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 Court of Appeals for the Second Circuit

BRIEF OF LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici curiae will address the following question:

Whether this Court's holding in *Dirks v. SEC*, 463 U.S. 646 (1983), requiring proof of "personal benefit" to establish insider-trading fraud, applies to Title 18 statutes that proscribe fraud in language virtually identical to the Title 15 anti-fraud provisions at issue in *Dirks*.

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INTERESTS OF *AMICI CURIAE*

The amici are or were law professors who teach and write about federal securities law.[1] They have an interest in the sound development and content of the law of insider trading, and their diverse experiences in academia and in government give them a valuable perspective on the Second Circuit's decision below. The following amici submit this brief to explain and underscore the importance of granting the petition:[2]

John P. Anderson, the J. Will Young Professor of Law at Mississippi College School of Law;

Kevin R. Douglas, an Assistant Professor of Law at Michigan State University College of Law;

Adam C. Pritchard, the Frances & George Skestos Professor of Law at the University of Michigan Law School;

Matthew C. Turk, an Assistant Professor in the Department of Business Law and Ethics at the Kelley School of Business at Indiana University;

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[1] Pursuant to Rule 37.2(a), counsel for *amici curiae* provided notice of *amici*'s intention to file this brief to counsel of record for all parties. Counsel of record for petitioners and respondent have both consented to the filing of this brief. Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, and no person other than *amici* or their counsel made a monetary contribution to this brief's preparation or submission.

[2] The views of the amici expressed here do not necessarily reflect the views of the institutions with which they are or have been affiliated, whose names are included solely for purposes of identification.

Andrew N. Vollmer, Senior Affiliated Scholar, Mercatus Center at George Mason University and former Professor of Law, General Faculty, University of Virginia School of Law; former Deputy General Counsel of the Securities and Exchange Commission; and former partner in the securities enforcement practice of Wilmer Cutler Pickering Hale and Dorr LLP; and

Karen Woody, an Associate Professor at Washington & Lee University School of Law.

The Second Circuit's decision departs from more than forty years of this Court's precedent defining the crime of insider trading. *See, e.g.*, *Dirks v. SEC*, 463 U.S. 646 (1983); *Chiarella v. United States*, 445 U.S. 222 (1980). The critical ingredient of that offense is a fiduciary's trading on non-public information for personal benefit without disclosure. That is a time-honored and quintessential element of fraud. Yet the Second Circuit discarded the personal-benefit requirement in the context of a criminal-code securities offense on the theory that personal benefit was a mere policy construct. That was wrong. This Court did not invent that requirement in *Dirks* for policy reasons. Rather, it adapted the traditional meaning of fraud to the misuse of insider information for personal gain.

If left unreviewed, the Second Circuit's failure to apply the personal-benefit requirement in the securities fraud context will have sweeping, negative consequences. A prime objective of insider-trading law is to create a clear line demarcating which forms of trading on nonpublic information are legal and which are not. That clarity is essential to efficient market operation, especially in tipping situations.

See Dirks, 463 U.S. at 655-59 & n.16. The Second Circuit's decision eliminates that clarity, thereby inhibiting the sound working of the securities markets. This error can be cured only by this Court's review and reversal of the decision below.

INTRODUCTION

Under longstanding common law, when a principal entrusts an agent with information, the information is to be used for the principal's purposes only, not for the agent's personal gain. If the agent uses the principal's information for his own benefit instead, he breaches a fiduciary duty. This Court has applied this common-law duty in a wide range of legal contexts, including fraud, embezzlement, agency law, and the law of corporations and fiduciary duties.

In *Dirks v. SEC*, 463 U.S. 646 (1983), this Court applied this common-law duty in the securities fraud context. *Id.* at 653-64. *Dirks* held that trading on material, non-public information is fraudulent when insiders use corporate information for their own personal benefit—or when they "give such information to an outsider for the same improper purpose of exploiting the information for their personal gain." *Id.* at 659. In the latter setting, the outsider (or "tippee") is liable "for trading on inside information only if the tippee participates in" the tipper's breach of his fiduciary duty. *Salman v. United States*, 137 S. Ct. 420, 427 (2016). "Thus, the test" for whether the tipper has breached that duty "is whether the insider personally will benefit, directly or indirectly, from his disclosure." *Dirks*, 463 U.S. at 662. That is because the personal benefit shows the insider used the corporate information for personal

(rather than corporate) advantage—*i.e.*, breached his fiduciary duty to the corporation by misappropriating its information. This breach of duty is a hallmark of fraud in tipping cases.

The decision below, however, believed the personal-benefit requirement was merely judge-made doctrine intended to effectuate the purpose of the Title 15 securities fraud statutes, under which insider-trading offenses have historically been prosecuted. Because the Second Circuit believed the statutes of conviction here—the wire fraud and Title 18 securities fraud statutes—had different purposes, the Second Circuit declined to require proof of personal benefit to establish liability.

That was error. The personal-benefit requirement flows from common-law concepts of fraud. Because the wire fraud and Title 18 securities fraud statutes criminalize *fraud*, they must criminalize only *fraudulent* acts of trading on inside information. And to distinguish fraudulent from non-fraudulent acts of trading on inside information, they must incorporate the personal-benefit requirement.

The decision below was not only wrong, but also will have severe negative consequences if left undisturbed. The government will rarely, if ever, have cause to charge tipping as a criminal offense under Title 15 when it can prevail without proving the traditional insider-trading elements by charging defendants under the wire fraud or Title 18 securities fraud statutes. And a Title 18 securities fraud conviction carries the possibility of a sentence of 25 years' imprisonment. This radical expansion of tipping liability will create serious distortions in the

activities of securities analysts and other professionals, to the detriment of the flow of information vital to healthy markets. The Court should grant the petition to reaffirm the limits on insider-trading liability and harmonize the rules governing liability across the various federal anti-fraud laws.

STATEMENT

1. After an investigation, the U.S. Attorney's Office came to believe that petitioners Robert Olan and Ted Huber, along with David Blaszczak and Christopher Worrall, had participated in an insider-trading scheme. Specifically, the government believed that Blaszczak, a former employee of the federal Centers for Medicare and Medicaid Services (CMS), learned of changes to Medicare reimbursement rates from Worrall, a current CMS employee. The government also concluded that Blaszczak passed this nonpublic information to Olan and Huber, who used it to execute profitable trades for their employer, a hedge fund.

The government charged petitioners with committing securities fraud under Section 10(b) of the Securities Exchange Act and Rule 10b-5 ("Title 15 securities fraud")—the provisions under which insider-trading schemes, both civil and criminal, are ordinarily charged. *See, e.g.*, *Salman*, 137 S. Ct. at 423. In addition, the government charged them with conversion of government property under 18 U.S.C. § 641; wire fraud under 18 U.S.C. § 1343; securities fraud under 18 U.S.C. § 1348 ("Title 18 securities fraud"); conspiracy to commit conversion and Title 15 securities fraud and to defraud the United States, 18 U.S.C.

§ 371; and conspiracy to commit wire fraud and Title 18 securities fraud.

2. The district court instructed the jury that petitioners could not be guilty of Title 15 securities fraud unless the government proved beyond a reasonable doubt that they knew that "the tipper disclosed the information in violation of a duty of confidentiality and that it was disclosed in exchange for a personal benefit." Pet. App. 82a. Petitioners asked the court to give that same instruction for the Title 18 securities fraud and wire fraud counts, but the court refused, instead instructing the jury on a more barebones set of elements. *Id.* at 85a-90a. For the wire fraud count, the court did not require the government to prove that the tipper received a personal benefit or that the tipper disclosed the information in violation of a duty of confidentiality. *Id.* at 86a.

Similarly, for the Title 18 securities fraud count, the district court instructed the jury that it could convict petitioners as long as it found that they (1) "executed a scheme to defraud a person or to obtain money or property by materially false and fraudulent pretenses, representations, or promises," (2) "participated in the scheme knowingly, willfully, and with an intent to defraud," and (3) "the scheme to defraud was connected to the purchase or sale of stock in" certain types of companies. Pet. App. 88a-89a. That is, the jury was not required to find all of the elements legally required for insider trading based on tipper-tippee liability under Title 15.

After a four-week trial, a jury acquitted petitioners of Title 15 securities fraud. At the same time, the jury convicted petitioners of wire fraud and Title 18

securities fraud. The jury also convicted Worrall of wire fraud and conversion of property of the United States, and it convicted Blascszak of conspiracy to convert property of the United States and to commit securities fraud. The district court denied their motions for judgments of acquittal on those counts. Pet. App. 53a-56a.

3. A divided Second Circuit upheld the convictions. According to the majority, the personal-benefit test that applies to Title 15 securities fraud does not apply to Title 18 securities fraud. Pet. App. 20a-25a. The majority reasoned that the Title 18 and Title 15 fraud statutes should be interpreted differently because they have different purposes: "Congress enacted the Title 15 fraud provisions (that is, Section 10(b) and Rule 10b-5) with the limited 'purpose of eliminat[ing] [the] use of inside information for *personal advantage*,'' and "the personal-benefit test is a judge-made doctrine" that effectuates that purpose. Pet. App. 22a (quoting *Dirks*, 463 U.S. at 662). By contrast, the majority determined, because Title 18's purpose was "to overcome the 'technical legal requirements' of the Title 15 fraud provisions," the personal-benefit test should not be read into Title 18. Pet. App. 24a.

Next, the majority held that Title 15 and Title 18's fraud provisions both rest on an "'embezzlement' or 'misappropriation' theory of fraud." Pet. App. 21a. And the majority determined the personal-benefit test "finds no support in the embezzlement theory of fraud" because embezzlement is always fraudulent, even without personal benefit. *Id.* at 23a.

In dissent, Judge Kearse contended that information about "a planned CMS regulation" is not "a thing of value" that a defendant can convert to his own use. Pet. App. 46a-47a. Judge Kearse would have reversed or vacated all of petitioners' convictions on that basis. *Id.* at 50a.

ARGUMENT

I. GRANTING THE PETITION IS ESSENTIAL TO RESTORE COHERENCE TO INSIDER-TRADING LAW

The Second Circuit's decision disrupts a key principle underlying this Court's longstanding framework for insider-trading offenses. This Court has repeatedly held that insider trading is a form of fraud, and that prohibition is critical to investor confidence in the honesty of markets. At the same, the Court has been careful to explain that overextension of insider-trading liability threatens to chill information flows within the securities markets—which is equally vital to a healthy securities market. The personal-benefit requirement strikes a balance between these two concerns: the use of inside information is a fraudulent breach of the insider's duty only when it is undisclosed and for personal benefit.

The Second Circuit discarded that requirement in the context of Title 18 fraud charges on the grounds that "the personal-benefit test is a judge-made doctrine premised on the Exchange Act's statutory purpose." Pet. App. 22a. It is not. Rather, it is a deeply rooted principle of common law fraud across a range of contexts. The Second Circuit's error will harm se-

curities professionals and investors by chilling the information-gathering activities essential to healthy markets. Because the Second Circuit is the epicenter of the nation's securities markets and courts perceive it as having "preeminence in the field of securities law," *see Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 260 (2010) (internal quotation marks omitted), this Court's intervention is warranted.

A. Trading On Inside Information Is Fraudulent Only If The Insider Acts For Personal Benefit

1. Section 10(b) of the Securities Exchange Act makes it "unlawful for any person . . . [t]o 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 [SEC] may prescribe." 15 U.S.C. § 78j(b). The SEC's Rule 10b-5 implements Section 10(b); it 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.

A corporate insider violates the antifraud provisions of Section 10(b) and Rule 10b-5 by "trad[ing] in the securities of his corporation on the basis of material, non-public information." *United States v. O'Hagan*, 521 U.S. 642, 651-52 (1997). In "classical" cases of insider trading, the trading "qualifies as a 'deceptive device'" under Section 10(b) because it violates the "relationship of trust and confidence" and duty to disclose that exists "between the shareholders of a corporation and those insiders who have obtained

confidential information by reason of their position with that corporation." *Id.* A "corporate 'outsider'" can similarly violate Section 10(b) by misappropriating material, nonpublic information in a securities transaction if the outsider breaches a duty he owes to the "source of the information." *Id.* at 652-53.

2. In *Dirks*, the Court addressed this type of "outsider" liability. A company's former officer told Dirks, a broker-dealer, that the company's assets were "vastly overstated as the result of fraudulent corporate practices." 463 U.S. at 649. Dirks shared this information "with a number of clients and investors," some of whom then sold their holdings in the company's securities. *Id.* The SEC censured Dirks for aiding and abetting violations of Rule 10b-5 "by repeating the allegations of fraud" to the sellers. *Id.* at 651.

This Court held that Dirks had not violated the securities fraud laws. It rejected the notion "that the antifraud provisions" always "require equal information among all traders." *Id.* at 657; *see id.* at 654-55. What makes use of information "fraudulent" in securities transactions is "a duty" to handle that information in a certain way. *Chiarella v. United States*, 445 U.S. 222, 232 (1980). Thus, an insider violates Rule 10b-5 when he has information "intended to be available only for a corporate purpose and not for the personal benefit of anyone," and "take[s] advantage of that information by trading" on it for his personal gain and "without disclosure" because that action violates the insider's fiduciary duty to shareholders. *Dirks*, 463 U.S. at 653-54 (internal citation omitted).

In determining whether the insider has breached his fiduciary duty in a tipping case, the relevant question "is whether the insider personally will benefit, directly or indirectly, from his disclosure." *Id.* at 662. Applying that test, *Dirks* found no violation because the insiders who disclosed the fraud to Dirks did not breach their duty to shareholders because they "were motivated by a desire to expose the fraud," "received no monetary or personal benefit" for their disclosure, and did not intend "to make a gift of valuable information to" Dirks. *Id.* at 667; *see also Salman*, 137 S. Ct. at 427 (reaffirming *Dirks*'s rule that, where an insider "personally" benefits, even if "indirectly, from his disclosure," the insider has breached his fiduciary duties by using the information for personal gain).

The personal-benefit requirement thus "determine[s] whether the insider's 'tip' constituted a breach of the insider's fiduciary duty" to act in shareholders' best interests. *Dirks*, 463 U.S. at 661. That is, the personal-benefit requirement separates fraudulent uses of information from non-fraudulent ones, *see id.* at 653-54, and is critical to distinguish lawful trading on information derived from an insider, on the one hand, from unlawful use of inside information, on the other.

3. In articulating the contours of tippee liability, *Dirks*—like many of this Court's other insider-trading decisions—drew on the common law. *See Dirks*, 463 U.S. at 653 n.10, 660 n.20; *O'Hagan*, 521 U.S. at 652-53; *Chiarella*, 445 U.S. at 227-28 & n.10.

Specifically, *Dirks* termed the duty not to trade on inside information the "*Cady, Roberts* duty," referring to *In re Cady, Roberts & Co.*, 40 S.E.C. 907 (1961).

Dirks, 463 U.S. at 655. That duty derives from "the common law . . . affirmative duty" barring corporate insiders from trading on material, non-public information or requiring them to disclose such information before trading. *Id.* at 653.

This duty has deep roots in the common law of corporations, agency, and embezzlement. Under the common law of corporations, fiduciaries may not use their positions "for personal or family advantage to the detriment of the corporation or other stockholders." *United States v. Byrum*, 408 U.S. 125, 142 (1972); *see* 3 W. Fletcher, Cyclopedia of the Law of Corporations § 1011 (Sept. 2020 update) ("Directors and officers who acquire confidential or special knowledge or information by virtue of their fiduciary relationship with the corporation and its shareholders are not free to exploit that knowledge or information for their own personal benefit and profit."). Under the common law of agency, "an agent has a duty not to use or communicate confidential information of the principal for the agent's own purposes or for those of a third party." 2A C.J.S. Agency § 281 (June 2020 update); *see also* Restatement (Third) of Agency § 8.05 (Am. Law Inst. 2006); Restatement (First) of Agency § 395 (Am. Law Inst. 1933). And under the common law of embezzlement—which this Court has analogized to insider-trading law, *see O'Hagan*, 521 U.S. at 654—a person may not "appropriat[e] to [his] own use" money or property that has been "intrusted" to him by another, *Grin v. Shine*, 187 U.S. 181, 189 (1902). Embezzlement requires an "intent to keep" the stolen property and "commingl[e] it with

[one's] own," in violation of one's "duty to keep it separate and intact." *Morissette v. United States*, 342 U.S. 246, 272 (1952).

4. The personal-benefit requirement articulated in *Dirks* is therefore not "a judge-made doctrine premised on the Exchange Act's statutory purpose." Pet. App. 22a. Rather, it derives from the common law—which "Congress intends to incorporate" into "the fraud statutes." *Neder v. United States*, 527 U.S. 1, 23 (1999). That common law draws the line between *authorized* use of non-public information—which is not fraud on the principal—and *unauthorized* and *undisclosed* use—which is. When a person (or agent) is entrusted with information by a principal, the information is to be used only for the principal's purposes, not for personal gain. The personal-benefit test ensures that the line has been crossed—*i.e.*, that a securities trade *and* a failure to disclose has occurred—to justify finding liability. Personal benefit is thus necessary to establish *any* fraud based on non-disclosure, not because of a particular fraud statute's purpose, but because of longstanding common-law definitions of fraud.

B. The Second Circuit Erred By Dispensing With The Personal-Benefit Requirement Under Section 1348

1. The Second Circuit posited that "the personal-benefit test is" merely "a judge-made doctrine premised on the Exchange Act's statutory purpose." Pet. App. 22a. That is incorrect. As explained above, *Dirks*'s embrace of the personal-benefit requirement draws on basic common-law concepts of fraud, which are incorporated into Section 10(b). *See supra* pp. 11-

13. Section 1348 incorporates the personal-benefit requirement because it draws on those same common-law concepts. Section 1348 criminalizes *fraud*, so it must criminalize only *fraudulent* acts of trading on inside information. *See Chiarella*, 445 U.S. at 234-35 ("Section 10(b) is aptly described as a catchall provision, but what it catches must be fraud.").

Contrary to the Second Circuit's view, this Court did not impose the personal-benefit test to achieve what it thought to be Section 10(b)'s purpose. This Court has never regarded adding elements to offenses for policy reasons a proper method of statutory interpretation. *See, e.g.*, *M. Kraus & Bros. v. United States*, 327 U.S. 614, 626 (1946). In fact, courts are *not* supposed to add non-statutory elements to offenses—especially in the criminal context. *See, e.g.*, *United States v. Williams*, 553 U.S. 285, 304-07 (2008). Because the personal-benefit test is not a policy-driven invention based on statutory purpose, the Second Circuit went astray in discarding that requirement because it viewed Section 1348 as having a distinct purpose from Section 10(b).

2. The Second Circuit erred not only by hinging its analysis on an inquiry into legislative purpose—rather than applying traditional concepts of fraud embedded in Section 1348—but also by concluding that Section 1348's purpose justifies rejecting the personal-benefit requirement.

Congress enacted Section 1348 as part of the Sarbanes-Oxley Act of 2002 in response to "a series of celebrated accounting debacles" involving companies like Enron and WorldCom. *Free Enter. Fund v. Pub.*

Co. Acct. Oversight Bd., 561 U.S. 477, 484 (2010). Enron "used thousands of off-the-book entities to overstate corporate profits, understate corporate debts and inflate Enron's stock price." The Corporate and Criminal Fraud Accountability Act of 2002, S. Rep. 107-146, 2002 WL 863249, at *2 (2002). These "complex financial structures," along with "the use of sophisticated professional advice," allowed Enron "to paint for the investing public a very different picture of the company's financial health than the true picture revealed." *Id.* at *3. Investors were left with an essentially worthless security. *Id.* at *3-4.

In Congress's view, prosecuting Enron for this conduct was unduly complicated. "[U]nlike bank fraud, health care fraud, and bankruptcy fraud, there is no specific 'securities fraud' provision in the criminal code to outlaw the breadth or schemes and artifices to defraud investors in publicly traded companies." *Id.* at *6. Rather, "prosecutors must rely on generic mail and wire charges that carry maximum penalties of up to only five years imprisonment and require prosecutors to carry the sometimes awkward burden of proving the use of the mail or the interstate wires to carry out the fraud," or they "may charge a willful violation of certain specific securities laws or regulations, but such regulations often contain technical legal requirements, and" defendants may escape liability by arguing "that they did not possess the requisite criminal intent" of willfulness. *Id.*

Congress enacted Section 1348 to fill these perceived gaps in statutes criminalizing securities fraud. To this end, Section 1348 effects several changes in the criminal code that distinguish it from Rule 10b-5:

First, it omits the mailing and interstate wire requirements found in the mail and wire fraud statutes. Second, Section 1348(1) requires only that the scheme occur in connection with a registered security, omitting the Exchange Act's requirement that the fraud scheme occur "in connection with the purchase or sale" of a security. Third, by focusing on the scheme to defraud rather than some technical accounting rules or internal control violations, Section 1348(1) allows federal prosecutors and juries to focus on the underlying fraud, rather than potential defenses to technical violations. Fourth, for those cases where dishonest means are used to deprive investors of money and property in connection with securities transactions, Section 1348(2) retains the purchase or sale language. Fifth, it omits the willfulness requirement found in the criminal provisions of Exchange Act. Finally, Section 1348 increases the statutory maximum for securities fraud to 25 years in jail. *See* 18 U.S.C. § 1348.

These aspects of Section 1348 evince a congressional intent to streamline a securities fraud case by eliminating proof of technical requirements. But the statute was not intended to and did "not lower the standard of criminal intent prosecutors must meet to convict securities fraud offenders." S. Rep. 107-146, 2002 WL 863249, at *30. *Cf. United States v. Mahaffy*, 2006 WL 2224518, at *16 (E.D.N.Y. Aug. 2, 2006) ("Though the text of the statute does not explicitly require the intentional mens rea, precedent compels this Court to read into 18 U.S.C. § 1348 the well-established requirement of fraudulent intent, which is requisite to a conviction under the other federal fraud statutes.").

3. The congressional objective to have the core prohibition of fraud in Section 1348 align with existing securities laws is manifest not only in its legislative history but also in its text: The key words in Section 1348 are nearly identical to those in Rule 10b-5, Section 17(a) of the Securities Act of 1933, and the mail and wire fraud statutes. All prohibit a scheme or artifice to defraud any person in connection with a security, including by means of false or fraudulent representations. *Compare* 18 U.S.C. § 1348; *with* 17 C.F.R. 240.10b-5; 15 U.S.C. § 77q(a); *and* 18 U.S.C. §§ 1341, 1343. These textual similarities support the conclusion that Congress did not seek to eliminate the traditional securities fraud elements in cases prosecuted under Section 1348. *See, e.g.*, *Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich LPA*, 559 U.S. 573, 588-89 (2010) (holding that Congress's incorporation of one statute's language into a later statute showed that Congress intended to incorporate judicial interpretations of the first statute into the second).

This textual similarity is unsurprising. While Section 10(b) and the traditional Title 18 fraud statutes focus on diverse contexts, they all punish activities that are fraudulent. Section 1348—like the other fraud statutes—likewise punishes only fraud. It accordingly must incorporate the personal-benefit requirement, which is an essential component of separating lawful from unlawful trading in tipper-tippee cases. *See supra* pp. 10-13; Kenneth M. Breen & Keith W. Miller, *Insider Trading Charges Under Section 1348–Without the 'Technical Elements?'*, 32 Champion 49, 50 (Oct. 2008) (arguing that prosecuting insider trading under Section 1348 should largely

track prosecutions of insider trading under other statutes).

C. The Common Law of Embezzlement Confirms That Section 1348 Incorporates the Personal-Benefit Requirement

The Second Circuit also erred in holding that Section 1348 does not need to incorporate traditional elements of insider-trading crimes because it derives from the law of embezzlement, and embezzlement is fraudulent even if there is no fiduciary duty and no personal benefit. As explained above, the law of embezzlement *does* incorporate the concept of using another's property for one's own personal benefit, in breach of a duty owed to the victim. *See supra* pp. 12-13.

Although the panel cited several of this Court's decisions that supposedly supported its view of the law, *all* of those cases involved an insider who had a preexisting fiduciary duty to a victim, misappropriated the victim's property, received a personal benefit, and deceived the victim by hiding the misappropriation. *See O'Hagan*, 521 U.S. at 653 (fiduciary misappropriated principal's confidential information and profited from it); *Carpenter v. United States*, 484 U.S. 19, 24 (1987) (employee disclosed employer's confidential information and received a benefit); *Grin*, 187 U.S. at 189 (clerk who absconded with money was agent of victim). Far from suggesting that tipping liability does not require satisfaction of the personal-benefit test, these cases confirm that this Court has consistently required a breach of fiduciary duty and receipt of personal gain in embezzlement cases.

D. This Court Should Grant Review Because The Second Circuit's Erroneous View Of The Law Will Harm The Fair And Efficient Operation Of The Markets

This Court should grant the petition "[i]n view of the importance" of the question presented. *Dirks*, 463 U.S. at 652. As this Court recognized in *Dirks*, "[t]he value to the entire market of [market analysis] cannot be gainsaid; market efficiency in pricing is significant enhanced by" the efforts of market analysts—like petitioners here—"to ferret out and analyze information." *Id*. at 658 n.17 (first alteration in original). Thus, market analysis "redounds to the benefit of all investors." *Id.*

That market analysis is not possible if analysts lack clarity about what forms of analysis and trading are permissible. Analysts routinely seek out information from insiders and they must have a test for when they can do so to avoid undue expansions of tippee liability. Hence the need for a clear limiting principle, which the personal-benefit test provides. The Second Circuit's decision, however, erases any clarity on that score. Its fragmentation of fraud law, permitting disparate results for the same conduct depending on the fraud statute the prosecutor selects, undermines decades of efforts by this Court to ensure that the vital activities of securities analysts are not inhibited by overbroad restrictions on the use of information. Indeed, under the Second Circuit's view, many defendants who cannot be held civilly liable in an enforcement action for tipping by the SEC will nonetheless be subject to criminal penalties—including the possibility of 25 years in prison. *See supra* pp.

4-5. This bizarre and flawed result is especially problematic given that the Second Circuit is the nerve center of the nation's securities markets and, in effect, often establishes securities law for the entire country. *See Morrison*, 561 U.S. at 260. This Court should not countenance the Second Circuit's recent misstep in defining a new insider-trading crime. Instead, it should grant the petition and reverse the decision below.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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