the friends would trade on the inside information or that he was reckless as to whether the friend would trade on the inside information, he knew this was a person who was in the stock market?

And as to the tippee, what would you have to prove? That the tippee knew that the insider knew that he was going to trade on the information? What would you have to prove?

MR. DREEBEN: As -- as to the tip -- as to the tipper, we submit that an element of the Cady, Roberts duty is that the insider anticipated that the person to whom he gave the information would trade. Now, he --

JUSTICE KAGAN: Is anticipated the same as he knew he would?

MR. DREEBEN: Yes. I think that knowledge, anticipation, understanding is the language that the Second Circuit has used to describe it all -- all fits the bill.

We're talking here about a gift of the information --

JUSTICE KAGAN: But it's not enough. It's like, well, I think he might or --

MR. DREEBEN: No, it's not enough.

JUSTICE KAGAN: -- or, you know, I'm sort of

betting that he would, but I don't really know.

MR. DREEBEN: Now, in a criminal case, we need to show a breach of the fiduciary duty. We're also going to have to show an intent to defraud, fraudulent intent, and we're going to have to show willfulness in order to obtain a criminal conviction.

JUSTICE SOTOMAYOR: So why do you want to put knowledge of the -- knowledge that it will be used for trading as part of the breach of fiduciary duty? If you do that, then you have to prove that the tippee knew that the tipper thought it would be traded.

MR. DREEBEN: Yes, and I don't think that's a very difficult burden because in most of these situations, it's obvious why it's being done.

JUSTICE SOTOMAYOR: Why can't you put it in the intent to defraud?

MR. DREEBEN: It goes to intent to defraud --

JUSTICE SOTOMAYOR: So why -- why make it part of the breach --

MR. DREEBEN: Because Dirks did. Dirks did. Dirks adopted the Cady, Roberts formulation of the breach of duty, which to go back to it again, it is of the transmission of information that was made available only for a corporate purpose, for personal benefit, with

the intent and knowledge that the individual is going to trade. Now, it doesn't --

JUSTICE BREYER: It doesn't say it -- it has a sentence here which is exactly what's hanging me up and exactly what I thought you were going to answer before you got cut off.

The sentence is: "The elements exist also when an insider makes a gift of confidential information to a trading relative or friend."

MR. DREEBEN: Yes.

JUSTICE BREYER: That doesn't sound as if the writer of those words had in mind any person in the world. Now, in each instance you have to know that that person would, in fact, use the information to trade, but it doesn't say any person in the world. It says a trading relative or friend.

MR. DREEBEN: Yes, but --

JUSTICE BREYER: So I want --

MR. DREEBEN: -- this isn't a portion of the opinion, Justice Breyer.

JUSTICE BREYER: No.

All right. So I should read the whole opinion, and --

MR. DREEBEN: No, I'm -- it's a portion of the opinion in which Justice Powell is giving examples

of the concrete circumstances, objective criteria that will allow the government to establish that the purpose of the disclosure was for personal benefit as opposed to what the SEC was concerned about, that people would use ostensible business justifications to explain why the information was being given out and the SEC was concerned this is going to create a quagmire of subjective analysis. And the Court's response was to give examples in which the objective criteria would help establish. And the confirmation of this, I think, Justice Breyer, is that at the end of the opinion, the portion that Justice Kagan read earlier today, it's on page 667, it's where the Court analyzes why Secrist and the other insiders at Equity Funding had not occasioned liability for Dirks.

JUSTICE BREYER: What can I read -- now I want you to tell me what I can read to get the explanation of Dirks that the majority of lower courts have followed. It seems to me the Second Circuit has not read it as you're reading it.

MR. DREEBEN: Correct.

JUSTICE BREYER: For after all, they came to the opposite conclusion. And are there circuits that have read it just as you had, said you walk down the street. You find anybody, you don't even know him, but

he does keep saying trading, trading, trading, trading, and you tell him, and therefore you know that he will likely trade. Now, in other words, an anonymous person, very far, just what you're arguing, what are the circuits that follow that?

MR. DREEBEN: I'm not -- this case does not involve that situation. This case involves --

JUSTICE BREYER: No, I realize this case -- I'm trying to get it clear in my mind.

MR. DREEBEN: This involves the classic, prototypical situation that actually arises in the real world and gets prosecuted.

There are very few cases that involve this hypothetical of somebody distributing inside information --

JUSTICE BREYER: I'm not worried about that. I'm not worried so much about this case. I a.m. worried about line drawing, and you want to draw a line so that friend, relative, doesn't matter, and -- and before I write those words, I'd like to know what circuit courts have followed that approach?

MR. DREEBEN: So I think that there aren't a lot of cases that don't involve friends or family members. I think the -- the case that most closely tracks the analysis that I think best explains Dirks is

the Seventh Circuit in SEC v. Maio. It's cited in our brief. It does involve two people who were close friends, because ordinarily those are the circumstances in which people decide to risk criminal liability to give out inside information so that somebody else can profit.

But the Court makes the statement in it that there was no corporate reason, there's no legitimate reason why one friend who's an insider at the corporation is giving information to a third person, he didn't have to give information at all. So why did he do it except for what the Court concluded fits within the Dirks language?

CHIEF JUSTICE ROBERTS: What if you have a situation where close friends or whatever and one says, I want to tell you what I've been working on, it's pretty interesting, but tells him, says, but whatever you do, don't go buy stock. You can't do that. That's against the law.

MR. DREEBEN: Right. And that is a situation --

CHIEF JUSTICE ROBERTS: So you're not going to prosecute that situation when the tippee goes and makes $100,000 on it?

MR. DREEBEN: The tipper in that situation

is disclosing information in the context where he has made an express statement, and I'm assuming understandings between the two that the information would not be used. The tipper is not liable for insider trading.

The tippee who then trades may be charged under the misappropriation theory for having taken information from a relationship of confidence or an express statement and an agreement not to use the information, and the fraud there is between the tipper and the tippee, not between, as here, the tipper and the people to whom the tipper owes a fiduciary duty.

This is explained in the SEC's Rule 10b5-2, which helps define the kinds of relationships that support a misappropriation theory of liability.

But I think, Mr. Chief Justice, what this illustrates is we are not urging a theory in which tippers are per se liable every time inside information is disclosed. This isn't a revival of the information theory that was rejected in Dirks. And I think what makes that most clear is that there are situations in which inside information can be legitimately revealed, even when it is known that it will occasion trading, and it doesn't violate the insider's fiduciary duty.

JUSTICE SOTOMAYOR: Mr. Dreeben, I think

you're taking this way out of existing law. Are you going to suggest that tippees aren't routinely prosecuted when tippers don't know that they are going to trade? I think they are, and most often it's because you claim that they should have known it was confidential information.

MR. DREEBEN: In a criminal case, we're not claiming that. The SEC in a civil case --

JUSTICE SOTOMAYOR: There's plenty -- there's a legion of cases I read for this -- preparing for this argument where the government has said --

MR. DREEBEN: I don't think that there are, Justice Sotomayor, because I don't think that that's what we're -- we're certainly not making that submission in this case. And I think that the cases that we are trying and the jury instructions that we are obtaining contemplate that the disclosures to a trading relative or friend. And that is the heart of the gift theory. So I don't think that I'm departing from the way that the --

JUSTICE SOTOMAYOR: So you're going to let go of the guy that Justice Alito -- the guy on the street who looks dejected is not my friend or a close relative, but I give him a tip and say, go trade on this. It will make you a lot of money.

That person -- that tipper would not be liable.

MR. DREEBEN: He would, Justice Sotomayor, for the very reason you yourself articulated. In that situation, there's a gift of information to someone with the intent that the person trade. Now doesn't --

JUSTICE SOTOMAYOR: So it's irrelevant whether it's a friend or family member?

MR. DREEBEN: My submission is that the best way to understand Dirks is that it goes to a breach of fiduciary duty, which would not be limited to two categories like that. And I don't think that Justice Powell, in articulating this species of personal benefit, was attempting to rely on it. I was trying to explain this before to Justice Breyer.

At the end of the opinion where the Court precisely says that Secrist is not liable because he didn't make any financial advantage, it goes on to say, nor did he make a gift of valuable information to Dirks.

Now the Court didn't say, well, Dirks wasn't a close friend. Dirks wasn't a relative. Therefore he's out of the picture.

The Court applied gift analysis in that situation precisely because the line that the Court was trying to draw was between the appropriate use of

corporate information and the inappropriate use.

JUSTICE KAGAN: Mr. Dreeben, I get your -- your theory and why it doesn't make any particular difference. And indeed, in that same paragraph where the Court says relatives or friends, the Court, just a sentence before, just talks about an intention to benefit a recipient --

MR. DREEBEN: Yes. Right.

JUSTICE KAGAN: -- without any sense of who that recipient has to be.

On the other hand, as you say, almost all of these cases are relatives and friends.

MR. DREEBEN: Yes.

JUSTICE KAGAN: And things might look different if we had a case that was not a relative or friend. And why not separate out that strange, unusual, hardly-ever-prosecuted situation and say we're not dealing with that here? We have nothing to say about it.

MR. DREEBEN: I'm fine with that. We are not seeking the Court to go beyond Dirks. These are the cases that actually do arise in the real world. There is one case that involves a guy who was an insider who tipped his barber, and the district court said, well, the barber and the insider weren't close enough, so that

it didn't count under Dirks. I think that's wrong. I don't think that there's a good principle for it. But the court --

JUSTICE SOTOMAYOR: So is there a difference between friend and acquaintance, as you're talking? Tell me.

MR. DREEBEN: So this is precisely the reason why I think it doesn't make sense, from a point of view of principle or application, to draw a distinction that's based on words in the opinion that the court didn't actually articulate when it applied them to the very situation before it. There is more nebulous features about relationships, once you confine it to undefined terms as friends or -- or relatives.

But this case clearly doesn't indicate -- implicate that at all. It's in the heartland of the insider trading prohibition. It's one brother to another brother. There's a very close relationship. The record is replete with all of that.

The Court doesn't have to deal with further outlier cases, and it doesn't have to reconceptualize Dirks, or even interpret it in the way that I have synthesized its analysis, in order to conclude that a strict pecuniary gain limitation is inimical to the purposes of the securities laws and inconsistent with

the doctrine that the Court has announced and applied for 33 years.

And with the exception of the Second Circuit in the Newman case, lower courts haven't had any difficulty applying it. There has been a couple of outlier cases, as I mentioned, involving barbers. But almost all of these cases involve situations in which there's a pretty good explanation for why the tipper would be providing information for the tippee in breach of a fiduciary duty.

And in cases when there is a legitimate corporate purpose alleged for the disclosure, which conceivably may have been the concern of the Newman court, Dirks already addressed that, too. It said that when there's an ostensibly legitimate business justification proffered for the disclosure, people are not going to be wandering around in the dark trying to sort out a subjective intent. There will be objective factors from which the relevant purpose, the personal purpose, can be inferred.

And that's the portion of the opinion in which the Court goes through examples of what those objective circumstances will be. It includes the intention to benefit a particular person, and it very specifically includes the gift situation. If the Court

feels more comfortable given the facts of this case of reaffirming Dirks and saying that was the law in 1983, it remains the law today, that is completely fine with the government.

I think that there are cases in which it would be clearer and more beneficial to adopt the rule that if there's no corporate purpose, the disclosure to anyone is a breach of a fiduciary duty. But if the Court is more at home with the language that was actually used in Dirks and wants to reaffirm it, it should do so.

Clearly, Congress is aware of this line of cases. It has never disturbed it. It has actually incorporated the words "insider trading" into Section 10(b). It's not like this is a stranger to Congress. And when it applied the 10(b) prohibitions to security swap agreements, this is a well known area of the law. And the submission of the government is that the Court should reaffirm it.

JUSTICE GINSBURG: And so a tip here like the one we're concerned with, the requirement is that that tippee know that the information came from a insider? Is that --

MR. DREEBEN: Yes. He has to know it came from an insider in breach of a fiduciary duty and for

personal benefit, as I've been articulating it. Conscious avoidance can be used to establish that knowledge. The person doesn't have to know all of the details of exactly what the breach of fiduciary duty was. There has to be enough information so that the government can prove beyond a reasonable doubt that the tippee didn't know. And --

JUSTICE SOTOMAYOR: Is recklessness used?

MR. DREEBEN: Recklessness is not enough for a criminal case, no. We need -- we need to show knowledge in order to establish the breach of fiduciary duty. We can and we do rely on conscious avoidance. To the extent that the tipper understood that the tippee would trade, that's a requirement of knowledge. It's not a requirement that the person intend that the tippee trade. It's just an understanding and knowledge that it would happen.

The tippee has to have the knowledge of the breach. Oftentimes this can be inferred from circumstantial evidence. This is a perfect example of it. The Petitioner in this case was the -- was the brother-in-law of the insider. He knew that the information was coming out of Citigroup. He knew that there was no legitimate reason for it to be disclosed from his brother.

And in submission, finally, the Court believes that -- the government believes that the Court should affirm the judgment in this case. Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Shapiro, you have four minutes remaining.

REBUTTAL ARGUMENT OF ALEXANDRA A. E. SHAPIRO

ON BEHALF OF THE PETITIONER

MS. SHAPIRO: The government's argument to this Court illustrates precisely the dangers with leaving a statute -- without having a statutory definition. The government now says, for the first time in its merits briefs and in its argument to this Court, that somehow Section 10(b) and Dirks embody a duty of loyalty standard that's nowhere in either the statute or the Dirks case.

Indeed, they never argued this to the district court, not to the Ninth Circuit, not in the brief in opposition, nor in the Newman case. And the facts of Newman are actually inconsistent with the standard that the government purports to propose, because the government claims that it will insist that the insider has to have an intention that the tippee trade. And if you look at the facts of Newman, you'll see that the undisputed evidence was that with respect

to the Nvidia company tipper, there was no evidence that that insider knew his acquaintance from church was going to trade on the information. And likewise, there wasn't any evidence that the other insider was aware that anyone would trade.

And the other -- the example of the other insider also illustrates that sometimes it's not so clear whether someone has a corporate purpose or a personal purpose, because sometimes purposes are mixed. In that instance, the insider was speaking with an analyst who was checking his financial model, and as the evidence in the case shows -- this happens every day in the markets -- the government argued that he was also seeking career advice from the other individual who was a college friend, but there's no indication there that he knew he was going to trade.

And furthermore, the government's argument is completely inconsistent with Dirks. The facts of Dirks, and it was undisputed on the record, are that the insider secrets disclosed the information. He was seeking to expose a fraud, but he intended that Dirks would share the information with his institutional clients so that they could trade and drive the price of the stock down. And the Court expressly rejected in footnote 27 a test almost identical to what the

government is proposing here. "The SEC," the Court said, "appears to contend that an insider invariably violates the fiduciary duty of the corporation shareholders by transmitting nonpublic corporate information to an outsider when he has reason to believe that the outsider may use it to the disadvantage of the shareholders." And the Court rejected that argument.

And later in the footnote, the Court talks about the dissent's argument. And the dissent argued, the Court said, by perceiving a breach of fiduciary duty whenever inside information is intentionally disclosed to securities traders, the dissenting opinion will achieve the same result that the Court had rejected in Chiarella and rejected again; that is, effectively, a parity of information rule. So the government test is inconsistent with Dirks.

Furthermore, as I believe Mr. Dreeben mentioned, one of the points in the section of the opinion that discusses the test is the concern that courts shouldn't have to read the party's minds as to this element of the offense as opposed to scienter, and to the extent the government claims that there's an intentionality element to the breach of duty, that would violate that suggestion in the Dirks case as well.

And finally, with respect to the whole

remote tippee concept in Petitioner in this case, in this case Petitioner had no idea why Maher Kara was disclosing information to his brother. The only thing the record shows is that there was testimony that Michael told him the information came from the brother. There was no evidence he had any idea why, and as I believe Justice Sotomayor pointed out earlier, there were three different reasons at various points that information was disclosed. One was so that he could educate himself about the science of the work that he was doing. One was so that they could discuss potential drugs for their ailing father. And then there was the third phase.

But there was no evidence whatsoever that Petitioner had any idea why the information was being disclosed.

And finally, with regard to the point about the congressional statute, the fact of the matter is, if Congress could be said to have --

CHIEF JUSTICE ROBERTS: Finish your sentence.

MS. SHAPIRO: -- if Congress could be said to have ratified anything, all it could be said to have ratified is that there is an insider trading ban. There's no indication that Congress ever ratified the

Dirks gift language.

Thank you.

CHIEF JUSTICE ROBERTS: Thank you, counsel. The case is submitted.

(Whereupon, at 11:06 a.m., the case in the above-entitled matter was submitted.)

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