No. 18-972

IN THE

Supreme Court of the United States

MATHEW MARTOMA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR LAW PROFESSORS AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae are law professors who teach and write about the federal securities laws. They have an interest in the appropriate development and content of the law of insider trading.[1]

[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amici curiae or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for the parties received notice of amici's intent to file this brief at least ten days before its due date. The parties have consented to the filing of this brief.

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The views of the amici curiae expressed here do not necessarily reflect the views of the institutions with which they are or have been affiliated. The names of the institutions are included for identification only.

SUMMARY OF ARGUMENT

In *Dirks* v. *SEC*, 463 U.S. 646 (1983), this Court held that a tipper who conveys confidential information to a tippee has breached a fiduciary duty—thus giving rise to potential civil and criminal liability—when he "receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings." *Id.* at 663. The Court reaffirmed that element of insider-trading liability just three Terms ago in *Salman* v. *United States*, 137 S. Ct. 420, 423 (2016).

Yet a divided panel of the Second Circuit held in this case that a tip can create liability whenever the tipper intends to benefit *the tippee*. Under the Second Circuit's standard, the tipper need not receive (or expect to receive) any personal benefit by providing the tip. Nor need he have the sort of close personal relationship with the tippee that might suggest a benefit to the tippee *is* a benefit to the tipper. Pet. App. 21. The Second Circuit's holding stands in conflict with *Dirks*, *Salman*, and numerous decisions of other courts of appeals that have followed those precedents.

The Second Circuit's standard also departs from this Court's prior emphasis on the need for *objective* indicia of whether a tipper has breached his fiduciary duty. Instead, the decision below requires law enforcement authorities, judges, and juries to engage in guesswork about the subjective mental states of the tipper and tippee—exactly the sort of speculation this Court has held should not be required. The Second Circuit's articulation of that standard in an opinion wholly unanticipated by decades of precedent compounds the vagueness, lenity, and ex post facto concerns already inherent in the judge-made nature of the criminal prohibition on insider trading.

The Second Circuit's error is thus exceptionally important to the criminal and civil enforcement of the insider trading laws and to the administration of the federal securities laws. Unless this Court grants certiorari, anyone discussing non-public information about securities within the Second Circuit—including the many analysts in New York's financial industry, whose role "is necessary to the preservation of a healthy market," *Dirks*, 463 U.S. at 658—faces the risk of imprisonment for violating a judge-made rule of criminal law that goes far beyond anything this Court has previously recognized. The expansive breadth of the Second Circuit's rule will deter lawful conduct that improves the functioning of the financial markets.

Finally, the Court's review is warranted because the Second Circuit's rule will not only apply in the many criminal prosecutions and SEC enforcement actions brought within that Circuit; it is likely to influence the law in other Circuits. The Court should stop the progression of the Second Circuit's erroneous rule before it can begin.

ARGUMENT

I. THE DECISION BELOW CREATES BROAD AND UNPREDICTABLE CRIMINAL LIABILITY

A. The Second Circuit Eliminated The Personal Benefit Element Prescribed By This Court

1. Under this Court's insider-trading decisions, a tip of material nonpublic information can give rise to criminal liability only if it breaches the tipper's fiduciary duty. *Chiarella* v. *United States*, 445 U.S. 222, 227-

235 (1980). The Court has specified that such a breach occurs only where "the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings." *Dirks* v. *SEC*, 463 U.S. 646, 663 (1983). The Court reaffirmed that standard just three Terms ago in *Salman* v. *United States*, 137 S. Ct. 420 (2016), explaining that "[a] tipper breaches … a fiduciary duty … when the tipper discloses the inside information for a personal benefit." *Id.* at 423.

The *Dirks* Court articulated a set of "objective facts and circumstances that often justify … an inference" that the tipper "receives a direct or indirect personal benefit from the disclosure." 463 U.S. at 663-664. "For example," the Court explained, "there may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient." *Id.* at 664. An inference of personal benefit may also be warranted, the Court wrote, "when an insider makes a gift of confidential information to a trading relative or friend," because in that situation "[t]he tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient." *Id.* But in all events, "*the test* is whether the insider personally will benefit, directly or indirectly, from his disclosure. Absent some personal gain, there has been no breach of duty to stockholders." *Id.* at 662 (emphasis added); *see also Salman*, 137 S. Ct. at 427 ("'[T]he test,' we explained, 'is whether the insider personally will benefit, directly or indirectly, from his disclosure.'").

2. The Second Circuit displaced the core "test" of *Dirks* and *Salman* by reading one phrase from *Dirks*—"an intention to benefit the particular recipient"—implausibly and entirely out of context.

As noted above, *Dirks* observed that "an inference" of personal benefit *to the tipper* is "often justif[ied]" where there is "a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient." 463 U.S. at 664. That sentence is most naturally read—given all that surrounds it—to mean that if the tipper and the tippee have a close personal relationship, then a benefit for the tippee is equivalent to a benefit for the tipper. That is the interpretation offered by the dissent below. Pet. App. 38. And the panel majority acknowledged it was a "plausible" interpretation. Pet. App. 16.

Yet despite the availability of that "plausible" reading that would preserve *Dirks*'s core holding, the panel majority instead adopted a different interpretation. It held that "[t]he comma separating the 'intention to benefit' and 'relationship …' phrases can be read to sever any connection between them," so that the sentence "effectively reads, 'there may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or there may be an intention to benefit the particular recipient.'" Pet. App. 17. That is how the Second Circuit reasoned that a tipper can breach his fiduciary duty simply by conveying information with the intent to benefit the tippee—even if the tipper and tippee have no close personal relationship, even if the tippee is a complete stranger to the tipper, and even if the tipper will realize no personal benefit whatsoever.

That holding is profoundly at odds with this Court's precedent. It disregards the Court's repeated statements that "*the test*" of whether a tipper breaches a fiduciary duty "is whether *[he] personally* will benefit, directly or indirectly, from his disclosure." *Dirks*, 463 U.S. at 662 (emphases added); *see Salman*, 137 S. Ct. at

427. It rewrites this Court's repeatedly articulated "test," eliminating the requirement that the *tipper* himself benefit from the disclosure of information.

3. The Second Circuit's departure from this Court's precedent is all the more concerning because, in *Salman*, this Court declined to adopt a theory of liability equivalent to the one the Second Circuit adopted.

In *Salman*, the government argued that a tipper "personally benefits from disclosing confidential information for trading when he acts for personal, rather than corporate, reasons," on the theory that such a tipper "places [his] personal interests above his fiduciary duty to shareholders." U.S. Br. 18-19, *Salman* v. *United States*, No. 15-628 (U.S. Aug. 1, 2016); *see Salman*, 137 S. Ct. at 426 ("Under the Government's view, a tipper personally benefits whenever the tipper discloses confidential trading information for a noncorporate purpose."). The government's theory in *Salman* is essentially the logic of the Second Circuit's opinion here. *See* Pet. App. 18 ("The tipper's intention to benefit the tippee proves a breach of fiduciary duty because it demonstrates that the tipper improperly used inside information for personal ends and thus lacked a legitimate corporate purpose.").

As the petition explains, however, several Justices expressed considerable skepticism of that theory at oral argument in *Salman*. *See* Pet. 24. And the Court declined to adopt it. *See* 137 S. Ct. at 426-427. Instead the Court chose to resolve the case on the "narrow" ground that—as *Dirks* explains—a tipper's "'gift of confidential information *to a trading relative or friend* … resemble[s] trading by the insider followed by a gift of the profits to the recipient.'" *Id.* at 427 (quoting *Dirks*, 463 U.S. at 664 (some emphasis omitted, remainder in original)).[2]

The decision below thus resurrected exactly the broad theory this Court declined to adopt in *Salman*—without even acknowledging that fact, let alone explaining why its departure from *Salman* was warranted. To the contrary, as noted above, the Second Circuit majority *rejected* what it conceded was a "plausible" interpretation of the statute (Pet. App. 16) that would have avoided any departure from this Court's precedents.

4. The decision below also conflicts with decisions of other courts of appeals, which have followed *Dirks* in holding that a tipper breaches his fiduciary duty only when he realizes (or expects to realize) a *personal* benefit from conveying confidential information—not just when he intends to benefit the tippee. A few examples prove the point.

In *SEC* v. *Yun*, 327 F.3d 1263 (11th Cir. 2003), the Eleventh Circuit reiterated *Dirks*'s requirement that, "for a tippee to be liable, the tipper (a corporate insid-

[2] It is noteworthy that the Second Circuit did not base its ruling on that so-called "gift theory." That is for good reason. The gift theory rests on a legal fiction—the idea that, where a tipper gives a "gift of confidential information to a trading relative or friend," he can be treated *as if* he had obtained a personal benefit by "trading … himself" on the information and then made "a gift of the profits to the recipient." *Dirks*, 463 U.S. at 664. As the petition explains (at 21), that legal fiction is plausible—if at all—only in the context of friends and relatives. That is because "the notion that an insider would trade on valuable inside information and then give the profits to a 'casual or social acquaintance'—let alone a perfect stranger—blinks reality. The inference makes sense only if the tipper and the tippee have the kind of relationship in which the tipper would give the tippee other valuable gifts." Pet. 21 (citation omitted).

er) would have to intend to benefit *personally* from his disclosure of the confidential information to the tippee." *Id.* at 1275 (emphasis added). The court further observed that, under *Dirks*, a tip could support liability only if the tipper acted "with the intent of *benefitting from the tippee's trading*." *Id.* at 1279 (emphasis added). The Second Circuit's decision in this case, by contrast, allows liability if the tipper intends for the *tippee* to benefit by trading, even if the tipper himself expects to realize no benefit at all.

Similarly, in *United States* v. *Bray*, 853 F.3d 18 (1st Cir. 2017), the First Circuit confronted an argument that the government had failed to prove either a quid pro quo or a close relationship between the tipper and the tippee. *Id.* at 26. The court responded by holding that the evidence was sufficient to prove a quid pro quo and a friendship between the tipper and tippee. Under the Second Circuit's standard, that analysis would have been unnecessary; the conviction could have been upheld simply on the theory that the tipper intended to benefit the tippee.

Finally, the Seventh Circuit's decision in *SEC* v. *Maio*, 51 F.3d 623 (7th Cir. 1995), emphasizes that "the test" for whether a corporate insider has breached a fiduciary duty by conveying information "is whether the disclosure *will benefit the insider* either directly or indirectly." *Id.* at 632 (emphasis added). "The theory," the court explained, "is that by disclosing information selectively the insider is, in effect, selling the information to its recipient for things of value to himself." *Id.* Under the Second Circuit's standard, by contrast, a tip can support liability absent any proof that a tipper expects to obtain anything of value by conveying information on which he expects a tippee to trade.

The conflict between the decision below and decisions of other courts of appeals heightens the need for review.

B. The Decision Below Converts ***Dirks***'s Objective Standard Into A Subjective One

The Second Circuit's decision would be troubling enough if it merely departed from this Court's personal benefit requirement. It is even more troubling because it also repudiates *Dirks*'s emphasis on the need to "focus on objective criteria" for determining whether a tipper has breached a fiduciary duty, 463 U.S. at 663.

In *Dirks*, the Court specifically held that law enforcement authorities and "courts are not required to read the parties' minds" to determine whether a tipper has breached a fiduciary duty. 463 U.S. at 663. Rather, the Court explained, the "inquiry … whether there has been a breach of duty by the insider … requires courts to focus on objective criteria, *i.e.*, whether the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings." *Id.* As discussed above, the Court went on to enumerate "objective facts and circumstances that often justify such an inference." *Id.* at 664. The Court reiterated the importance of '"focus[ing] on objective criteria"' in *Salman*. 137 S. Ct. at 427.[3]

Yet the decision below will require judges, juries, and law enforcement authorities in the Second Circuit

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[3] Scholarship indicates that the *Dirks* Court emphasized the personal benefit requirement and the objective nature of that requirement to avoid concerns about a subjective standard. Pritchard, Dirks *and the Genesis of Personal Benefit*, 68 S.M.U. L. Rev. 857, 862-868 (2015).

to do precisely what *Dirks* held was not required: to "read the parties' minds," 463 U.S. at 663, to determine whether a tipper has breached a fiduciary duty. The Second Circuit's standard invites prosecutors and the SEC to bring charges, and invites juries to find defendants criminally or civilly liable, based on nothing more than guesswork about whether the tipper subjectively intended to benefit the tippee. As the dissent warned, "the prosecution could pile up insinuations about the tipper's subjective understanding of the purpose of the tip, and the jury would be charged with resting their inferences about her benefit on those wobbly foundations." Pet. App. 38. Even more serious concerns would arise in tippee prosecutions, which would require judges and juries to guess not only about whether the tipper subjectively intended to benefit the tippee but also about whether the tippee *knew* of the tipper's intent, *see Salman*, 137 S. Ct. at 427.

By converting the objective "personal benefit" inquiry into a subjective one, in defiance of *Dirks* and *Salman*, the Second Circuit's standard puts extreme enforcement discretion in the hands of criminal prosecutors and the SEC and will fundamentally change how insider-trading cases are presented and proved.

II. THE DECISION BELOW COMPOUNDS EXISTING PROBLEMS WITH INSIDER-TRADING LAW

The Court's review is further warranted because the Second Circuit's rule compounds existing problems in the law of insider trading. It worsens the vagueness, lenity, and ex post facto concerns that are inherent in the judge-made nature of the criminal prohibition on insider trading. By leaving financial market participants with even less guidance about how to conform their conduct to the mandates of the law, it will chill activity that helps the markets to function efficiently.

A. The Decision Below Worsens The Due Process Problems Of Insider-Trading Law

The criminal prohibition on insider trading is exceptionally unusual because it has been articulated by the courts, not by Congress. Section 10(b) of the Securities Exchange Act—the provision that has been interpreted as the font of the prohibition against insider trading—does not mention insider trading, let alone tipping, at all. It merely prohibits the "use or employ[ment], in connection with the purchase or sale of any security," of "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). Nor does the SEC's Rule 10b-5 offer any more specific bar on insider trading; it simply prohibits materially false statements or misleading omissions, fraudulent or deceitful practices, and the use of "any device, scheme or artifice to defraud." 17 C.F.R. § 240.10b-5. The law of insider trading originates instead from decisions of this Court, including *Chiarella* and *Dirks*.

That is highly anomalous, since this Court has long held that Congress and not the courts must determine the elements of federal crimes. That principle dates back to *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32 (1812), in which the Court recognized that "[t]he legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence," *id.* at 34, and it has been recognized in many more recent decisions as well. *See, e.g.*, *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001); *Bousley* v. *United States*, 523 U.S. 614, 621 (1998); *Liparota* v.

United States, 471 U.S. 419, 424 (1985); *see also, e.g.*, *Whitman* v. *United States*, 135 S. Ct. 352, 354 (2014) (Scalia, J., respecting the denial of certiorari).

The rule that Congress must define federal crimes advances essential liberty interests, not just separation-of-powers principles. *See, e.g.*, *United States* v. *Reese*, 92 U.S. 214, 221 (1875) ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large."). When a criminal prohibition is codified in the U.S. Code, anyone potentially affected by the prohibition can read it and conform his conduct to its requirements, knowing that he can rely on what is written on the printed page. Indeed, whole bodies of constitutional law serve to fortify that reliance interest. The Ex Post Facto Clause, for example, prevents changes in criminal statutes from being applied retroactively. *See, e.g.*, *Peugh* v. *United States*, 569 U.S. 530, 538 (2013). The void-for-vagueness doctrine requires that prohibitions be "clearly defined," on the view that individuals are "free to steer between lawful and unlawful conduct" and so must have "a reasonable opportunity to know what is prohibited." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972). And the rule of lenity recognizes that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of" the defendant. *Rewis* v. *United States*, 401 U.S. 808, 812 (1971); *see also, e.g.*, *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-222 (1952) ("[W]hen choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.").

The Second Circuit's decision exemplifies the vagueness, lenity, and ex post facto problems that arise when federal courts (rather than Congress) determine the elements of a criminal offense. Start with vagueness: How could one consider the prohibition against insider trading to be "clearly defined," *Grayned*, 408 U.S. at 108, when after years of development in the law, the judges of the Second Circuit cannot agree on the basic elements of the offense? Next, lenity: If the Second Circuit had been construing a statute as opposed to this Court's decision in *Dirks*, it could not have adopted the more punitive interpretation of what it conceded was "ambiguous" language, when a less punitive interpretation was "plausible," Pet. App. 16. Finally, consider the ex post facto concerns raised by this case. The defendant, who engaged in the charged conduct in 2008 (Pet. App. 4-7), is now most of the way through a nine-year prison sentence. His appeal—which was first argued in 2015 (Pet. App. 1)—has taken so long because the Second Circuit repeatedly delayed it to account for developments in the law of insider trading (*see* Pet. 10-14). And at the end of the day, the Second Circuit affirmed the judgment on a theory that could not have been envisioned, under *Dirks*, at the time of the allegedly criminal conduct. Indeed, it is a theory on which the jury in the case was not even instructed. *See* Pet. 16. None of this is how criminal law is supposed to work.

Decisions like the one here, which expand the scope of liability in unpredictable ways, make it exceedingly difficult for individuals to know what is unlawful and to conform their conduct to what the law proscribes. That is a problem even in the civil context, but it is a problem of constitutional dimension in the criminal context: "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta* v. *New Jersey*, 306 U.S. 451, 453 (1939). The imposition of our society's second most serious sanction—the deprivation of liberty—cannot depend on the case-by-case, retrospective exposition of legal principles. "[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States* v. *Lanier*, 520 U.S. 259, 266 (1997).

B. Indiscriminate Insider Trading Prosecutions Will Chill Valuable Economic Activity

The Second Circuit's decision also worsens the extent of uncertainty faced by financial market participants as they go about their business.

It is essential to the efficient operation of financial markets that market participants be able to share information with each other. As *Dirks* explains, "the SEC itself recognizes" that "the role of market analysts … is necessary to the preservation of a healthy market." 463 U.S. at 658; *see also id.* at 658 n.17; Newkirk & Robertson, SEC, *Remarks at the 16th International Symposium on Economic Crime: Insider Trading—A U.S. Perspective* (Sept. 19, 1998) (acknowledging the "important role that analysts play in our markets"), http://tinyurl.com/y5t7jg9c. Analysts commonly "'ferret out and analyze information,'" often "by meeting with and questioning corporate officers and others who are insiders," and that information "may be the basis for judgments as to the market worth of a corporation's securities"—judgments that allow the market price of the security to reflect its value more accurately. *Dirks*, 463 U.S. at 658-659; *see also, e.g.*, Black, *The Legal and Institutional Preconditions for Strong Securities Mar-*

kets, 48 UCLA L. Rev. 781, 783 (2001) (an essential prerequisite for strong public securities markets is the ability of a country's laws and institutions to permit minority shareholders to obtain "good information about the value of a company's business").

For that reason, the *Dirks* Court worried about adopting a standard that "could have an inhibiting influence on the role of market analysts." 463 U.S. at 658. That is why it adopted the objective personal benefit requirement: "to have a guiding principle for those whose daily activities must be limited and instructed by the SEC's inside-trading rules." *Id.* at 664. The Court sought to define legal standards that give market participants adequate notice of the line between permissible and impermissible communications and that prevent arbitrary and discriminatory law enforcement. *See id.* at 658 n.17, 664 n.24.

The decision below flouts that objective of *Dirks*. The vagueness and expansive breadth of the Second Circuit's standard will chill legitimate communications of financial analysts and other law-abiding participants in the securities market. Even if a corporate insider (or an analyst) may have information to communicate without any intention that the recipient obtain a benefit by trading on it, he may well hesitate to share the information because he fears that law enforcement authorities or a jury might misperceive his intention. That is the danger of a standard so reliant on guesswork about a tipper's mental state.

III. THE DECISION BELOW WILL HAVE WIDESPREAD EFFECTS

Even though the Second Circuit's error is currently limited to that jurisdiction, it will have outsize importance. The Second Circuit—home to the world's largest securities market—"has long been the country's preeminent court in the field of securities and financial regulation." Seymour, *Securities and Financial Regulation in the Second Circuit*, 85 Fordham L. Rev. 225, 225 (2016); *see also, e.g.*, *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 276 (2010) (Stevens, J., concurring in the judgment) (adopting Justice Blackmun's description of the Second Circuit as "[t]he Mother Court of securities law" (internal quotation marks omitted)). That has two consequences.

First, many insider-trading prosecutions and enforcement actions are brought in the Second Circuit. That is true both because much of the relevant conduct occurs within that Circuit and because the relevant venue statute is so broad, allowing actions to be "brought in the district wherein any act or transaction constituting the violation occurred," 15 U.S.C. § 78aa—which frequently includes the Southern District of New York—even where the passing of information occurred elsewhere. The permissiveness of the venue statute means that prosecutors and the SEC are likely to bring even more actions within the Second Circuit than they otherwise might have, to take advantage of the Second Circuit's lax tipping rule.

Second, the Second Circuit's interpretation of securities law often has broad influence in other courts nationwide. *See generally* Seymour, 85 Fordham L. Rev. 225. The Second Circuit first articulated what became known as the "classical theory" of insider trading. *SEC* v. *Texas Gulf Sulphur Co.*, 401 F.2d 833 (2d Cir. 1968) (en banc). It was the first court of appeals to recognize an implied private right of action under Rule 10b-5. *Fischman* v. *Raytheon Mfg. Co.*, 188 F.2d 783 (2d Cir. 1951). And it has pioneered developments in criminal securities law as well. In *United States* v. *Simon*, 425 F.2d 796 (2d Cir. 1969), for example, it became one of the first courts to hold that even an accountant who complies with General Accepted Accounting Principles can be criminally liable if the financial statements nevertheless create a false or misleading impression—a position later adopted by other circuits. *See e.g.*, *In re K-tel Int'l, Inc. Sec. Litig.*, 300 F.3d 881 (8th Cir. 2002); *United States* v. *Weiner*, 578 F.2d 757 (9th Cir. 1978) (per curiam).

Members of this Court have recognized the Second Circuit's influence over the development of securities law. For example, Justice Stevens's concurrence in *Morrison* explained how the Second Circuit's interpretation of § 10(b) of the Securities Exchange Act "became the 'north star' of § 10(b) jurisprudence, not just regionally but nationally as well," as "other courts converged on the same basic approach." 561 U.S. at 275 (citation omitted). Yet the Court has not hesitated to overrule the Second Circuit's standards when they are incorrect, as in *Morrison* itself. *See id.* at 255-261 (majority opinion).

Because the Second Circuit's approach in matters of securities law has considerable influence with other courts, it is essential for this Court to articulate the correct interpretation of the law before the Second Circuit's incorrect version can infect the jurisprudence of other courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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