No. 20-306

In the
Supreme Court of the United States

ROBERT OLAN AND THEODORE HUBER,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

After receiving two extensions of the deadline to file its brief in opposition, the government has now submitted a one-paragraph "memorandum" that does not defend the Second Circuit's decision. Instead, the government urges that the decision be vacated and remanded in light of *Kelly* v. *United States*, 140 S. Ct. 1565 (2020). The government is certainly correct that a denial of certiorari would not be appropriate after *Kelly*. But here *Kelly* warrants more than a GVR; it warrants summary reversal, because it makes unmistakably clear that the Second Circuit's decision is irreconcilable with the text of the federal fraud and conversion statutes and with this Court's precedents. If there is any doubt whether summary reversal is appropriate, the Court should grant certiorari and decide the case after briefing and argument during the current Term. But if the Court decides not to take either of those courses, then, at a minimum, a GVR is necessary.

This is no run-of-the-mill criminal case. In the courts below, the government succeeded in securing a decision that vastly expands the scope of the federal wire-fraud, conversion, and securities-fraud statutes. In the Second Circuit, the government can now prosecute the unauthorized disclosure and use of confidential government information as wire fraud and conversion even when the information has no economic value to the government—transforming those provisions from property crimes into a cudgel to threaten whistleblowers and journalists, and creating an all-purpose prohibition on "dishonest services" that can be wielded to prosecute official misconduct. See Pet.19-23. And the government can now prosecute insider trading without any need to prove that an insider received a personal benefit for tipping inside information (which

this Court has held is the *sine qua non* of insider-trading fraud) or that downstream tippees knew of any such benefit—a long-desired goal of federal prosecutors that Congress has never seen fit to enact into law. See Pet.25-31. In both of those ways, the Second Circuit effectively created new crimes at the behest of federal prosecutors, thereby flouting fundamental principles rooted in due process and the separation of powers.

The Second Circuit may reverse itself in light of *Kelly*. But that is not certain. See Pet.App.46a-50a (Kearse, J., dissenting) (explaining, before issuance of *Kelly*, that the panel majority's decision was wrong in light of *Cleveland* v. *United States*, 531 U.S. 12 (2000), which held that if the government's "core concern is regulatory" rather than "economic" then the object of that concern is not "'property' in the government regulator's hands," *id.* at 20). Petitioners should not have to continue to live under the threat of lengthy incarceration while the case returns to the Second Circuit, especially because the case could well come back to this Court once the Second Circuit renders its new decision.

In addition, even if the Second Circuit does reach a different conclusion about "property" on remand, that court's radical change to insider-trading law would remain unaddressed. To be sure, that change may not remain a holding of the court post-remand. If the Second Circuit reverses itself on the "property" issue, it may choose to go no further (because that ruling would invalidate all counts), or to discuss the personal-benefit issue in a way that might be considered only dicta. But unless the court's existing erasure of the personal-benefit requirement under Sections 1343 and 1348 is repudiated, prosecutors in the Second Circuit will continue to feel free to charge insider-trading crimes even

where there is no proof of personal benefit. And district courts in the Circuit (where most insider-trading prosecutions are brought) would likely follow the Second Circuit's lead even if it were not technically binding, just as they do with unpublished Second Circuit opinions. That in turn would produce exactly the unfairness to individual defendants and chilling effect on market analysts that the personal-benefit requirement exists to prevent. See *Salman* v. *United States*, 137 S. Ct. 420, 427 (2016); *Dirks* v. *SEC*, 463 U.S. 646, 663 (1983). It is therefore important that the Second Circuit's insider-trading ruling be reversed as well.

A. This Is An Appropriate Case For Summary Reversal

The position of the government before this Court is extraordinary. After pressing for and obtaining an unprecedented expansion of the scope of federal wire fraud, conversion, and securities fraud in the courts below, the government now makes no effort to defend those rulings. Instead, it asks that the case be remanded for further consideration in light of *Kelly*. But the government offers *no* rationale on which the Second Circuit's ruling could be upheld. Indeed, the government has all but confessed error.[1]

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[1] The government has purported to waive "further" response. U.S. Memo. 2 n.*. But the government has not waived response in the manner contemplated by this Court's usual practice. To the contrary, the government has in fact responded and urged a particular disposition (vacatur and remand). Whatever the reasons for the government's unusual statement that it is waiving "further" response, the government should not be permitted a second bite at the apple in the event this Court concludes—as petitioners respectfully suggest it should—that summary reversal is appropriate. The government had ample time to develop a substantive response to the petition for certiorari. If the government

The contrast between the government's current position and the position it took in opposing petitioners' motion to stay the Second Circuit's mandate pending certiorari—thereby seeking to send petitioners to prison—is especially striking. In seeking that relief, petitioners argued that *Kelly* required reversal of the decision below. The government responded that *Kelly* (as well as this Court's earlier unanimous decision in *Cleveland*) had no application here. At that point, the government contended that confidential government information could be deemed "property" within the meaning of the relevant statutes even if that information lacked any economic value to the government. Dkt.343 (2d Cir. 18-2811) (28(j) letter). Apparently upon further reflection the government no longer believes that the Second Circuit's decision can be defended on that basis. Yet the government is unable to identify any other basis on which the decision could be upheld in light of *Kelly*. Likewise, the government offers not one word in defense of the Second Circuit's decision to eliminate the personal-benefit requirement in criminal insider-trading cases.

In view of the government's inability to offer *any* defense of the decision below, the case can and should be decided now on a summary basis. A remand would merely delay the inevitable while forcing petitioners to continue to endure the stress of criminal jeopardy and

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had anything to offer in defense of the Second Circuit's decision, presumably it would have said so. It would be fundamentally unfair to petitioners, and a waste of this Court's time and resources, to allow the government's gambit to succeed in delaying definitive resolution of this case. But if the Court concludes that the government's purported waiver of "further" response precludes summary reversal, then the Court should grant the petition for certiorari and consider the case after plenary review this Term.

allowing the government to pursue other defendants under the same theories.[2] Summary reversal also would eliminate the chilling effect on whistleblowers, journalists, and publishers who now must weigh the risk that any unauthorized disclosure of government information will subject them to criminal prosecution. And it would send an unmistakable message about the need to rein in overzealous enforcement of the federal criminal law in disregard of statutory text, this Court's precedents, and bedrock constitutional principles.

B. If The Court Does Not Summarily Reverse, Certiorari Should Be Granted And The Case Should Be Decided This Term

If this Court determines that summary reversal is not warranted, then the petition for certiorari should be granted. Both of the questions presented easily satisfy the standards for plenary review.

1. In urging this Court to vacate and remand, the government effectively concedes that the Second Circuit's decision conflicts with this Court's decision in *Kelly*. And, as Judge Kearse explained in dissent below (Pet.App.49a), the decision is also in direct conflict with *Cleveland*, which *Kelly* reaffirmed. Those decisions underscore what the statutory text already makes plain: a scheme to defraud the government of "property" under the wire-fraud statute (or of "a thing of value" under the conversion statute) must deprive the government of something that has economic value to the government. Those provisions protect the gov-

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[2] See, *e.g.*, *United States* v. *Middendorf*, 2018 WL 3443117, at *8-9 (S.D.N.Y. July 17, 2018), *appeal pending* (2d Cir. Nos. 19-2983, 19-3374); *United States* v. *Sidoo*, 468 F. Supp. 3d 428, 440 (D. Mass. 2020); *United States* v. *Blakstad*, 2020 WL 5992347 (S.D.N.Y. Oct. 9, 2020).

ernment's property interests, not its regulatory interests. They cannot plausibly be stretched to cover the unauthorized disclosure and use of government information that lacks any economic value to the government.

Unless it is reversed, the Second Circuit's decision to criminalize the unauthorized disclosure of government information will have wide-ranging pernicious consequences. See Pet.19-24; Nat'l Assoc. of Crim. Def. Lawyers Amicus Br. 13-16; Eugene Volokh, *Journalists Might Be Felons for Publishing Leaked Governmental "Predecisional Information*," Reason (Jan. 27, 2020).[3] Confidential government information is leaked to journalists, lobbyists, and legislative staffers every day in Washington, D.C., and state capitals across the nation. As a result of the decision below, any of those disclosures can be prosecuted as wire fraud and conversion. The government can also charge deprivations of honest services—without any need to prove a bribe or kickback—as federal property crimes, thereby erasing the strict limitations that this Court has placed on honest-services prosecutions. See *Skilling* v. *United States*, 561 U.S. 358, 408-409 (2010) (honest-services fraud requires proof of bribe or kickback). And the government can do all of those things in disregard of numerous statutes that penalize disclosure of confidential or classified information in only limited circumstances (and subject to only limited penalties), because the Second Circuit's decision effectively replaces those statutes with a broader and more draconian prohibition.

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[3] *Available at* https://reason.com/volokh/2020/01/27/journalists-might-be-felons-for-publishing-leaked-governmental-predecisional-information.

2. The Second Circuit's elimination of the personal-benefit element of insider-trading fraud in Title 18 cases also merits plenary review. The government offers no defense of that ruling, which upends decades of settled precedent, flouts fundamental principles of statutory interpretation, deprives financial professionals and investors of *Dirks*'s clear "guiding principle," and criminalizes conduct that the SEC cannot civilly charge. This Court's intervention is critical now, given the Second Circuit's radical departure from settled doctrine, its nationwide influence on securities law, and the destabilizing impact of its ruling on the securities markets.

As the petition explains (at 25-30), the Second Circuit's personal-benefit ruling squarely conflicts with this Court's insider-trading jurisprudence over the past four decades. This Court has repeatedly held that personal benefit is the *sine qua non* of insider-trading fraud, and that using confidential information in investment decisions is not *fraudulent* unless the source of the information received a personal benefit in exchange for the disclosure. See, *e.g.*, *Dirks*, 463 U.S. at 663 (personal benefit "determin[es] whether * * * a particular disclosure is fraudulent"); *Salman*, 137 S. Ct. at 427 ("[T]he disclosure of confidential information without personal benefit is not enough."). Yet the Second Circuit dismissed this Court's insider-trading decisions as irrelevant to Title 18 fraud, even though the Title 15 and Title 18 provisions at issue contain nearly identical anti-fraud language.

The Second Circuit's ruling has been roundly criticized by securities-law scholars and other commentators, including petitioners' amici. See Pet.29, 33 n.15; Alternative Investment Mgmt. Assoc. (AIMA) Amicus Br. 2-18; Law Profs. Amicus Br. 8-20. They rebuke the Second Circuit for subordinating textual consistency

to unsupported suppositions about statutory purpose, and for blatantly contorting and misconstruing both the legislative history and *Dirks*. And they warn that the decision below represents a sea change in insider-trading law, exposes financial professionals to imprisonment for doing their jobs, and chills the analysis of information on which the integrity of the securities markets depends.

For good reason. This Court's review is urgently needed given the importance of the issue and the far-reaching negative consequences likely to flow from the Second Circuit's decision.

First, securities trades that were universally understood to be lawful and *nonfraudulent* before the Second Circuit's decision now expose even the most casual investor to up to 25 years' incarceration. For four decades, financial professionals, investors, and even the government relied on *Dirks*'s personal-benefit requirement, which everyone understood marked the boundary between permissible trading on confidential information and illegal insider-trading fraud. There was no reason to second-guess precedent or suspect that the government might one day suggest that different rules applied under Title 18; on the contrary, this Court had proclaimed that wire fraud and Title 15 fraud are "the same species" of fraud. *United States* v. *O'Hagan*, 521 U.S. 642, 654 (1997). Yet the Second Circuit has now created an entirely new crime that allows prosecutors to imprison people for insider-trading "fraud" that is not actually fraud as defined in *Dirks* and this Court's other insider-trading decisions.

That raises substantial constitutional concerns, because "only Congress, and not the courts, * * * can make conduct criminal." *Bousley* v. *United States*, 523 U.S. 614, 620-621 (1998); see *United States* v. *Wiltberger*, 18 U.S. 76, 95 (1820) ("It is the legislature, not

the Court, which is to define a crime, and ordain its punishment."). The Second Circuit's decision also conflicts with basic principles of due process and lenity, which prohibit courts from affirming criminal convictions on the basis of statutory interpretation animated by "policy judgments rather than by the inexorable command of relevant language." *M. Kraus & Bros.* v. *United States*, 327 U.S. 614, 626 (1946); see *Hughey* v. *United States*, 495 U.S. 411, 422 (1990) ("[L]ongstanding principles of lenity * * * preclude our resolution of the ambiguity [in a criminal statute] against petitioner on the basis of general declarations of policy in the statute and legislative history."); see also AIMA Br. 10-11; Law Profs. Br. 14.

Second, the Second Circuit has made it easier for the government to prove a crime than a regulatory violation, because the SEC's authority is limited to enforcing Title 15. That upends traditional norms of civil-criminal proportionality, which require more culpable conduct to justify criminal sanctions and, in particular, deprivation of a citizen's liberty. See Karen E. Woody, *The New Insider Trading*, 52 Ariz. St. L.J. 594, 639-640 (2020); see also William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. Contemp. Legal Issues 1, 24-26 (1996). Moreover, Congress charged the SEC with ensuring the integrity of the nation's securities markets. It is inconceivable that Congress intended to extend federal prosecutors greater latitude than its chief market regulator to employ the anti-fraud rules against pernicious market behaviors.

Third, as amicus AIMA explains, the ruling threatens to undermine the nation's securities markets. The efficient functioning of the markets depends on the ability of investors and analysts to perform regular, meaningful diligence on issuers and to freely use that research in their trading activities. When they do,

buy/sell orders better incorporate all relevant information and market prices better reflect the true value of the securities. AIMA Br. 4-6. This Court recognized as much in *Dirks*. It emphasized that an overbroad insider-trading proscription would inhibit analysts from "ferret[ing] out and analyz[ing] information"—a function "necessary to the preservation of a healthy market." 463 U.S. at 658-659. The Court identified the personal-benefit requirement as the "essential" "guiding principle" for market participants who need clear rules as to when they can lawfully use market intelligence for trading decisions. *Id.* at 664.

The Second Circuit erased that essential and long-settled demarcation and replaced it with uncertainty that will only worsen if the decision is vacated on other grounds. "[E]specially given the ever-increasing availability of information and the fast pace of complex transactions," analysts and traders can no longer reliably determine what information they can lawfully act on. AIMA Br. 7. Inevitably they will bypass perfectly legitimate information, for fear of transgressing an ever-expanding criminal proscription. *Id.* at 14. Investment managers, similarly, will be caught "between a rock and a hard place," unable to fulfill their fiduciary obligations to maximize client returns for fear of crossing a line that now appears in flux. *Id.* at 5, 7. And corporations that faithfully instituted measures to ensure insider-trading compliance based on *Dirks* and its progeny now have to return to the drawing board, designing extraordinarily restrictive compliance programs to address the Second Circuit's newly expansive definition of fraud. *Id.* at 7.

The resulting overdeterrence will upset the delicate balance this Court struck in *Dirks* and deprive markets of important and lawful information on which their health and fairness depend. AIMA Br. 7-8. That,

in turn, will cause prices to "become untethered from the fundamental values of securities" and subvert the very premise of the securities markets. *Id.* at 14 (internal quotation marks omitted).

The policy determination that a broad insider-trading prohibition justifies the attendant market inefficiencies can be made only by Congress—not courts. That Congress has repeatedly declined to do so attests to just how far the Second Circuit overstepped. Its decision to criminalize trading that was legal for four decades cries out for this Court's immediate review.

C. At A Minimum, The Court Should Grant, Vacate, And Remand

If this Court were to decide not to summarily reverse or to grant plenary review, then—at a minimum—a GVR is warranted. That is the course that the government has recommended. As the government agrees, at the very least the Second Circuit must have the opportunity to consider whether this Court's intervening and highly relevant decision in *Kelly* dictates a different result.

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For the foregoing reasons and those stated in the petition, the decision below should be summarily reversed, or this Court should grant plenary review. At a minimum, consistent with the government's position, the Court should GVR.

Respectfully submitted,

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December 8, 2020