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IN THE SUPREME COURT OF THE UNITED STATES

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BASSAM YACOUB SALMAN, :

Petitioner : No. 15-628

v. :

UNITED STATES, :

Respondent. :

- - - - - x

Washington, D.C.

Wednesday, October 5, 2016

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:05 a.m.

APPEARANCES:

ALEXANDRA A. E. SHAPIRO, ESQ., New York, N.Y.; on behalf of the Petitioner.

MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case No. 15-628, *Salman v. United States*.

Ms. Shapiro.

ORAL ARGUMENT OF ALEXANDRA A. E. SHAPIRO

ON BEHALF OF THE PETITIONER

MS. SHAPIRO: Mr. Chief Justice, and may it please the Court:

In case after case -- *McNally*, *Skilling*, and *McDonald*, to name just a few -- this Court has construed Federal criminal statutes narrowly to avoid serious separation of powers and vagueness problems.

This case presents those same constitutional concerns, but to a far greater degree, because no statute defines the elements of the crime. The Court should limit this crime to its core, as it did in *Skilling*, and that core is the insider's abuse of confidential corporate information for personal profit. Unless and until Congress enacts a definition, the crime should be limited to trading by the insider or its functional equivalent -- equivalent where the insider tips another person in exchange for a financial benefit.

JUSTICE GINSBURG: Suppose in this case the

1 person with the inside -- inside information, the
2 brother with the inside information, had himself traded
3 in the securities, and then gave the proceeds to his --
4 what was it? His older brother? Would that have
5 violated 10(b)?

6 MS. SHAPIRO: Yes, Your Honor.

7 JUSTICE GINSBURG: So what's the difference,
8 if the insider trades and gives it -- makes the proceeds
9 a gift, or if he just says, you do the trade; here's the
10 gift?

11 MS. SHAPIRO: The difference, Your Honor, is
12 that the transaction -- the securities transaction is
13 complete when the insider trades. And this is a statute
14 that doesn't even mention insider trading, much less
15 tipping or personal benefit. And so in that instance,
16 it wouldn't be covered, and he can do whatever he wants
17 with the money.

18 JUSTICE KENNEDY: Justice Ginsburg was
19 setting up the question, isn't he -- in -- in her
20 instance where the tippee does the trading, the tippee
21 is just an accomplice. This is standard accomplice
22 stuff.

23 MS. SHAPIRO: No, Your Honor. This -- the
24 statute -- this is a case where we have to take a step
25 back and look at the fact the statute doesn't define the

1 elements. It doesn't even mention insider trading, much
2 less tipping, and the -- the -- whereas Dirks and
3 Chiarella before it make clear that not all trading on
4 inside information is unlawful. And what makes it
5 unlawful is that the insider is doing it for personal
6 gain, whether trading himself and profiting on the
7 information by doing so, or whether it's by
8 circumventing that rule, as discussed in Dirks, and
9 essentially giving the information to someone else so
10 that he can get a financial kickback. That's --

11 CHIEF JUSTICE ROBERTS: Maybe I'm missing --
12 maybe one of us is missing the import of the question.

13 Are -- are you suggesting that if two people
14 get together, one of them has inside information and he
15 says to the other person, why don't the two of us -- why
16 don't you trade on that, and then you and I will split
17 the proceeds, that that's not covered?

18 MS. SHAPIRO: That is covered, Your Honor.

19 CHIEF JUSTICE ROBERTS: Oh, okay.

20 MS. SHAPIRO: I'm sorry. What I meant was
21 that if the insider -- as occurred in this case, and
22 it's undisputed in this case -- did not act for any
23 financial gain, did not make any money at all, that's
24 what's not covered.

25 JUSTICE SOTOMAYOR: Don't you think that his

1 brother's statement -- when he was asked about trading
2 by Maher, the younger brother, he said, I owe somebody
3 money. Isn't that most naturally read to be either give
4 me the money to pay this person back or give me
5 information that lets me pay him back? Isn't that
6 always the quid pro quo of a gift, that you believe that
7 if you give someone a gift, it's going to cost you one
8 way or another?

9 You're going to give them something of
10 value, or you're going to substitute money for the gift,
11 or you're going to do something that saves you money by
12 giving the tip.

13 MS. SHAPIRO: Well, Your Honor, I think the
14 problem with that is that virtually anything would --
15 any disclosure would then amount to a gift, and this
16 Court has been crystal clear that -- that not any
17 disclosure leads to a violation --

18 JUSTICE SOTOMAYOR: That's true, but then
19 comes the government's suggestion that the disclosure
20 has to be for a personal benefit or a personal purpose,
21 that there has to be a reason you're doing it, not
22 accidentally, not -- not unknowingly, but something
23 you're doing because you want to receive some benefit
24 from it.

25 MS. SHAPIRO: Well, in this case, it's quite

1 clear that Maher, the -- the insider brother, didn't
2 receive any benefit at all, and indeed the district
3 court and the SEC made that clear. He did not do this
4 for any kind of self-benefit, and I think the evidence
5 in the record, even construed in the light most
6 favorable to the government, as it must be, demonstrates
7 that at most, the insider got the scant benefit of
8 getting his brother off his back. This was not a
9 willing transfer of inside information.

10 JUSTICE BREYER: Why do you say "scant"?

11 MS. SHAPIRO: Well, Your Honor, I think we
12 have to get back to the fact that this --

13 JUSTICE BREYER: No, my bigger question is
14 why -- why do all the disclosure forms we have to fill
15 out? They have a lot of relatives. You have to put,
16 like, your minor children, your wife. And in giving
17 gifts, you have to disclose your minor children, your
18 wife.

19 I mean, why are the statute books filled
20 with instances where the public wants to know, not just
21 how you might benefit, but how your family might
22 benefit?

23 MS. SHAPIRO: Well, Your Honor, the statute
24 books are filled with rules like that, but Section --

25 JUSTICE BREYER: Because --

1 MS. SHAPIRO: -- 10(b) --

2 JUSTICE BREYER: No, no, I realize it
3 doesn't, but I mean, I'm looking for the reason why.
4 And of course I can suggest a reason. Because they
5 think very often, though it depends on families, to help
6 a close family member is like helping yourself. That's
7 not true of all families --

8 MS. SHAPIRO: Well, Your Honor --

9 JUSTICE BREYER: -- but many, it is.

10 MS. SHAPIRO: I think that the important
11 thing here is that the statute doesn't address this.
12 And Congress could certainly pass a statute --

13 JUSTICE BREYER: Do you think it addresses
14 benefits?

15 MS. SHAPIRO: No, the statute --

16 JUSTICE BREYER: I mean, the statute
17 doesn't, but there's a long history, and the person
18 who's been defrauded, I take it, or the object of deceit
19 is the company whose information you use. And when you
20 use their information, which you shouldn't, and tell it
21 to someone, you're hurting them. And then there's a
22 subset of cases that we prosecute. And the subset of
23 cases we prosecute are the cases where, having used that
24 information, you use it to benefit yourself.

25 And the question, I take it, is when you use

1 it to benefit a close family member, is that, in effect,
2 benefitting yourself. Cecil B. DeMille said -- or maybe
3 Jack Warner -- rule of relativity: Never hire a
4 relative. You could have -- you could have that view,
5 but you also have the view that helping a relative is
6 helping yourself.

7 Now, that seems to me where we are in this
8 case, and the law is filled with instances where they do
9 seem to think it's the same. And there are a lot of
10 cases here that think it's about the same, so why isn't
11 it?

12 MS. SHAPIRO: Well, Your Honor, there aren't
13 a lot of cases, and the only cases that this Court has
14 decided are Chiarella, Dirks and O'Hagan. The only case
15 in which the Court held for the government was O'Hagan,
16 and the insider was making his own profits to the tune
17 of \$4 million.

18 JUSTICE KAGAN: Ms. Shapiro, you're asking
19 us to ignore some extremely specific language in Dirks,
20 which of course, was decided quite some time ago. So
21 I'm just going read in Dirks.

22 The Court is talking about when it would be
23 proper under the statute to convict somebody for insider
24 trading, it's because there might be a relationship
25 between the insider and the recipient, or an intention

1 to benefit the particular recipient. And then it goes
2 on to say, "When an insider makes a gift of confidential
3 information to a trading relative or friend," and then
4 in the last paragraph of the opinion, where it's really
5 summing up everything that it's done, the Court says,
6 "The tippers received no monetary or personal benefit,
7 nor was their purpose to make a gift of valuable
8 information to the tippee."

9 So there's a lot of language in Dirks which
10 is very specific about, it's not only when there's a
11 quid pro quo from the tippee to the tipper, but when the
12 tipper makes a gift to the tippee, and in particular a
13 relative or friend.

14 MS. SHAPIRO: That's right, Your Honor.
15 Dirks does mention gifts, but I don't think that --

16 JUSTICE KAGAN: More than mention. This is
17 like half their holding.

18 MS. SHAPIRO: Well, I don't -- don't agree,
19 Your Honor. Dirks mentions gifts in two places, but
20 the -- I believe that it's dictum, and that the holding
21 of the case is -- is far different. And dictum should
22 not be used to be the basis for criminal liability when
23 we have a statute that doesn't address --

24 JUSTICE KAGAN: I don't know what
25 "dictum" -- what "dictum" means. The court is very

1 clearly setting out a test here. And this is part of
2 the test.

3 JUSTICE KENNEDY: And it's certainly not
4 dictum in *Dirks* when the Court says, "Thus, the test is
5 whether the insider personally will benefit directly or
6 indirectly from his disclosure."

7 MS. SHAPIRO: I agree with you, Justice
8 Kennedy. And in fact, the Court goes on to then say
9 right after that, "Absent some personal gain, there has
10 been no breach of duty to stockholders." And
11 personal --

12 JUSTICE KENNEDY: We're talking about
13 benefit and personal gain. And *Dirks* says there's a
14 benefit in making a gift. Now, it's -- it's true in the
15 law of gifts, we don't generally talk about benefit to
16 the donor -- I can -- other than in gift tax, but that's
17 for different reasons.

18 MS. SHAPIRO: No. In fact, the opposite.
19 In -- in most areas of the law, a gift is supposed to be
20 something that is not intended to benefit the giver.
21 And it's critical in this area, and I think the
22 Securities Industry Association brief illustrates this
23 point, but many of the other briefs do --

24 JUSTICE KENNEDY: Except, as Justice Breyer
25 points out, you certainly benefit from giving to your

1 family.

2 MS. SHAPIRO: Well, I -- just to -- I want
3 to be very clear about --

4 JUSTICE KENNEDY: It ennobles you, and in a
5 sense it -- it helps you financially because you make
6 them more secure.

7 MS. SHAPIRO: Well, I want to be very clear
8 about the test that we're proposing, because I do think
9 it's going to capture a number of these families'
10 situations. The point is the line has to be clear,
11 whether it's family or anyone else that the disclosure
12 is being given to. And under the pecuniary gain test
13 that we propose, certainly there will be many cases
14 where the government can introduce evidence showing the
15 kind of financial interdependence that will illustrate
16 that the insider does benefit financially from the
17 disclosure. I'm sure that's going to be true in most
18 situations involving spouses, and many other situations
19 involving close relatives.

20 JUSTICE KAGAN: Ms. Shapiro, let me give you
21 a hypothetical. Let's suppose I would like to give a
22 gift to a friend of mine, but it's just too expensive
23 for me to give it. And then I pass a coworker's desk,
24 and I see a hundred dollar bill sitting there, and I
25 take the hundred dollar bill; and now I can give a gift

1 that I had wanted to give, but I couldn't.

2 Now, have I benefitted from stealing the
3 hundred dollar bill?

4 MS. SHAPIRO: Yes, Your Honor.

5 JUSTICE KAGAN: Yes, you have. And why
6 should the issue be any different if, instead of
7 stealing the hundred dollar bill off my coworker's desk,
8 I instead steal information and give the gift of that
9 information rather than give a gift of cash?

10 MS. SHAPIRO: Well, there's certainly going
11 to be some situations involving gifts that will be
12 covered. So for example, if I have a tradition every --
13 once a year at Christmastime to give a household
14 employee a bonus, and one year I decide to give her a
15 tip instead, that would certainly qualify. It's going
16 to depend on the nature of the evidence and whether
17 there's a -- a --

18 JUSTICE KAGAN: I think what I'm suggesting
19 by the hypothetical is that we all have our own
20 interests and purposes behind giving gifts. Some of
21 those might be very practical and pragmatic. Some of
22 them might be more altruistic. But we give gifts for
23 individual interests and purposes.

24 And here, I'm stealing corporate
25 information. It's essentially a kind of embezzlement or

1 conversion. I'm stealing information to give a gift to
2 somebody I know. It might be, as in this case, a family
3 member. It might be a friend. And I benefit from that
4 because -- I mean, it's the -- I personally benefit.
5 It's the exact opposite of using corporate information
6 for corporate purposes. I'm using it for my own
7 personal purposes.

8 MS. SHAPIRO: But, Your Honor, that would be
9 true in virtually any instance one could think of where
10 an insider disclosed confidential corporate information,
11 whether it's in a business setting, or, as is often the
12 case, a mixed social and business setting. Analysts
13 talk to company insiders all the time, and it's
14 essential to the free flow of information to the
15 marketplace that that occurs. And if --

16 JUSTICE SOTOMAYOR: Wait a minute. First of
17 all, that's no longer true. There's regulations that
18 stop that, talking to analysts.

19 But talk about the culpability question.
20 Why is it any less culpable to give your close relative,
21 who you've been supporting every month for your entire
22 life, so instead of giving him, one month or two months,
23 that regular one hundred dollar bill, you choose to give
24 him corporate information. That's Justice Kagan's
25 example.

1 Why is that person more culpable than the
2 person who just -- a relative comes and says, it would
3 be nice; I need some money. And you give him a tip
4 instead of the cash.

5 MS. SHAPIRO: I think the issue is that
6 there has to be a clear line. We're dealing with a
7 crime that was never defined by Congress. None of these
8 words are in the statute.

9 JUSTICE SOTOMAYOR: But Congress doesn't
10 define what's deceptive or manipulative or -- what's the
11 third word? -- what defrauds. It has general words.
12 Don't devise a scheme that does these things. The law
13 has for ages said that the failure to -- to speak when
14 you're obligated to; i.e., an insider who doesn't
15 disclose that he's using your information is an omission
16 that's been, classically, a fraud.

17 So I don't understand why you keep saying
18 that the law doesn't define this.

19 MS. SHAPIRO: Because, Your Honor, the law
20 says nothing about insider trading, and as the Chiarella
21 court said, the statute provides no specific guidance,
22 nor does the legislative history. And any -- this is
23 very similar to the honest services fraud crime, or
24 indeed, before that statute was enacted, the mail fraud
25 statute that existed before the McNally case.

1 The statute talked about fraud. The honest
2 services fraud statute talked about fraud, but it
3 provided no specific guidances to what would violate.

4 And this Court held that the statute needed
5 to be construed narrowly to ensure that there was a
6 clear line. Other countries have insider trading laws,
7 and all of those laws use words like "insider" and
8 define under what circumstances a person is violating
9 the law by trading.

10 This Court has repeatedly held that there is
11 no general duty to refrain from insider trading. And
12 it's essential that the market participants understand
13 when the line is crossed and when it's not.

14 JUSTICE BREYER: I -- well --

15 CHIEF JUSTICE ROBERTS: Justice Breyer.

16 JUSTICE BREYER: I agree with that. But it
17 seems to me the analogy is the antitrust laws, very
18 vague statute. They've been around a long time.
19 Exactly what's criminal and what's civil and so forth
20 has been developed by courts over a long time. This
21 statute's been around since the '30s, and we have courts
22 developing law in it. And I believe the marketplace
23 pays a lot of attention to that. And virtually every
24 court, I think, but this one has held that this does
25 extend to a tipper giving inside information to a close

1 relative. And it seems to me -- and I'm giving you a
2 chance to respond to this, that -- suddenly to take the
3 minority statute here -- or to take the Second Circuit,
4 is what I'm thinking of -- is really more likely to
5 change the law that people have come to rely upon than
6 it is to keep to it.

7 I just want to get your view on that.

8 MS. SHAPIRO: Well, I don't think so, Your
9 Honor, and I think some of the amicus briefs illustrate
10 that there's been a tremendous amount of murkiness in
11 the Securities Industry Association. In particular, it
12 has had a lot of trouble -- its members have had a lot
13 of trouble determining when they can and can't use
14 market information of this sort. And regulation FD, by
15 the way, is very clear that it does not purport to
16 change the antifraud laws. And the regulation itself
17 provides that a violation of regulation in FD does not
18 in and of itself constitute insider trading under
19 10(b) --

20 JUSTICE KENNEDY: But that -- that addresses
21 whether or not there's an initial breach. Here, we
22 assume there's an initial breach. The question is: How
23 far out does liability extend? And it seems to me that
24 what you're saying doesn't quite address the problem
25 we're discussing.

1 MS. SHAPIRO: No, Justice Kennedy, I don't
2 agree with that, because what this Court has repeatedly
3 held in a number of cases going back to the Santa Fe
4 case is not every breach of fiduciary duty violates
5 Section 10(b), and it has to be a fraudulent breach.
6 And the question of whether it's a fraudulent breach
7 depends upon whether the insider is doing the disclosing
8 in exchange for personal benefit. That's the test.

9 It's not simply whether there's any old
10 breach of fiduciary duty. Indeed, one could argue in
11 the Dirks case that the insider there, Secrist, was
12 breaching his fiduciary duty.

13 JUSTICE GINSBURG: If Dirks is the test, and
14 it certainly was phrased as a test and that's how Judge
15 Ray could have understood it, if it is the test, then
16 this case falls within it because it's a gift, right?

17 MS. SHAPIRO: I don't agree with that, Your
18 Honor. I think that the facts of this case show that --
19 there may be many family circumstances where this would
20 be a gift, but I think the facts of this case show that
21 the insider was not -- he was being pestered by his
22 brother and pressured to release the information. He
23 didn't even know he was trading until later in the
24 process. And even then the largest trade in this case
25 involves a situation where he immediately called his

1 brother back and begged him not to trade, and the
2 brother said he wouldn't. So I don't agree with that,
3 Your Honor.

4 But I think it is essential in order for
5 there to be a clear line that the Court hold that the
6 insider must personally benefit in a concrete way unless
7 and until Congress -- if that's an under inclusive test,
8 Congress can act. Congress can change the law.

9 JUSTICE GINSBURG: And why isn't it a
10 benefit, if you said the brother was pestering him so
11 now his brother is happy? He's no longer being
12 pestered. Isn't that a benefit?

13 MS. SHAPIRO: Well, if that's a benefit,
14 virtually anything is, and then the Court would be going
15 back to the rule that expressly rejected in Chiarella,
16 reaffirmed in Dirks, and even in the Omega case, that --
17 that any general duty not to refrain from -- to refrain
18 from insider trading.

19 CHIEF JUSTICE ROBERTS: But you agree that
20 the -- you phrased it in terms of a concrete personal
21 benefit. I take it you agree it doesn't have to be
22 purely financial? The example is the government gave a
23 preference for a child in college admissions, romantic
24 favors. The personal benefit you say just has to be
25 tangible and concrete, but it doesn't have to be money,

1 right?

2 MS. SHAPIRO: It doesn't necessarily have to
3 be money. It has to be something concrete.

4 JUSTICE SOTOMAYOR: Except your defining
5 limit? It has to be tangible?

6 MS. SHAPIRO: It has to be tangible. It
7 doesn't have to be cash. It has to be something that is
8 either immediately pecuniary or can be translated into
9 financial.

10 JUSTICE SOTOMAYOR: If we disagree with you
11 because of the gift language of *Dirks*, how else could
12 you suggest to limit liability? What other ways are
13 there to take care of someone who -- closer cases that
14 exist? *Lisser* has given us one proposal. What's yours?
15 Besides the fact it has to be a tangible benefit.

16 MS. SHAPIRO: I don't think there's any
17 other test that the Court could provide that wouldn't
18 essentially be a judicial expansion retroactively of a
19 statute that doesn't address the question in violation
20 of the separation of powers. I think that the other
21 thing that I would like to come back to, which we talk
22 about in the briefs, is the fact that there's a very
23 analogous situation with respect to the private right of
24 action in 10(b), which was also created by the courts,
25 and this Court has repeatedly held that in that context,

1 which is not in criminal context and does not involve a
2 risk to a person's liberty that the Court must narrowly
3 construe the statute and not expand it further, and it's
4 for Congress to decide whether to expand it further.

5 And I think that --

6 JUSTICE KAGAN: Ms. Shapiro, here is not a
7 question of expanding it further. You're asking us to
8 cut back significantly from something that we said
9 several decades ago, something that Congress has shown
10 no indication that it's unhappy with, and in a context
11 in which, I mean, obviously the integrity of the markets
12 are a very important thing for this country. And you're
13 asking us essentially to change the rules in a way that
14 threatens that integrity.

15 MS. SHAPIRO: No, Your Honor, I don't think
16 we're asking you to change the rules. This Court has
17 only addressed this question once. I don't think the
18 gift language is -- is the holding of the case. The
19 holding of the case is that the insider has to get a
20 personal gain. The point of the test in the case,
21 which, again, ruled against the government, is to ensure
22 that what's captured is something that is essentially a
23 circumvention of the test the Court discussed in
24 Chiarella where the insider is improperly profiting from
25 the information.

1 And with respect to the integrity of the
2 markets --

3 JUSTICE GINSBURG: And Chiarella really
4 wasn't an insider. He was the printer that -- he had
5 the information, but he was -- he didn't have any
6 fiduciary duty to the corporation.

7 MS. SHAPIRO: That's correct. I was
8 referring to the discussion in the case about when a
9 duty would arise. And the Court in that case held that
10 there was no duty, but that a duty would have arisen if
11 he had been an insider in the company whose shares were
12 at issue. And the reason for that is that the Court
13 held that it would be a fraud to exploit the information
14 for his personal trading profits because he had a duty
15 to those shareholders and a duty to speak and either
16 disclose or abstain from trading.

17 With respect to the integrity of the
18 markets, getting back to your question, Justice Kagan, I
19 think that that is clearly a policy question, and it is
20 a very complex policy question. It is not one nearly as
21 simple as the government would like to have the Court
22 believe. And I think there's extensive literature cited
23 in our briefs and some of the amicus briefs which
24 illustrates that's there's a robust debate among
25 academics, regulators, market participants about what --

1 what should be -- whether insider trading should be
2 regulated at all, but more importantly to what extent,
3 and how do you do that while ensuring that there's
4 sufficient free flow of information to the markets that
5 this information can actually work its way into the
6 price.

7 JUSTICE KAGAN: No, I wasn't suggesting that
8 there was -- there are easy answers to the question of
9 what contributes to the integrity of the market. I was
10 suggesting that it's a reason for caution in changing a
11 30-year-old rule that everybody has understood and lived
12 by, and that -- that Congress has shown no indication
13 it's unhappy with.

14 MS. SHAPIRO: Your Honor, may I reserve the
15 remainder of my time for rebuttal?

16 CHIEF JUSTICE ROBERTS: Sure. Thank you.

17 Mr. Dreeben.

18 ORAL ARGUMENT OF MICHAEL R. DREEBEN

19 ON BEHALF OF THE UNITED STATES

20 MR. DREEBEN: Mr. Chief Justice, and may it
21 please the Court:

22 Under a pecuniary gain limitation to the
23 personal benefit test in *Dirks*, a corporate insider
24 possessing very valuable nonpublic material information
25 could parcel it out to favored friends, family members

1 and acquaintances who could all use it in trading
2 without the knowledge of the public or the investors on
3 the other side of the trade. This would be deleterious
4 to the integrity of the securities markets. It would
5 injure investor confidence, and it would contradict a
6 33-year-old precedent of this Court that was designed to
7 announce the circumstances in which material nonpublic
8 information possessed by an insider could not be used.

9 JUSTICE KENNEDY: Isn't it something of a
10 stretch to say that the circumstance you describe more
11 widespread on dissemination are all gifts?

12 MR. DREEBEN: So some of them may be gifts.
13 Some of them may be to obtain a reputational benefit
14 that might translate in the future into pecuniary gain.
15 Some of them might actually involve a quid pro quo. My
16 point is that under Petitioner's theory, when they are
17 gifts, in other words when the information is given out
18 to a romantic partner or to a struggling child who's
19 having difficulty making it, or as in this case a
20 brother who at one point actually was offered money by
21 the insider but turned it down and preferred the
22 information, those things would not be criminal.

23 CHIEF JUSTICE ROBERTS: But not everything
24 is a -- is a gift just because it's disclosed. I mean
25 a -- social acquaintances, you know, that people say

1 we're all going away for the weekend, why don't you join
2 us? I can't, I'm working on this Google thing, or
3 something like that, and it means something to the other
4 people. You wouldn't call that a gift. You'd call it a
5 social interchange. And maybe it's, you know, something
6 he should have been more careful about saying, but it's
7 quite different than a gift. And it seems to me that,
8 however you read Dirks, it certainly doesn't go beyond
9 gifts.

10 MR. DREEBEN: So I -- I don't disagree with
11 that, Mr. Chief Justice. There is a difference between
12 a breach of a duty of confidentiality with respect to
13 information, and the kind of breach that was defined by
14 the SEC in Cady, Roberts and incorporated into the law
15 of securities fraud in this Court's decisions in
16 Chiarella and Dirks.

17 And it has two elements to it. The first
18 element is that the information was made available to
19 the insider for a corporate purpose and not for personal
20 benefit or personal use.

21 And the second is that the insider is
22 providing it for the purpose of obtaining a personal
23 advantage, either for himself or somebody else.

24 CHIEF JUSTICE ROBERTS: So then the
25 social -- casual social interchange I -- I hypothesized

1 would not be covered under your interpretation?

2 MR. DREEBEN: It would not be a personal
3 benefit. Now, it might give rise to liability on the
4 part of the tippee if there was an understanding between
5 the parties, the insider and the tippee, that
6 conversations of that kind would remain confidential.

7 CHIEF JUSTICE ROBERTS: It's hazy -- it's
8 kind of a hazy line to draw, isn't it, between something
9 that you characterize as a gift and something that would
10 be characterized as social interaction, isn't it?

11 MR. DREEBEN: No, I don't think it's hazy at
12 all.

13 CHIEF JUSTICE ROBERTS: Does it depend how
14 close a friend -- the friends are going away for the
15 weekend, how close the friends are?

16 MR. DREEBEN: There may be --

17 CHIEF JUSTICE ROBERTS: If it's -- then I --
18 I want to give him a gift, because we've been great
19 friends for so many years, as opposed to I just want to
20 tell him why I can't come?

21 MR. DREEBEN: So the burden is on the
22 government to show that the information was given for a
23 purpose of trading and that it was in breach of
24 fiduciary duty. And in most of these cases, there's no
25 evidence of any legitimate corporate purpose for the

1 disclosure whatsoever.

2 JUSTICE BREYER: But the difficult part is
3 for a personal advantage, at least to me. And the
4 question is what counts if the tipper gives inside
5 information to a member -- a family member or friend?
6 When is it for a personal advantage, and when is it not
7 for a personal advantage?

8 MR. DREEBEN: So I think that --

9 JUSTICE BREYER: Do we decide?

10 MR. DREEBEN: I think, Justice Breyer, that
11 whenever information is given, it's inside information;
12 it's given by an insider to another person for that
13 person to be able to profit on it, something that the
14 insider himself is forbidden to do.

15 JUSTICE BREYER: So if you know --

16 MR. DREEBEN: It's covered.

17 JUSTICE BREYER: If you give it to your --
18 anyone in the world, and -- whom you happen to know, and
19 you believe that that person will trade on it, that is
20 for a personal advantage.

21 MR. DREEBEN: Yes --

22 JUSTICE BREYER: Yes?

23 MR. DREEBEN: -- because --

24 JUSTICE BREYER: What is the personal
25 advantage?

1 MR. DREEBEN: You have taken valuable
2 corporate information --

3 JUSTICE BREYER: Uh-huh.

4 MR. DREEBEN: -- and you're giving a gift of
5 that information to a person to enable them to profit.

6 JUSTICE BREYER: Okay. So what is the
7 personal advantage that you received?

8 MR. DREEBEN: The advantage that you receive
9 is that you are able to make a gift with somebody else's
10 property. And I think that, to the extent that the
11 Court used the word --

12 JUSTICE BREYER: That is a personal
13 advantage?

14 MR. DREEBEN: Well, Justice Breyer, let me
15 step back for a minute. What the Court was trying to do
16 in Dirks was separate out when an insider was breaching
17 his fiduciary duty by providing information and when he
18 was not. And the line that the Court selected tracks
19 the basic duty of loyalty in corporate law.

20 JUSTICE ALITO: It doesn't seem to me that
21 your argument is much more consistent with Dirks than
22 Ms. Shapiro's.

23 Now suppose someone, the insider is walking
24 down the street and sees someone who has a really
25 unhappy look on his face and says, I want to do

1 something to make this person's day. And so he provides
2 the inside information to that person and says, you can
3 make some money if you trade on this.

4 Is that a violation?

5 MR. DREEBEN: Yes. And I'm trying to
6 explain why that is. I think that Dirks adopted the
7 basic line that sets forth in the duty of loyalty, which
8 is well established, that when you are given something
9 for corporate purposes, you may not use it for personal
10 reasons. And that was exactly what the Court adopted
11 in --

12 JUSTICE BREYER: If they did that, why did
13 they use the word "advantage"? The -- you keep going
14 back to the -- the part that everybody concedes: This
15 tipper is using information he shouldn't use in a way he
16 shouldn't use it. Okay? Conceded.

17 Now, it's the next step of what -- when is
18 he liable, and what the words are is when he uses it for
19 a personal advantage. And it sounds to me, as you are
20 saying -- and you said this -- whenever the tipper knows
21 that the person, to him, he -- who he gives the
22 information might well use it to trade.

23 MR. DREEBEN: No. I did not say that,
24 Justice Breyer.

25 JUSTICE BREYER: What did you say?

1 MR. DREEBEN: Let -- let me clarify this.

2 JUSTICE BREYER: Yes.

3 MR. DREEBEN: What the Court said in
4 Dirks --

5 JUSTICE BREYER: Yes.

6 MR. DREEBEN: -- was that it was drawing a
7 line between people who had information for corporate
8 purposes and used it consistently with those purposes,
9 and people who had access to corporate information made
10 available to them only for corporate purposes and used
11 it for personal benefit.

12 And it gave a number of examples. And I
13 think that the way to understand Dirks is to synthesize
14 the various examples the Court gave to understand the
15 principle underlying the decision.

16 JUSTICE BREYER: Yes.

17 MR. DREEBEN: The examples --

18 JUSTICE BREYER: Go ahead.

19 MR. DREEBEN: The examples include direct
20 quid pro quo --

21 JUSTICE BREYER: Yes.

22 MR. DREEBEN: -- profiting, paid clearly a
23 personal benefit.

24 JUSTICE BREYER: Yes.

25 MR. DREEBEN: It also includes something far

1 less tangible: Reputational benefit that will possibly
2 translate in the future into financial advantage.

3 And then it clearly included in the category
4 of things that were not appropriate corporate purposes,
5 giving a gift to somebody, and it explained why. If you
6 give a gift of information to somebody for trading, it
7 is equivalent to the insider using the information to
8 trade himself, and then making a gift of the profits to
9 a recipient.

10 CHIEF JUSTICE ROBERTS: So you are -- you
11 are arguing for an exact relationship between, not for a
12 corporate purpose and for a personal benefit. Is there
13 any area that something falls in the middle of that,
14 that it's -- it's not for a corporate purpose, but it
15 also doesn't qualify for a personal benefit.

16 Whenever you're talking about how you define
17 personal gain/personal benefit, you say this was
18 given -- not given to him for a corporate purpose.

19 Is it an exact parallel?

20 MR. DREEBEN: I think it -- I think it is,
21 Mr. Chief Justice --

22 CHIEF JUSTICE ROBERTS: So any disclosure of
23 any confidential information is actionable under that to
24 you --

25 MR. DREEBEN: No.

1 CHIEF JUSTICE ROBERTS: -- because it was
2 not given to him to disclose.

3 MR. DREEBEN: No. That is the difference
4 between the breach of a duty of confidentiality, which
5 may have to do with the corporate officer's duty of
6 care, as distinct from the duty of loyalty.

7 CHIEF JUSTICE ROBERTS: Give me the example
8 of something that is not for a corporate purpose but is
9 also not for a personal gain, under your view.

10 MR. DREEBEN: When there's no knowledge that
11 the individual to whom you're going to give the
12 information is trading, there's no breach of the Cady,
13 Roberts duty. So in your hypothetical of the social
14 conversation, the government would not seek to hold
15 liable somebody who was loose in their conversations but
16 had no anticipation that there would be trading.

17 CHIEF JUSTICE ROBERTS: I'm not interested
18 in who the government would seek to have liable. I'm
19 interested in what the rule is going to be.

20 MR. DREEBEN: I'm equating the two,
21 Mr. Chief Justice. I'm not --

22 CHIEF JUSTICE ROBERTS: This Court has not
23 equated the two.

24 (Laughter.)

25 MR. DREEBEN: I understand. But I think

1 that -- that the -- the rule that we're asking the Court
2 to adopt is really a rule that tracks the basic
3 principles of duty of loyalty that lie at the base of
4 the Dirks opinion.

5 And I realize that the Dirks opinion used
6 language in it; it used a variety of formulations:
7 Personal benefit, personal advantage, personal gain.
8 But the examples that the Court gives, gave to support
9 that doctrinal analysis, I think lead to the conclusion
10 that what Justice Powell was trying to do in the opinion
11 was to distinguish cases in which somebody was a
12 corporate officer, and they used the information for an
13 appropriate purpose; maybe somebody went out and traded
14 on it afterward --

15 JUSTICE SOTOMAYOR: Mr. Dreeben, I'm -- I'm
16 not sure that your solution is going to clarify much of
17 this area, because now I think the fight is going to be
18 over what was the reason that the tipper gave for giving
19 the tip.

20 I mean, in this very case, there were three
21 reasons for breaching the rule of confidentiality. The
22 first, to -- for Maher to become more knowledgeable of
23 the health care industry. Under your reading, if he had
24 no knowledge his brother would trade, that was not
25 actionable; correct?

1 MR. DREEBEN: Well, correct, Justice
2 Sotomayor, but that also was not information that was
3 flowing from the insider to his brother. What we
4 charged in this case were the circumstances --

5 JUSTICE SOTOMAYOR: No. I'm talking about
6 that there are three examples of breaching
7 confidentiality.

8 The first was to -- for him to become more
9 knowledgeable of the health industry.

10 The second was to help the father with his
11 medical care.

12 And the third, the one you charged, was the
13 giving of information, knowing that his brother was
14 going to trade on it.

15 How do you draw the line among those three?
16 All three were for personal reasons.

17 MR. DREEBEN: No. But the only one that
18 involved knowledge or anticipation of trading were the
19 circumstances in which the brother was basically funding
20 his --

21 JUSTICE SOTOMAYOR: So you have --

22 MR. DREEBEN: -- older brother's securities
23 trading.

24 JUSTICE SOTOMAYOR: So if all he did it for
25 was to get information for his father, had no idea that

1 his brother was trading, he would not be liable and his
2 brother wouldn't be liable.

3 MR. DREEBEN: I agree with the first, not
4 with the second.

5 If I could explain just briefly for just a
6 second. There are two theories of insider trading. One
7 is classical insider trading where an insider who's been
8 given the information for a corporate purpose trades on
9 it, or tips somebody else to trade on it.

10 The second theory is misappropriation. And
11 if the older brother in this instance was given
12 confidential information under a circumstance in which
13 there was an understanding that there would be no use of
14 that information for personal benefit or under the SEC's
15 current Rule 10b5-2, which defines these kinds of close
16 family relationships, siblings, parents and children,
17 husbands and wives, as being relationships that are
18 typically ones in which secrets are protected, the older
19 brother could be charged with misappropriating
20 information from the younger one.

21 But here we're concerned with the insider's
22 personal benefit. And my suggestion, I think --

23 JUSTICE GINSBURG: Is it -- but the
24 defendant here is not the insider, and -- and we've been
25 talking about the two brothers. How far down the line

1 do you go? Because Salman is not -- he's a relative by
2 marriage, but he's -- he's not -- he gets the money
3 from -- I mean, he gets the tip from the first tippee.

4 MR. DREEBEN: Correct.

5 JUSTICE GINSBURG: How -- how long does it
6 continue?

7 MR. DREEBEN: Well, tipping chains can --
8 can go quite a ways when the information is passed, and
9 the limitation on when the government can charge these
10 cases is a limitation of proof. We need to be able to
11 show that the tippee, perhaps at the end of the chain
12 will be more difficult than the ones earlier in the
13 chain, had knowledge that the information originated in
14 a circumstance in which there was a breach of fiduciary
15 duty for personal benefit.

16 JUSTICE GINSBURG: Had knowledge or
17 should -- should have known.

18 MR. DREEBEN: No, with -- in a criminal case
19 we have to show knowledge. Now, we can rely on
20 conscious avoidance. That's a very classic instruction
21 that the Court clarified in Global-Tech about how
22 knowledge can be inferred when someone deliberately
23 avoids confirming facts of which they -- or should be
24 aware, but that involves a personal culpability that
25 takes care of I think the concern that criminal

1 liability will extend forever. It won't.

2 JUSTICE KAGAN: Let's look at -- on the
3 other side, if you think about the tipper now. You've
4 used a couple of times the phrase "knowledge" or
5 "anticipation."

6 MR. DREEBEN: Yes.

7 JUSTICE KAGAN: That there would be trading.

8 MR. DREEBEN: Yes.

9 JUSTICE KAGAN: So is -- is that something
10 more than he thinks there could be --

11 MR. DREEBEN: Yes.

12 JUSTICE KAGAN: -- he thinks there -- I
13 mean, he thinks there would be? Is it as strong as
14 that?

15 MR. DREEBEN: Yes.

16 JUSTICE ALITO: Let me give you this example
17 because that -- this goes to that, this.

18 So the person with the inside information
19 has had a few drinks at the country club and is talking
20 to some friends and discloses the inside information
21 to -- to the friends. And one of the friends then
22 trades on the information.

23 Now, what would you have to prove as to the
24 mental state of the tipper and the tippee? As to the
25 tipper, would you have to prove that he knew that one of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

10 MR. DREEBEN: Yes.

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

17 MR. DREEBEN: Yes, but --

18 JUSTICE BREYER: So I want --

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

21 JUSTICE BREYER: No.

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

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

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

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

21 MR. DREEBEN: Correct.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. DREEBEN: The tipper in that situation

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

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

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

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

25 JUSTICE SOTOMAYOR: Mr. Dreeben, I think

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

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

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

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

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

1 That person -- that tipper would not be
2 liable.

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

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

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

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

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

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

1 corporate information and the inappropriate use.

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

8 MR. DREEBEN: Yes. Right.

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

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

13 MR. DREEBEN: Yes.

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

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

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

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

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

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

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

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

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

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

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

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

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

12 Clearly, Congress is aware of this line of
13 cases. It has never disturbed it. It has actually
14 incorporated the words "insider trading" into Section
15 10(b). It's not like this is a stranger to Congress.
16 And when it applied the 10(b) prohibitions to security
17 swap agreements, this is a well known area of the law.
18 And the submission of the government is that the Court
19 should reaffirm it.

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

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

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

8 JUSTICE SOTOMAYOR: Is recklessness used?

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

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

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

4 CHIEF JUSTICE ROBERTS: Thank you, counsel.

5 Ms. Shapiro, you have four minutes
6 remaining.

7 REBUTTAL ARGUMENT OF ALEXANDRA A. E. SHAPIRO

8 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

25 And finally, with respect to the whole

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

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

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

20 CHIEF JUSTICE ROBERTS: Finish your
21 sentence.

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

1 Dirks gift language.

2 Thank you.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 The case is submitted.

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

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