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

BRIEF OF *AMICUS CURIAE* THE ALTERNATIVE INVESTMENT MANAGEMENT ASSOCIATION, LTD., IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether information about a proposed government regulation is "property" or a "thing of value" belonging to a federal, state, or local regulator such that its unauthorized disclosure can constitute fraud or conversion under federal criminal law.

2. 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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INTEREST OF *AMICUS CURIAE*[1]

The Alternative Investment Management Association, Ltd. (AIMA) is the global representative of the alternative investment industry, with around 2,000 corporate members in over 60 countries. AIMA's fund manager members collectively manage more than $2 trillion in hedge fund and private credit assets. AIMA provides leadership in industry initiatives such as advocacy, policy and regulatory engagement, educational programs, and sound practice guides. It also encourages combating market abuse, including market manipulation and insider trading. AIMA member firms rely on the integrity of securities markets both in the U.S. and globally, and many (if not most) routinely undertake fundamental investment research. Accordingly, AIMA has an interest in the clarity and predictability of insider trading law, and how the Second Circuit's decision below will affect its members.

[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae*, its members, and its counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amicus curiae* to file this brief. All parties consented to the filing of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

AIMA and its members have no sympathy for unlawful insider trading. In fact, AIMA's core policy principles include "[c]ombating market abuse" and "[i]mposing sanctions against market abuse," "including, where appropriate, administrative or criminal sanctions." AIMA, *AIMA's Policy Principles*, https://bit.ly/2RZrN52. At the same time, however, AIMA and its members are acutely concerned with the need for clarity on what constitutes lawful behavior and with ensuring that historically legitimate investment research activities are not criminalized. The efficient functioning of the markets depends on investors being able to act on reliable information. And those investors, in turn, need clear guidance from the courts on what is allowed and what is forbidden. Yet the Second Circuit's decision creates significant uncertainty in an area of the law that requires clarity. In particular, the decision upended decades of insider trading law in two discrete ways: First, it expanded the definition of "property" under the relevant fraud statutes. Then, it eliminated the long-standing rule that insider trading liability for remote tippees requires proof that the tipper received a "personal benefit" in exchange for the tip and that the tippees had knowledge of that personal benefit. Because the decision below deprives investors of fair notice of how to lawfully structure their conduct and reduces market efficiency, it calls out for certiorari.

The Second Circuit's decision rests on two key holdings. Each is problematic in its own right. But together the consequences are untenable.

First, the Second Circuit held that Title 18's fraud provisions do not include the "personal benefit" test that has long applied to identical language in Title 15. Basic principles of statutory interpretation foreclose that result, which eliminates decades of precedents and sows confusion as to how investors should now order their conduct to comply with the law. Casual observers will be left without notice as to how identically-worded provisions have such different meanings, while industries that have spent billions on compliance programs will be left lurching for guidance on how to comply with a newly minted legal regime.

Second, the Second Circuit expanded the definition of "property" in the relevant fraud statutes to include virtually all confidential government information, regardless of whether disclosing that information caused any economic harm to the government. Apart from conflicting with bedrock (and recent) Supreme Court precedents, that holding threatens to chill the information discovery process necessary to healthy markets. And there is hardly any sector of the economy that government action does not touch in some manner, underscoring the breadth of this holding. When faced with such a massive expansion of potential liability, many investors will naturally eschew reliance on many types of government-related data or opinions out of fear that their use could unwittingly result in a felony.

Together, those holdings cause uncertainty where there is a paramount need for clarity. Worse yet, they make it easier for the government to meet criminal insider trading statutes than their civil counterparts. The natural consequences of that backwards regime

and the uncertainty it causes will be either that investors disregard swaths of information—thus harming market efficiency—or that individuals will be prosecuted without fair notice that their acts were illegal—thus harming the rule of law. And because insider trading is largely a creature of judicial and administrative decisions, it is especially important that this Court step in to provide that guidance where the government and lower courts have stretched the doctrine beyond its previous bounds.

To be clear, *amicus curiae* and its members abhor unlawful insider trading and do not in any way seek to weaken traditional insider trading law. But because the Second Circuit's decision injects significant uncertainty into the law and threatens to penalize conduct that is both lawful and essential to healthy markets, they respectfully urge this Court to grant the petition for certiorari.

ARGUMENT

I. This Court's Review Is Necessary to Restore Clarity To Insider Trading Law.

It is critical that courts provide clear guidance so that investors can order their conduct. This Court emphasized that very point in *Dirks v. S.E.C.*, 463 U.S. 646, 658 (1983), when it stressed the need for courts to consider whether their decisions will inhibit "the preservation of a healthy market." But one of the key aspects of a healthy, efficient market is "share price accuracy," or ensuring that the price of securities reflects the actual value of those securities. Zohar Goshen & Gideon Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. 711, 714 (2006). Given the substantial role that investors play in

determining share prices, it is paramount that those investors know with clarity what methods of gathering relevant information are permitted and which are forbidden. And without such guidance, many investment managers will be left between a rock and a hard place, trying to maximize their returns for their clients while ensuring they remain within the bounds of the law.

It is widely accepted that, "[i]n an efficient market, all available information about a corporation and its securities will be incorporated into the stock price." Jill E. Fisch, *Start Making Sense: An Analysis and Proposal for Insider Trading Regulation*, 26 GA. L. REV. 179, 182-83 (1991).[2] This Court has recognized as much, explaining that "the market price of shares traded on well-developed markets reflects all publicly available information." *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 270 (2014) (quoting *Basic Inc. v. Levinson*, 485 U.S. 224, 246 (1988)). But "perfection is impossible." Ronald J. Gilson & Reinier Kraakman, *Market Efficiency after the Financial Crisis: It's Still a Matter of Information Costs*, 100 VA. L. REV. 313, 321-22 (2014). As this Court itself has recognized, all possible "information [about securities or companies] cannot be made simultaneously

[2] *See also, e.g.*, Frank J. Sensenbrenner & Margaret Ryznar, *The Law and Economics of Insider Trading*, 50 WAKE FOREST L. REV. 1155, 1166 n.87 (2015); Ronald J. Gilson & Reinier Kraakman, *Market Efficiency after the Financial Crisis: It's Still a Matter of Information Costs*, 100 VA. L. REV. 313, 321 (2014); Goshen & Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. at 714; Ronald J. Gilson & Reinier H. Kraakman, *The Mechanisms of Market Efficiency*, 70 VA. L. REV. 549, 554-57 (1984).

available" to everyone everywhere. *Dirks*, 463 U.S. at 659.

Thus, healthy markets depend on investors trading on relevant information. *Id.* at 658-59. "It is commonplace for analysts to ferret out and analyze information, and this often is done by meeting with and questioning corporate officers and others who are insiders." *Id.* (internal quotations and citation omitted). With that information in hand, investors and analysts buy undervalued securities and sell overvalued ones, helping the stock price reflect that information. *See* Fisch, *Start Making Sense*, 26 GA. L. REV. at 182-83. And by doing so, those investors help effectively disseminate the information "almost as rapidly as information that the entire market learns at once." Gilson & Kraakman, *Market Efficiency after the Financial Crisis*, 100 VA. L. REV. at 329; *see also* Goshen & Parchomovsky, *The Essential Role of Securities Regulation*, 55 DUKE L.J. at 729-30. These investors and analysts are therefore essential for a healthy, efficient market.

Yet, a critical question for any investor is whether trading on certain information constitutes illegal "insider trading." That is why *Dirks* was adamant that any rule governing insider trading must be precise and clear, because "imprecision prevents parties from ordering their actions in accord with legal requirements." 463 U.S. at 658 n.17. "Unless the parties have some guidance as to where the line is between permissible and impermissible disclosures and uses, neither corporate insiders nor analysts can be sure when the line is crossed." *Id.* And the need for clarity on that line is exactly why the potential

impact of the Second Circuit's decision is so concerning to *amicus* and its members.

This is no academic point. Anyone who has worked in the financial industry knows the difficulty of tracking every piece of information's source—especially given the ever-increasing availability of information and the fast pace of complex transactions. As a result, corporate officers and investment firms have invested heavily in compliance programs, trainings, and other resources to ensure that they remain within the bounds of the law—to the point of hiring "hundreds, even thousands" of compliance officers in the last few decades. Sean J. Griffith, *Corporate Governance in an Era of Compliance*, 57 WM. & MARY L. REV. 2075, 2077, 2103 (2016).

Moreover, investment managers—like those who make up the bulk of AIMA's membership—have a duty to their investors to maximize profits from all legal sources. That requires a delicate balance, ensuring that no trades expose their investors to compliance risks, while simultaneously attempting to quickly trade on legitimate information for maximum profits. Thus, investment managers must constantly evaluate the risk of legal violations, often in real time, as they attempt to navigate the "line between legitimate, public information and material nonpublic information." *Cf.* Bradley J. Bondi & Steven D. Lofchie, *The Law of Insider Trading: Legal Theories, Common Defenses, and Best Practices for Ensuring Compliance*, 8 N.Y.U. J. L. & BUS. 151, 195 (2011).

In such an environment, it is obvious that any uncertainty about insider trading law will only "prevent[] parties from ordering their actions in accord

with legal requirements" and deter even legitimate trading—in flat contravention of *Dirks*, 463 U.S. at 658-59 & n.17. Without "a clear definition of the prohibited conduct," insider trading law will "hamper the efficient functioning of capital markets" because analysts and investors will be "unable to trade rapidly on rumors, hearsay, and other common sources of information"—or even know when such trading is permitted. Fisch, *Start Making Sense*, 26 GA. L. REV. at 182-83. Accordingly, confusion and "overdeterrence produce[] some of the very same social costs" as insider trading itself and "upset the allocative efficiency of the economy." Amanda M. Rose, *The Multienforcer Approach to Securities Fraud Deterrence: A Critical Analysis*, 158 U. PA. L. REV. 2173, 2184 (2010). Again, that is not to condone *unlawful* activity but to prevent the overdeterrence of *lawful* activity.

II. The Decision Below Creates Uncertainty And Overdeterrence.

Despite this Court's admonition in *Dirks*, the Second Circuit's decision risks exactly the confusion and inefficiencies that inhibit the preservation of healthy markets. By both expanding the definition of "property" so drastically and eliminating the longstanding "personal benefit" test, the decision below threatens to deter investors from trading on even lawful information. Each of the Second Circuit's twin holdings is problematic on its own, but together they are untenable, extending insider trading liability to actions long thought to be lawful in ways that are difficult to avoid.

A. The Decision Below Jettisoned the Personal Benefit Test that This Court Has Long Required.

The personal-benefit test is longstanding and well-known. *See Dirks*, 463 U.S. at 667; Andrew W. Marrero, *Insider Trading: Inside the Quagmire*, 17 BERKLEY BUS. L.J. 234, 249-50 (2020). Yet the Second Circuit eliminated that prominent requirement from insider trading liability under § 1343 and § 1348—while acknowledging the requirement's continued vitality under Rule 10b-5. That atextual decision creates exactly the uncertainty and overdeterrence that this Court forbade in *Dirks*.

As the court below itself acknowledged, none of the relevant statutes expressly prohibits insider trading—each, on its face, prohibits fraud. Pet.App.21a-22a; *see also* Frank J. Sensenbrenner & Margaret Ryznar, *The Law and Economics of Insider Trading*, 50 WAKE FOREST L. REV. 1155, 1161 (2015) ("Neither Section 10(b) nor Rule 10b-5 was cited in order to regulate insider trading until 1961."). And each statute's text is materially identical in all relevant respects. *See* 18 U.S.C. § 1348 (prohibiting "a scheme or artifice to defraud"); *id.* § 1343 (same); 17 C.F.R. § 240.10b-5 (same). Despite that materially identical text, the Second Circuit interpreted the provisions in starkly different ways, jettisoning the long-standing "personal benefit" limitation and knowledge requirement that the industry has long understood and built their compliance regimes around. Pet.App.23a-24a.

Nor does the decision below comport with standard principles of statutory interpretation. As this Court has said "time and again . . . courts must presume that

a legislature says in a statute what it means and means in a statute what it says there." *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 548 U.S. 291, 296 (2006) (quoting *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992)). The fundamental goal of interpreting that text is to render it "in a manner consistent with ordinary English usage" as reasonable people would understand it. *Nichols v. United States*, 136 S. Ct. 1113, 1118-19 (2016) (rejecting an interpretation that was "too clever by half" and not in accordance with ordinary usage) (citation omitted). It is therefore elemental that courts typically interpret "the same language" as having "the same meaning." *Smith v. City of Jackson*, 544 U.S. 228, 233 (2005) (plurality); *see also Northcross v. Bd. of Educ. of Memphis City Schools*, 412 U.S. 427, 428 (1973) (per curiam). Applied here, those principles should have led the panel to interpret the same text in these laws as bearing the same meaning.

The court below did precisely the opposite. It instead embarked on a free-wheeling discussion about different "theor[ies] of fraud" and the "purpose[s]" of the statutes,[3] grounded mainly in a single quote from a lone piece of legislative history that does not even mention the personal-benefits test. Pet.App.21a-24a. But the goal of statutory interpretation is to provide

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[3] Even taken on its terms, the panel's "purposive argument simply cannot overcome the force of the plain text," as this Court has held time and again. *Mohamad v. Palestinian Auth.*, 566 U.S. 449, 460 (2012) (citing *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (per curiam)). Allowing such amorphous purposes or vague legislative history to distort statutory text is a "relic from a 'bygone era.'" *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019).

notice and guidance to "ordinary" people, not only to well-trained lawyers. *See Nichols*, 136 S. Ct. at 1119; *Smith v. United States*, 508 U.S. 223, 228 (1993). And it is flatly unreasonable to think that an ordinary citizen would somehow discern that two identically-worded provisions—one of which has a longstanding, well-known limitation—are fundamentally different because of vague legislative history and esoteric theories about fraud and embezzlement.

That lack of consistency and predictability is only worse because the court below was interpreting a criminal provision. As this Court has admonished, courts must ensure that any criminal statute "define[s] the criminal offense . . . with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Skilling v. United States*, 561 U.S. 358, 402 (2010) (citation omitted). Here, the panel's decision upended a longstanding rule of insider trading law that the government had respected for nearly four decades. And the new theories being tested in this case appear to have been crafted to get around those decades of doctrine, not to help "ordinary people . . . understand what conduct is prohibited" by the relevant statutes. *Id.*

Nor does the decision below appear to comport with the will of Congress. In 2012, Congress passed the Stop Trading on Congressional Knowledge Act—which explicitly addressed the best way to expand insider trading law to governmental information. Pub. L. 112-105, 126 Stat. 291 (Apr. 4, 2012). And that Act unequivocally applies the *same* standards from § 10(b) and Rule 10b-5 to governmental employees, showing that Congress has no designs to create

different standards for different kinds of insider trading. *Id.* §§ 4(a); 9(b)(1). That textual commitment is a far better indicator of congressional intent than a lone piece of vague legislative history, and reaffirms the basic principle that these identically-worded statutes should have the same meaning.

The decision below would thus upset the delicate balance that has evolved over the years under § 10(b) jurisprudence—and in the process, harming market efficiency while deterring legitimate conduct. Worse still, it does so in the context of a criminal statute. For those reasons, this Court should grant the petition for certiorari to provide clarity and guidance.

B. The Decision Below Expands the Definition of "Property" Beyond What This Court Has Permitted.

The Second Circuit's expansion of "property" under § 1343 and § 1348 to include all nonpublic government information only compounds that uncertainty and disruption. Pet.App.12a-20a. As this Court just explained in *Kelly v. United States*, 140 S. Ct. 1565, 1571-72 (2020), the federal fraud statues prohibit only schemes that target *property*—mere interference with the government's "regulatory power" is not fraud. That distinction has deep roots, going back to this Court's decisions in *Cleveland v. United States*, 531 U.S. 12, 26-27 (2000), and *McNally v. United States*, 483 U.S. 350, 358 (1987). It was not for the Second Circuit to disregard those decisions, or so dramatically upset the careful distinctions that this Court has drawn for investors and the public alike.

By so drastically expanding the definition of property, the decision below threatens to deter

investors from acting on perfectly legitimate information, especially now that governmental information touches on almost all aspects of business. A central problem for any investor is determining whether trading on certain information is legal. As *Dirks* cogently explained, "it may not be clear—either to the corporate insider or to the recipient analyst—whether the information will be viewed as material nonpublic information." 463 U.S. at 662. By sheer bad luck, investors "may mistakenly think the information already has been disclosed or that it is not material enough to affect the market." *Id.* Because trading on relevant information is necessary to well-functioning markets, it is critical that investors have clear notice of what is legal so that they can act accordingly. *Id.* 658-59 & n.17.

The Second Circuit's holding that any nonpublic, government information constitutes "property" fails to appreciate how far-reaching the effects of that rule may be. For better or for worse, our modern government has grown to encompass and regulate more aspects of our economic and personal lives than ever before. To take just one statistic, from 1990 to 2010, the Code of Federal Regulations grew by 40,000 pages to a total of 146,000 pages. *See* Christopher DeMuth, *Can the Administrative State Be Tamed?*, 8 J. LEGAL ANALYSIS 121, 126 (2016). The volume of both the United States Code and state regulations has similarly exploded in the modern era. *See* Robert C. Ellickson, *Taming Leviathan: Will the Centralizing Tide of the Twentieth Century Continue Into the Twenty-First?*, 74 S. CAL. L. REV. 101, 105 (2000). Few could dispute that today there are literally "hundreds of federal agencies poking into every nook and cranny

of daily life." *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

Thus, an efficient market will *necessarily* take into account *all* relevant government information. Given the vast breadth of modern government, it appears obvious that the value of a given security would be affected by governmental actions, regulations, or adjudications. *Cf.* Fisch, *Start Making Sense*, 26 GA. L. REV. at 223. To say that such information cannot be traded upon would therefore generate market inefficiencies, as prices would become untethered from the "fundamental values of securities." Gilson & Kraakman, *Market Efficiency after the Financial Crisis*, 100 VA. L. REV. at 321-22. Trading on certain governmental information is thus necessary for a healthy market. *Cf. id.*

By deeming all pre-decisional government information to be "property" under the fraud statutes, the panel majority vastly expanded the potential liability of investors. Naturally, "a firm's agents must make judgment calls about the volume of information to collect, verify, and release." *See* Rose, *The Multienforcer Approach to Securities Fraud Deterrence*, 158 U. PA. L. REV. at 2186. Whenever those judgment calls are second-guessed by prosecutors or courts—with 20/20 hindsight—the government risks overdeterring investors from acting on legitimate information. *See id.* Indeed, investors "increasingly [are] afraid that diligent review, analysis, and investigation on behalf of [their] clients will land [them] before the SEC or worse yet a defendant in a criminal case." Robert Anello, *Letter on Insider Trading from a Confused Wall Streeter*,

FORBES (Sept. 6, 2017), at https://bit.ly/3iFLcmz; *see also* Jessica Hostert, Note, *Great Expectations, Good Intentions, and the Appearance of the Personal Benefit in Insider Trading: Why the Stage Needs Reset After* Martoma, 43 S. ILL. U.L.J. 703, 743 (2019).

Once again, that is exactly what *Dirks* forbids. Not all trades on non-public information are illegal, and trading on relevant information is part of a "healthy market." *Dirks*, 463 U.S. at 658. The key is to draw a line that prohibits unlawful conduct without deterring healthy investment activity. Yet the decision below, by dramatically expanding the scope of "property" while excluding the "personal benefit" test and knowledge requirement from textually-identical statutes, threatens to unleash exactly the sort of confusion and overdeterrence that undermine efficient and well-ordered markets—especially because the Second Circuit is now so clearly at odds with the Ninth and D.C. Circuits. *See United States v. Tobias*, 836 F.2d 449, 451 (9th Cir. 1988); *Pearson v. Dodd*, 410 F.2d 701, 708 (D.C. Cir. 1969).

While *amicus* and its members unequivocally abhor and condemn illegal insider trading, corporate officers and investors should not be forced to operate in gray areas of legality, guessing whether their activities are lawful. Because the decision below creates that untenable situation, this Court should grant the petition for certiorari.

III. The Decision Below Upends The Balance Between Civil And Criminal Law.

The confusion and overdeterrence threatened by the Second Circuit's decision is compounded by the fact that it lowered the bar for criminal prosecutions.

In so doing, the decision below will paradoxically allow the government to pursue *criminal* charges even where it could not seek *civil* penalties, upending the traditional balance between civil and criminal law and throwing a wrench into the congressional scheme of securities regulation. This illogical result will plainly lead to market disruptions as investors and traders refrain from acting on information for fear of prosecution.

The regime endorsed by the lower court is antithetical to our legal system, which has long recognized that "in a criminal case . . . there is a greater strictness of construction than in a civil controversy." *Decatur Bank v. St. Louis Bank*, 88 U.S. 294, 300 (1874) (citing *Rex v. Chapple*, Russell & Ryan, Crown Cases, 77 (1804)). By virtue of the simple fact that "'the stakes are higher' in criminal cases, where liberty or even life may be at stake," it is even more critical that courts ensure that people receive fair notice and guidance. *Mitchell v. United States*, 526 U.S. 314, 328 (1999) (citation omitted); *see also Johnson v. United States*, 576 U.S. 591, 595 (2015). Moreover, our Constitution demands as much through a multitude of provisions—from the Due Process Clause to the Confrontation Clause—that safeguard the People from prosecutorial overreach. *See United States v. Davis*, 139 S. Ct. 2319, 2325 (2019); *Crawford v. Washington*, 541 U.S. 36, 50 (2004). Those principles certainly apply with equal force to analysts and investors who act on information long considered permissible under insider trading law.

Yet the upshot of the decision below is that "insider trading is easier to prove under a criminal statute

than the related civil statute." Karen E. Woody, *The New Insider Trading*, 52 Ariz. S.L.J. 594, 600 (2020).[4] By removing a longstanding limit that applies to § 10b-5 and expanding the definition of "property," the decision below removes key limits on prosecutors that will still apply to the SEC in civil enforcement cases. *Id.* That "inversion of civil and criminal standards" upends "foundational concepts of law" and "distorts the purpose of criminal law." *Id.* at 640. If nothing else, the decision below runs flatly against the fundamental principle that "the weight of inertia [should be] upon the party that can best induce Congress to speak more clearly" and that courts ought not make "criminal law in Congress's stead." *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality).

By so doing, the decision below also threatens to upset Congress's obvious scheme of designating the SEC as the primary securities regulator. Because the decision below "means that a civil action brought by the SEC under § 10(b) will be harder to prove . . . than the criminal action brought under § 1348," it effectively "hamstrings the SEC . . . despite [the SEC] being tasked by Congress to maintain fairness of the securities markets." Woody, *The New Insider Trading*, 52 ARIZ. S.L.J. at 640. This is especially troubling because "the law of insider trading has been shaped almost entirely by common law, in the form of SEC administrative actions and judicial opinions." *Id.* at 602; *see also Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 737 (1975). Investors and

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[4] *See also* Eugene Volokh, *Journalists Might Be Felons for Publishing Leaked Governmental "Predecisional Information"*, REASON.COM (Jan. 27, 2020), https://bit.ly/30J9kPc.

traders must now order their conduct under a regime that may be driven not by the longstanding and apparent regulatory authority, but by prosecutors.

Such a result is wholly contrary to the basic principle that "[s]tatutes should be interpreted 'as a symmetrical and coherent regulatory scheme.'" *Mellouli v. Lynch*, 575 U.S. 798, 135 S. Ct. 1980, 1989 (2015) (citation omitted). Far from coherent, the decision below would impose new criminal statutes on investors and traders—while stripping those statutes of longstanding, well-known limits on the definition of insider trading. Such a result upends the regulatory scheme structured by Congress, inverts the balance of civil and criminal law, and thereby unleashes massive uncertainty, confusion, and overdeterrence on the market. In so doing, it creates precisely the kinds of market inefficiencies that this Court has long strove to avoid. *Dirks*, 463 U.S. at 658.

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To be clear once again, *amicus* and its members have no respect for illegal insider trading and do not seek to defend it in any form. But it is critically important both to the efficient functioning of the financial markets and to individual fairness that there is predictability in the insider trading laws. This Court should accordingly grant certiorari to provide guidance and clarity that will avoid the substantial harms threatened by the decision below.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully urges this Court to grant the petition for certiorari.

Respectfully submitted,

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