No. 18-972

In The Supreme Court of the United States

MATHEW MARTOMA,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, in an insider trading prosecution, the government must demonstrate that the tipper received a personal benefit in exchange for providing insider information, as required by *Dirks*, or whether it suffices for the government to show that the tipper intended to confer a benefit on the tippee.

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. NACDL files numerous amicus briefs each year in this Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

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[1] Under Sup. Ct. R. 37.6, counsel for amicus curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel for all parties received notice of NACDL's intention to file this amicus brief ten days before the due date. Letters of consent from both parties to the filing of this brief have been lodged with the Clerk of the Court under Rule 37.2(a).

SUMMARY OF ARGUMENT

Tipper/tippee insider trading is a quasi-common law crime--a federal offense that rests on a statute so broadly worded that courts must define the elements of the crime with scant guidance from the statutory language. For such offenses, this Court's limiting construction, rather than the statutory text itself, affords the "fair warning" that due process requires. *McBoyle v. United States*, 283 U.S. 25, 27 (1931). But the Court's construction can perform that vital function only if lower courts treat it with the respect they afford a criminal statute.

This Court defined the crime of tipper/tipee insider trading in *Dirks v. SEC*, 463 U.S. 646 (1983), and *Salman v. United States*, 137 S. Ct. 420 (2016). Those cases establish "a simple and clear guiding principle for determining tippee liability," *id*. at 428 (quotation omitted): for the tippee to be liable, the tipper must have breached a fiduciary duty, and to determine whether such a breach has occurred, "the test is whether the [tipper] personally will benefit, directly or indirectly, from his disclosure," *Dirks*, 463 U.S. at 662. For more than three decades, that "simple and clear guiding principle" has defined the crime of tipper/tippee insider trading and provided fair warning to those who considered trading on tips of nonpublic information.

The court of appeals majority amended this Court's "guiding principle," and broadened the crime of insider trading, by substituting the tipper's intent to benefit the tippee for the requirement established in *Dirks* and *Salman* that the tipper personally

benefit. That disregard of this Court's decisions would warrant review under any circumstances. But review is especially important when, as here, those decisions define the scope of criminal liability for market participants nationwide, and when it is the Second Circuit--the "'Mother Court' in this area of the law," *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 762 (1975) (Blackmun, J., dissenting)--that has chosen to go its own way. The Court should grant the writ, reverse the court of appeals' judgment, and reinforce the personal benefit test that *Dirks* and *Salman* establish.

ARGUMENT

1. Over 200 years ago, this Court declared that there are no federal common law crimes. *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812); *see, e.g., Liparota v. United States*, 471 U.S. 419, 424 (1985) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." (citing *Hudson*)).[2] Although that rule remains in place, the intervening years have witnessed the creation of *quasi*-common law crimes. These are crimes that rest on statutory terms so broad and indefinite that courts are left to define the elements of the offense with little or no guidance from the statutory text.

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[2] The Court has cited approvingly the description of this rule as the "principle of legality," which "implement[s] separation of powers, provide[s] notice, and prevent[s] abuses of official discretion." *United States v. Lanier*, 520 U.S. 259, 265 n.5 (1997).

Quasi-common law crimes include, for example, the Sherman Antitrust Act, which prohibits any conspiracy "in restraint of trade," 15 U.S.C. § 1[3]; the honest services fraud statute, which defines "scheme or artifice to defraud" in the mail and wire fraud statutes to include "a scheme or artifice to deprive another of the intangible right of honest services," 18 U.S.C. § 1346; and the crime at issue here: tipper/tippee insider trading, which finds its statutory basis in 15 U.S.C. § 78j(b)'s prohibition of "any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the [SEC] may prescribe," coupled with Rule 10b-5's ban on "any device, scheme, or artifice to defraud . . . in connection with the purchase or sale of any security."

Such offenses--although not, strictly speaking, common law crimes--nonetheless present the same dangers. Quasi-common law crimes shift the task of defining what conduct deserves "the moral condemnation of the community" from the legislature, where it belongs, to the courts. *United States v. Bass*, 404 U.S. 336, 348 (1971). And such crimes flout the principle that "'fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as

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[3] As this Court put it in a notable understatement, "The Sherman Act, unlike most traditional criminal statutes, does not, in clear and categorical terms, precisely identify the conduct which it proscribes." *United States v. United States Gypsum Co.*, 438 U.S. 422, 438 (1978). Elsewhere the Court has referred to the "quasi-common law realm of antitrust." *California Dental Ass'n v. FTC*, 526 U.S. 756, 780 (1999).

possible the line should be clear.'" *Id*. (quoting *McBoyle*, 283 U.S. at 27).

2. This Court has sought to remedy the lack of fair warning inherent in quasi-common law crimes through a process of interpretation that often resembles common law crime definition. The Court has construed section 1 of the Sherman Act, for example, to prohibit only conspiracies to impose "unreasonable" restraints on trade, *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911), even though the word "unreasonable" does not appear in the statute. And the Court has distinguished between restraints that are per se unreasonable (such as price-fixing), *see, e.g., United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), and those for which reasonableness must be determined on a case-by-case basis, *see, e.g., Texaco v. Dagher*, 547 U.S. 1, 5-7 (2006) (pricing decisions of legitimate joint venture). Because the government prosecutes only per se cases criminally, *see* United States Department of Justice Manual § 7-1.100 (2018), market participants can assess the risks of criminal antitrust prosecution through careful review of this Court's decisions categorizing certain conduct as per se unreasonable.

The Court has adopted a similar approach to address fair warning problems with honest services fraud. Lower courts first created that crime by reading schemes to deprive another of honest services into the phrase "scheme or artifice to defraud" in the mail fraud statute. In *McNally v. United States*, 483 U.S. 350 (1987), the Court rejected this interpretation. It limited the mail fraud statute to the protection of property rights and left it to Congress to

determine whether honest services should also be covered. *See id.* at 360. Congress responded by enacting § 1346, which added "the intangible right of honest services" to "money or property" as the potential object of a "scheme or artifice to defraud." But § 1346 does not define "the intangible right of honest services," which left to the federal courts the quasi-common law task of defining that phrase "in language that the common world will understand." *McBoyle*, 283 U.S. at 27. Not surprisingly, given the vague statutory language and absence of legislative history, the lower courts splintered on this question.

This Court resolved the circuit split in *Skilling v. United States*, 561 U.S. 358 (2010). Drawing on the "core" conduct in the pre-*McNally* honest services cases, the Court concluded that § 1346 must be limited to "fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived." *Id.* at 404; *see id.* at 409 ("[W]e now hold that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law." (emphasis in original)). The Court rejected the government's effort to include a third category of conduct: "undisclosed self-dealing by a public official or private employee." *Id.* at 409-10. As in the antitrust context, persons who want to conform their conduct to § 1346 will glean the elements of an honest services violation not from the text of the statute, but from a careful parsing of this Court's decisions.

Insider trading liability--and, in particular, the liability of tippers and tippees at issue here--has followed the same pattern. The language of 15 U.S.C.

§ 78j(b), even coupled with Rule 10b-5, provides no guidance to the elements of the offense. This Court first filled this statutory vacuum in a civil case, *Dirks v. SEC*, 463 U.S. 646 (1983). The Court declared that neither a tipper nor a tippee is liable for insider trading unless the tipper breached a fiduciary duty in making the disclosure; in other words, the tippee's liability derives from the tipper's breach of fiduciary duty. The Court added that, to determine whether such a breach has occurred, "the test is whether the insider personally will benefit, directly or indirectly, from his disclosure." *Id.* at 662. Three decades later, in a criminal case, the Court reiterated that § 78j(b) and Rule 10b-5 "prohibit undisclosed trading on inside corporate information by individuals who are under a duty of trust and confidence that prohibits them from secretly using such information for their personal advantage." *Salman v. United States*, 137 S. Ct. 420, 423 (2016). The Court restated the *Dirks* rule that a tippee commits a crime only when the tipper receives a personal benefit. And it concluded that such a personal benefit to the tipper may be inferred when the tipper provides the nonpublic information to "'a trading relative or friend.'" *Id.* at 427-28 (quoting *Dirks*, 463 U.S. at 664).

In the tipper/tippee insider trading context, therefore--as in the antitrust and honest services contexts--the Court, rather than Congress, has determined the elements of the crime. And as in those contexts, a person seeking to conform his conduct to the law when trading on a tip of nonpublic information will learn virtually nothing from the statutory text. He must turn instead to *Dirks*' "simple and clear 'guiding principle' for determining tippee

liability" and act accordingly. *Salman*, 137 S. Ct. at 428 (quoting *Dirks*, 463 U.S. at 664).

3. The Court's definition of these and other quasi-common law crimes--its creation of "simple and clear guiding principle[s]" for determining whether an offense has been committed--ameliorates (but does not eliminate) the fair warning danger such crimes present.[4] But the Court's decisions perform that function *only if the lower courts treat their operative language as if Congress had included that language in the statute itself*. If lower courts can modify the Court's "guiding principles" materially, as the court of appeals did here, and thus broaden the scope of criminal liability, then the lack of fair warning inherent in quasi-common law crimes will remain. Defendants will suffer "the arbitrariness and unfairness of a legal system in which judges would develop the standards for imposing criminal punishment on a case-by-case basis." *United States v. Kozminski*, 487 U.S. 931, 951 (1988). The fair warning problem might even become worse, because persons who rely on the Court's definition of the crime will find themselves affirmatively misled when a lower court revises that definition to suit its own views. It is therefore essential to individual liberty that the Court rigorously police the lower courts' application of its decisions defining quasi-common law crimes.

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[4] By contrast, the Court's definition of these offenses highlights the other principal danger of quasi-common law crimes: that they shift from Congress to the courts the task of determining what conduct warrants "the moral condemnation of the community." *Bass*, 404 U.S. at 348.

The need for the Court's intervention is particularly acute here, because the court of appeals endorsed an expansion of the tipper/tippee insider trading crime that the Court declined to adopt in *Salman*. As described at pages 11-12 of Martoma's petition, the government urged the *Salman* Court to hold that tipper/tippee insider trading liability arises "whenever the tipper discloses confidential trading information for a noncorporate purpose." *Salman*, 137 S. Ct. at 426. Under this view, a gift of nonpublic information to *anyone*--even a complete stranger--"would support the inference that the tipper exploited the trading value of inside information for personal purposes and thus personally benefited from the disclosure." *Id*. Rather than adopt this sweeping expansion of *Dirks*, the *Salman* Court applied the "guiding principle" from that case and found that a personal benefit to the tipper may be inferred "when a tipper gives inside information to 'a trading relative or friend.'" *Id*. at 427-28 (quoting *Dirks*, 463 U.S. at 664).

The court of appeals, by contrast, effectively adopted the government's position in *Salman* by substituting the tipper's intent to benefit the tippee for the requirement established in *Dirks* and *Salman* that the tipper personally benefit. That exceeded the court's proper role; a lower court cannot revise this Court's definition of a quasi-common law crime, any more than it can amend the statute on which the crime nominally rests. The court of appeals' decision to disregard *Dirks* and *Salman* is no less troublesome than if it had held a joint venture pricing agreement per se unreasonable under section 1 of the Sherman Act (and thus subject to criminal prosecution),

contrary to *Dagher*, or if it had found undisclosed self-dealing to violate the honest services statute, contrary to *Skilling*. If *Dirks*' "guiding principle" of three decades' standing is to change, Congress should act, or at least this Court should expressly overrule its prior decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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