Favored tippees could reap instant, no-risk profits at the expense of stockholders, free from securities-law liability. Such trading, which would likely proliferate, would undermine a core purpose of the securities laws: to "eliminate the idea that use of inside information for personal advantage is a normal emolument of corporate office." *Dirks*, 463 U.S. at 653 n.10.

Applying the proper test, petitioner's convictions should be affirmed: he knowingly traded on the basis of information that he knew an insider disclosed for no corporate purpose, but instead as a personal gift to the insider's brother for trading. Petitioner knowingly exploited that breach of fiduciary duty in trading and thus violated the securities laws.

ARGUMENT

A CORPORATE INSIDER'S GIFT OF CONFIDENTIAL CORPORATE INFORMATION FOR USE IN SECURITIES TRADING VIOLATES THE SECURITIES LAWS

A. *Dirks*'s Personal-Benefit Standard Encompasses A Tipper's Gift Of Confidential Information For Use In Trading

1. The Dirks *framework governs tipping cases*

a. Congress enacted the Securities Exchange Act of 1934 (Exchange Act), 15 U.S.C. 78a *et seq.*, to "insure honest securities markets and thereby promote investor confidence." *United States* v. *O'Hagan*, 521 U.S. 642, 658 (1997); see 15 U.S.C. 78b. Section 10(b) of the Exchange Act makes it "unlawful for any person * * * [t]o use or employ, in connection with the purchase or sale of any security * * * , any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe." 15 U.S.C. 78j(b). The SEC's Rule 10b-5, which implements Section 10(b), forbids the use, "in connection with the purchase or sale of any security," of "any device, scheme, or artifice to defraud" or any other "act, practice, or course of business" that "operates * * * as a fraud or deceit." 17 C.F.R. 240.10b-5.

A corporate insider violates the antifraud provisions of Section 10(b) and Rule 10b-5 by "trad[ing] in the securities of his corporation on the basis of material, nonpublic information." *O'Hagan*, 521 U.S. at 651-652. Under the "classical" theory, such trading "qualifies as a 'deceptive device'" within the meaning of Section 10(b) because it violates the "relationship of trust and confidence" that exists "between the shareholders of a corporation and those insiders who have obtained confidential information by reason of their position with that corporation." *Id.* at 652 (citation omitted). To avoid deceiving "uninformed . . . stockholders," a corporate insider in possession of such information must either publicly "disclose" it or "abstain from trading." *Ibid.* (citation omitted). And "a corporate 'outsider'" can be held liable for the misappropriation of material, nonpublic information from its lawful possessor, if the outsider acts deceptively by pretending loyalty while breaching a duty he owes to the "source of the information." *Id.* at 652-653.[1]

b. In *Dirks* v. *SEC*, 463 U.S. 646 (1983), this Court addressed the scope of "tipper-tippee" insider-trading liability—that is, liability that arises from an insider's disclosure of confidential corporate information to others who "exploit[]" it in trading. *Id.* at 659, 664. An ex-officer at Equity Funding of America told Dirks, a broker-dealer, that the company's assets were "vastly overstated as the result of fraudulent corporate practices." *Id.* at 649. Dirks investigated by speaking to present and former employees who corroborated the fraud; he urged a Wall Street Journal reporter to publish a story on it; and he "openly discussed the information he had obtained with a number of clients and investors," some of whom then sold

[1] The personal-benefit analysis is the same under both the "classical" and "misappropriation" theories of insider trading, see *O'Hagan*, 521 U.S. at 651-652, and the facts of this case can be analyzed under both theories—*i.e.*, Maher misappropriated information in violation of a "duty of trust and confidence" owed to Citigroup and its clients, *id.* at 652-653, and Maher was a corporate advisor who, while not actually an insider, became a "fiduciar[y] of the shareholders" of those clients, *Dirks* v. *SEC*, 463 U.S. 646, 655 & n.14 (1983). This brief's references to "insiders" should be read to include misappropriators.

their holdings in the corporation's securities. *Id.* at 649-650. Although Dirks's efforts ultimately sparked public exposure of the fraud, the SEC censured him for aiding and abetting violations of Rule 10b-5 "by repeating the [fraud] allegations" to the sellers. *Id.* at 651; see *id.* at 649-650, 652 n.8.

In an opinion by Justice Powell, this Court held that Dirks had not violated the securities-fraud laws. The Court disapproved the broad theory, which it viewed as implicit in the SEC's censure of Dirks, "that the antifraud provisions" always "require equal information among all traders." 463 U.S. at 657; see *id.* at 654-655; see also *Chiarella* v. *United States*, 445 U.S. 222, 232 (1980) (explaining that "the element required to make silence fraudulent" in securities transactions is "a duty to disclose"). Nevertheless, the Court confirmed, a corporate insider violates Rule 10b-5 when he possesses information "intended to be available only for a corporate purpose and not for the personal benefit of anyone," and "take[s] advantage of that information by trading without disclosure." 463 U.S. at 653-654 (citations omitted). That action violates the insider's fiduciary duty to shareholders. *Id.* at 654. And, the Court held, "[t]he need for a ban on some tippee trading is clear." *Id.* at 659; see *ibid.* (noting that it is unlawful for an insider "to do indirectly," through disclosing inside information to "'any other person,'" what the insider cannot do directly) (quoting 15 U.S.C. 78t(b)). The Court explained that a tippee's duty is "derivative from * * * the insider's duty"—that is, "a tippee assumes a fiduciary duty * * * when the insider has breached his fiduciary duty to the shareholders by disclosing the information to the tippee and the tippee knows or should know that there has been a breach." *Id.* at 659-660.

In determining whether an insider has breached his duty, the Court stated, the relevant question "is whether the insider personally will benefit, directly or indirectly, from his disclosure." 463 U.S. at 662. To identify such a breach of duty, the Court wrote, decisionmakers must "focus on objective criteria," and "[t]here are objective facts and circumstances that often justify such an inference." *Id.* at 663-664. "For example," the Court observed, "there may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention" on the part of the insider "to benefit the particular recipient." *Id.* at 664; see *id.* at 663 (describing "pecuniary gain or a reputational benefit that will translate into future earnings" as forms of personal benefit). In addition, "[t]he elements of fiduciary duty and exploitation of nonpublic information also exist when an insider makes a gift of confidential information to a trading relative or friend," a situation in which "[t]he tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient." *Id.* at 664; see *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 311 n.21 (1985) (endorsing *Dirks*'s gift language).

Applying that test, the Court found no violation by Dirks because the insiders did not breach their duty to shareholders. 463 U.S. at 662, 665; see *id.* at 667. The "tippers were motivated by a desire to expose the fraud," and they "received no monetary or personal benefit for revealing Equity Funding's secrets, nor was their purpose to make a gift of valuable information to Dirks." *Id.* at 667.

2. *Dirks's personal-benefit test is satisfied by disclosure of corporate information without a corporate purpose*

Under *Dirks*, an insider personally benefits from disclosing confidential information for trading when he acts for personal, rather than corporate, reasons. That analysis is confirmed by the basis for *Dirks*'s rule, the examples *Dirks* furnished, and common-law principles.

a. The personal-benefit requirement is a means of "determin[ing] whether the insider's 'tip' constituted a breach of the insider's fiduciary duty" to act in the shareholders' interest. *Dirks*, 463 U.S. at 661; see *id.* at 663 n.23. That duty—which *Dirks* termed the "*Cady, Roberts* duty," see *In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961)—is premised on "the existence of a relationship affording access to inside information" that is "intended to be available only for a corporate purpose and not for the personal benefit of anyone" and "the unfairness of allowing a corporate insider to take advantage of that information." 463 U.S. at 653-655 (quoting *Chiarella*, 445 U.S. at 227, and *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 43 S.E.C. 933, 936 (1968) (quoting *Cady, Roberts*, 40 S.E.C. at 912)); see *id.* at 655 n.14 (stating that "outsiders may become fiduciaries of the shareholders" when "given access to information solely for corporate purposes").

An insider who trades for himself on material, non-public information inherently acts contrary to a corporate purpose, to the detriment of shareholders. That trading is a breach of his fiduciary duty. The same is true when an insider, while not trading himself, provides the information to a tippee for that person to trade. See *Dirks*, 463 U.S at 659, 663. As *Dirks* emphasizes, "[n]ot only are insiders forbidden by their fiduciary relationship from personally using undisclosed corporate information to their advantage, but they also may not give such information to an outsider for the same improper purpose of exploiting the information for their personal gain." *Id.* at 659 (citing 15 U.S.C. 78t(b)). Either situation places the insider's personal interests above his fiduciary duty to shareholders and involves the same unfairness. And both situations are characterized by the same feature: the absence of any corporate purpose for acting, and the consequent inference of personal benefit.

The existence of a corporate purpose for disclosing confidential information indicates that a tipper is acting within the bounds of the applicable duty. As *Dirks* explained, "[a]ll disclosures of confidential corporate information are not inconsistent with the duty insiders owe to shareholders." 463 U.S. at 661-662. For example, in certain circumstances, disclosure may be made for the very purpose of serving the shareholders' (or a client's) interests. *Id.* at 662 n.22 (example of disclosure to representative of another corporation in confidential "negotiations" for possible "takeover"). And a disclosure of material information also may be made mistakenly in the course of carrying out appropriate corporate functions. *Id.* at 662.

The existence of "personal benefit" is simply the flip side of the absence of a corporate purpose. *Dirks* expressly contrasted a personal benefit with a corporate purpose, treating them as opposite sides of the same coin. 463 U.S. at 653-654. As noted, the personal-benefit language in *Dirks* is drawn directly from *Cady, Roberts*, which recognized that confidential corporate information is "available only for a corporate purpose and not for the personal benefit of anyone." *Id.* at 654 (citation omitted). In that formulation, information can be used either for a corporate purpose or for a personal benefit, and so a personal benefit exists when a corporate purpose does not. See *Webster's New International Dictionary* 1828 (2d ed. 1957) (*Webster's*) (definition of "personal" includes "peculiar or proper to private concerns; not public or general"); cf. *FCC* v. *AT&T Inc.*, 562 U.S. 397, 404 (2011) ("personal," characteristically, "mean[s] precisely the *opposite* of business related"). Similarly, *Dirks* states—again quoting *Cady, Roberts*—that "[a] significant purpose of the Exchange Act was to eliminate the idea that use of inside information for personal advantage was a normal emolument of corporate office." 463 U.S. at 653 n.10 (quoting 40 S.E.C. at 912 n.15). That language reinforces *Dirks*'s core precept: acting for a corporate purpose is consistent with a corporate officer's or employee's fiduciary responsibilities, while using corporate information for personal advantage or benefit is not. See *id*. at 663 (emphasizing that "objective criteria" will distinguish acting for "legitimate business justification" from "direct or indirect personal benefit").

b. That a tipper personally benefits when acting for a personal, rather than corporate, purpose in giving a tippee confidential information for trading is borne out by the specific examples of personal benefit that *Dirks* gives as well as by the result in that case.

Dirks states that an inference of personal benefit arises when a tip is part of a *quid pro quo* in which the insider receives "pecuniary gain" or a "reputational" boost. 463 U.S. at 663. A tipper providing information to receive such a return is plainly acting not for a corporate purpose but for a personal one. *Dirks* also says that a personal benefit "exist[s] when an insider makes a gift of confidential information to a trading relative or friend." *Id.* at 664. In that circumstance, as well, the insider acts for a personal purpose and—given that the tip is a "gift" precisely because the tipper understands that the tippee intends to trade on the information and make money from it—sets a third party against the shareholders' interests.

The outcome in *Dirks* reflects that analysis. The tippers in *Dirks* acted consistent with the shareholders' interests. See 463 U.S. at 666-667. They did not "violate[] their *Cady, Roberts* duty to the corporation's shareholders by providing information to *Dirks*"; they were "motivated by a desire to expose the [corporate] fraud," and that exposure was ultimately for the shareholders' benefit (even if a recipient might have used the information to their short-term "disadvantage"). *Id.* at 666-667 & n.27. Because the insiders did not breach their duties by acting for a personal purpose, such as a "purpose to make a gift of valuable information," *id.* at 667, the tippee (Dirks) had no derivative securities-fraud liability.

c. The rule that an insider violates his fiduciary duty under *Dirks* by disclosing information for the non-corporate purpose of enabling the tippee to trade —and thus profit at the expense of the shareholders (or the source of the information)—accords with the common law. See, *e.g.*, 463 U.S. at 653 n.10, 660 n.20 (drawing on agency law and corporate law); *O'Hagan*, 521 U.S. at 653 (agency law and embezzlement law); *Chiarella*, 445 U.S. at 227-228 & n.10 (corporate law and other common law). In the corporate context, specified fiduciaries must act for the "benefit of all the shareholders" and "solely in the interest of the corporation," rather than for their own "self-interest and self-protection." 3 *Fletcher Cyclopedia of the Law of Corporations* § 848, at 238-239 (2010); see *id.* § 837.60, at 201 (stating that the "best interest of the corporation and its shareholders take precedence over any interest possessed by" certain fiduciaries "and not shared by the shareholders generally"); see also *United States* v. *Byrum*, 408 U.S. 125, 142 (1972) (certain fiduciaries may not misuse position "for personal or family advantage to the detriment of the corporation or other stockholders"). And in the agency context, "an agent is subject to a duty to the principal not to use or to communicate information confidentially given him by the principal * * * in competition with or to the injury of the principal, on his own account or on behalf of another." Restatement (Second) of Agency § 395 (1958); see Restatement (First) of Agency §§ 387 cmt. b, 395 (1933); Floyd R. Mechem, *Outlines of the Law of Agency* § 297, at 190 (3d ed. 1923) (agent may not "promote his own or some other person's interest at the expense of the principal's").

Similarly, in the law of embezzlement—which this Court has closely analogized to insider-trading law, see *O'Hagan*, 521 U.S. at 653-654—a person may not "appropriat[e] to [his] own use" money or property that has been "entrusted" to him by another, *Carpenter* v. *United States*, 484 U.S. 19, 27 (1987) (quoting *Grin* v. *Shine*, 187 U.S. 181, 189 (1902)). That conduct remains unlawful even if the person who takes the property for his own use fails to retain it for himself or to realize any profit from it. See, *e.g.*, *Republic of Iraq* v. *ABB AG*, 768 F.3d 145, 166 (2d Cir. 2014) (embezzlement occurs "where the insider's misconduct benefits only himself or a third party"), cert. denied, 135 S. Ct. 2836 (2015). The critical factor is the embezzler's use of the property—here, confidential information—not for the purposes for which it was entrusted, but for the person's own purposes.

3. **Dirks** ***makes clear that the tipper's understanding that the information will be used for trading by a tippee is critical to liability***

Securities fraud requires more than simple breach of fiduciary duty. *Dirks*, 463 U.S. at 653-654 & n.10. Unlawful tipping "deceives, manipulates, or defrauds," *id.* at 663 (citation and brackets omitted), only when the insider breaches his fiduciary duty by disclosing inside information to a favored person, and does so knowing or expecting that the information will be used for securities trading. That act violates an insider's duty not to deceive and harm the corporation or shareholders by acting "against" their "interests" with respect to securities transactions. *Bateman Eichler*, 472 U.S at 311 n.21; see *O'Hagan*, 521 U.S. at 653-654. The insider's knowledge that a tippee will "exploit[]" the confidential information in trading is thus critical to finding securities fraud. 463 U.S. at 664 (referring to "elements of fiduciary duty *and* exploitation of nonpublic information") (emphasis added).[2]

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[2] The insider's disclosure of information without knowledge that the tippee will trade may result in liability for a trading *tippee* under the misappropriation doctrine. Cf. 17 C.F.R. 240.10b5-2 (clarifying rules under the misappropriation doctrine when a tippee misuses information that was not disclosed to him for purposes of trading). But the tipper will not be liable under Rule 10b-5 absent the requisite degree of awareness of the likelihood of trading.

Accordingly, "the government must prove" that "the tipper conveyed material nonpublic information to his 'tippee' with the understanding that it would be used for securities trading purposes." *United States* v. *Gansman*, 657 F.3d 85, 92 (2d Cir. 2011). The tipper's understanding that the tippee will use the confidential information for trading is relevant to various elements of liability under Section 10(b) and Rule 10b-5. In addition to speaking to the existence of the relevant breach of duty, and the resulting deception necessary to establish fraud, see *Dirks*, 463 U.S. at 664; *O'Hagan*, 521 U.S. at 653-655, it is relevant to whether the deception is in connection with trading in securities, see 15 U.S.C. 78j; *O'Hagan*, 521 U.S. at 655-656, as well as to whether a defendant acted with the requisite scienter by possessing the "intent to deceive, manipulate, or defraud," *Dirks*, 463 U.S. at 663 n.23 (citation omitted).

4. A tipper personally benefits by giving a gift of information for trading

Under the *Dirks* framework, a gift of information for trading intrinsically involves a personal benefit.

a. *Dirks* expressly states that a gift of confidential information for trading satisfies the requirement that the tipper personally benefit. See 463 U.S. at 662-664; see also *Bateman Eichler*, 472 U.S at 311 n.21 (repeating gift language from *Dirks*). That is so for several reasons. As *Dirks* emphasizes, a gift of information with the expectation that the recipient will convert it into cash is functionally equivalent to "trading by the insider himself followed by a gift of the profits to the recipient." 463 U.S. at 664. Given the close equivalency between such trading and a gift of information, it would make "scant sense" to find that the insider had breached his duty in one situation but not the other. *O'Hagan*, 521 U.S. at 659 (making same point in adopting misappropriation theory as counterpart to classical insider-trading theory).

In order for a gift of information to trigger liability, the government need not show that the insider personally profited (or expected to) in a financial sense. The point of a gift is to transfer something of value without a *quid pro quo*. See *Webster's* 1056 (defining "gift" as "anything voluntarily transferred * * * without compensation"). Thus, if the evidence establishes that the insider gave a gift of information for trading and that a business justification for the disclosure is absent, the factfinder need not investigate the exact nature of the personal reasons that drove the tipper to decide to confer such a gift. See *SEC* v. *Maio*, 51 F.3d 623, 633 (7th Cir. 1995) ("Absent some legitimate reason for [the tipper's] disclosure, * * * the inference that [the] disclosure was an improper gift of confidential corporate information is unassailable. After all, he did not have to make any disclosure, so why tell [the tippee] anything?").

Liability for giving a gift of information is further compatible with a personal-benefit standard because insiders who make a gift of information for trading may benefit in tangible or intangible ways. A tipper who gives a gift of confidential information for trading can save money if he intended to provide funds to the tippee anyway; passing the information does not cost the tipper anything out of pocket. See Pet. App. 6. Instead of giving a household employee a monetary bonus for good performance, for example, a tipper might simply disclose valuable nonpublic information and keep the bonus money. Cf. *SEC* v. *Blackwell*, 291

F. Supp. 2d 673, 692-693 (S.D. Ohio 2003). Similarly, the tipper can fulfill what he sees as an unbreakable social obligation—like supporting an aging parent or a struggling adult child—by providing information for trading. Cf. *CBI Indus., Inc.* v. *Horton*, 682 F.2d 643, 644-647 (7th Cir. 1982) (stating that "[a] person's 'wealth,' in a realistic though not pecuniary sense, is increased by increasing the pecuniary wealth of his children"). And the tipper can give a gift to impress his associates, or because of vanity about his generosity. See Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 Harv. L. Rev. 322, 348 (1979) (Brudney) (explaining that a giver may obtain "prestige or status or the like"), cited in *Dirks*, 463 U.S. at 663-664. Any suggestion that giving gifts does not confer something of value on the tipper thus would be blind to social and cultural realities.

Because of the variety of motives and rewards from giving a gift of information for trading, however, the personal-benefit requirement properly focuses on whether the tipper is serving a corporate purpose, not on the question of what the gifting tipper obtains for himself from his misuse of information. Accordingly, *Dirks* does not call for a subjective inquiry into whether the tipper received some form of financial or psychic value as a result of his actions. In *Dirks* itself, the Court observed that the giving of a gift in certain circumstances was an "objective" circumstance that would allow the factfinder to infer the requisite personal benefit. 463 U.S. at 663-664. The Court did not suggest that any subjective inquiry into the nature of the giver's motivations or rewards was necessary. See *id.* at 663 ("In determining whether the insider's purpose in making a particular disclosure is fraudulent, the SEC and the courts are not required to read the parties' minds.").

b. Similarly, *Dirks*'s personal-benefit test encompasses a gift to *any* person with the expectation that the information will be used for trading, not just to a "trading relative or friend." 463 U.S. at 664. The Court's use of those examples did not state a limiting principle—and such a principle would have no logical connection to the decision's rationale.

Dirks's reference to a "trading relative or friend" illustrated the Court's point that tipping information for a non-corporate purpose (*i.e.*, a personal one) breaches the relevant fiduciary duty and occasions tipper liability. The context of the discussion made clear the phrase's illustrative purpose. The sentences addressing the "trading relative or friend" appear in a portion of the opinion that is introduced by the words "[f]or example," demonstrating that the particular "objective facts and circumstances" that *Dirks* describes as "justify[ing] * * * an inference" of personal benefit to the tipper are not the exclusive facts and circumstances that can give rise to such an inference. 463 U.S. at 664. Nothing in *Dirks* suggested that those were the only gifts that could count, as opposed to the most likely improper gifts to be made.

Nor would anything in *Dirks*'s logic support a "relative or friend" restriction. A gift of confidential corporate information to an acquaintance, a household employee, or even a stranger is just as unauthorized, and just as contrary to the interests of the corporation and shareholders, as a gift to someone with whom the tipper has a closer relationship. Limiting tipper-tippee liability in gift cases to a subset of recipients would conflict with *Dirks*'s goal of identifying situations in which a tipper's disclosure of confidential information breaches his fiduciary duty. See, *e.g.*, 463 U.S. at 661-663; see also 18 Donald C. Langevoort, *Insider Trading: Regulation, Enforcement & Prevention* § 4:6 n.14 (2016) (Langevoort) ("The Court's actual phrasing refers to a gift 'to a relative or a friend.' But there is no conceptual reason to limit the category in that fashion.").

The improper nature of a disclosure that lacks any "ostensibly legitimate business justification," *Dirks,* 463 U.S. at 663, may be particularly clear when the insider provides information for trading in a close personal relationship. The facts of this case provide a stark example. And many tipping cases do involve tips to friends or relatives, see Langevoort § 11:9, likely because those are the people for whom a gift-giving tipper may be most moved to act for personal reasons and to violate his duty—and the law. But *Dirks* did not require courts to inquire into whether a particular recipient was a close enough family member to count as a tipper's "relative," or was sufficiently friendly with the tipper to count as his "friend"—and such a rule would serve no valid purpose. Under *Dirks*, a factfinder confronting a gift case involving *any* recipient must simply ask whether the tipper gave the confidential information for a personal reason expecting that it would be used for trading, thus allowing the information to be "exploit[ed]" and deceiving the party that had "repose[d] trust or confidence in him." 463 U.S. at 664-665.

B. *Stare Decisis* And Subsequent Legislation Strongly Support *Dirks*

Principles of *stare decisis* apply with special force here because *Dirks*—and its holding that a tipper personally benefits by giving a gift—has been the law for more than 30 years. And Congress has indicated its endorsement of the principles established in *Dirks*.

1. "[T]his Court does not overturn its precedents lightly," because *stare decisis* "promotes the even-handed, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Michigan* v. *Bay Mills Indian Cmty.,* 134 S. Ct. 2024, 2036 (2014) (citation omitted). In "the area of statutory interpretation," where the "legislative power is implicated," *Patterson* v. *McLean Credit Union,* 491 U.S. 164, 172 (1989), *stare decisis* "carries enhanced force," *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015), because "Congress remains free to alter what [the Court] ha[s] done," *John R. Sand & Gravel Co.* v. *United States*, 552 U.S. 130, 139 (2008) (citation omitted); see *Halliburton Co.* v. *Erica P. John Fund, Inc.*, 134 S. Ct. 2398, 2411-2413 (2014).

2. Far from altering this Court's work in interpreting Section 10(b), Congress has repeatedly approved the existing state of the law.

a. Since *Dirks* was decided, Congress has twice amended Section 10(b) without modifying the Court's standard. One of those amendments extended to "security-based swap agreements" the application of "judicial precedents decided under subsection (b) * * * that prohibit fraud, manipulation, or insider trading," including *Dirks* itself. Pub. L. No. 106-554, 114 Stat. 2763A-454 (2000); see 124 Stat. 1761 (2010).

Congress also enacted other post-*Dirks* laws that build upon existing Section 10(b) precedents. In the Insider Trading Sanctions Act of 1984 (ITSA), Pub. L. No. 98-376, 98 Stat. 1264, Congress created a civil-penalty sanction that the SEC may seek to impose upon anyone found to have tipped or traded on "material nonpublic information" in violation of the securities laws. § 2, 98 Stat. 1264. In the Insider Trading and Securities Fraud Enforcement Act of 1988 (ITSFEA), Pub. L. No. 100-704, 102 Stat. 4677, Congress increased the criminal penalties for willful violation of the securities laws and created a private cause of action for persons who contemporaneously trade with someone who is violating the securities-fraud laws through trading on "material, nonpublic information." §§ 4-5, 102 Stat. 4680; see §§ 3, 5, 102 Stat. 4677-4681 (joint and several liability in private action and civil penalty in enforcement action for person who "communicat[ed]" inside information). Congress also stated that the SEC's "rules and regulations * * * governing" insider trading are "necessary and appropriate in the public interest and for the protection of investors" and that the SEC has "fairly" enforced those rules "within the limits of accepted * * * judicial construction of such rules and regulations." § 2, 102 Stat. 4677. And in the STOCK Act, Pub. L. No. 112-105, 126 Stat. 291, enacted in 2012, Congress provided that members of Congress, judicial officers, and executive-branch, judicial, and congressional employees "are not exempt from the insider trading prohibitions arising under the securities laws, including section 10(b) * * * and Rule 10b-5" and are prohibited "from using nonpublic information derived from their official positions for personal benefit." Pmbl., §§ 4, 9, 126 Stat. 291-292, 297-298.

Those post-*Dirks* enactments are premised on existing requirements for securities-fraud liability, including the requirement described in *Dirks*. "Congress hardly could be expected to" augment enforcement of the securities-fraud laws proscribing insider trading as it did after *Dirks* was decided—including by making explicit that those laws applied to the conduct of members of Congress themselves—"if it was dissatisfied with the substantive grounds on which" the government "could bring its actions." Donald C. Langevoort, Commentary, *The Insider Trading Sanctions Act of 1984 and Its Effect on Existing Law*, 37 Vand. L. Rev. 1273, 1274 (1984).

b. The legislative history of several of the relevant provisions also evinces Congress's awareness, understanding, and approval of the state of the law under *Dirks*. For example, the House Report accompanying enactment of ITSFEA explains that "several major court cases in recent years," including *Dirks*, "have established clear boundaries for prosecution of [insider-trading] violations." H.R. Rep. No. 910, 100th Cong., 2d Sess. 9 (1988) (1988 House Report). That Report states that ITSFEA was "not intended to alter in any respect * * * the underlying standards for tipper and tippee liability" that are "set forth in * * * *Dirks*." *Id.* at 19; see *id.* at 11 ("The legal principles governing insider trading cases are well-established and widely-known."). And the House Report accompanying enactment of ITSA discusses *Dirks*, explains that the decision "preserves insider trading liability and expresses a continued, firm disapproval of insider trading," and concludes that "the law with respect to insider trading is sufficiently well-developed at this time to provide adequate guidance." H.R. Rep. No. 355, 98th Cong., 1st Sess. 13, 15 (1983) (1983 House Report); see *id.* at 13 (warning that "any new definition [of insider trading] which might be adopted would be likely to create new ambiguities"); *id.* at 15 (stating that if *Dirks* is properly "construed by the courts" so as not to further limit insider-trading liability, "the [SEC]'s insider trading program will not be adversely affected").

Those developments strongly support the *Dirks* standard. As this Court noted in another context under Section 10(b), "Congress' decision to leave § 10(b) intact" when revising the securities laws "suggests that Congress ratified" a "well-established judicial interpretation" of Section 10(b). *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 386 (1983); see *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 381-382 (1982) (same); see also *Kimble*, 135 S. Ct. at 2409-2410 (refusing to overturn precedent when Congress "spurned multiple opportunities to reverse" because "long congressional acquiescence * * * enhance[s] even the usual precedential force" accorded "interpretations of statutes") (quoting *Watson* v. *United States*, 552 U.S. 74, 82-83 (2007)) (internal quotation marks omitted).

C. The Legal Standards That Petitioner Proposes Are Erroneous

Petitioner does not address the *stare decisis* considerations supporting *Dirks* or Congress's approval of its standard. Instead, petitioner suggests (Br. 22) that this Court "reconsider its prior cases" and hold that Section 10(b) "does not prohibit insider trading at all," at least "where transactions are conducted anonymously in public markets." Alternatively, petitioner suggests (Br. 30) that "personal benefit" in *Dirks* means only "pecuniary gain"—that is, obtaining money or its equivalent in exchange for confidential information. Those contentions lack merit.

1. Petitioner's broadest submission—made for the first time in his merits brief—is that insider trading does not involve any deceit and therefore does not fit within Section 10(b)'s proscription on the use of "any manipulative or deceptive device or contrivance." 15 U.S.C. 78j(b). That argument is incorrect.

As this Court has held for decades, insider trading most certainly does involve deception—it involves the failure to tell a party to whom the tipper or trader owes a fiduciary or similar duty that confidential information, intended to be used only for a limited purpose consistent with the duty, is being taken for personal use in an act closely "akin to embezzlement." *O'Hagan*, 521 U.S. at 654; see, *e.g.*, *id.* at 651-652, 654, 659 (insider trading violates Section 10(b) because it involves "[d]eception through nondisclosure"); *Dirks*, 463 U.S. at 653-664 (same); *Chiarella*, 445 U.S. at 230 (same). That is a straightforward interpretation of Section 10(b)'s broad text, and Congress has ratified it. See pp. 29-32, *supra*.

Petitioner nevertheless submits (Br. 21) that the Court should overrule its long-standing precedents and ignore Congress's views on the ground that Section 16(b) of the Exchange Act, 15 U.S.C. 78p(b), forbids "short-swing profits by certain corporate insiders." But the existence of Section 16(b), which "differs in focus from § 10(b)," *Lampf, Pleva, Lipkind, Prupis & Petigrow* v. *Gilbertson*, 501 U.S. 350, 360 n.5

(1991), says nothing about whether Section 10(b) covers bad acts like the ones at issue in this case. Under Section 16(b), a limited category of insiders must disgorge any profits realized from engaging in both a sale and a purchase of corporate stock within a six-month period—without regard to any "proof of actual abuse of insider information" or "proof of intent to profit on the basis of such information." *Kern County Land Co.* v. *Occidental Petroleum Corp.*, 411 U.S. 582, 595 (1973). In creating that "narrowly drawn" remedy, Congress left "some problems of the abuse of inside information" to the "general antifraud statute[] that proscribe[s] fraudulent practices by insiders," thereby "alleviat[ing] concern that ordinary investors are unprotected against actual abuses of inside information in transactions not covered by § 16(b)." *Foremost-McKesson, Inc.* v. *Provident Sec. Co.*, 423 U.S. 232, 251, 255 & n.29 (1976) (citing Section 10(b)); see generally *United States* v. *Naftalin*, 441 U.S. 768, 778 (1979). In sum, petitioner provides no support for dismantling the structure of insider-trading law that this Court synthesized and applied in *Dirks.*

2. a. Although petitioner tries to derive his "pecuniary gain" formulation from *Dirks* itself (Br. 30-31), he does not (and cannot) explain the Court's statement that personal benefit includes things "*such as* a pecuniary gain"—especially when the decision then goes on to list a number of other forms of benefit that qualify. 463 U.S. at 663 (emphasis added). In particular, he virtually ignores the Court's clear statement that a gift of confidential information is sufficient to establish that the tipper has personally benefited and thereby breached his duty. See *id.* at 664; see also *Bateman Eichler*, 472 U.S. at 311 n.21 (discussing

Dirks and stating that personal benefit "can derive from the insider's use of the information to secure a 'pecuniary gain' * * * *or* simply to confer 'a gift of confidential information'") (emphasis added).[3]

Petitioner's proposed rule would give rise to liability only where the tipper seeks to engage in an exchange: information for pecuniary value. But such an exchange is, by definition, a *quid pro quo*, something for something. If the personal-benefit requirement could not be met by a gift giver unless an exchange takes place, then the "gift" discussion in *Dirks* would have been entirely superfluous. See Pet. App. 15-16; *SEC* v. *Payton*, 97 F. Supp. 3d 558, 563 (S.D.N.Y. 2015).[4]

b. Petitioner also relies (Br. 33-34) on criminal-law decisions outside the securities-fraud context that he interprets as requiring a "tangible gain" to consum-

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[3] Petitioner notes (Br. 32) that the facts of this Court's other insider-trading cases involved fraudsters acting for their "own pecuniary benefit." But that says nothing about whether insider-trading liability should be limited to such circumstances.

[4] Petitioner suggests that the personal-benefit requirement should be difficult to satisfy—and thus should exclude gifts without a "tangible economic" payback—because, he claims, *Dirks* limited "tip-based liability" to "'extraordinary'" cases. Br. 45 (quoting *Dirks*, 463 U.S. at 657); see Br. 53. That misinterprets *Dirks*. *Dirks* uses the word "extraordinary" only to reaffirm what *Chiarella* already held: that possession alone of nonpublic information does not trigger a disclose-or-abstain duty and that it is only when an insider breaches an independent "legal obligation[]" that trading is barred. *Dirks*, 463 U.S. at 657. When discussing the personal-benefit requirement itself, *Dirks* makes clear that the requirement may be satisfied through well-recognized (but regrettably ordinary) breaches of duty—including making a "gift" of information for trading—that do not involve pecuniary gain to the giver. *Id.* at 663-664.

mate a violation—and suggests that personal benefit in an insider-trading case must similarly be understood as requiring "tangible gain." His reliance on non-securities-fraud decisions is misplaced.

The decisions at issue interpret statutory elements requiring that a defendant's conduct deprive a person of money or property, *Cleveland* v. *United States*, 531 U.S. 12, 22-23 (2000) (wire fraud); *McNally* v. *United States*, 483 U.S. 350, 357-359 (1987) (mail fraud); result in obtaining property, *Sekhar* v. *United States*, 133 S. Ct. 2720, 2724-2727 (2013) (extortion under the Hobbs Act); or involve a bribe or kickback, *Skilling* v. *United States*, 561 U.S. 358, 403-404 (2010) (honest-services mail and wire fraud). An analogous property-based element is readily satisfied in an insider-trading case: the violation involves a deprivation of the shareholders' or the corporation's property rights (or both). Fraudulent trading with shareholders injures their financial interests. See *Dirks,* 463 U.S. at 653-654. And fraudulent use of a corporation's information injures its property interests. See *Carpenter*, 484 U.S. at 25-26 (recognizing "property right in keeping confidential and making exclusive use" of "[c]onfidential business information"); see also *O'Hagan*, 521 U.S. at 653-654 (same, under misappropriation doctrine). Accordingly, when a tipper takes confidential information and gives it to a tippee for trading, the tipper has necessarily taken valuable property away from the party with the right to control how the information is used and to whom it is disclosed—and the trading with shareholders (in a classical insider-trading case) constitutes a further property-based fraud.

The question answered by the personal-benefit requirement is an entirely different one: whether such a deprivation of property involves deception. See *Dirks*, 463 U.S. at 653-655. Under *Dirks*, no deception occurs unless a fiduciary duty is breached, and no fiduciary duty is breached unless the tipper acts for his own personal purpose rather than for a corporate purpose. See *id.* at 659-667; pp. 18-28, *supra*. This Court's mail- and wire-fraud precedent is consistent with that analysis, see *Carpenter*, 484 U.S. at 27-28, and that precedent does not embrace petitioner's view that no deceptive breach occurs if the tipper uses corporate property for a non-corporate purpose but does not himself realize a resulting "tangible gain" (Br. 33). Accordingly, those cases provide no support for petitioner's restrictive personal-benefit approach.

c. Ultimately, petitioner fails to explain how his proposed rule relates to the statutory requirement addressed in *Dirks*: whether a defendant has used "any manipulative or deceptive device or contrivance" in violation of the securities laws. 15 U.S.C. 78j(b). He provides no historical or legal support for his submission that a faithless agent, who misuses corporate information entrusted to him by giving it to another for trading, has not personally benefited absent pecuniary gain. Nor can he plausibly attribute such a rule to Congress.[5] And displacing the *Dirks* framework with a newly fashioned "pecuniary gain" rule would raise a host of legal questions that petitioner does not

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[5] When Congress wanted to ensure that a proscription in the Exchange Act was limited to situations in which "profit [is] realized" by an insider, it knew how to do so. 15 U.S.C. 78p(b) (disgorgement of "profit realized by" insider who engages in short-swing trading).

even attempt to address.[6] In short, petitioner fails to offer any justification for replacing *Dirks*'s long-standing personal-benefit rule with a new set of requirements.

D. Petitioner's Attack On The *Dirks* Standard Lacks Merit

Petitioner suggests (Br. 35-57) that his "pecuniary gain" test is necessary to avoid vagueness, provide guidance to the securities markets, and prevent asserted abuses. His arguments, which are premised on a distortion of the personal-benefit test, lack merit.

1. The Dirks *standard is not vague*

The Due Process Clause bars enforcement of a criminal statute as vague only if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States* v. *Williams*, 553 U.S. 285, 304 (2008); see *Johnson* v. *United States*, 135 S. Ct. 2551, 2556-2557 (2015); *Skilling*, 561 U.S. at 402-403. Contrary to petitioner's contention (Br. 40-55), *Dirks*'s long-standing interpretation of Section 10(b) and Rule 10b-5 is not vague under either aspect of that test. It provides fair notice of what conduct constitutes illegal

[6] It is unclear, under petitioner's proposal, whether the pecuniary gain must be immediate; whether the tipper's receipt of any amount of money, no matter how small, suffices; whether the tipper must actually receive money, or just have expected to receive money at the time he gave the tip; or whether a tip that might or might not result in pecuniary gain for the tipper could result in securities fraud. See 4 *Bromberg and Lowenfels on Securities Fraud* § 6:516, at 6-1340 to 6-1340.1 (2d ed. 2016) (discussing "difficulties in deciding whether something is a pecuniary benefit").

insider trading, and it forecloses "subjective" or discriminatory prosecutorial judgments. *Williams*, 553 U.S. at 306.

a. For the more than 30 years that *Dirks* has been the law, it has been easily understood that an insider personally benefits when he acts for a personal purpose by giving a gift of confidential information for trading. *Dirks* itself says as much, in plain and unmistakable terms. See 463 U.S. at 663-664, 667; *id.* at 664 (noting importance of creating "guiding principle"); see also *Bateman Eichler*, 472 U.S. at 311 n.21.

That holding was embraced by courts, which—but for the Second Circuit's erroneous decision in *United States* v. *Newman*, 773 F.3d 438 (2014), cert. denied, 136 S. Ct. 242 (2015), see Pet. App. 15-16—applied it with apparent ease. See, *e.g.*, *id.* at 12 ("Maher's disclosure of confidential information to Michael, knowing that he intended to trade on it, was precisely the 'gift of confidential information to a trading relative' that *Dirks* envisioned."); *SEC* v. *Ginsburg*, 362 F.3d 1292, 1295, 1304 (11th Cir. 2004) ("Deliberately tipping material nonpublic information for family members' financial gain is a bad thing, and doing it twice in a year is doubly so."); *SEC* v. *Rocklage*, 470 F.3d 1, 4, 7 n.4 (1st Cir. 2006); *SEC* v. *Warde*, 151 F.3d 42, 48-49 (2d Cir. 1998); *Maio*, 51 F.3d at 627, 632-633. Commentators, financial-industry actors, and the public at large have also understood that under *Dirks* giving inside information for use in securities trading as a personal gift, and receiving inside information with knowledge that it has been bestowed as a personal gift, violates the securities laws. See, *e.g.*, Ass'n for Investment Mgmt. & Research Amicus Br. at 3-4, 14-15, *O'Hagan*, *supra* (No. 96-842) (financial-industry association characterizing the *Dirks* gift language as part of a "bright-line test" that creates "great[] certainty"). Indeed, the insider in this very case harbored no doubt that his gift-giving behavior was legally impermissible. See, *e.g.*, pp. 2-5, *supra* (Maher on notice that his behavior was illegal, regretted a tip for fear of violating the law, and took steps to hide tipping from authorities); J.A. 125 (Maher testifies he told Michael that tip "was illegal" and the SEC might "trace this phone call").

The ease with which *Dirks*'s holding has been understood is not surprising. The line between transmission of confidential information for personal use and transmission of that information for a "legitimate business justification," 463 U.S. at 663, was adopted precisely to separate permissible from impermissible conduct. No question about its application arose here. See, *e.g.*, Pet. App. 16 (concluding, based on ample evidence, that Maher tipped "for the purpose of benefiting and providing for his brother Michael").[7] That line is particularly clear given that no securities-fraud liability attaches unless the tipper has "breach[ed] a recognized [fiduciary] duty" of which he should already be aware. *O'Hagan*, 521 U.S. at 666. More specifically, it is not difficult to ascertain when an insider has tipped confidential information as a gift so that his

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[7] Nor does the possibility of closer cases produce a vagueness problem. *Dirks* recognized that its personal-benefit standard is a "question of fact," which "will not always be easy for courts." 463 U.S. at 664. But the possibility of close factual cases does not render a statute vague. "Close cases can be imagined under virtually any statute" that requires a factual determination; it is only when the standard itself is indeterminate that a vagueness problem exists. *Williams*, 553 U.S. at 306. No such indeterminacy exists here.

brother, his girlfriend, his roommate, his employee, or some other person can trade on it and make a secret profit. As petitioner acknowledges (Br. 40), "gift" has a widely accepted meaning, and the concept of a gift arises often in daily life as well as in numerous areas of the law.

b. Petitioner's contrary arguments (Br. 41-43) are based on a misconception of the applicable standard.

First, petitioner contends (Br. 41-42) that if "emotional satisfaction" sufficed to show a personal benefit, then it would be difficult to discern "[w]hich emotions give rise to insider trading liability, and which do not." But *Dirks* does not require any inquiry into the existence of personal satisfaction in a particular case. What matters is "objective" evidence relevant to the "purpose of the disclosure," *Dirks*, 463 U.S. at 662-663, not a subjective determination of whether the insider experienced an adequate range or intensity of emotion in carrying out that purpose. An insider's gift of information for trading, for no corporate purpose, violates an insider's *Cady, Roberts* duty—regardless of the gift giver's subjective feelings about his breach.[8]

Second, petitioner suggests (Br. 43) that *Dirks* is unworkable, particularly for a remote tippee, because too many questions arise about who qualifies as a friend or relative. But *Dirks* refers to "a trading rela-

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[8] Contrary to petitioner's suggestion (Br. 42), the facts of *Dirks* demonstrate that subjective satisfaction is not the test for personal benefit. Secrist, the former executive, might well have felt personally gratified to expose the fraud by revealing it to Dirks. What made the disclosure not for a personal benefit was the fact that exposure of the fraud was consistent with Secrist's obligations to shareholders. 463 U.S. at 666-667.

tive or friend" only as an exemplar of a typical situation in which an insider would be likely to act for a personal rather than a corporate purpose. See 463 U.S. at 663-664, 667. The tipper's purpose, rather than the identity of the recipient, is dispositive. See pp. 18-28, *supra*. Accordingly, courts applying *Dirks* need not attempt to answer any of the questions posed by petitioner about the degree of closeness involved in various relationships.

Finally, petitioner purports to identify evidence (Br. 45-48) that the government actually has engaged in "arbitrary enforcement," *Kolender* v. *Lawson*, 461 U.S. 352, 358 (1983), under the *Dirks* standard. No such evidence exists. Petitioner simply identifies cases that are roughly analogous to his own and claims that they should not have been prosecuted because of his disagreement with *Dirks*.

For instance, in service of his idea that the government "has pursued an extremely aggressive litigation strategy" (Br. 47), petitioner lists cases in which the personal benefit to the tipper was the giving of a gift to someone in his personal sphere without any corporate purpose. Those cases—including an insider's provision of highly sensitive mergers-and-acquisition information to his mistress for wholly personal reasons, enabling her to make large amounts of money, see *Gansman*, 657 F.3d at 90-92, and an insider's tip to a friend for purposes of enabling his trading, garnering that friend nearly $1 million in quick, risk-free profits, see *Warde*, 151 F.3d at 46-49—are in the heartland of the securities-law violation that *Dirks* describes. See Pet. App. 12.[9] In pursuing

[9] The allegedly "draconian" sentences for such conduct that petitioner singles out for complaint (Br. 51) reflect proper considera-

such cases under the *Dirks* standard, the government has exercised a power "no broader than the authority [it] routinely exercise[s] in enforcing the criminal laws" or the securities laws. *United States* v. *Batchelder*, 442 U.S. 114, 126 (1979).

Separately, petitioner claims (Br. 48, 59) that the government has "cast" too "wide [a] net" in pursuing someone in a tipping chain other than the original tipper or tippee. The question of whether a tippee can ever be too "remote" from the tipper's own bad act has nothing to do with the meaning of "personal benefit" and is therefore outside the scope of the question presented in this case. See *Yee* v. *City of Escondido*, 503 U.S. 519, 537 (1992); Sup. Ct. R. 14.1(a). In any event, *Dirks* makes clear that a tippee has derivative liability for an insider's breach of duty, on a "constructive trust" theory, if the tippee knows that the insider personally benefited; *Dirks* does not hold that a tippee's liability depends on having had a direct relationship or interchange with the insider. 463 U.S. at 660 n.20; see *id.* at 659-661; see also *Bateman Eichler*, 472 U.S. at 302, 311 n.21 (discussing liability of tippees once removed from original tipper). Pursuit of tippees like petitioner—who obtained the confidential information from the first-line tippee rather than from the insider himself—is justified so long as evidence shows that the tippee had the requisite knowledge of the

tion of the relevant factors under the Sentencing Guidelines, including obstructive actions by the defendant. See, *e.g.*, *United States* v. *Skowron*, 11-cr-699 Docket entry No. 27 (S.D.N.Y. 2011) (below-Guidelines sentence despite obstruction of justice); *United States* v. *Contorinis*, 09-cr-1083 Docket entry No. 94 (S.D.N.Y. 2010) (below-Guidelines sentence despite perjury); *United States* v. *Riley*, 13-cr-339 Docket entry No. 258 (S.D.N.Y. 2015) (below-Guidelines sentence for tipper in $39 million scheme).

insider's breach and the other elements of Section 10(b) liability are satisfied. Nothing about such cases indicates that existing law leaves prosecutors free to "pursue their personal predilections." *Kolender*, 461 U.S. at 358 (citation omitted).

c. The absence of any vagueness concern about the rule that a personal gift amounts to a personal benefit is confirmed by the "sturdy safeguards Congress has provided" to establish scienter. *O'Hagan*, 521 U.S. at 665 (rejecting vagueness argument in insider-trading case).

To establish either a civil or criminal violation of Section 10(b), the government must establish culpable intent: an "intent to deceive, manipulate, or defraud." *Dirks*, 463 U.S. at 663 n.23 (quoting *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 194 n.12 (1976)). In a criminal case, the government must show that the defendant committed the violation "willfully," 15 U.S.C. 78ff(a), because he realized that he was committing a wrongful act, *O'Hagan*, 521 U.S. at 665-666; see, *e.g.*, *United States* v. *Kaiser*, 609 F.3d 556, 568-570 (2d Cir. 2010); see also J.A. 394. For a tippee like petitioner, knowledge that his conduct was wrongful depends on knowledge that the insider breached a fiduciary duty by disclosing material, nonpublic information for a personal benefit—a significant limitation on tippee liability. See *Dirks*, 463 U.S. at 660, 662; J.A. 396-397.

As the Court observed in *O'Hagan*, the "'requirement of the presence of culpable intent as a necessary element of the offense does much to destroy any force in the argument that application of the [statute]' in circumstances such as [petitioner's] is unjust." *O'Hagan*, 521 U.S. at 666 (quoting *Boyce Motor Lines, Inc.* v. *United States*, 342 U.S. 337, 342

(1952)). Where a defendant consciously acts in a manner that he knows to be wrongful, and where his conduct is fairly encompassed by the terms of the criminal statute, he faces no "trap for the unwary." *United States* v. *Yermian*, 468 U.S. 63, 74 (1984).

To overcome that flaw in his vagueness argument, petitioner asserts (Br. 49) that "the Ninth Circuit has gutted [the scienter] safeguard against government overreaching" through holdings on willfulness and deliberate ignorance. That is not the issue here, but in any event, the Ninth Circuit recognizes that the willfulness requirement for criminal liability in this context means "intentionally undertaking an act that one knows to be wrongful," *United States* v. *Tarallo*, 380 F.3d 1174, 1188 (2004), see J.A. 394 (jury instructions)—a robust safeguard against convicting someone of a crime as to which they lack fair notice. And while the evidence in this case established petitioner's actual knowledge of the facts giving rise to the jury's finding that he willfully "act[ed] for the wrongful purpose of defrauding or deceiving someone," J.A. 394, the Ninth Circuit has also correctly held, consistent with *Global-Tech Appliances, Inc.* v. *SEB S.A.*, 563 U.S. 754 (2011), that a defendant's knowledge of a fact can be established by evidence that the defendant deliberately avoided learning the fact while aware of a high probability of its existence. See Pet. App. 23-25; Br. in Opp. 13-18, 21-22; compare Pet. i, with 136 S. Ct. at 899 (declining to grant review of deliberate-ignorance question).

2. The **Dirks** *standard is not unduly broad*

Invoking the separation of powers and the rule of lenity, petitioner also argues (Br. 36-40) that the *Dirks* Court did not interpret Section 10(b) narrowly enough in ruling that a personal benefit exists when a tipper gives a gift of confidential information. But *Dirks* cabined the scope of insider-trading liability, and neither of those doctrines justifies any further narrowing.

Petitioner asserts that "the insider trading offense, like the private § 10(b) action, was created by the judiciary," which cannot "define new federal crimes." Br. 36, 39 (citation omitted). But petitioner's premise is mistaken. While the private remedy for violation of Section 10(b) is not found in the text of the provision, and therefore can be described as a "judicial construct," *Stoneridge Inv. Partners, LLC* v. *Scientific-Atlanta, Inc.*, 552 U.S. 148, 164 (2008), the proscription on insider trading—of which the personal-benefit requirement is a part—is different. That proscription is drawn directly from the text of Section 10(b), which forbids any manipulation or deception in connection with the purchase or sale of securities, in contravention of the SEC's rules. See, *e.g.*, *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 172-173 (1994) (contrasting decisions about private right of action, which "Congress did not create," with decisions about "the scope of conduct prohibited by § 10(b)," including *Dirks* and *Chiarella*, as to which "the text of the statute controls").

Section 10(b) is unquestionably broad—and intentionally so, to capture all kinds of fraud. See *Ernst & Ernst*, 425 U.S. at 203 (Section 10(b) is "catchall" to "deal with new manipulative or cunning devices"). That does not make it ambiguous. See *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499 (1985) (statute's application to "situations not expressly anticipated by Congress does not demonstrate ambiguity"; "[i]t demonstrates breadth") (citation omitted). No separation-of-powers or rule-of-lenity issue arises when a court interprets or applies such a statute as written. See, *e.g.*, *United States* v. *Castleman*, 134 S. Ct. 1405, 1416 (2014) (rule of lenity applies only to resolve "a grievous ambiguity or uncertainty in the statute, such that the Court must simply guess as to what Congress intended") (citation omitted).

Dirks interpreted Section 10(b) to conform with background concepts of fraud and provide clarity to the securities markets. In *Dirks* (and in *Chiarella*), the Court rejected a parity-of-information rule under which any use in securities trading of confidential information to which the counterparty did not have access would be considered a deceptive device. See 463 U.S. at 657 ("*Chiarella* * * * repudiat[ed] any notion that all traders must enjoy equal information before trading"). Rather, the Court explained, the requisite deception does not exist in impersonal marketplace transactions unless the insider violates a recognized duty. See *Dirks*, 463 U.S. at 657, 660-662; see also *O'Hagan*, 521 U.S. at 652-653. That rule restricts insider-trading liability to fraudulent conduct, eliminating liability, for example, where the insider disclosed the information for corporate purposes, incorrectly believed that the information was public or immaterial, or disclosed the information inadvertently. See 463 U.S. at 662 & n.22, 666-667. And because *Dirks* absolves a tippee of securities-fraud liability unless the tippee knows about the insider's breach of duty, *id.* at 659-660 & n.20, tippees are similarly not exposed to liability simply for trading on nonpublic information.

Petitioner suggests (Br. 50, 52-54) that *Dirks* has somehow evolved into a parity-of-information rule and that the genie can be returned to the bottle only by imposing a novel pecuniary-gain limitation on *Dirks*. Experience provides no basis for that assertion. The Court anticipated the need for "a guiding principle for those whose daily activities must be limited and instructed by the SEC's inside-trading rules," 463 U.S. at 664, and articulated one based in common-law rules and the text and policies of the securities law. And it specifically recognized that a "gift" of information for trading violates a "fiduciary duty" and involves the "exploitation of nonpublic information." *Ibid.* In light of the Court's rejection of the parity-of-information approach in *Dirks*, petitioner's assertion (Br. 50, 52-54) that applying *Dirks*'s personal-benefit standard to improper gifts would resurrect that approach is unfounded.

E. The Proposal To Narrow *Dirks* To Exclude Gifts Would Harm Investors And The Securities Markets

Petitioner's proposed restriction of *Dirks* would seriously undermine "an animating purpose" of the securities laws: "to insure honest securities markets and thereby promote investor confidence." *O'Hagan*, 521 U.S. at 658; see 15 U.S.C. 78b (regulation of deceptive practices is necessary "to insure the maintenance of fair and honest markets"). Under petitioner's pecuniary-gain-only rule, an insider who provided highly confidential, market-moving corporate information so that his children, his parents, his friends, or his other connections could trade on it would evade the securities-fraud laws so long as he did not receive any pecuniary return from the tippees for doing so—and the tippees could enjoy virtually unlimited profits, unavailable to less privileged investors, without incurring any such liability. See Pet. App. 16. When Congress enacted the Exchange Act to "eliminate the idea that use of inside information for personal advantage was a normal emolument of corporate office," *Dirks*, 463 U.S. at 653 n.10 (citation omitted), it cannot have intended that harmful interpretation of Section 10(b).[10]

1. "[E]liminat[ing] 'use of inside information for personal advantage,'" *Dirks*, 463 U.S. at 662 (citation omitted), is vital to investor confidence in our securities markets, "the comparative honesty of which is one of our nation's great business assets." *Payton*, 97 F. Supp. 3d at 559; see *O'Hagan*, 521 U.S. at 657-658. An insider who makes personal use of inside information, without a corporate justification, "tak[es] unfair advantage of uninformed stockholders," *O'Hagan*, 521 U.S. at 652 (quoting *Chiarella*, 445 U.S. at 228-229), and harms "the buying public," which is "wholly unprotected from the misuse of special information," *Cady, Roberts*, 40 S.E.C. at 913. Such activity also strips investors of confidence that the markets are fair and open. See *O'Hagan*, 521 U.S. at 658-659. While some "informational disparity is inevitable in the

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[10] Notably, the Second Circuit's decision in *Newman*, on which petitioner's proposed rule appears to be patterned, see 773 F.3d at 452, has been subject to withering criticism along those lines. See, *e.g.*, Carlyle H. Dauenhauer, *Justice in Equity:* Newman *and Egalitarian Reconciliation for Insider-Trading Theory*, 12 Rutgers Bus. L. Rev. 39, 91-92 (2015) (*Newman* creates "precarious and disturbing legal uncertainty"); Michael Perino, *The Gift of Inside Information*, N.Y. Times, Dec. 12, 2014, http://dealbook.nytimes.com/2014/12/12/the-gift-of-inside-information/ ("Allowing executives to give away information to whomever they choose so long as they get nothing in return simply makes no sense.").

securities markets," a rational investor will "hesitate to venture * * * capital" in a rigged game—one in which he faces a systematic "informational disadvantage" vis-à-vis insiders and their chosen beneficiaries that can never "be overcome with research or skill." *Ibid.*; see *Dirks*, 463 U.S. at 661-662; see also 1983 House Report 2.

Small investors are especially likely to be deterred from participating in the securities markets under such circumstances. See 1988 House Report 8. And those investors who do decide to participate, despite insurmountable informational disadvantages, are likely to demand risk premiums for doing so. See Brudney 334-335, 356; see also Michael Manove, *The Harm from Insider Trading and Informed Speculation*, 104 Q. J. Econ. 823, 824 (1989). If investors leave the securities markets or demand premiums for staying, then capital formation will be impaired—a point that has been expressly noted by congressional committees endorsing increased sanctions for insider trading. See 1988 House Report 8; 1983 House Report 2.

Providing certain favored investors with a special advantage also has other negative effects. It discourages securities analysts from providing legitimate investors with valuable insights. Effective professional analysis of the value of a company's stock is a labor-intensive process, see, *e.g.*, *DeMarco* v. *Lehman Bros. Inc.*, 222 F.R.D. 243, 246 (S.D.N.Y. 2004)—and if non-analyst market participants can sidestep that labor by siphoning secret information from insiders, thereby arriving at "predictions" of corporate performance that no model can equal, then legitimate analysts will be discouraged from doing the work that is necessary for the markets to function effectively. See Michael J. Fishman & Kathleen M. Hagerty, *Insider Trading and the Efficiency of Stock Prices*, 23 RAND J. Econ. 106, 107 (1992). In addition, advance trading on confidential information about corporate acquisitions—as occurred in this case—can drive up the cost of transactions by increasing the price that the acquiring company must pay for tendered shares. See J.A. 39-46, 52-53, 70-76, 171-173; see also, *e.g.*, *Maio*, 51 F.3d at 634 n.12; Bradford Cornell & Erik R. Sirri, *The Reaction of Investors and Stock Prices to Insider Trading*, 47 J. Fin. 1031, 1032-1033, 1045-1046 (1992).[11]

2. Petitioner's proposed pecuniary-benefit-only rule would give rise to just such harms.

The incentives for insiders to bestow gifts of inside information on others are obvious—especially given how often insiders already take that step under a regime in which they know that their actions are illegal. See, *e.g.*, Langevoort §§ 1:8, 11:9 ("nearly half" of SEC insider-trading cases "involved some sort of 'tip,'" and "largest category of unlawful tipping involves instances where an insider passes along information to a friend or a relative").[12] If insiders could

[11] Petitioner contends that insider-trading regulation "harm[s] the securities markets." Br. 27 n.7; see Cato Inst. Amicus Br. 16-20. That contention has been rejected by a near-consensus of academics, see, *e.g.*, Alexandre Padilla & Brian Gardiner, *Insider Trading: Is There an Economist in the Room?*, 24 J. Private Enterprise 113, 123 (2009) ("economists have progressively reached the same conclusion: that insider trading * * * ought to be prohibited"), and Congress has not accepted it, see, *e.g.*, 1988 House Report 8.

[12] See also Patrik Augustin et al., *Informed Options Trading Prior to M&A Announcements: Insider Trading?* 2 (May 2014),

give tippees valuable information with no fear of securities-fraud liability, then more individuals are likely to risk doing so—especially if they could secure in return a non-pecuniary benefit, such as romantic favors from a mistress or a college-admissions preference for their children. See, *e.g.*, *Warde*, 151 F.3d at 46 (tipper's friend obtained nearly $1 million); Pet. App. 5 (petitioner shared tippee profit of over $1.5 million with his brother-in-law). And because the liability of everyone down a tipping chain stems from the insider's breach of duty, in the absence of such a breach the first-line tippees would themselves be able to pass the information to others, or even sell it, without running afoul of Section 10(b) or Rule 10b-5. See, *e.g.*, pp. 5-6, *supra* (Michael passed information to others and received a monetary kickback).

That state of affairs would shake investor confidence and upend the normal operation of the financial industry and the securities markets. It would create two classes of investors: those with "cozy" connections to insiders at corporations or the law firms, accountants, and bankers who service those corporations, see John C. Coffee, Jr., *Getting Away with Insider Trading*, N.Y. Times, May 23, 2016, at A19, and those left on the outside. The profits enjoyed by the former group would be made at the expense of the latter group, see *O'Hagan*, 521 U.S. at 665-666, which would no doubt include many small and relatively unsophisticated investors. In that world, the markets would not in any way resemble the "fair and honest"

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http://irrcinstitute.org/wp-content/uploads/2015/09/Informed-Options-Trading_June-12-20141.pdf (study suggesting that insider trading takes place in approximately 25% of mergers and acquisitions); 1983 House Report 2.

ones that Congress intended to ensure by enacting the Exchange Act. 15 U.S.C. 78b; see H.R. Conf. Rep. No. 229, 94th Cong., 1st Sess. 91-92 (1975).

3. Petitioner's suggestion that his proposed standard would not result in such harms (see Br. 27, 54 n.12) lacks merit.

First, petitioner asserts (Br. 27) that enforcement of *Dirks*'s personal-benefit rule "over-deter[s] the legitimate exchange of information" and his approach would be a correction. But *Dirks* already strikes a careful balance that avoids just such overdeterrence. The Court recognized the important role that market analysts play in obtaining and analyzing information, and the Court was cautious not to advance a rule that would unduly "inhibit[] * * * the role of market analysts." 463 U.S. at 658; see *id.* at 658-659 & nn.17-18. And circumstances have changed since *Dirks* was decided in a way that makes overdeterrence even less likely. Although analysts used to routinely obtain material, nonpublic information "by meeting with and questioning corporate officers" who were acting in the normal course of their corporate duties, *id.* at 658-659, the SEC's Regulation FD now forbids corporations from disclosing such information selectively to analysts rather than to the public at large. See 17 C.F.R. 243.100-243.103; 65 Fed. Reg. 51,716 (Aug. 24, 2000); Andreas Gintschel & Stanimir Markov, *The Effectiveness of Regulation FD*, 37 J. Acct. & Econ. 293, 294-295, 312-313 (2004).[13] Because Regulation FD alters the interactions between issuers and analysts with which *Dirks* was concerned, solicitude for analysts

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[13] In addition, whistleblowers like Secrist and Dirks are now protected under 15 U.S.C. 78u-6 (Supp. IV 2010), 17 C.F.R. 240.21F-1 *et seq.*, and 18 U.S.C. 1514A.

provides no reason to restrict the *Dirks* personal-benefit standard.

Second, petitioner claims (Br. 54 n.12) that "mechanisms" other than the federal securities-fraud provisions "may be available" to "deter the illicit disclosure of inside information." But private policies or state law could not fill that gap. Such measures could not be uniform, even though national uniformity is vital in this area. See generally *Lampf*, 501 U.S. at 357-361. And without the enforcement power of the SEC and the federal criminal authorities, the lucrative tipping that petitioner's rule would encourage would be less likely to be detected, let alone prevented. Cf. Roman P. Wuller, Note, *Insider Trading: Circumventing the Restrictive Contours of the* Chiarella *and* Dirks *Decisions*, 1985 U. Ill. L. Rev. 503, 505-507. The federal "mechanisms" to which petitioner points would be of little aid in that regard because of their limited applicability or their dependence on insider-trading law. Regulation FD applies only when the disclosing person is acting on behalf of an issuer of securities. 17 C.F.R. 243.100. That excludes unauthorized "gifts." See 17 C.F.R. 243.101(c) ("disclos[ing] material nonpublic information in breach of a duty of trust or confidence to the issuer shall not be considered to be acting on behalf of the issuer"). And the Exchange Act provision requiring broker-dealers to maintain policies "to prevent the misuse" of confidential information applies only to disclosures that would otherwise be "in violation of" the securities laws. 15 U.S.C. 78*o*(g).

F. Petitioner's Convictions Should Be Affirmed

Under a straightforward application of *Dirks*, petitioner's convictions must stand. As the court of appeals observed, the evidence of personal benefit to the tipper, petitioner's knowledge of that benefit, and the other elements of Section 10(b) liability was overwhelming. See Pet. App. 12, 16-17. That evidence established that Maher willingly gave Michael gifts of inside information for a personal purpose knowing that his brother would trade on it, thus conferring a trading advantage "the average person does not have access to" and "would never have or dream of" having. J.A. 251. It also established that petitioner knew of Maher's personal benefit when trading on the information himself: he was told of the sensitivity of the source and the need to protect Maher and went to great lengths to conceal his own trading. See pp. 5-7, *supra.*[14]

[14] Petitioner's suggestion of an absence of "fraudulent conduct" in his case (*e.g.*, Br. 34-35) distorts the trial record and relies on evidence that the jury must have rejected through its verdict. For instance, petitioner emphasizes trial testimony by Maher that Michael swore "he would not trade." *E.g.*, Br. 35 (citing J.A. 81). But petitioner neglects to mention that Michael's statement came early in the "evolution of the way that [Maher] was transferring information to [his] brother," J.A. 79, and that the conduct involved in this case happened later, see J.A. 81; see also J.A. 83 ("[A]t the point where I decided to give him information with the intent to help him trade I didn't want to ask him again, 'Are you trading,' because I knew what the answer was going to be, and that was going to be 'Yes.'"). Petitioner also contends (Br. 35) that Maher acted only because "Michael pressured him into providing the information." Even if that were true, it would not absolve Maher of wrongdoing or demonstrate a lack of personal benefit—but, in any event, petitioner omits mention of Maher's statements that he "knowingly, willfully acted to benefit [his] brother." J.A. 119.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 15 U.S.C. 78j (2006)[1] provides:

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—

(a)(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement (as defined in section 206B of the Gramm-Leach-Bliley Act), any manipulative or deceptive device or con-

[1] In 2010, this provision was amended to (1) strike out "registered on a national securities exchange" and insert "other than a government security" in Subsection (a)(1); (2) strike out "(as defined in section 206B of the Gramm-Leach-Bliley Act)" where it appeared; and (3) add a new Subsection (c), which covers "effect[ing], accept[ing], or facilitat[ing] a transaction involving the loan or borrowing of securities in contravention of such rules and regulations as the Commission may prescribe." Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, §§ 762(d)(3), 929L(2), 984(a), 124 Stat. 1761, 1861, 1932.

trivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Rules promulgated under subsection (b) of this section that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) of this section and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i, 78*o*, 78p, 78t, and 78u-1 of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements (as defined in section 206B of the Gramm-Leach-Bliley Act) to the same extent as they apply to securities.

2. 15 U.S.C. 78ff provides:

(a) Willful violations; false and misleading statements

Any person who willfully violates any provision of this chapter (other than section 78dd-1 of this title), or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of section 78*o* of this title, or by any self-regulatory organization in connection with an application for membership or participation therein or to become associated with a member thereof which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $5,000,000, or imprisoned not more than 20 years, or both, except that when such person is a person other than a natural person, a fine not exceeding $25,000,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

(b) Failure to file information, documents, or reports

Any issuer which fails to file information, documents, or reports required to be filed under subsection (d) of section 78*o* of this title or any rule or regulation thereunder shall forfeit to the United States the sum of $100 for each and every day such failure to file shall continue. Such forfeiture, which shall be in lieu of any criminal penalty for such failure to file which might be deemed to arise under subsection (a) of this section, shall be payable into the Treasury of the United States and shall be recoverable in a civil suit in the name of the United States.

(c) Violations by issuers, officers, directors, stockholders, employees, or agents of issuers

(1)(A) Any issuer that violates subsection (a) or (g) of section 78dd-1 of this title shall be fined not more than $2,000,000.

(B) Any issue that violates subsection (a) or (g) of section 78dd-1 of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(2)(A) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who willfully violates subsection (a) or (g) of section 78dd-1 of this title shall be fined not more than $100,000, or imprisoned not more than 5 years, or both.

(B) Any officer, director, employee, or agent of an issuer, or stockholder acting on behalf of such issuer, who violates subsection (a) or (g) of section 78dd-1 of this title shall be subject to a civil penalty of not more than $10,000 imposed in an action brought by the Commission.

(3) Whenever a fine is imposed under paragraph (2) upon any officer, director, employee, agent, or stockholder of an issuer, such fine may not be paid, directly or indirectly, by such issuer.

3. 18 U.S.C. 2 provides:

Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

4. 18 U.S.C. 371 provides:

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

5. 17 C.F.R. 240.10b-5 provides:

Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

6. 17 C.F.R. 240.10b5-1 provides:

Trading "on the basis of" material nonpublic information in insider trading cases.

PRELIMINARY NOTE TO § 240.10b5-1: This provision defines when a purchase or sale constitutes trading "on the basis of" material nonpublic information in insider trading cases brought under Section 10(b) of the Act and Rule 10b-5 thereunder. The law of insider trading is otherwise defined by judicial opinions construing Rule 10b-5, and Rule 10b5-1 does not modify the scope of insider trading law in any other respect.

(a) *General.* The "manipulative and deceptive devices" prohibited by Section 10(b) of the Act (15 U.S.C. 78j) and § 240.10b-5 thereunder include, among other things, the purchase or sale of a security of any issuer, on the basis of material nonpublic information about that security or issuer, in breach of a duty of trust or confidence that is owed directly, indirectly, or derivatively, to the issuer of that security or the shareholders of that issuer, or to any other person who is the source of the material nonpublic information.

(b) *Definition of "on the basis of."* Subject to the affirmative defenses in paragraph (c) of this section, a purchase or sale of a security of an issuer is "on the basis of" material nonpublic information about that security or issuer if the person making the purchase or sale was aware of the material nonpublic information when the person made the purchase or sale.

(c) *Affirmative defenses.* (1)(i) Subject to paragraph (c)(1)(ii) of this section, a person's purchase or sale is not "on the basis of" material nonpublic information if the person making the purchase or sale demonstrates that:

(A) Before becoming aware of the information, the person had:

(*1*) Entered into a binding contract to purchase or sell the security,

(*2*) Instructed another person to purchase or sell the security for the instructing person's account, or

(*3*) Adopted a written plan for trading securities;

(B) The contract, instruction, or plan described in paragraph (c)(1)(i)(A) of this Section:

(*1*) Specified the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be purchased or sold;

(*2*) Included a written formula or algorithm, or computer program, for determining the amount of securities to be purchased or sold and the price at which and the date on which the securities were to be purchased or sold; or

(*3*) Did not permit the person to exercise any subsequent influence over how, when, or whether to effect purchases or sales; provided, in addition, that any other person who, pursuant to the contract, instruction, or plan, did exercise such influence must not have been aware of the material nonpublic information when doing so; and

(C) The purchase or sale that occurred was pursuant to the contract, instruction, or plan. A purchase or sale is not "pursuant to a contract, instruction, or plan" if, among other things, the person who entered into the contract, instruction, or plan altered or deviated from the contract, instruction, or plan to purchase or sell securities (whether by changing the amount, price, or timing of the purchase or sale), or entered into or altered a corresponding or hedging transaction or position with respect to those securities.

(ii) Paragraph (c)(1)(i) of this section is applicable only when the contract, instruction, or plan to purchase or sell securities was given or entered into in good faith and not as part of a plan or scheme to evade the prohibitions of this section.

(iii) This paragraph (c)(1)(iii) defines certain terms as used in paragraph (c) of this Section.

(A) *Amount.* "Amount" means either a specified number of shares or other securities or a specified dollar value of securities.

(B) *Price.* "Price" means the market price on a particular date or a limit price, or a particular dollar price.

(C) *Date.* "Date" means, in the case of a market order, the specific day of the year on which the order is to be executed (or as soon thereafter as is practicable under ordinary principles of best execution). "Date" means, in the case of a limit order, a day of the year on which the limit order is in force.

(2) A person other than a natural person also may demonstrate that a purchase or sale of securities is not "on the basis of" material nonpublic information if the person demonstrates that:

(i) The individual making the investment decision on behalf of the person to purchase or sell the securities was not aware of the information; and

(ii) The person had implemented reasonable policies and procedures, taking into consideration the nature of the person's business, to ensure that individuals making investment decisions would not violate the laws prohibiting trading on the basis of material nonpublic information. These policies and procedures may include those that restrict any purchase, sale, and causing any purchase or sale of any security as to which the person has material nonpublic information, or those that prevent such individuals from becoming aware of such information.

7. 17 C.F.R. 240.10b5-2 provides:

PRELIMINARY NOTE TO § 240.10b5-2: This section provides a non-exclusive definition of circumstances in which a person has a duty of trust or confidence for purposes of the "misappropriation" theory of insider trading under Section 10(b) of the Act and Rule 10b-5. The law of insider trading is otherwise defined by judicial opinions construing Rule 10b-5, and Rule 10b5-2 does not modify the scope of insider trading law in any other respect.

(a) *Scope of Rule*. This section shall apply to any violation of Section 10(b) of the Act (15 U.S.C. 78j(b)) and § 240.10b-5 thereunder that is based on the purchase or sale of securities on the basis of, or the communication of, material nonpublic information misappropriated in breach of a duty of trust or confidence.

(b) *Enumerated "duties of trust or confidence."* For purposes of this section, a "duty of trust or confidence" exists in the following circumstances, among others:

(1) Whenever a person agrees to maintain information in confidence;

(2) Whenever the person communicating the material nonpublic information and the person to whom it is communicated have a history, pattern, or practice of sharing confidences, such that the recipient of the information knows or reasonably should know that the person communicating the material nonpublic information expects that the recipient will maintain its confidentiality; or

(3) Whenever a person receives or obtains material nonpublic information from his or her spouse, parent, child, or sibling; *provided,* however, that the person receiving or obtaining the information may demonstrate that no duty of trust or confidence existed with respect to the information, by establishing that he or she neither knew nor reasonably should have known that the person who was the source of the information expected that the person would keep the information

confidential, because of the parties' history, pattern, or practice of sharing and maintaining confidences, and because there was no agreement or understanding to maintain the confidentiality of the information.