No. 18-972

In the Supreme Court of the United States

MATHEW MARTOMA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court's instructions to the jury on the requirement, in an insider-trading prosecution based on a tipper's disclosure of material nonpublic information to a tippee, that the tipper must receive or anticipate a "personal benefit from the disclosure," *Dirks* v. *SEC*, 463 U.S. 646, 663 (1983), were plainly erroneous.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-48) is reported at 894 F.3d 64. That opinion amended and superseded an earlier panel opinion (Pet. App. 50-119), which is reported at 869 F.3d 58.

JURISDICTION

The judgment of the court of appeals was entered on August 23, 2017. A petition for rehearing was denied on August 27, 2018 (Pet. App. 49). On November 1, 2018, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including December 26, 2018. On December 10, 2018, Justice Ginsburg further extended the time to and including January 24, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371, and two counts of securities fraud, in violation of 15 U.S.C. 78j(b) (2006) and 15 U.S.C. 78ff. Judgment 1. He was sentenced to 108 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1-48.

1. Section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. 78a *et seq.*, makes it unlawful to "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 [Securities and Exchange Commission (SEC)] may prescribe." 15 U.S.C. 78j(b) (2006). 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.

Insider trading is one of the deceptive devices prohibited by Section 10(b) and Rule 10b-5. Under the "'classical theory'" of insider trading, a corporate insider violates Section 10(b) and Rule 10b-5 by "trad[ing] in the securities of his corporation on the basis of material, nonpublic information." *United States* v. *O'Hagan*, 521 U.S. 642, 651-652 (1997). Such trading "qualifies as a 'deceptive device'" because it violates the "'relationship of trust and confidence * * * between the shareholders of a corporation and those insiders who have ob-

tained confidential information by reason of their position with that corporation.'" *Id.* at 652 (quoting *Chiarella* v. *United States*, 445 U.S. 222, 228 (1980)). To avoid deceiving "uninformed . . . stockholders," a corporate insider in possession of such information must either publicly "disclose" it or "abstain from trading." *Ibid.* (brackets and citation omitted).

Under the "'misappropriation theory'" of insider trading, a person violates Section 10(b) and Rule 10b-5 "when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information." *O'Hagan*, 521 U.S. at 652. Whereas the classical theory "premis[es] liability on a fiduciary relationship between company insider and purchaser or seller of the company's stock," the misappropriation theory rests on the "fiduciary-turned-trader's deception of those who entrusted him with access to confidential information." *Ibid.* The misappropriation theory thus "outlaws trading on the basis of nonpublic information" by "outsider[s]" to the corporation who act fraudulently. *Id.* at 652-653.

In either case, individuals under a fiduciary duty to disclose material nonpublic information or abstain from trading on the basis of the information "also may not tip [the] information to others for trading." *Salman* v. *United States*, 137 S. Ct. 420, 423 (2016); see *id.* at 425 n.2. "The tippee acquires the tipper's duty to disclose or abstain from trading if the tippee knows the information was disclosed in breach of the tipper's duty, and the tippee may commit securities fraud by trading in disregard of that knowledge." *Id.* at 423. "A tipper breaches such a fiduciary duty * * * when [he] discloses the inside information for a personal benefit." *Ibid.*; see *Dirks* v. *SEC*, 463 U.S. 646, 664 (1983).

2. Petitioner was convicted of securities fraud for trading on the basis of material nonpublic information regarding the results of a clinical trial of an experimental drug. Pet. App. 4-7. Petitioner received the information from two physicians involved with the clinical trial, whom petitioner had cultivated for nearly two years as paid sources of inside information. Gov't C.A. Br. 2-3. Petitioner traded on the tips to make profits and avoid losses of approximately $275 million. *Id.* at 3.

a. Petitioner worked as a portfolio manager at S.A.C. Capital Advisors (SAC), a hedge fund owned and managed by Steven Cohen. Pet. App. 4. Petitioner "managed an investment portfolio * * * focused on pharmaceutical and healthcare companies." *Ibid.* In 2006, petitioner began accumulating shares of two pharmaceutical companies, Elan Corporation and Wyeth, which were jointly developing an experimental drug called bapineuzumab to treat Alzheimer's disease. *Ibid.*; see Trial Tr. (Tr.) 117, 124. Petitioner also advised Cohen, who managed the hedge fund's largest portfolio, to buy shares in Elan and Wyeth. Pet. App. 4.

At the time, bapineuzumab was in a Phase II clinical trial. Tr. 124-125.[1] To glean more information about the clinical trial, petitioner contacted two "expert networking firms" and sought to consult with 22 doctors whom petitioner identified as involved with the clinical trial. Gov't C.A. Br. 4. Ultimately, he arranged paid consultations with two such doctors: Dr. Sidney Gilman, who oversaw the "safety monitoring committee" of the clinical trial, and Dr. Joel Ross, who served as a principal investigator for the clinical trial. Pet. App. 5.

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[1] Clinical trials to study the safety and effectiveness of new drugs generally proceed in three phases involving successively larger groups of patients. See Tr. 272-273.

Petitioner arranged approximately 43 consultations with Dr. Gilman, at a rate of $1000 per hour—paying Dr. Gilman more than $70,000 through an expert networking firm. Pet. App. 5 & n.1; Gov't C.A. Br. 5. Although Dr. Gilman knew that he was required not to disclose any confidential information from the clinical trial, he "nevertheless provided [petitioner], whom he knew to be an investment manager seeking information to help make securities trading decisions, with confidential updates on the drug's safety that he received during the meetings of the safety monitoring committee." Pet. App. 5. Dr. Gilman also provided petitioner with the dates of upcoming meetings, which enabled petitioner "to schedule consultations with Dr. Gilman shortly after each one." *Ibid.* Based on the information he obtained, petitioner was able to amass a large position in Wyeth and Elan stock secure in the knowledge—not yet known to the market—that the clinical trial had not revealed any serious safety problems. Gov't C.A. Br. 6.

Petitioner also met "on many occasions between 2006 and July 2008" with Dr. Ross. Pet. App. 5. Petitioner paid Dr. Ross approximately $1500 per hour for those consultations, through an expert networking firm. *Id.* at 5 & n.1. Like Dr. Gilman, Dr. Ross knew that he was required to maintain the confidentiality of information about the bapineuzumab clinical trial, but he too "provided [petitioner] with [confidential] information about the clinical trial, including information about his patients' responses to the drug and the total number of participants in the study." *Id.* at 6.

b. The final results of the Phase II trial were scheduled to be released at a conference on Alzheimer's disease on July 29, 2008. Pet. App. 6. Dr. Gilman was selected to present the results at the conference. *Ibid.* On

July 15 and 16, Dr. Gilman was "unblinded" to the final efficacy results for the first time. Gov't C.A. Br. 7. Dr. Gilman "identified two major weaknesses in the data that called into question the efficacy of the drug as compared to the placebo." Pet. App. 6 (citation and internal quotation marks omitted).

On July 17, 2008—one day after seeing the final results—Dr. Gilman shared what he had learned with petitioner in a 90-minute phone call. Pet. App. 6. That same day, petitioner bought a ticket to fly to Michigan to meet with Dr. Gilman in person; the meeting took place two days later, on July 19. *Id.* at 6-7. "At that meeting, Dr. Gilman showed [petitioner] a PowerPoint presentation containing the efficacy results and discussed the data with him in detail." *Id.* at 7. Dr. Gilman "knew that [petitioner] was an investment manager who was seeking information on which to base securities trading decisions" and "plainly understood the valuable nature of the information." *Id.* at 27-28. Dr. Gilman did not submit an invoice to be paid for the July 17 telephone call or the July 19 meeting; he later explained that seeking to be paid for such a consultation, shortly after being one of the few persons to whom the final results were disclosed, would have been "tantamount to confessing that [he] was feeding * * * [petitioner] inside information." Tr. 1918; see Gov't C.A. Br. 19.

Petitioner emailed Cohen the morning after meeting with Dr. Gilman. Pet. App. 7. The subject line of the email was "It's important," and petitioner asked Cohen if they could talk by phone. *Ibid.* The two then spoke by phone, after which petitioner "emailed Cohen a summary of SAC's Elan and Wyeth holdings." *Ibid.* On July 21, 2008, "SAC began to reduce its position in Elan and Wyeth securities and entered into short-sale and

options trades that would be profitable if Elan's and Wyeth's stock fell." *Ibid.* Petitioner sold all of the Elan and Wyeth shares in his own portfolio and shorted Wyeth's stock. Gov't C.A. Br. 8.

On July 29, 2008, Dr. Gilman publicly presented the results of the bapineuzumab clinical trial. Pet. App. 7. Elan's stock price dropped during the announcement; by the following afternoon, Elan's and Wyeth's share prices had dropped by 42% and 12%, respectively. *Ibid.* As a result of the preceding week's trades, however, SAC made "approximately $80.3 million" and avoided $194.6 million in losses after the announcement. *Ibid.* Petitioner himself received a $9.3 million bonus "based in large part on his trading activity in Elan and Wyeth." *Ibid.*; see Gov't C.A. Br. 9.

3. On August 22, 2013, a grand jury in the Southern District of New York returned a superseding indictment charging petitioner with one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. 371, and two counts of securities fraud, in violation of 15 U.S.C. 78j(b) (2006) and 15 U.S.C. 78ff. Superseding Indictment 1-13.

The case proceeded to trial. With regard to the government's requirement to prove that Dr. Gilman or Dr. Ross disclosed material nonpublic information to petitioner for personal benefit, see p. 3, *supra*, the district court instructed the jury as follows:

> If you find that Dr. Gilman or Dr. Ross disclosed material, non-public information to [petitioner], you must then determine whether the government proved beyond a reasonable doubt that Dr. Gilman or Dr. Ross received or anticipated receiving some personal benefit, direct or indirect, from disclosing the material, non-public information at issue.

> The benefit may, but need not be, financial or tangible in nature; it could include obtaining some future advantage, developing or maintaining a business contact or a friendship, or enhancing the tipper's reputation.
>
> A finding as to benefit should be based on all the objective facts and inferences presented in the case. You may find that Dr. Gilman or Dr. Ross received a direct or indirect personal benefit from providing inside information to [petitioner] if you find that Dr. Gilman or Dr. Ross gave the information to [petitioner] with the intention of benefiting themselves in some manner, or with the intention of conferring a benefit on [petitioner], or as a gift with the goal of maintaining or developing a personal friendship or a useful networking contact.

Tr. 3191; see Pet. App. 8. Petitioner did not object to that instruction. See Pet. App. 62.

The jury found petitioner guilty on all counts. Pet. App. 1. The district court sentenced petitioner to concurrent terms of imprisonment of 60 months on the conspiracy count and 108 months on the substantive securities-fraud counts, to be followed by three years of supervised release. Judgment 2-3.

4. The court of appeals affirmed. Pet. App. 1-48.[2] In relevant part, petitioner challenged the personal-benefit jury instruction in light of a circuit decision postdating his conviction, *United States* v. *Newman*, 773 F.3d 438 (2d Cir. 2014), cert. denied, 136 S. Ct. 242 (2015), which this Court abrogated in part during his appeal, see *Sal-*

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[2] The panel issued an opinion in August 2017 (Pet. App. 50-119) and a substantially amended opinion in June 2018 (*id.* at 1-48).

man, 137 S. Ct. at 428. The court determined that petitioner's forfeited claim did not warrant plain-error relief because the challenged instruction did not affect petitioner's substantial rights, given the "compelling evidence" that Dr. Gilman and Dr. Ross "shared a relationship [with petitioner] suggesting a *quid pro quo*" of consulting fees in exchange for tips. Pet. App. 27; see *id.* at 3-4, 24-28.

a. The court of appeals began by reviewing this Court's seminal decision in *Dirks* v. *SEC*, *supra*. Pet. App. 14-16. *Dirks* explained that a tippee "assume[s]" a "derivative" fiduciary duty not to trade on the basis of material nonpublic information (or to disclose the information) when the tippee receives such information and the tippee "knows or should know that" the information was disclosed "*improperly*," in breach of an insider's fiduciary duty. 463 U.S. at 659-660. "In determining whether a tippee is under an obligation to disclose or abstain, it thus is necessary to determine whether the insider's 'tip' constituted a breach of the insider's fiduciary duty." *Id.* at 661. That question, in turn, "depends in large part on the purpose of the disclosure." *Id.* at 662.

Dirks held that "the test" for a breach of fiduciary duty is "whether the insider personally will benefit, directly or indirectly, from his disclosure," such as through "a pecuniary gain or a reputational benefit that will translate into future earnings." 463 U.S. at 662, 663. The Court observed that "[t]here are objective facts and circumstances that often justify * * * an inference" that the "insider receive[d] a direct or indirect personal benefit." *Id.* at 663-664. "For example, 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. The relevant requirements are also satisfied "when an insider makes a gift of confidential information to a trading relative or friend"; in such a circumstance, "[t]he tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient." *Ibid.*

b. Petitioner contended that the personal-benefit instruction, to which he did not object, was inaccurate because it permitted the jury to infer that the doctors benefited if they disclosed inside information to petitioner "as a gift with the goal of maintaining or developing a personal friendship." Pet. App. 8 (citation omitted); see Pet. C.A. Br. 26. In petitioner's view, such an inference was impermissible without proof of a "meaningfully close personal relationship" between the tipper and tippee. Pet. App. 13. That proposed limitation on the gift-giving theory was drawn from the Second Circuit's decision in *Newman*, which had announced that, "[t]o the extent *Dirks* suggests that a personal benefit may be inferred from a personal relationship between the tipper and tippee, where the tippee's trades 'resemble trading by the insider himself followed by a gift of the profits to the recipient,' * * * such an inference is impermissible in the absence of proof of 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." 773 F.3d at 452 (quoting *Dirks*, 463 U.S. at 664).

The government contended that this Court's decision in *Salman* had abrogated that aspect of *Newman*. Pet. App. 10. In *Salman*, the Court affirmed a conviction where the tipper "ma[de] a gift of confidential information" to his brother (who then disclosed it to Salman). 137 S. Ct. at 427. The Court explained that such a disclosure is no different than if the tipper "personally

traded on the information * * * himself" and then gave the illicit proceeds (rather than the tip) to his brother. *Id.* at 427-428. In reaching that conclusion, the Court expressly disapproved of any requirement under *Newman* that the personal benefit to the tipper be "something of a 'pecuniary or similarly valuable nature.'" *Id.* at 428 (quoting *Newman*, 773 F.3d at 452).

c. The court of appeals in this case explained that it "need not decide whether *Newman*'s gloss on the gift theory is inconsistent with *Salman*." Pet. App. 10. The court found "compelling evidence that Dr. Gilman received a different type of personal benefit: $70,000 in consulting fees, which can be seen either as evidence of a *quid pro quo*-like relationship or simply advance payments for the tips of inside information that Dr. Gilman went on to supply." *Ibid.* The court additionally found "sufficient evidence to prove Dr. Gilman received a personal benefit by disclosing inside information with the intention to benefit" petitioner. *Ibid.*

Before turning to the particular jury instructions challenged in this case, the court of appeals reasoned, based on *Dirks* and circuit precedent, that evidence of a tipper's "intention to benefit" the tippee could itself serve as a "standalone personal benefit," for which proof of a meaningfully close personal relationship between tipper and tippee is not required. Pet. App. 16-17. That approach, the court explained, was "consonant with *Dirks*" because evidence that the tipper intended to benefit the tippee "demonstrates that the tipper improperly used inside information for personal ends" and thus "proves a breach of fiduciary duty." *Id.* at 17-18.

As to the jury instruction here, the court of appeals found no plain error. Pet. App. 24-26. The court agreed with petitioner that the portion of the instruction he

challenged, addressing gift-giving, was "incomplete" under *Newman*, which the court understood as having decided that a personal benefit may be inferred from an insider's gift of confidential information to a friend or relative only if the jury also finds "a relationship suggesting a *quid pro quo*" or an "inten[t] to benefit" the tippee. *Id.* at 24. The court did not find error in the portion of the instruction stating that a personal benefit may be inferred from evidence that Dr. Gilman or Dr. Ross disclosed inside information "with the intention of benefiting" themselves in some manner or "with the intention of conferring a benefit on" petitioner. *Ibid.* (citation omitted).

The court of appeals also determined that any deviation from *Newman* in the instruction did not "affect [petitioner's] substantial rights" in this case, because the "government produced compelling evidence that Dr. Gilman, the tipper, entered into a relationship of *quid pro quo* with" petitioner. Pet. App. 25 (citation and internal quotation marks omitted). The court observed that Dr. Gilman "regularly and intentionally provided [petitioner] with confidential information from the bapineuzumab clinical trial" in sessions billed at $1000 per hour, in which he rendered "no legitimate service." *Ibid.* The court explained that, although unbilled, Dr. Gilman's July 17 and July 19 disclosures were part of that pecuniary relationship, and the doctor "admitted at trial" that he avoided billing on those occasions because doing so would have been "'tantamount to confessing'" to breaching his fiduciary duty, given the limited number of individuals party to the final results at that time. *Id.* at 25-26 (citation omitted). Thus, "on the compelling facts of this case," the court found it "clear beyond a

reasonable doubt that a properly instructed jury would have found [petitioner] guilty." *Id.* at 26.

The court of appeals also rejected petitioner's challenge to the sufficiency of the evidence of personal benefit, stressing again the "compelling evidence" of a *quid pro quo* relationship between petitioner and Dr. Gilman. Pet. App. 27. The court noted that, in the alternative, a reasonable jury could have found "that Dr. Gilman personally benefited by disclosing inside information with the 'intention to benefit'" petitioner. *Ibid.* (quoting *Dirks*, 463 U.S. at 664).

d. Judge Pooler dissented. Pet. App. 30-48. In her view, the majority did not give full effect to *Newman*; erred in reasoning that a fact-finder may infer that the tipper personally benefited from proof of the tipper's intention to benefit the tippee; and misevaluated the evidence. See *ibid.* She also observed that (although she disagreed with it), the majority's harmlessness determination based on "objective evidence of a relationship suggesting a quid pro quo" was sufficient for affirmance. *Id.* at 48.

ARGUMENT

Petitioner contends (Pet. 19-28) that the decision below conflicts with this Court's decisions in *Dirks* v. *SEC*, 463 U.S. 646 (1983), and *Salman* v. *United States*, 137 S. Ct. 420 (2016). That contention does not warrant review. The court of appeals correctly determined that the personal-benefit jury instruction in this case was not plainly erroneous, and its factbound decision does not conflict with any decision of this Court or any other court of appeals. No good reason exists to review petitioner's claim, which effectively contends that isolated language from the Second Circuit's decision in *United States* v. *Newman*, 773 F.3d 438 (2014), cert. denied,

136 S. Ct. 242 (2015), survives *Salman*—a question that the court below did not address. Petitioner's corrupt *quid pro quo* arrangement fell within the heartland of the "deceptive device[s]" the securities laws prohibit, and his conviction broke no new ground. 15 U.S.C. 78j(b) (2006). Accordingly, the petition for a writ of certiorari should be denied.

1. The court of appeals correctly determined that the personal-benefit jury instruction in this case was not plainly erroneous. To show plain error, a defendant must establish (i) error that (ii) was "clear or obvious, rather than subject to reasonable dispute," (iii) "affected [his] substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the district court proceedings,'" and (iv) "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" *Puckett* v. *United States*, 556 U.S. 129, 135 (2009) (citations omitted). "Meeting all four prongs is difficult, 'as it should be.'" *Ibid.* (quoting *United States* v. *Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004)). Petitioner failed to do so.

a. In *Dirks*, "this Court explained that a tippee's liability for trading on inside information hinges on whether the tipper breached a fiduciary duty by disclosing the information." *Salman*, 137 S. Ct. at 423; see *Dirks*, 463 U.S. at 661.[3] In determining whether an insider has breached his duty, the Court also explained

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[3] The personal-benefit requirement is the same under both the "classical" theory of insider trading (at issue in *Dirks*) and the "misappropriation" theory (at issue here). See *United States* v. *O'Hagan*, 521 U.S. 642, 651-653 & n.5 (1997); cf. *Salman*, 137 S. Ct. at 425 n.2. Accordingly, references in this brief to "insiders" include misappropriators.

that the relevant question "is whether the insider personally will benefit, directly or indirectly, from his disclosure." *Dirks*, 463 U.S. at 662; see *Salman*, 137 S. Ct. at 423.

To identify such a breach of duty, the fact-finder must "focus on objective criteria," and "[t]here are objective facts and circumstances that often justify such an inference." *Dirks*, 463 U.S. 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 *Salman*, 137 S. Ct. at 427 (reaffirming this "gift-giving principle"); see also *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 311 n.21 (1985) (similar).

b. The court of appeals faithfully applied those principles in evaluating the personal-benefit instruction here, which closely tracked the language of *Dirks*. Pet. App. 24-26. The district court instructed the jury to determine "whether the government proved beyond a reasonable doubt that Dr. Gilman or Dr. Ross received or anticipated receiving some personal benefit, direct or indirect, from" their disclosures. Tr. 3191. The court explained that the personal benefit "need not be[] financial or tangible in nature" and that it "could include

* * * developing or maintaining a business contact or a friendship, or enhancing the tipper's reputation." *Ibid.* The court also instructed the jury that it could find the requisite personal benefit if it found that "Dr. Gilman or Dr. Ross gave the information to [petitioner] with the intention of benefiting themselves in some manner, or with the intention of conferring a benefit on [petitioner], or as a gift with the goal of maintaining or developing a personal friendship." *Ibid.*; cf. *Dirks*, 463 U.S. at 664 (identifying "an intention to benefit the" tippee and "a gift of confidential information to a trading relative or friend" as among the "objective facts and circumstances that often justify" inferring that the tipper acted for personal benefit).

Although the court of appeals determined that the instruction here omitted additional language that its prior decision in *Newman* would require, see pp. 11-12, *supra*, the court correctly found that any discrepancy "did not affect [petitioner's] substantial rights" and thus did not amount to plain error. Pet. App. 25. The jury was instructed that it could find a personal benefit if the insiders disclosed information "with the intention of benefiting themselves," including if the insiders "received or anticipated receiving" a benefit that was "financial * * * in nature." *Id.* at 8 (citation omitted); see *id.* at 24 (finding "no error" in that portion of the instruction); cf. *Dirks*, 463 U.S. at 662. And the court found "compelling evidence" that Dr. Gilman tipped petitioner in exchange for money, Pet. App. 25-26, *i.e.*, that Dr. Gilman was "in effect selling the information" to petitioner "for cash," *Dirks*, 463 U.S. at 664 (citation omitted). As the court explained, the $70,000 that Dr. Gilman received from petitioner could "be seen either as evidence of a *quid pro quo*-like relationship, or simply advance payments

for the tips of inside information that Dr. Gilman went on to supply" on June 17 and 19, 2008—when he disclosed the critical final results of the clinical trial but did not directly bill petitioner. Pet. App. 10. The court accordingly found it "clear beyond a reasonable doubt that a rational jury would have found [petitioner] guilty absent" any perceived error in the instruction. *Id.* at 26 (citation omitted).

c. As the dissenting judge herself recognized (Pet. App. 48), the court of appeals' determination that the verdict here was supported by compelling evidence of a *quid pro quo* relationship is in itself sufficient to uphold petitioner's conviction. Petitioner does not address the plain-error standard; does not dispute that an insider breaches his fiduciary duty by accepting money in exchange for disclosing material, nonpublic information to a tippee; and does not challenge the jury instruction on that issue. Indeed, petitioner acknowledges that "personal benefit may be proved by evidence of an actual *quid pro quo* resulting in * * * 'a pecuniary gain[.]'" Pet. 20 (citation omitted). Trading on inside information derived from such a pecuniary *quid pro quo*—as petitioner did—falls squarely within the fraudulent conduct prohibited by the securities laws. See *Dirks*, 463 U.S. at 663-664 (insider's receipt of "a direct or indirect personal benefit from the disclosure, such as a pecuniary gain" will constitute a "breach of duty by the insider"); see also *Salman*, 137 S. Ct. at 427.

Although petitioner disputes the court of appeals' evaluation of the *quid pro quo* evidence in this case, that dispute is the sort of quintessentially factbound question that does not warrant this Court's review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous

factual findings or the misapplication of a properly stated rule of law."). And in light of the court of appeals' determination that the jury would have found petitioner guilty based on the *quid pro quo* portion of the instruction alone, any assertion of error in any other portion of the instruction does not warrant review. See, *e.g.*, *Hedgpeth* v. *Pulido*, 555 U.S. 57, 60-61 (2008) (per curiam) (holding that harmless-error analysis applies when a jury is "instructed on multiple theories of guilt, one of which is improper").

2. Even if that were not the case, further review would nevertheless be unwarranted. Petitioner errs in contending (Pet. 19-28) that the decision below departs from *Dirks*, *Salman*, and the decisions of other courts of appeals with respect to whether proof of an insider's intention to benefit the tippee may suffice to prove that the insider disclosed material nonpublic information for personal benefit.

a. Petitioner principally argues that, "under *Dirks*, the government must prove either a personal benefit to the insider/tipper or a *meaningfully close personal relationship* from which such a benefit may be inferred." Pet. 19 (capitalization and emphasis altered). But petitioner's proposed "meaningfully close personal relationship" test is found nowhere in *Dirks*. That language, instead, appeared for the first time in any insider trading case in the Second Circuit's decision in *Newman*. See Pet. App. 23 (noting that those terms were "new to * * * insider trading jurisprudence"). Petitioner himself repeatedly argued below that *Newman* marked a significant change in that respect—not that his proposed "meaningfully close personal relationship" test was compelled by this Court's decision in *Dirks*. See,

e.g., Pet. C.A. Br. 15 (ascribing this supposed requirement to the "landmark *Newman* decision").

At bottom, then, petitioner's disagreement with the decision below centers on whether it adhered to the prior panel opinion in *Newman*. See Pet. 32 n.4. But any tension between the two decisions is an issue for the court of appeals, not this Court, to resolve. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam) ("It is primarily the task of a Court of Appeals to reconcile its internal difficulties."). The government argued below that *Salman* had abrogated the relevant portion of *Newman*, see *Salman*, 137 S. Ct. at 427-428, so that the panel below was free to disregard *Newman*'s "meaningfully close personal relationship" language. Gov't C.A. Ltr. Br. 6-7 (Jan. 6, 2017); see *id.* at 9 (noting that the jury instruction in *Salman* was "in substance identical to the one" given here); pp. 10-11, *supra*. The court of appeals declined to resolve that question, see Pet. App. 10, and that court is capable of addressing the issue if it is outcome-determinative in a future case.

Petitioner is incorrect in suggesting (Pet. 21-22) that the decision below conflicts with the decisions of other courts of appeals. First, none of the decisions identified by petitioner held that proof of a "meaningfully close personal relationship" is always necessary for a jury to find that an insider personally benefited in making a gift of confidential information to a trading friend or relative.[4] Second, none of those decisions is inconsistent

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[4] See *United States* v. *Bray*, 853 F.3d 18, 26-27 (1st Cir. 2017) (rejecting the defendant's *Newman*-based argument that "an informational exchange between casual, as opposed to close, friends does not meet *Dirk*'s personal benefit requirement," in light of the evidence in that case); *United States* v. *McPhail*, 831 F.3d 1, 10-11

with the court of appeals' understanding that, under *Dirks*, evidence of a tipper's "intent to benefit" the tippee can be a basis for inferring a personal benefit to the tipper. Pet. App. 16; see, *e.g.*, *United States* v. *Bray*, 853 F.3d 18, 26 (1st Cir. 2017) (noting that a personal benefit may be inferred from evidence of the tipper's "intention to benefit the particular recipient") (quoting *Dirks*, 463 U.S. at 664).

b. In the absence of any conflict with this Court's precedent or the law of any other circuit, petitioner identifies no compelling reason to grant review of the question he seeks to present. Petitioner asks the Court to examine whether evidence that the tipper "intended to confer a benefit on the tippee" may suffice to infer that the tipper disclosed information for personal benefit. Pet. i (emphasis omitted); see Pet. 23-28. This case would be an unsuitable vehicle to address that question, however, because the answer would be academic here.

The court of appeals correctly determined that petitioner cannot show any plain error in the personal-benefit instruction in light of the "compelling" evidence of the *quid pro quo* exchange at the heart of petitioner's fraud, in which he corruptly cultivated two physicians as paid

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(1st Cir. 2016) (rejecting a similar *Newman*-based argument); cf. *SEC* v. *Cuban*, 620 F.3d 551, 557 n.38 (5th Cir. 2010) (pre-*Newman* decision stating that "a gift [of inside information] to a trading friend or relative" could suffice to show personal benefit) (citation omitted); *United States* v. *Evans*, 486 F.3d 315, 321 (7th Cir.) (similar; noting that "the concept of gain is a broad one" under *Dirks*), cert. denied, 552 U.S. 1050 (2007); *SEC* v. *Rocklage*, 470 F.3d 1, 7 n.4 (1st Cir. 2006) (observing that a gift of inside information between siblings met the personal-benefit requirement); *SEC* v. *Sargent*, 229 F.3d 68, 77 (1st Cir. 2000) (finding sufficient evidence of personal benefit for a tip between friends). In addition, none of these decisions involved the sort of pecuniary *quid pro quo* at issue here.

sources of inside information about the bapineuzumab clinical trial. Pet. App. 25-26; see pp. 16-17, *supra*. The evidence conclusively established that Dr. Gilman acted to benefit himself financially (and the jury was properly instructed on that form of personal benefit), whether or not he also acted with the intent to benefit petitioner. Given that petitioner does not dispute the *quid pro quo* portion of the instruction, the result below would be the same even if this Court were to agree with petitioner that the instruction was flawed with respect to another theory of liability. See *Pulido*, 555 U.S. at 60-61.

Petitioner provides no meaningful support for any suggestion (Pet. 3, 33) that, in finding no plain error because of the *quid pro quo* evidence, the court of appeals acted in bad faith to "insulate" or "shield" any discussion of the question presented from this Court's review. Petitioner's own failure to object to the personal-benefit jury instruction at trial triggered the plain-error standard of review, and the court of appeals appropriately relied on the substantial-rights prong of that standard to deny relief. And petitioner's suggestion (Pet. 31-32) that this is solely a gift-giving case, because Dr. Gilman did not submit an invoice to be paid for the July 17 telephone call and July 19 meeting at which he disclosed the final clinical trial results to petitioner, is simply a factbound dispute with the court of appeals. As already explained, the court of appeals correctly determined that the evidence showed that those disclosures were part and parcel of the *quid pro quo* arrangement between the two. See Pet. App. 25-26; pp. 12-13, 16-17, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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