No. 15-628

IN THE

Supreme Court of the United States

BASSAM YACOUB SALMAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NEW YORK COUNCIL OF DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the personal benefit to the insider that is necessary to establish insider trading under *Dirks v. SEC*, 463 U.S. 646 (1983), require proof of "an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature," as the Second Circuit held in *United States v. Newman*, 773 F.3d 438 (2d Cir. 2014), *cert. denied*, No. 15-137 (Oct. 5, 2015), or is it enough that the insider and the tippee shared a close family relationship, as the Ninth Circuit held in this case?

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INTERESTS OF THE *AMICI CURIAE*[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association working on behalf of criminal defense attorneys to promote justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has approximately 9,000 direct members in 28 countries, and its 90 affiliated state, provincial, and local organizations consist of up to 40,000 attorneys, including private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL files numerous *amicus* briefs each year in this Court, the federal courts of appeals, and state high courts. NACDL's mission is to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, as well as the justice system as a whole.

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts of New York. NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the proper administration of criminal

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, and their counsel made a monetary contribution to its preparation or submission. Petitioner's consent to the filing of *amicus* briefs is filed with the Clerk. *Amici* received Respondent's consent to file this brief by letter.

justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts. NYCDL's *amicus* briefs have been cited by this Court or by concurring or dissenting justices in cases such as *Luis v. United States*, 136 S. Ct. 1083, 1095 (2016), *Kaley v. United States*, 134 S. Ct. 1090, 1104, 1112 (2014) (opinion of the Court and Roberts, C.J., dissenting), *Rita v. United States*, 551 U.S. 338, 373 n.3 (2007) (Scalia, J., concurring in the judgment), and *United States v. Booker*, 543 U.S. 220, 266 (2005).

Amici's members frequently defend individuals against insider-trading charges. *Amici* have a particular interest in the properly limited interpretation of the criminal prohibition on insider trading, as well as in protecting against the unwarranted expansion of federal crimes, and the application of lenity principles to ambiguous criminal provisions.

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 10(b) of the Securities Exchange Act of 1934 is an anti-fraud provision, proscribing the use of a "manipulative or deceptive device or contrivance" in connection with the purchase or sale of any security. This Court has therefore emphasized that Section 10(b) does not criminalize all securities trading based on material, nonpublic information. *See Chiarella v. United States*, 445 U.S. 222, 233 (1980); *Dirks v. SEC*, 463 U.S. 646 (1983). Instead, what Section 10(b) proscribes is "fraud"—and trading on nonpublic information entails fraud only when there is some fiduciary duty to disclose the information, such that trading without disclosure is misleading. *Chiarella*, 445 U.S. at 233. Such a disclosure duty exists, in turn, only when a corporate insider misuses corporate information for personal gain—to reap "secret profits" for himself. *Dirks*, 463 U.S. at 662. Accordingly, the line demarcating the boundary between fraudulent and non-fraudulent trading is the insider's misuse of information for personal tangible gain. Without such a benefit to the insider from his sharing of the information, there is no duty to disclose and thus no fraud.

The Court applied this principle to so-called "tippee" liability in *Dirks v. SEC*, holding that trading by a tippee—one who receives information shared by a corporate insider—can be fraud prohibited by Section 10(b), but only where the tippee knows that the corporate insider shared the information for personal gain. Absent such personal gain, there is no fiduciary duty to disclose, and therefore no fraud in violation of Section 10(b).

Despite this requirement, which *Dirks* intended to *cabin* Section 10(b) liability—and which is essential to limiting the crime of insider trading to what Congress actually prohibited, *i.e.*, financial fraud—the Ninth Circuit affirmed Petitioner's conviction for insider trading without finding that the tipper (Maher Kara) received any tangible benefit in exchange for disclosing the inside information. Instead, the court found it sufficient that Maher shared information with his brother with the intent to "benefit" his brother and "fulfill[] whatever needs he had." Pet. App. 12. By deeming such an amorphous, purely emotional benefit to satisfy *Dirks*, the Ninth Circuit effectively negated the personal-benefit requirement as a meaningful limitation and resurrected the very equal-information rule this Court has repeatedly rejected as one unauthorized by Congress.

While *Dirks* contemplated that *some* gifts to family or friends could give rise to liability—such as where such gifts are used by the insider as a substitute for trading himself—it did not abandon the principle that personal gain by the insider, typically to reap "secret profits," is the touchstone. 463 U.S. at 664. A gift of information is accordingly not actionable unless it contemplates some tangible gain to the insider. *See United States v. Newman*, 773 F.3d 438, 452 (2d Cir. 2014). Otherwise, the personal-benefit requirement of *Dirks* is a nullity. If the mere satisfaction of helping a family member or friend in some amorphous way is a sufficient personal benefit, then virtually *any* motivation for sharing information may qualify as well; the Government can always argue that the tipper obtained *some* satisfaction from his conduct. Yet that squarely conflicts with this Court's repeated guidance that Section 10(b) does not proscribe all trading on material, nonpublic information, even when such trading could be described as "unfair."

Further, even if Section 10(b) could plausibly be read to encompass the purely psychic or emotional benefits embraced by the Ninth Circuit, the rule of lenity independently forecloses such a result. That rule serves the twin aims of providing defendants notice of what is criminalized and ensuring that Congress, not courts, defines crimes. Because neither Congress nor the S.E.C. has ever defined the crime of insider trading, and the Ninth Circuit's rule would criminalize a broad swath of conduct as to which Section 10(b) is at best ambiguous, the rule of lenity compels a narrower reading of that provision here.

The Ninth Circuit's interpretation also exacerbates the problems that attend overcriminalization more generally, as it grants prosecutors tremendous leverage to charge broadly and extract plea deals, including from those who have serious defenses but whose risk calculus is distorted by the uncertainty created by an amorphous personal-benefit standard. In recent years, this Court has repeatedly rejected the Government's aggressive interpretations of other federal criminal statutes that would have dramatically expanded the conduct covered by the statute and thereby granted prosecutors tremendous leverage. And Congress has declined to take any legislative action supporting the Government's desired interpretations. The Court should likewise reject the Government's overreaching and nearly unbounded interpretation of "personal benefit" in this case.

ARGUMENT

I. THE DECISION BELOW IMPROPERLY EXTENDS THE CRIME OF INSIDER TRADING TO CONDUCT NEVER CRIMINALIZED BY CONGRESS.

1. This Court has consistently rejected the Government's entreaties to create a federal common law criminal prohibition outlawing all securities trading based on material, nonpublic information. Emphasizing that "neither the Congress nor the

Commission ever has adopted a parity-of-information rule," *Chiarella v. United States*, 445 U.S. 222, 233 (1980), this Court has made clear that insider trading cannot violate Section 10(b) unless it amounts to *fraud*; and that such trading can be fraud only if there is an independent fiduciary duty to disclose the information, such that trading without disclosure is misleading. *Id.* at 227-28. Even where such trading may be perceived as involving informational imbalances, Congress has criminalized only fraud, not unfairness: "not every instance of financial unfairness constitutes fraudulent activity under § 10(b)." *Id.* at 232. There is therefore no "general duty . . . to forgo actions based on material, nonpublic information." *Id.* at 233.

The "personal benefit" requirement is critical to this distinction between what Congress has actually criminalized—fraud—and trading that a jury might perceive as unfair but that is not fraud. This is because the duty to disclose that is a *sine qua non* of *fraudulent* insider trading arises only when the insider misuses corporate information for personal gain—where "the insider personally will benefit, directly or indirectly," from the "'use of inside information for personal advantage.'" *Dirks v. S.E.C.*, 463 U.S. 646, 662 (1983) (quoting *In re Cady, Roberts & Co.*, 40 S.E.C. 907, 912, n. 15 (1961)). Absent such a "personal benefit," there is no duty to disclose and therefore no fraud.[2] Rigorous

[2] Any tippee liability is purely derivative of the corporate insider's breach of fiduciary duty and duty to disclose. Thus, only where the insider himself is exploiting the information for "personal gain" does the tippee inherit the *Cady, Roberts* duty not to trade on nonpublic information. *Dirks*, 463 U.S. at 662.

enforcement of the personal benefit requirement is therefore the only safeguard ensuring that the crime of insider trading is limited to cases of fraud, and is not extended—without any basis in the statute—to all trading based on nonpublic information.

In so holding, this Court has repeatedly rejected the Government's efforts to erase the critical distinction between criminal and noncriminal conduct. In *Chiarella*, the Court expressly rejected the SEC's position that any individual receiving inside information inherited a duty not to trade on it. 445 U.S. at 232-33. Subsequently, in *Dirks*, the first case addressing tippee liability, the Government took—and this Court rejected—a virtually identical position, "rooted in the idea that the antifraud provisions require equal information among all traders." 463 U.S. at 656-57. Again emphasizing that Section 10(b) is not a parity-of-information mandate, *id.* at 657, the Court held that tippees assume an insider's obligation to abstain from trading only where the insider breaches his own fiduciary duties by receiving a "personal benefit" in exchange for the information. *Id.* at 662-63. The fraudulent aspect of insider trading, the Court explained, derives from the "inherent unfairness" involved where an insider with fiduciary obligations to the corporation "takes advantage of information intended to be available only for a corporate purpose" and reaps "secret profits" as a result. *Id.* at 654.

2. Despite this Court's clear pronouncements in *Chiarella* and *Dirks* that Section 10(b) does not contain a parity-of-information rule, the Government's nearly unbounded interpretation of "personal benefit" would effectively impose such a

rule, and make its violation a federal crime. According to the Government, the personal-benefit requirement of *Dirks* is satisfied even by intangible and subjective emotional benefits, such as when an insider gives information to "a trading friend or relative *without any expectation of receiving money or valuables as a result*." Petition for Writ of Certiorari at 18, *United States v. Newman*, 136 S. Ct. 242 (2015) (No. 15-137) (emphasis added). In short, the Government would have this Court dramatically expand the reach of a federal crime with an already tenuous foundation in statutory text, by redefining a fiduciary duty aimed at use of corporate information for personal profit as a much broader duty triggered by any putative emotional or psychological benefit. *See* Andrew N. Vollmer, *A Rule of Construction for* Salman (Mar. 18, 2016), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2749834 (arguing that the insider trading violation, like other products of judicial implication not rooted in statutory text, must be narrowly construed).

To be sure, *Dirks* contemplated that *some* gifts of information to family or friends could give rise to insider trading liability. 463 U.S. at 664. But it never suggested that this supplanted the touchstone principle that personal gain such as "secret profits" by the insider—whether obtained directly or indirectly—is necessary. *See id.* at 659 (insiders "may not give such information to an outsider for the same improper purpose of exploiting the information *for [the insiders'] personal gain*" (emphasis added)). Instead, *Dirks* identified gifts to family or friends as one way an insider may seek to evade restrictions on trading himself. *See id.* at 664 ("The tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient."). Thus, while tipping with family or friends may take the form of a gift, it becomes actionable only where it contemplates an exchange of money or property to the insider. *See United States v. Newman*, 773 F.3d 438, 452 (2d Cir. 2014).

A contrary conclusion would effectively negate the personal-benefit requirement of *Dirks*. If the mere satisfaction derived from helping a family member or friend is sufficient, there is no reason why sympathy for the plight of a stranger would not be as well. Nor, for that matter, is there a basis for distinguishing these psychological benefits from the satisfaction some may find in aiding law enforcement (which *Dirks* itself said was insufficient, 463 U.S. at 667), or in any other reason for sharing information. In all of these scenarios, the Government will be able to argue that some benefit was reaped by the tipper—some satisfaction obtained through the disclosure of information. In short, the Government can treat any *motivation* for sharing information as a benefit to the tipper. But if such ethereal benefits suffice, the personal-benefit requirement of *Dirks* is no requirement at all, as virtually any reason for tipping (apart from inadvertence or mistake) will qualify. Not to require more would thus effectively revive the very equal-information rule rejected in *Chiarella* and *Dirks*.

This becomes particularly obvious in light of the relationship between the breach of fiduciary duty requirement and the knowledge requirement. In *Dirks*, the Court held that tippee liability requires knowledge that the tipper disclosed information in breach of a duty. 463 U.S. at 660. This specifically requires knowledge of the personal benefit received by the tipper, since the only breach of duty that supports tipper liability is the exchange of confidential information for a personal benefit. *See id.* at 659; *Newman*, 773 F.3d at 451. But if any ethereal benefit to the tipper satisfies *Dirks*, then the very act of disclosure of material nonpublic information would satisfy both requirements. Indeed, the government itself has suggested this. *See* Petition for Writ of Certiorari at 30-31, *United States v. Newman*, 136 S. Ct. 242 (2015) (No. 15-137). But, as the Court has made clear, disclosure of inside information—regardless of its value—is not itself a breach of fiduciary duty that supports liability under Section 10(b). *Dirks*, 463 U.S. at 661-62 ("All disclosures of confidential corporate information are not inconsistent with the duty insiders owe to shareholders").

The amorphous definition of personal benefit advocated by the Government is particularly problematic because the dynamics of criminal prosecutions will inevitably lead, in practice, to criminalizing a broader scope of conduct than authorized by Congress. Although this Court recognized in *Dirks* that "there may be significant distinctions between actual legal obligations and ethical ideals," 463 U.S. at 661 n.21, in the absence of a strict and objective definition of personal benefit, few juries—faced with noncriminal activity that they may find unfair or objectionable—are likely to draw that distinction. *See Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (the absence of clear guidelines permits "a standardless sweep that allows policemen, prosecutors, and juries to pursue their personal predilections") (internal quotation omitted).

The jury may infer, for example, that a *tippee's* profitable use of valuable information must have entailed a breach of fiduciary duty by the insider.[3] And courts would have no way to meaningfully police these determinations. Under the Ninth Circuit's personal-benefit test, the reviewing court has no way to determine whether the jury convicted simply to punish bad conduct or whether it actually found the *kind* of breach of fiduciary duty that is necessary to convict someone of a crime (namely, one involving a personal benefit to the insider). After all, apart from a "close" relationship, there would be no other concrete facts necessary to establish that the insider in fact derived a benefit. Given these realities, it may often be impossible to discern whether the jury concluded that the tipper actually received a benefit for the information and, if so, what kind. The risk of improper conviction is high.

This heightened risk of conviction also creates tremendous plea pressure on defendants. Potential sentences under federal securities laws are draconian. A person convicted of insider trading faces up to 20 years' imprisonment and a fine of up to $5 million. 15 U.S.C. § 78ff(a). The specter of such penalties, paired with a broad, amorphous personal-

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[3] The recent insider trading initiative in the Second Circuit prior to the *Newman* decision suggests that prosecutors recognized this jury dynamic, as downstream tippees receiving sizable trading profits were typically prosecuted more zealously than the insiders actually accused of breaching their fiduciary duties.

benefit standard, gives prosecutors extraordinary leverage. Such a legal regime would flip the burden of proof and force defendants in many instances to prove a negative to the jury, notwithstanding the absence of any *quid pro quo* or tangible gain to the tipper—namely, that the tipper obtained no emotional benefit despite his personal relationship with a tippee. Even if defendants have serious arguments that the insider received no personal benefit from the disclosures, the risk calculus, distorted by the uncertainty under such a rule, may lead many legally innocent defendants to plead guilty.

3. In this case, the Ninth Circuit erred by all but reading the personal-benefit requirement out of *Dirks*. The court seized upon *Dirks*'s "gift" language, but missed the critical point of that decision. What makes *trading* on inside information fraudulent is the insider's misuse of corporate information for personal gain. What makes *tipping* improper is the fact that federal law precludes a person from doing indirectly what he may not do directly; an insider cannot escape liability merely because he structured a transaction to allow him to reap secret profits without having to trade directly. But in either case—direct trading or a structured transaction—the improper conduct is the same: the insider collects improper gains through abuse of his corporate position. And it is that fact that brings tippees within the reach of Section 10(b).

The transactions at issue here are different. Maher (the insider) never received any tangible benefit from his brother Michael, the tippee, in exchange for the inside information. Nor was there any indication that Maher was funneling his trades through Michael in order to reap secret profits for himself: he neither earned a windfall nor provided information on the expectation that he would receive anything in return. There was a "close fraternal relationship" between them, Pet. App. 6, but there was no gain to Maher from his brother's abuse of that relationship. If this is enough, it is difficult to imagine any reason apart from mistake or inadvertence that would not bring a tip within the reach of Section 10(b). The evidence in this case therefore cannot sustain a conviction for insider trading.

This is not to suggest that a jury would be likely to find the actors here sympathetic. But Congress has not outlawed unsympathetic conduct. *See Dirks*, 463 U.S. at 661 n. 21 ("[T]here may be *significant* distinctions between actual legal obligations and ethical ideals.") (internal quotation omitted and emphasis added). And anything short of a parity-of-information rule will inevitably allow some parties to reap profits by trading on inside information. Yet this Court has twice rejected an equal-information rule. To the extent the Government sees that limitation as a problem, it is a problem properly addressed to Congress. *See Norwood v. Kirkpatrick*, 349 U.S. 29, 40 (1955) (a court's role is to "interpret [a statute,] not to expand and enlarge upon it").

II. THE RULE OF LENITY PROVIDES ADDITIONAL REASONS TO REJECT THE RULE ADOPTED BELOW.

For these reasons, the Ninth Circuit's decision cannot be accepted without reading the personal-benefit requirement out of *Dirks*. But even if Section 10(b) could plausibly be read to encompass the kind of personal benefits contemplated by the Ninth Circuit, the rule of lenity would foreclose such a result. There is, at best, severe doubt about whether Congress, by outlawing fraud, intended to criminalize the conduct at issue here.

1. "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality op.); *see McNally v. United States*, 483 U.S. 350, 359-60 (1987) ("[W]hen there are two rational readings of a criminal statute, one harsher than the other, [the Court is] to choose the harsher only when Congress has spoken in clear and definite language."). This rule serves two principal functions. It ensures that individuals receive "fair warning" before being punished for their conduct. *United States v. Bass*, 404 U.S. 336, 348 (1971). It is foundational that "no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." *Santos*, 553 U.S. at 514 (plurality op.); *see United States v. Gradwell*, 243 U.S. 476, 485 (1917) ("[B]efore a man can be punished as a criminal under the federal law his case must be plainly and unmistakably within the provisions of some statute."). The rule also "vindicates the principle that only the *legislature* may define crimes and fix punishment." *Whitman v. United States*, 135 S. Ct. 352, 354 (2014) (Scalia, J., statement respecting denial of certiorari); *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (the rule of lenity "is founded on … the plain principle that the

power of punishment is vested in the legislative, not in the judicial department"). The rule of lenity does this by precluding courts from expanding criminal prohibitions by resolving ambiguities in favor of liability.

Both concerns are implicated here. Congress has never defined, or even expressly prohibited, insider trading. Indeed, this Court itself has recognized that neither the statutory language nor even the legislative history of Section 10(b) "specifically address[es] the legality" of insider trading. *Chiarella*, 445 U.S. at 230; *see also id.* at 226 (§10(b) "does not state whether silence may constitute a manipulative or deceptive device"). Courts have therefore been left to determine what forms of trading fall within the exceedingly general prohibition on the use of deception "in connection with the purchase or sale of any security," 17 C.F.R. § 240.10b-5 (1998). *See, e.g.*, J. Kelly Strader, *(Re)conceptualizing Insider Trading:* United States v. Newman *and the Intent to Defraud*, 80 BROOK. L. REV. 1419, 1422 (2015) ("insider trading is a form of securities fraud that is primarily judicially-defined"); Vollmer, *supra*, at 5-6. It breaks no new ground to note that this judge-made, ad-hoc law-making process has failed to yield uniform and clear standards, but instead, as a former chair of the SEC has noted, has produced an "intolerable degree of uncertainty" for market participants. Harvey L. Pitt & Karen L. Shapiro, *The Insider Trading Proscriptions Act of 1987: A Legislative Initiative for a Sorely Needed Clarification of the Law Against Insider Trading*, 39 Ala. L. Rev. 415, 416 (1988). As one commentator put it, "the legal restrictions on trading securities while in possession of material nonpublic information are confused and confusing." Jill E. Fisch, *Start Making Sense: An Analysis And Proposal For Insider Trading Regulation*, 26 GA. L. REV. 179, 179 (1991); *see also* Richard M. Phillips & Larry R. Lavoie, *The SEC's Proposed Insider Trading Legislation: Insider Trading Controls, Corporate Secrecy, and Full Disclosure*, 39 ALA. L. REV. 439, 440 (1988) ("[T]he case-by-case approach has failed to produce a rational, comprehensible definition that the average person can apply with predictability.").

The Ninth Circuit's decision only deepens this confusion. Rather than clarify the boundaries of the personal-benefit requirement, the court sustained liability on nothing more than vague testimony that the insider was "close" with his brother and shared information "to 'benefit' [him] and to 'fulfill whatever needs had he had.'" Pet. App. 12 (alteration omitted). What benefit did the insider receive from all of this? The Ninth Circuit did not say. Apparently, the psychological satisfaction of providing assistance to his brother was enough. *See* U.S. Supp. Br. at 8, *United States v. Salman*, 792 F.3d 1087 (9th Cir. 2015) (No. 14-10204) (arguing that "the personal benefit of appeasing and benefiting his brother" was sufficient). But, as noted, if that is enough, there is no principled way to limit liability short of a parity-of-information rule, which this Court has expressly rejected.

What remains, then, is a field of uncertainty between two poles. On one end are cases in which the insider discloses information for a tangible benefit, which would clearly support tippee liability. On the other are cases where the insider discloses information by mistake or inadvertence, which clearly would *not* support liability. But in between—if the Government's position were accepted—it is impossible to discern where liability ends. If intent to benefit a friend is enough, how is "friend" defined and how close does that friend need to be? If family receives the information, what degree of consanguinity is required? And if the mere intent to benefit family and friends is sufficient, what other psychological benefits suffice as well? These questions defy clear and certain answers. And it is precisely this situation that the rule of lenity guards against. If a law "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement," it cannot support a criminal conviction. *United States v. Williams*, 553 U.S. 285, 304 (2008). Because the Ninth Circuit adopted a rule that provides neither fair notice nor a clear standard of liability, its position must be rejected.

2. The rule of lenity should have special force in the insider-trading context, given Congress's consistent refusal to draw clear lines. In 1984, Congress passed the Insider Trading Sanctions Act of 1984, which enhanced the penalties for insider trading. Though Congress considered defining the offense of insider trading, it ultimately did not. At the hearings, the SEC warned that a legislative definition would leave holes and remove the flexibility necessary to address novel conduct. *See The Insider Trading Sanctions Act of 1983: Hearing Before the Subcomm. on Securities of the Senate Comm. on Banking, Housing, and Urban Affairs*,

98th Cong., 2d Sess. 37-38 (1984) (testimony of SEC Enforcement Director John Fedders); H.R. Rep. No. 98-355, at 32-33 (1983), *as reprinted in* 1984 U.S.C.C.A.N. 2274, 2305 (testimony of SEC Chairman John S. R. Shad). While the SEC's candor is admirable, this rationale is antithetical to rule-of-law and separation-of-power principles—namely, that proscriptions must be promulgated by the legislature, before conduct is penalized, and in a manner that affords fair warning of what is prohibited.

In 1988, Congress again considered defining the offense of insider trading on two separate occasions. The first was when the Insider Trading Proscriptions Act of 1987 was introduced. Oliver P. Colvin, *A Dynamic Definition of and Prohibition Against Insider Trading*, 31 SANTA CLARA L. REV. 603, 619-20 (1991). Though the proposal would have defined the prohibition on insider trading, Congress did not enact it. *Id.* The second was when Congress considered the Insider Trading and Securities Fraud Enforcement Act of 1988, Pub. L. No. 100-704, 102 Stat. 4677 (1988). Congress passed this act, but refused to define what insider trading is prohibited. H.R. Rep. No. 100-910, at 11 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 6043, 6048. The Court should not do the work that Congress has repeatedly declined to do.

III. THE DECISION BELOW EXEMPLIFIES A BROADER PATTERN OF OVER-CRIMINALIZATION THROUGH EXPANSIVE INTERPRETATION OF FEDERAL CRIMINAL LAWS.

The Ninth Circuit's decision fits into a larger pattern. As noted, since the inception of insider-trading liability under Section 10(b), the government has consistently fought to transform that provision into an equal-information rule. *Supra*, at 7. While this Court has repudiated these efforts, this has not decreased the Government's appetite for interpreting Section 10(b) as broadly as possible. *See Janus Capital Grp., Inc. v. First Derivative Traders*, 564 U.S. 135 (2011) (rejecting SEC's "broad" reading of "make" in Rule 10b-5); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 188-191 (1994) (rejecting SEC's position that the Rule 10b-5 cause of action should extend to aiders and abettors). This case is simply one more chapter in this story.

Such overreach is not limited to Section 10(b). In recent years, this Court has confronted—and rejected—several similarly overbroad readings of federal criminal statutes advanced by federal prosecutors and endorsed by lower courts. In *Yates v. United States*, 135 S. Ct. 1074 (2015), for example, a commercial fisherman caught undersized red grouper in violation of federal fishing regulations and "ordered a crew member to toss the suspect catch into the sea." *Id.* at 1078 (plurality op.). The defendant was brought up on criminal charges for violating 18 U.S.C. § 1519, a provision of the Sarbanes-Oxley Act that criminalizes concealing or destroying "any record, document, or tangible object with the intent to impede, obstruct, or influence" a federal investigation. *Id.* This Court reversed, rejecting the government's "unrestrained" and "aggressive" reading of "tangible object" to include fish. "It is highly improbable," the Court observed, "that Congress would have buried a general spoliation statute covering objects of any and every kind in a provision targeting fraud in financial record-keeping." *Id.* at 1087.

In *Bond v. United States*, 134 S. Ct. 2077 (2014), the defendant, upon discovering that her closest friend was pregnant with her husband's child, spread "irritating chemicals" on the friend's car door, mailbox, and door knob. *Id.* at 2085. The friend suffered a minor injury to her thumb, "which she treated by rinsing with water." *Id.* The government charged defendant with violating a provision of the Chemical Weapons Convention Implementation Act of 1998 that forbids the "possess[ion] or use … [of] any chemical weapon." 18 U.S.C. § 229(a)(1). Noting that defendant's "common law assault" was nothing like the "war crimes and acts of terrorism" the Convention was designed to address, the Court refused to accept the government's "boundless" interpretation of the statute, which would have "ma[d]e it a federal offense to poison goldfish" with "a few drops of vinegar." 134 S. Ct. at 2090-91.

This is not to say, of course, that the defendants in these cases were morally blameless. In many cases implicating overcriminalization concerns, the defendant's conduct is objectionable. But federal law is not coextensive with upright conduct. Nor does Section 10(b) in particular exhaust the ethical standards for securities trading. *See Chiarella*, 445 U.S. at 232 ("[N]ot every instance of financial unfairness constitutes fraudulent activity under §10(b)."). But nothing in this justifies impressing federal criminal law into service that its text cannot bear. For one thing, the rule of lenity squarely precludes this approach in order to preserve the important constitutional principles of fair notice and separation of powers. For another, states themselves have broad authority to criminalize behavior that federal law does not. *See United States v. Morrison*, 529 U.S. 598, 618 (2000) ("the Founders … reposed [the police powers] in the States"). This is true even in the insider-trading context. Both *Chiarella* and *Dirks* premised insider-trading liability under Section 10(b) on a breach of fiduciary duty. *Dirks*, 463 U.S. at 654; *Chiarella*, 445 U.S. at 232. Because fiduciary duties are largely creatures of state law, states could likely "impose a duty to reveal material, non-public information in all securities transactions." Saikrishna Prakash, *Our Dysfunctional Insider Trading Regime*, 99 COLUM. L. REV. 1491, 1501 n. 42 (1999). This would lay the foundation for "finding a deception whenever someone traded on such information." *Id.* States thus have latitude to decide for themselves which other forms of insider trading should be criminalized. The effect of the Ninth Circuit's expansive interpretation, however, is to federalize the issue entirely, leaving states with little room to act. *See Cleveland v. United States*, 531 U.S. 12, 24 (2000) (rejecting government's interpretation that would "invite[] us to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress").

There are significant and concrete consequences that flow from such overcriminalization. Most obviously, capacious readings of criminal statutes vastly expand the power of prosecutors and law enforcement. Where a law is interpreted overly broadly, it may reach a vast swath of conduct that the legislature did not intend to proscribe and that few would expect to fall within the scope of the law. This leaves many to the mercy of prosecutorial discretion.

This problem is exacerbated in the insider trading context, where, as noted earlier, an amorphous personal-benefit standard will effectively invite juries to convict defendants for conduct that is not criminal but strikes jurors as unethical, and will pressure defendants, in the face of that possibility, to enter unwarranted guilty pleas.

CONCLUSION

In *Dirks*, this Court highlighted the importance of "objective criteria," "limiting principle[s]," and "legal limitations" in defining the scope of liability under Section 10(b). Because the decision of the court of appeals offered none of these, its judgment should be reversed.

Respectfully submitted,

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