No. 15-137

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

TODD NEWMAN AND ANTHONY CHIASSON

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

REPLY BRIEF FOR THE PETITIONER

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Although the court below created an upheaval in insider-trading law by rewriting the settled test announced in *Dirks* v. *SEC*, 463 U.S. 646 (1983), respondents contend that certiorari is not warranted. In their view, the Second Circuit's decision can be reconciled with *Dirks*; does not conflict with court of appeals' decisions applying *Dirks*; can be supported on supposedly independent grounds; and does not pose a threat to investors or the integrity of the securities markets. Each of those submissions is wrong, and the Second Circuit's stark and overt departure from this Court's definition of insider trading warrants review and correction.

1. The Second Circuit's legal interpretation of "personal benefit" directly conflicts with *Dirks*. This Court held that a tipper obtains a personal benefit by making a "gift of confidential information to a trading

relative or friend," an act that "resemble[s] trading by the insider himself followed by a gift of the profits to the recipient." 463 U.S. at 664. But the Second Circuit held that a gift requires a "meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." Pet. App. 26a; see *id.* at 25a-28a. Because that kind of "exchange" is equivalent to a quid pro quo, and because the undefined phrase "meaningfully close personal relationship" covers only a subset of the relationships described by *Dirks*, the Second Circuit's new test effectively erases the "gift" category of personal benefit. See Pet. 18-21.[1]

Resisting that conclusion, respondents ignore key elements of the Second Circuit's test. In Newman's view, the court held that the only requirement to show a gift is a "close" personal relationship, because in such a relationship the tipper receives "satisfaction" from conveying confidential information. Newman Br. 21-22, 26; see *id.* at 14. Chiasson interprets the Second Circuit's use of the word "exchange" to encompass the fulfillment of an intention to benefit the tippee through a gift. Chiasson Br. 17-18.

Those interpretations mischaracterize the decision below. The court of appeals did not state that a close

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[1] Contrary to respondents' contentions (*e.g.*, Newman Br. 19-20), the Second Circuit's decision was not a fact-specific sufficiency determination. It defined a key legal element of insider trading, and, as such, will guide the government's charging decisions and influence future jury instructions. Nor is the only issue "a single sentence" (Chiasson Br. 1); the new requirements are the express "hold[ing]" of the court (Pet. App. 26a) and run through its analysis.

relationship sufficed to show a gift to a tippee; nor did it state that any form of "exchange" will do. Rather, it imposed two separate requirements: (1) that the relationship be "meaningfully close" (whatever that might signify), and (2) that the relationship "generate[] an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." Pet. App. 26a. That means that the inference of a gift to a tippee does not arise unless the tipper has received something "consequential" that is closely akin to money, even though that condition is antithetical to the concept of a gift. Pet. 19. It also means that the gratification from giving a gift does not establish that a tipper has obtained a personal benefit, because such an emotion is neither "objective" nor "pecuniary or similarly valuable." *Dirks* imposed no such limitations for gift liability.

Both respondents support their truncated readings of the Second Circuit's decision by pointing to the court's statement that its test "requires evidence of 'a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the [latter].'" Pet. App. 26a (brackets in original) (quoting *United States* v. *Jiau*, 734 F.3d 147, 153 (2d Cir. 2013), cert. denied, 135 S. Ct. 311 (2014)). But the "intention to benefit" language on which respondents focus (*e.g.*, Chiasson Br. 17-18) does not alter the Second Circuit's strict requirements for a gift. And in *Dirks* itself, as well as in the quoted decision in *Jiau*, an "intention to benefit the particular recipient" was a means of showing that the insider expected some sort of financial reward—not that he intended to confer a gift of information for trading. *Dirks*, 463 U.S. at 663-664; see *Jiau*, 734 F.3d at 153;

Pet. 17-18. The Second Circuit's use of that language in a gift discussion thus collapsed the two separate personal-benefit categories that *Dirks* identified.

Respondents also claim (Newman Br. 22-25; Chiasson Br. 18) that district court decisions support their interpretations of the Second Circuit's personal-benefit ruling. But district courts have struggled in vain to reconcile the court of appeals' new dictates with this Court's existing statement of the law. Compare, *e.g.*, *United States* v. *Whitman*, 2015 WL 4506507, at *3 (S.D.N.Y. 2015), with *SEC* v. *Payton*, 2015 WL 1538454, at *4 & n.2 (S.D.N.Y. 2015), cited in Pet. 19-20.[2] Without this Court's intervention, that confusion will deepen—especially if other circuits adopt the Second Circuit's mistaken view. See Pet. 33-34. This Court should intervene now to resolve the conflict between *Dirks* and the decision below over the personal-benefit standard.

2. The Second Circuit's decision also conflicts with decisions of circuits that faithfully apply *Dirks*. Pet. 22-25. Respondents' contrary arguments rely on their erroneous contention that the Second Circuit's personal-benefit ruling did not depart from *Dirks* in any way. *E.g.*, Chiasson Br. 20.

In *United States* v. *Salman*, 792 F.3d 1087 (2015), the Ninth Circuit "decline[d] to follow" the decision

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[2] The government filings to which respondents point (*e.g.*, Newman Br. 24-25) also do not support their interpretations of the decision below. For instance, the SEC's filing in *SEC* v. *Holley* (D.N.J.) noted the SEC's amicus brief in this case, which recognized the conflict with *Dirks*, see Pet. 14, and stated that the decision below could result in "limit[ing] the meaning of a 'personal benefit' within the Second Circuit." 11-cv-205 Docket entry No. 56, at 8-11.

below to the extent it requires a tipper to receive a "tangible benefit in exchange for the inside information" in order to be found to have made a gift of that information. *Id.* at 1093; see *ibid.* (describing that requirement as "depart[ing] from the clear holding of *Dirks*"). Yet such a "tangible benefit" is exactly what the decision below does require. Contrary to respondents' assertions (*e.g.*, Newman Br. 25), *Salman* did not reject that reading of the decision below; the court merely noted that the Second Circuit generally accepted the idea of a "gift" category of personal benefit. See 792 F.3d at 1093. Nor do the facts of *Salman* indicate, as respondents declare (*e.g.*, Newman Br. 26), that the result in that case would have been the same in the Second Circuit. While the tipper and the tippee wanted to help each other because of their fraternal bond, the tippee did not give his brother money (or anything "similar[]") in exchange for receiving confidential information. Pet. App. 26a. That is why the Ninth Circuit disapproved a test for personal benefit that includes such a prerequisite.

Similarly, respondents fail to reconcile the Seventh Circuit's decision in *SEC* v. *Maio*, 51 F.3d 623 (1995), with the Second Circuit's personal-benefit test. Respondents emphasize the closeness of the relationship between the tipper and tippee in *Maio*, see *id.* at 627; Pet. 24—but nothing indicates that the tipper obtained anything "objective," "consequential," or "pecuniary" from the tippee in exchange for the tip, as the Second Circuit demands to find personal benefit. And the Seventh Circuit never asked whether such evidence existed. Instead, the court inferred personal benefit from the absence of any "legitimate reason"

for the disclosure of confidential information. 51 F.3d at 632-633.[3]

The circuits thus disagree about insider-trading law: whether to apply *Dirks*—or rewrite it. This Court should resolve that conflict by reaffirming *Dirks*.

3. Respondents' arguments that the Court should forgo the opportunity to review the Second Circuit's decision are misguided. Respondents principally argue that the Second Circuit's holding that they lacked knowledge that they traded on the basis of information obtained from insiders in violation of those persons' fiduciary duties would ensure the same outcome, regardless of the court's conception of personal benefit. Newman Br. 16-19; Chiasson Br. 26-30. That claimed alternative ground for decision provides no reason to decline review of the personal-benefit holding. As the petition explains, correction of the Second Circuit's personal-benefit standard would require the court of appeals to reexamine the sufficiency of the evidence on personal benefit *and* on respondents' knowledge of that benefit. See Pet. 29-31.

Respondents contend that this Court's resolution of the question presented could not "change the result of this case." *E.g.*, Newman Br. 17. But they do not

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[3] Chiasson suggests that inferring a personal benefit where an insider's disclosure lacks a "valid business purpose" or does not arise from a "mistake[]" somehow conflicts with *Dirks*. Br. 19-20 (citation omitted). But Chiasson offers no other reasons why an insider who knows that a tippee will trade would permissibly disclose valuable nonpublic corporate information. The inference of a gift (or other personal benefit) is the natural explanation, as *Maio* recognized.

contest that the sufficiency of the evidence on personal benefit depends entirely on the meaning of that concept.[4] Nor do they deny that, as the standard for personal benefit becomes more demanding and detailed, establishing that a defendant had knowledge of such a benefit becomes more difficult—and, therefore, that correction of the Second Circuit's personal-benefit test would reduce the quantum of evidence necessary to prove that respondents themselves had (or consciously avoided) the requisite knowledge. See Pet. 30.

Respondents nevertheless assert that the Second Circuit already assumed the *Dirks* personal-benefit standard that the government espouses and nevertheless found proof of knowledge insufficient. See Chiasson Br. 27-28; cf. Newman Br. 17. That is not so. While the court assumed that the evidence "offered on the issue of personal benefit was sufficient" when it addressed knowledge, the court assumed only that the evidence satisfied its own new test for personal benefit—not that it satisfied the government's understanding of the personal-benefit requirement. Pet. App. 3a; see *id.* at 28a. The court's ruling that evidence of knowledge of a personal benefit was insufficient thus incorporated its erroneous redefinition of personal benefit.

Respondents also suggest (*e.g.*, Chiasson Br. 28) that the court of appeals found the evidence of know-

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[4] They do assert that the government "abandoned" a gift theory at trial for the Dell tipper (*e.g.*, Chiasson Br. 3)—but cite nothing to support that assertion. The government's discussion of a quid-pro-quo relationship did not constitute such abandonment. See Tr. 4001. And respondents do not deny the relevance of the "gift" theory to the NVIDIA tipper.

ledge so thin that a remand could not alter its ruling. That suggestion is seriously overblown. The court itself stated that the knowledge evidence was in equipoise, see Pet. App. 33a—indicating that a change in the personal-benefit standard could make a critical difference, especially when the evidence is viewed in the light most favorable to the verdict. And respondents' factual assertions, intended to show that they were engaging in business as usual, ignore a wealth of proof.[5] For example, while respondents claim that Dell and NVIDIA leaked information similar to the tips at issue in this case, the fairly general guidance they cite either did not emerge during the "quiet period" (which lasts from just before a quarter's close until a public announcement) or did not involve specific earnings numbers—in sharp contrast to the highly unusual and valuable tips that respondents so avidly sought out. See, *e.g.*, Tr. 1631 (Goyal responds "[n]o" to the question "[d]id anyone else in Dell investor relations" besides the tipper "ever give you quarterly financial results before they were announced to the public?"); Tr. 578, 1614-1618 (similar); see also, *e.g.*, Def. Exs. 866, 994 (unremarkable communications to groups of analysts), cited in Newman Br. 10 n.7. Thus, under the *Dirks* personal-benefit standard, the evidence would certainly support the conclusion that respondents, at the very least, consciously avoided knowing that the tippers acted for their own personal benefit rather than to advance any corporate interest.

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[5] That flaw permeates respondents' descriptions of the facts. Compare, *e.g.*, Newman Br. 9 n.6 (stating that "Goyal was paid as a consultant" for "financial modeling"), with Tr. 1630, 1640-1641 (Goyal testimony that Newman paid him for confidential "Dell quarterly results" and not for modeling).

Finally, Chiasson argues (Br. 29-30) that the Second Circuit's ruling that the jury was improperly instructed on the knowledge element is a reason to deny review. That suggestion is wrong. The remedy for a preserved jury-instruction error that is not harmless is a new trial, not judgment in favor of the defendants. See, *e.g.*, *Cobb* v. *Pozzi*, 363 F.3d 89, 112 (2d Cir. 2004). Yet the judgment below orders dismissal of the indictment. Pet. App. 34a.

For those reasons, the Second Circuit's holding on knowledge poses no barrier to this Court's consideration of the legal question presented by this case. If the Court grants review and reverses, a remand could (and should) produce a different outcome. But if it does not, respondents will have suffered no prejudice from this Court's resolution of an issue that has split the circuits and is central to the government's ability to deter and punish tipper/tippee insider trading.[6]

4. Absent this Court's intervention, the Second Circuit's redefinition of the personal-benefit standard will result in significant harm—restricting enforcement of the securities laws against culpable actors, spurring fraudulent activity, undermining the necessary work of legitimate analysts, depriving the financial community of guidance on how to comply with the law, and decreasing public confidence in the securities markets. See Pet. 25-29, 32-34. Those serious harms

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[6] Respondents offer up other pending cases (*e.g.*, Newman Br. 18 n.10) as allegedly superior vehicles for addressing the question presented. None of those cases is even a suitable vehicle, because each involves a tipper engaged in a quid-pro-quo arrangement. See, *e.g.*, *United States* v. *Martoma*, 2014 WL 4384143, at *1-*2 (S.D.N.Y. 2014) (tipper received thousands of dollars).

reinforce the importance of the question presented and call for this Court's review.

Respondents barely address those issues. They insist (*e.g.*, Chiasson Br. 30) that the decision below cannot have any negative effects because it routinely applied *Dirks*. But that reading of the Second Circuit's opinion is contrary to its explicit language and its novel, stringent test. The sweep of the decision has been widely recognized. See Pet. 25 n.5, 33 (citing some of the widespread criticism of the legal holding below by professors, practitioners, and other experts).

They also point (*e.g.*, Newman Br. 27-28) to a handful of decisions issued after the Second Circuit ruled to contend that the government's prosecution of tipper-tippee insider trading on a gift theory will not be hampered in that circuit. Those factually and procedurally distinguishable cases provide no such reassurance. In many of the cited cases, the defendant—spurred by respondents' success in the court of appeals—unsuccessfully tried to raise a personal-benefit argument for the first time after final judgment had already issued. See, *e.g.*, *Whitman*, 2015 WL 4506507, at *2-*4 (Section 2255 motion); *SEC* v. *Conradt*, 2015 WL 4486234 (S.D.N.Y. 2015) (motions to vacate judgments); cf. *United States* v. *Riley*, 2015 WL 891675 (S.D.N.Y. 2015) (post-trial motions decided under plain-error standard). The rejection of such procedurally defaulted claims says nothing about the *prospective* effects of the decision below on the government's ability to prosecute wrongdoers, let alone on the integrity of the markets.[7] The other decisions

[7] The effects are real: in *United States* v. *Conradt* (S.D.N.Y.) the district court, acting before final judgment, responded to the decision below by vacating guilty pleas. See Pet. 32 n.8. A com-

cited by respondents are similarly irrelevant, because they involve preliminary motions on the pleadings, see, *e.g.*, *SEC* v. *Jafar*, 2015 WL 3604228, at *5-*7 (S.D.N.Y. 2015) (stating that SEC need not plead facts relating to "nature of the tip" and recognizing distinction between requirements "at the motion to dismiss stage" and requirements to "ultimately prevail"), or facts demonstrating a clear monetary benefit to the tipper in exchange for the tip, see, *e.g.*, *Riley*, 2015 WL 891675, at *3, *6-*8.

Accordingly, those district court decisions do not suggest that the Second Circuit's personal-benefit ruling is benign. And the court of appeals' own words show the opposite. The message sent by the court's ruling is that an insider may bestow secret corporate information on her friends and relations so long as she does not accept anything "consequential" in "exchange," or can plausibly deny being "meaningfully close" to the recipients of her largesse. Pet. App. 26a. Sophisticated investment professionals also have been instructed that they can reap enormous profits, unavailable to the investing public, by using information from tippers who supply confidential data but shielding themselves from specific details about the relationship between a tipper and his immediate tippee—even when it is plain that the information must have been misappropriated from a corporation for the tip-

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panion civil case (involving a lower standard of proof) survived a motion to dismiss, based in part on an allegation of a quid-pro-quo arrangement, but the case has not been finally decided, see *Payton*, 2015 WL 1538454, at *5, and does not amount to a government "w[i]n," Newman Br. 28-29. Indeed, the defendants are now relying on the decision below to seek summary judgment. 14-cv-04644 Docket entry No. 68, at 6, 8 (S.D.N.Y.).

per's own personal reasons.[8] The ruling therefore has a profoundly destabilizing effect in an area that has long been understood as settled by *Dirks*. This Court's review, far from "threaten[ing] upheaval in the markets," Chiasson Br. 32, is urgently needed to restore certainty and order.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted.

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SEPTEMBER 2015

[8] Prosecution of remote tippees is not atypical. See, *e.g.*, *United States* v. *Goffer*, 721 F.3d 113 (2d Cir. 2013), cert. denied, 135 S. Ct. 63 (2014).