No. 20-________

In the
Supreme Court of the United States

EDWARD J. KOSINSKI,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a simple agreement to keep information confidential by itself can establish the fiduciary or similar relationship of "trust and confidence" required to establish criminal insider-trading fraud.

2. Whether the Second Circuit's open-ended, case-by-case approach to the duty element of insider-trading fraud is unconstitutionally vague because it fails to give fair warning of when a relationship between two parties involves the "trust and confidence" necessary to proscribe trading.

3. Whether, if a jury was erroneously instructed on an element of a criminal offense, a reviewing court may affirm the conviction based upon a theory of guilt that the jury never considered or found proven beyond a reasonable doubt.

PARTIES TO THE PROCEEDING

Edward J. Kosinski is the petitioner here and was the defendant-appellant in the court of appeals. The United States of America is the respondent here and was the appellee in the court of appeals.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

United States v. Kosinski, No. 16-cr-148 (VLB), United States District Court for the District of Connecticut. Judgment entered October 12, 2018.

United States v. Kosinski, No. 18-3065, United States Court of Appeals for the Second Circuit. Judgment entered September 22, 2020.

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INTRODUCTION

No federal criminal statute expressly proscribes "insider trading." Instead, such conduct is typically prosecuted under the anti-fraud provisions in Section 10(b) of the Securities Exchange Act of 1934 and SEC Rule 10b–5. But this Court established long ago that these provisions create no general duty to refrain from trading on material nonpublic information. Rather, to prove a violation the government must establish that the trades were *fraudulent*—and fraud requires a breach of a duty arising from a specific relationship between two parties. This Court has repeatedly held that only a fiduciary or similar relationship of "trust and confidence" creates such a duty.

These clear and firmly established principles have marked the line between lawful and unlawful trading since this Court's decision in *Chiarella v. United States*, 445 U.S. 222 (1980). For over four decades, investors and market professionals have relied on this established doctrine. But the Second Circuit defied this Court's rulings, and in three distinct ways. Unless this Court intervenes, the Second Circuit's decision threatens to upend and muddy insider-trading law and create uncertainty for investors, market professionals, and the securities markets.

First, the decision below would criminalize conduct that this Court has held is not fraudulent under §10(b). This Court has repeatedly and clearly defined the relationship required for criminal fraud: It must be a fiduciary or similar relationship of "*trust and* confidence." This Court has never suggested that an agreement between arm's-length counterparties to maintain information in confidence, without more, suffices. Yet the Second Circuit held that a mere

promise of "confidentiality" establishes the requisite duty, even without any other indicia of fiduciary status or trust. That ruling is irreconcilable with this Court's decisions, conflicts with the law of another circuit, and significantly expands the insider-trading crime.

Second, the Second Circuit failed to articulate any clear, definitive standard for determining when the requisite fiduciary or fiduciary-like relationship exists. The court instead served up a smorgasbord of competing formulations that "authorize and even encourage arbitrary and discriminatory enforcement" by inviting prosecutors to pick and choose whichever options best suit their case. *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). This post hoc, case-by-case approach deprives investors of any fair notice as to when they can trade on information they have obtained. And some of the factors the court identified—like two parties' need to remain "independent"—actually suggest the *absence* of fiduciary-like duties. The result is an incoherent and indeterminate jumble in an area of the law that demands clarity and certainty to ensure the smooth operation of the securities markets.

Third, the government secured this conviction based on its theory that an agreement to keep information confidential necessarily makes trading on that information fraudulent. The district court instructed the jury to find the "duty of trust and confidence" element satisfied if there was proof of a confidentiality agreement, and to look no further. Yet the Second Circuit held that any error in this erroneous instruction was harmless because *the court of appeals* believed the facts supported a fiduciary-like

relationship under *other* theories that it hypothesized could apply. None of those other theories was ever submitted to, or considered by, the jury; the only finding the jury necessarily made under the erroneous instruction was that there was a fiduciary or similar duty because of a confidentiality agreement. The Second Circuit's holding therefore violates the defendant's Sixth Amendment right to a jury trial and conflicts with this Court's rulings on a basic principle of appellate review: A criminal conviction tainted by instructional error cannot be affirmed on a basis that the jury never considered or found proven beyond a reasonable doubt.

The questions presented are exceedingly important. The Second Circuit's malleable conception of the duty of trust and confidence provides no ascertainable standard. It invites enterprising prosecutors to rewrite myriad relationships that the parties never contemplated would impose any fiduciary or similar duties. Left unchecked, the decision below is likely to impair the efficient functioning of the securities markets, which require insider-trading rules to be clear and certain. Most insider-trading prosecutions are (or could be) filed in the Second Circuit, as nearly every securities transaction touches New York. Other circuits often defer to the Second Circuit because of its expertise in securities law. *See Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 260 (2010). Second Circuit rulings in this area thus tend to have nationwide influence, making this Court's intervention critical.

The petition for certiorari should be granted.

OPINIONS BELOW

The Second Circuit's opinion is reported at 976 F.3d 135 and reprinted at Pet.App.1a-40a. The district court's opinion denying Petitioner's motion to dismiss the indictment is not reported but is available at 2017 WL 3527694 and reprinted at Pet.App.41a-56a, and its opinion denying Petitioner's motions for a judgment of acquittal and for a new trial likewise is not reported but is available at 2018 WL 9988663 and reprinted at Pet.App.57a-72a.

JURISDICTION

The Second Circuit issued its opinion on September 22, 2020. On March 19, 2020, this Court issued an order extending the time to file petitions for certiorari to 150 days, making the deadline for this petition February 19, 2021. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are reproduced at Pet.App.73a-75a.

STATEMENT OF THE CASE

A. Factual Background

Dr. Edward J. Kosinski was one of New England's leading cardiologists and treated patients in southern Connecticut for over 40 years. He was highly regarded for his clinical expertise and participated in several drug trials over the course of his career. This case relates to securities trades Kosinski placed in 2014 while working on a clinical trial for a cardiovascular drug that Regado Biosciences, Inc. ("Regado"), a

publicly-traded biopharmaceutical company, was developing.

Kosinski was not a Regado employee, nor did he have any direct interactions with Regado or its personnel. Instead, Kosinski served as a "principal investigator" in Regado's clinical trial without having to depart his daily cardiology practice. He administered Regado's drug to those of his patients who elected to participate in the study and dutifully recorded their responses to the medication. But his primary duty was to treat and care for his patients, not to serve Regado.

Kosinski's responsibilities during the clinical trial were defined in a contract he entered with the third party that administered the trial for Regado. The contract described Kosinski as an "independent contractor" and disclaimed any suggestion that he was acting as Regado's agent or fiduciary. It required Kosinski to keep information he learned through the study confidential—which he did—but did not impose any restraints on his use of the information, whether in treating his patients or otherwise.

1. The REG1 Anticoagulation System ("REG1") was Regado's experimental drug therapy to prevent blood clotting in patients undergoing heart procedures. Pet.App.4a-5a. In 2005, to obtain FDA approval for REG1, Regado launched a multi-phase clinical trial which it hoped would demonstrate the drug's safety and efficacy. However, at Phase II three patients experienced serious allergic reactions. C.A.App.91-92. Regado designed its Phase III trial to closely monitor allergic reactions and identify factors that might be contributing to their incidence. C.A.App.93-96.

To manage the Phase III trial, Regado formed a small team that included its own high-level personnel as well as individuals from the Cleveland Clinic Foundation, a research organization that Regado engaged to administer the trial on its behalf. Pet.App.8a n.1. Because of their central role in the trial, members of the trial management team had access to all patient data generated at each clinical site, including details of every adverse event, case reports for every patient, and all other data collected during the trial. C.A.App.109-10, 188-89. Given the obvious sensitivity of this information, Regado expressly prohibited management team members from owning or trading Regado's securities. C.A.App.194-95, 322, 337.

Kosinski was not part of the Phase III trial management team. He served as one of hundreds of principal investigators that interfaced directly with patients, and his involvement was limited to a single clinical site. Pet.App.3a, 5a. The function of an investigator in a clinical trial is to enroll patients in the study, administer the drug to them, and monitor their responses—positive or negative. Pet.App.58a-59a. Principal investigators are not privy to patient data from clinical sites other than their own and thus learn little about the overall trial until that information is made public. C.A.App.186-89. Although such investigators must report their findings to the drug company sponsoring the trial and adhere to the sponsor's protocol, the sponsor's chief interest is in obtaining FDA approval to sell its product. C.A.App.190-91. Investigators like Kosinski, by contrast, are charged with "protecting the rights, safety, and welfare of subjects under the[ir]...care." 21 C.F.R. §312.60. Accordingly, their duty remains "first

and foremost" to their patients, not the drug company. C.A.App.185-91.

2. In June 2013, the Cleveland Clinic Foundation approached Kosinski about serving as a principal investigator in Regado's Phase III trial. To facilitate these discussions, Kosinski was asked to and did sign a Confidential Disclosure Agreement ("CDA"). The CDA permitted him to receive the trial protocol and other confidential information "for the purpose of evaluating [his] interest in participating in [the] clinical trial." Pet.App.5a, 58a. The CDA required Kosinski to keep the information confidential and stated expressly that Kosinski was not to "*use, disclose or exploit* [the] Proprietary Information for [his] own benefit." Pet.App.58a (emphasis added). Kosinski complied with the CDA while it was in effect. As explained below, long before the trades that are at issue in this case, the CDA was superseded by a different agreement. The latter agreement, however, imposed no similar restrictions on Kosinski's use of any confidential information. Pet.App.59a.

In January 2014, Kosinski agreed to participate in the trial as the principal investigator at a hospital site in Bridgeport, Connecticut, and entered a new contract, a Clinical Study and Research Agreement ("CSRA"), with the Cleveland Clinic Foundation. Pet.App.6a, 58a. The CSRA expressly superseded the CDA. Pet.App.21a n.6. The CSRA emphasized Kosinski's independence. It specified that, in his role as a principal investigator, he was "an independent contractor and not an agent, joint venturer, or partner of [Regado]," and that he lacked any authority to legally bind Regado. C.A.App.232. Kosinski agreed to maintain in "strict confidence" all confidential

information that he received in the course of the study. Pet.App.6a. But in sharp contrast to the CDA (and restrictions Regado imposed on the high-level managers running the clinical study), the CSRA contained no restrictions on Kosinski's *use* of Regado's confidential information. It did not directly or indirectly bar him from using that information to trade Regado's securities. Pet.App.59a. The same lawyer drafted both the CSRA and the CDA on Regado's behalf. C.A.App.227, 245.

The CSRA also imposed additional obligations on Kosinski, which were designed to ensure his commitment to patient safety and independence from Regado. For example, principal investigators were required to complete Form FDA 1572, in which they affirmed that they would not administer REG1 to patients without informed consent and would do whatever necessary—even if it meant departing from the trial protocol—"to protect the safety, rights, or welfare of [test] subjects." C.A.App.230, 290. In addition, all principal investigators were required to disclose whether they had a financial interest in Regado that exceeded $50,000. Pet.App.6a, 60a; *see* 21 C.F.R. §§54.2(b), 54.4(a)(3)(iv). But nothing prohibited investigators from trading Regado securities during the trial; investigators were merely obliged to update their disclosure if, as a result of new acquisitions or otherwise, the value of their interest surpassed the specified threshold.

3. Kosinski maintained several brokerage accounts with assets totaling over $11 million. Pet.App.3a. In October 2013, he began purchasing Regado stock. Pet.App.7a. He eventually purchased

40,000 shares worth approximately $210,000. Pet.App.60a.

Kosinski sold his Regado shares on June 30, 2014. Pet.App.8a. The previous afternoon, all principal investigators had received an email from the REG1 trial management team instructing them not to enroll new patients due to recent allergic reactions that had been observed. *Id.* Three days later, Regado issued a press release announcing that its data safety management board ("DSMB") had "initiated an unplanned review of data" and that enrollment was paused. C.A.App.267.[1] Regado's share price dropped by 58%. Pet.App.8a.[2]

On July 31, Kosinski purchased fifty put options. Pet.App.9a. Two days earlier the trial management team had emailed the principal investigators "[i]n accordance with the Good Clinical Practice and scientific national regulatory requirements" to alert them to an anaphylactic reaction that resulted in a patient's death. C.A.App.253-56. The email indicated that the trial was on hold "pending a DSMB assessment." C.A.App.256. On August 25, 2014, Regado issued a press release announcing that the trial was permanently halted because of the "frequency and severity" of allergic reactions, and the next day Regado's share price dropped substantially.

[1] The DSMB reviews adverse safety-related events and advises the sponsor whether to continue with the drug trial. C.A.App.349.

[2] The amount of losses Kosinski's trades avoided was hotly disputed at sentencing, but the district court adopted the government's figure of $160,000.

Pet.App.9a. Two days later, Kosinski exercised his put options, earning $3,300 in profit. *Id.*

Kosinski had accurately certified at the beginning of the trial that the value of his Regado equity interest was below $50,000. C.A.App.137-39, 298. Although he neglected to amend that statement upon buying additional shares, at the end of the study he received a reminder of that requirement and promptly submitted a new form to Regado, disclosing that his stock holdings had, in fact, exceeded $50,000. C.A.App.302-03.

B. The Indictment and Trial

The government charged Kosinski with two counts of securities fraud in violation of Securities Exchange Act §10(b) and SEC Rule 10b–5, one for the sale of Regado shares in June 2014, and the second for the put options Kosinski purchased and exercised later that summer. Throughout the case—from indictment through post-trial motions—the government acknowledged that it had to prove Kosinski owed Regado a "duty of trust and confidence" and breached that duty by trading. *E.g.*, C.A.App.17-18, 21, 44, 353-56. At each stage, the central disputed issue was whether, as the government asserted, the CSRA's confidentiality provision was in itself sufficient to establish that duty.

For example, the only allegation in the indictment supporting Kosinski's alleged duty was that the CDA and CSRA required Kosinski to "not disclose" but "maintain in strict confidence" all confidential information he received. C.A.App.16. Kosinski moved to dismiss on the ground that the indictment thus failed to allege a fiduciary or fiduciary-like

relationship that would have precluded him from trading Regado securities. The government opposed, contending that "an explicit confidentiality agreement, by its own terms, is sufficient to establish the requisite duty for…insider trading." C.A.App.28-29. The district court adopted the government's arguments and denied the motion. Pet.App.41a-56a.

Trial began on November 13, 2017 and lasted five days. After the government rested, Kosinski moved for a judgment of acquittal, and the district court reserved decision. C.A.App.166-67. Kosinski then called an expert witness who testified about the structure of clinical trials and that a clinical investigator generally has access to patient data only from his own site, which explains why investigator contracts are less restrictive than those binding trial managers. *E.g.*, C.A.App.185-89.

The government's closing arguments focused the jury intently on the CSRA. The prosecutors argued that the contract's use of "strict confidence" connotes something more than "just keep it confidential" and "also means that Dr. Kosinski had a duty of trust and confidence to Regado," and that the jury need not look any further than "a plain reading of just the words on the page of the CSRA" to resolve the duty question. C.A.Govt.App.991, 995, 1065.

The district court's jury instructions fully endorsed this prosecution argument that the confidentiality provision dispositively proved the duty element. In charging that the government had to prove Kosinski owed Regado "a duty of trust and confidence," the court—over Kosinski's objection, *e.g.*, C.A.App.208-10—instructed the jury that a confidentiality

agreement is, without more, sufficient to establish the requisite duty:

> The Government must establish beyond a reasonable doubt that Dr. Kosinski had a duty of trust and confidence to Regado. That means that he was reasonably expected to keep the material information at issue confidential or at least that the relationship between the defendant and Regado reasonably implied such a duty.... *[A] person has a requisite duty of trust and confidence whenever a person agrees to maintain information in confidence.*

Pet.App.78a-79a (emphasis added). Since the confidentiality clause in the CSRA was undisputed and indisputable, the inevitable consequence of this instruction was to direct a finding for the government on the duty of trust and confidence, a critical element of the offense.

The jury returned a guilty verdict on both counts. Pet.App.10a. The district court subsequently denied Kosinski's Rule 29 motion for acquittal and his post-trial motions. Pet.App.57a-72a. The court sentenced Kosinski principally to six months' imprisonment, but granted bail pending appeal. Pet.App.4a.[3]

C. The Second Circuit's Decision

Kosinski's primary contention on appeal was that the CSRA's confidentiality clause could not create the requisite duty of "trust and confidence." As a result, he argued, the evidence on the duty element was legally insufficient to sustain his convictions; the jury instruction was fatally flawed; and at a minimum, he

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[3] Kosinski is currently due to surrender on March 31, 2021.

was entitled to a new trial because the flawed instruction told the jury that the government's burden of proving the duty element is satisfied based on a mere confidentiality agreement. The Second Circuit affirmed the conviction in an opinion authored by Judge Korman of the Eastern District of New York (sitting by designation). On the pivotal question in the appeal, the court ruled that a confidentiality agreement by itself can satisfy the duty element.

The Second Circuit concluded that there was sufficient evidence of a "fiduciary-like relationship with Regado" because "Kosinski expressly agreed to keep Regado's information confidential" in the CSRA. Pet.App.17a. The court explained that under two prior Second Circuit decisions—*United States v. Chestman*, 947 F.2d 551 (2d Cir. 1991) (en banc), and *United States v. Falcone*, 257 F.3d 226 (2d Cir. 2001)—such an agreement was all that was needed to establish the requisite duty. The court stated that the Second Circuit "has held that…an 'explicit acceptance of a duty of confidentiality' is itself sufficient to establish the necessary fiduciary duty of trust and confidence." Pet.App.19a (quoting *Falcone*, 257 F.3d at 234, and citing *Chestman*, 947 F.2d at 571); *see also* Pet.App.28a.

The court went on to introduce a compilation of additional theories, tests, and factors that had never been presented to or considered by the jury. Under this amalgam of theoretical bases for creating the requisite duty, the court purported to have *itself* found a fiduciary-like relationship. Additionally, in finding any error harmless, the court ignored that the jury's finding could not possibly have been based on any one of those theories, tests, or factors, because the jury had

been instructed to look no further than the confidentiality agreement to find proof of the duty element.

For instance, the court concluded that Kosinski qualified as a "temporary insider" of Regado, Pet.App.12a-17a, invoking a footnote in *Dirks v. SEC*, 463 U.S. 646, 655 n.14 (1983). But this Court has not developed the temporary-insider theory in any subsequent case, and, as the Second Circuit acknowledged, the theory relates to *classical* insider-trading fraud, not the misappropriation doctrine under which the government prosecuted this case. Pet.App.14a-15a.[4] That is undoubtedly why the government never argued—not to the jury, not to the district court, not to the court of appeals—that Kosinski qualified as a "temporary insider." The Second Circuit injected that theory entirely on its own.

The court also posited various other alternative grounds for finding Kosinski bound by "fiduciary-like" duties to Regado; none of these had been presented to the jury either. Pet.App.17a-30a. For example, the court found that Regado "entrusted" Kosinski to properly administer REG1 to patients and that Kosinski "serv[ed]…the interests" of Regado to the extent his "experience and skill" made FDA approval more likely. Pet.App.17a-18a.

In addition, the court found Kosinski's *independence* from Regado indicative of a fiduciary

[4] The classical theory concerns the duty officers, directors, and other corporate "insiders" owe to the shareholders of the company that issued the securities. *United States v. O'Hagan*, 521 U.S. 642, 651-52 (1997). "Temporary insiders" are "attorneys, accountants, consultants, and others who temporarily become fiduciaries of a corporation." *Id.* at 652.

relationship. It noted that Kosinski's "independent assessment [was] required for FDA approval," that "Regado relied upon Kosinski's professional independence," and that Kosinski served Regado's interests by *not* being "aligned" with the company. Pet.App.18a-20a, 24a. At the same time, the court refused to afford any weight to the CSRA's clear statement that Kosinski was "an independent contractor and not an agent" of Regado. Doing so, the court claimed, "would permit unlawful insider trading"; it even suggested that the clause could be struck as against public policy. Pet.App.21a-22a & n.7.

The Second Circuit also endorsed multiple varying formulations of fiduciary duty, including two that were quoted in *Chestman*, four that describe New York State law, and yet another from a test the Second Circuit had previously applied in various fraud cases. Pet.App.23a-24a, 27a-29a. But the Second Circuit pointedly refused to articulate any "exclusive test of fiduciary status" or any characterization of "the proof necessary to sustain a conviction under the misappropriation theory." Pet.App.29a. Instead, the court announced that there are many "appropriate standard[s] from which the jury could find the requisite fiduciary relationship." Pet.App.24a-25a.

The Second Circuit also refused to directly address whether the jury instruction misstated the law. Instead, the court asserted that "any error in the instruction was harmless" because "the trial evidence overwhelmingly established that Kosinski had a fiduciary or fiduciary-like duty to Regado," referring back to its smorgasbord of alternative theories that the jury was never afforded any opportunity to

consider, much less find proven beyond a reasonable doubt. Pet.App.30a.

REASONS FOR GRANTING CERTIORARI

This Court has repeatedly held that §10(b) and Rule 10b–5 do not create any "general duty between all participants in market transactions to forgo actions based on material, nonpublic information," nor entitle all investors to equal information. *United States v. O'Hagan*, 521 U.S. 642, 661 (1997) (quoting *Chiarella*, 445 U.S. at 233). "Section 10(b) is aptly described as a catchall provision, but what it catches must be *fraud*." *Chiarella*, 445 U.S. at 234-35 (emphasis added). Under this Court's precedents, only trading that violates a fiduciary or similar duty of "trust and confidence" is "deceptive" behavior that contravenes §10(b). The breach of that duty is what divides lawful from unlawful trading.

The decision below transgresses these clear principles, which market participants have relied upon for four decades, in three significant ways that cry out for this Court's intervention.

I. Permitting a simple confidentiality obligation to substitute for the requisite duty of "trust and confidence" would vastly expand the scope of the insider-trading offense and ensnare conduct that is not fraudulent. This Court has repeatedly held that "trust" and "loyalty" are essential to creating the fiduciary or similar duty necessary to expose a person to criminal fraud liability for trading based on confidential information. The Second Circuit's ruling contravenes this Court's decisions by excising the concept of "trust" from the duty of "trust *and*

confidence," and is at odds with the Fifth Circuit on this important issue.

II. The Second Circuit's amorphous conception of the duty element fails to articulate any constitutionally "ascertainable standard of guilt." *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). Due process and separation-of-powers require clear definitions for each element of an offense, and securities law particularly "demands certainty and predictability." *Pinter v. Dahl*, 486 U.S. 622, 654 n.29 (1988). Clear lines are needed in this area to avoid "unpredictable results" and "over-deterring activities related to lawful securities sales." *Id.* But the Second Circuit consciously refused to specify any "exclusive test" or "proof necessary" to establish fiduciary status. Its unwieldy assortment of theories, tests, and factors to be applied ad hoc, post hoc, and case-by-case makes it impossible for ordinary citizens to determine, ex ante, whether they can legally trade. This creates uncertainty and undermines the efficient operation of the nation's securities markets, particularly in light of the Second Circuit's national influence on the law in this area.

III. The Second Circuit's method of harmless-error review transgresses the Sixth Amendment and this Court's precedents. A reviewing court cannot ignore an instructional error on which the jury's verdict necessarily rests by interposing its own notions of how the case should have been prosecuted or the evidence presented. This Court has repeatedly held that appellate courts may not affirm a conviction on any theory that the jury did not get to consider for itself. *See*, *e.g.*, *McCormick v. United States*, 500 U.S. 257, 269-70 (1991). It should grant certiorari to enforce

that cardinal principle, which is constitutionally-based and of critical importance in numerous criminal appeals.

I. The Second Circuit's Ruling That A Confidentiality Agreement By Itself Establishes A Duty Of "Trust And Confidence" Warrants This Court's Review

1. Section 10(b) does not expressly address "insider trading." It prohibits "deceptive" conduct "in connection with the purchase or sale of any security." 15 U.S.C. §78j(b); *see* 17 C.F.R. §240.10b–5 (making it unlawful, *inter alia*, to employ a "scheme…to defraud...in connection with the purchase or sale of any security"). Accordingly, this Court has repeatedly held that §10(b) and Rule 10b–5 only prohibit *fraudulent* trading. The statute creates "no 'general duty'" to refrain from trading "'based on material, nonpublic information.'" *O'Hagan*, 521 U.S. at 661 (quoting *Chiarella*, 445 U.S. at 233).

In *Chiarella*, the Court explained that "not every instance of financial unfairness constitutes *fraudulent* activity under §10(b)." 445 U.S. at 232 (emphasis added). Fraud requires a misrepresentation or omission, but insider trading typically involves no misrepresentations, and silence cannot be fraudulent absent "a duty to speak." *Id.* at 235. In the context of securities trading that duty—the duty to disclose the information at issue, or else abstain from trading altogether—is "extraordinary." *Dirks*, 463 U.S. at 657. It arises only "from a specific relationship between two parties," not "the mere possession of nonpublic market information." *Chiarella*, 445 U.S. at 233, 235; *see also Dirks*, 463 U.S. at 654-59.

Moreover, for four decades this Court has insisted that this duty to disclose or refrain from trading only arises from a fiduciary or similar relationship of "trust and confidence." *Chiarella*, 445 U.S. at 230; *see also id.* at 232 (no duty without "trust and confidence"). In *Chiarella*, the Court held that corporate insiders violate §10(b) by trading on inside information without first publicly disclosing the information, because doing so breaches their "fiduciary or other similar relation of trust and confidence" to the corporation's shareholders (the "classical theory"). *Id.* at 228 (quotation marks omitted); *see also Dirks*, 463 U.S. at 654 (the duty arises from "trust and confidence" and "the existence of a fiduciary relationship"). *O'Hagan* extended this principle to corporate outsiders under the "misappropriation theory." That doctrine holds that an individual is prohibited from trading on material nonpublic information if it was entrusted to him by someone to whom he owes a fiduciary or similar "duty of loyalty and confidentiality." 521 U.S. at 652. The Court reaffirmed the "trust and confidence" requirement just five years ago in *Salman v. United States*, 137 S. Ct. 420 (2016). There, the Court reiterated that §10(b) and Rule 10b–5 "prohibit undisclosed trading on inside corporate information by individuals who are under a *duty of trust and confidence* that prohibits them from secretly using such information for their personal advantage." *Id.* at 423 (emphasis added).

Yet the Second Circuit held that a mere agreement to keep information confidential—even if the parties are at arm's length and have no relationship of "trust"—is sufficient to trigger a duty to refrain from trading on that information. That decision is irreconcilable with this Court's decisions. It squarely

conflicts with this Court's repeated insistence that the duty element requires proof of "trust *and* confidence" and effectively excises the words "trust" and "and" from the United States Reports.

2. The "trust" component of "trust and confidence" is integral to the misappropriation theory of insider-trading fraud on which this prosecution was premised. It is the duty of loyalty—and not that of confidentiality—which obliges a fiduciary to refrain from using his principal's information to trade for his own benefit. As this Court explained in *O'Hagan*, the very premise of the misappropriation doctrine is that "[a] *fiduciary* who 'pretends *loyalty* to the principal while secretly converting the principal's information for personal gain' 'dupes' or defrauds the principal." 521 U.S. at 653-54 (quoting U.S. Br. at 17; emphasis added). The fiduciary's duty of loyalty binds him to use information the principal has entrusted to him to benefit only the principal, not himself. The "deception" manifests in the fiduciary having "feign[ed] *fidelity* to the source of information"; accordingly, "there is no 'deceptive device' and thus no §10(b) violation" "if the fiduciary discloses to the source that he plans to trade." *Id.* at 655 (emphasis added). It follows that an individual who owes only a duty of confidentiality and faithfully keeps the information to himself—whether or not he uses it to trade—neither breaks any promise to the source nor has anything to disclose. Absent a duty of trust, undisclosed trading is not "deceptive" or "fraudulent" and thus cannot violate §10(b) and Rule 10b–5.

That is why the controlling cases use conjunctive, not disjunctive, language to describe the duty: It is one of "trust *and* confidence," not "trust *or* confidence."

Allowing "confidence" alone to establish a duty—as the Second Circuit did—would significantly broaden the reach of §10(b) to arm's-length relationships that neither Congress nor this Court has ever suggested create any duty to refrain from trading. Moreover, such an expansive reading raises a grave threat to individual liberty because "neither the legislative history nor the statute itself affords specific guidance" about when insider trading, which involves no misstatement, constitutes fraud. *Chiarella*, 445 U.S. at 226, 233; *accord Dirks*, 463 U.S. at 657-58 & n.16. *See also Dowling v. United States*, 473 U.S. 207, 227 (1985) (courts may not authorize a statute's "use in wide expanses of the law which Congress has evidenced no intention to enter by way of criminal sanction"). Accordingly, this Court has relied on principles of common-law fraud, in which a duty to disclose or refrain from trading only arises from one discrete type of relationship—namely, a relationship of "trust and confidence." *Chiarella*, 445 U.S. at 227-28. Yet the Second Circuit has expanded the category of relationships that qualify. Left undisturbed, its decision eviscerates the critical limitation this Court placed on when relationships create the duty necessary to trigger §10(b) liability for insider-trading fraud.

3. Under the Second Circuit's decision, parties in arm's-length relationships that do not involve fiduciary-like "trust and confidence" will now be subject to criminal §10(b) liability for the first time. "Trust" connotes a solemn duty, requiring obeyance of "the punctilio of an honor the most sensitive." *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928) (Cardozo, Ch. J.). This Court endorsed the misappropriation fraud theory in *O'Hagan* because

the defendant there, a partner at a law firm, indisputably owed a duty to his firm and its clients not to profit from confidential client information. 521 U.S. at 653. A similar duty clearly attaches to the relationship between a reporter and the newspaper that employs him with respect to the paper's confidential, potentially market-moving news before it is published. *See Carpenter v. United States*, 484 U.S. 19, 22-23 (1987); *see also Skilling v. United States*, 561 U.S. 358, 407 n.41 (2010) (identifying "public official-public," "employee-employer," and "union official-union members" as clear fiduciary relationships).

Treating any arrangement that includes an understanding of confidentiality as a fiduciary-like relationship of trust and confidence would have troubling consequences. Under the Second Circuit's holding, for example, a pedestrian who receives a stock tip from a benevolent passerby with the condition to keep it "under wraps" risks a criminal conviction and years in prison if he decides to trade—despite the passerby's clear intent and the total absence of any relationship between them. Or imagine a fledgling business is approached by a large corporation about a potential acquisition and required to enter a non-disclosure agreement. Has the smaller company unwittingly assumed uncontracted-for fiduciary-like responsibilities to its competitor even after the negotiations break down? Would a country-club caddy have to maintain a list of "no trade" stocks representing the corporations of every member who "just between us guys" let loose about work over a round of golf?

These hypotheticals demonstrate that excising the notion of "trust" from the duty of "trust and

confidence" vastly expands the category of relationships that traditionally created the duty to speak necessary to establish insider-trading fraud. The Second Circuit's decision thus verges on creating precisely the "parity-of-information" rule this Court has repeatedly rejected. *See Dirks*, 463 U.S. at 656-57; *Chiarella*, 445 U.S. at 233. Indeed, the court below transparently acknowledged that it sought to create such a rule. For instance, it opined that Kosinski was guilty because he "trad[ed] on nonpublic inside information that was not available to those upon whom he unloaded his shares." Pet.App.11a; *see also*, *e.g.*, Pet.App.22a-23a n.7. But that is precisely the theory this Court rejected in *Chiarella*, when it held: "No duty could arise from petitioner's relationship with" his trading counterparties, because "petitioner had no prior dealings with them. He was not their agent, he was not a fiduciary, he was not a person in whom [these trading counterparties] had placed their trust and confidence. He was, in fact, a complete stranger who dealt with [them] only through impersonal market transactions." 445 U.S. at 232-233. The same is true of Kosinski. Indeed, the government's theory was that he owed a duty under the misappropriation doctrine "to the source of information"—Regado—not counterparties to his securities transactions. *O'Hagan*, 521 U.S. at 655.

4. The CSRA specified that it "embodie[d] the entire understanding" between Kosinski and Regado and "superseded" "any prior or contemporaneous negotiations, either oral or written." Pet.App.21a n.6. Had Regado intended to prohibit Kosinski from trading its securities during the trial period, it very easily could have said so in the agreement, just as it did in the superseded CDA. But sophisticated parties

have the right to determine for themselves what terms to include, or not, in a business agreement. Where, as here, two parties stand at arm's length, and the only possible source of a duty is the contract between them, it defies logic to say that the contract created a duty to refrain from trading if trading would not breach the contract. Without such a restriction—or any provision suggesting a duty of trust and loyalty—Kosinski's only obligation under the CSRA was confidentiality, a duty with which he fully complied.

The Second Circuit insinuated into the CSRA's confidentiality clause a far more expansive duty than the one the parties had specified. Its decision reinforces and expands upon the Second Circuit's prior pronouncements that "explicit acceptance of a duty of confidentiality" is sufficient by itself to establish the requisite duty of trust and confidence. *Falcone*, 257 F.3d at 234; *see also United States v. Afriyie*, 929 F.3d 63, 68 (2d Cir. 2019) ("An express agreement of confidentiality may establish fiduciary status."); *Chestman*, 947 F.2d at 571.

What is more, the Second Circuit's decision to elevate confidentiality *simpliciter* to fiduciary or similar status is at odds with how the Fifth Circuit approaches the trust-and-confidence element in §10(b) cases. The issue arose in the Fifth Circuit in the well-publicized case against Mark Cuban. There, the SEC alleged that the CEO of a company in which Cuban invested obtained his commitment to keep certain information confidential and then disclosed a new development that would dilute the value of Cuban's holdings. Cuban sold all of his shares, and the SEC brought an enforcement action alleging violations of §10(b) and Rule 10b–5. The district court granted

Cuban's motion to dismiss. Relying on *O'Hagan* and *Chiarella*, it held that to create the requisite duty, an agreement "must consist of more than an express or implied promise merely to keep information confidential. It must also impose on the party who receives the information the legal duty to refrain from trading on or otherwise using the information for personal gain." *SEC v. Cuban*, 634 F. Supp. 2d 713, 725 (N.D. Tex. 2009). On appeal, the Fifth Circuit adopted the district court's legal analysis, but it reversed because it read the complaint to allege that additional duty. The Fifth Circuit concluded that the SEC had adequately alleged that the agreement between Cuban and the CEO "was more than a simple confidentiality agreement," but instead included the essential understanding that Cuban "was not to trade." 620 F.3d 551, 557 (5th Cir. 2010). *See also Jacked Up, L.L.C. v. Sara Lee Corp.*, 854 F.3d 797, 809 (5th Cir. 2017) (non-disclosure agreements and "other agreements requiring confidentiality" "generally do not create fiduciary relationships").

The CSRA was just "a simple confidentiality agreement." Kosinski was independent and had no fiduciary or similar duty to Regado. He could not have been prosecuted in the Fifth Circuit for his Regado trades. In light of the importance of the duty element in insider-trading fraud, the Second Circuit's defiance of this Court's precedents narrowing that element to traditional relationships of "trust and confidence," and the conflict between its decision and that of the Fifth Circuit, this Court's intervention is critical.

II. The Second Circuit's Standardless Approach To The Duty Element Is Unconstitutionally Vague And Injects Uncertainty Into The Securities Markets

1. The Fifth Amendment's Due Process Clause prevents the government from "tak[ing] away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 595 (2015) (citing *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983)). "The dividing line between unlawful…and lawful action cannot be left to conjecture." *M. Kraus & Bros. v. United States*, 327 U.S. 614, 621 (1946). This void-for-vagueness doctrine also enforces the constitutional separation of powers by ensuring that criminal laws do not "hand off the legislator's responsibility for defining criminal behavior to unelected prosecutors and judges." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). It "require[s] that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not" in terms that are clear, certain, and objective. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018) (plurality opinion).

As discussed, the crime of insider trading poses particular challenges because §10(b) itself says nothing about insider trading, and for decades the offense has developed entirely in the courts. *See* John C. Coffee, Jr., *The 'Tip' of the Bunny's Nose: Sniffing Out Crime Where None Exists*, LEGAL TIMES, Sept. 25, 1989, at 34, 35 ("law of insider trading is developing through after-the-fact judicial decision-making," which "inevitably leads to the criminal law's

overexpansion" and violates separation of powers). While that ship might already have sailed, courts must nevertheless employ "restraint…[and] narrow interpretation," *Dowling*, 473 U.S. at 213 (quotation marks omitted), and any ambiguity concerning the scope of the offense must be "resolved in favor of lenity," *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (quotation marks omitted); *see also*, *e.g.*, *Yates v. United States*, 574 U.S. 528, 547-48 (2015).

Consistent with those principles, this Court has rejected government efforts to expand the nature of the duty that defines the scope of insider-trading fraud. *See Salman*, 137 S. Ct. at 426-27 ("adher[ing] to *Dirks*" and its personal-benefit requirement, instead of the "noncorporate purpose" test proposed by the government); *Chiarella*, 445 U.S. at 233 (refusing to recognize a broader duty than "trust and confidence"). And the Court has deemed it "essential" that caselaw articulate clear and objective "guiding principle[s]" for market participants "whose daily activities must be limited and instructed" by the insider-trading rules. *Dirks*, 463 U.S. at 664.

2. The Second Circuit did the opposite. It proclaimed that there is no "exclusive test of fiduciary status" nor any particular "proof necessary to sustain a conviction." Pet.App.29a. The court instead endorsed a mélange of competing and often counterintuitive theories, tests, and factors and provided zero guidance as to how each should be weighed against the other. The decision thus hands prosecutors the flexibility post hoc to bend the law to the facts and makes it impossible for anyone seeking to invest in the securities markets to confidently

identify, ex ante, the line demarcating lawful from unlawful trading.

Certain factors that the Second Circuit emphasized also make no sense. *O'Hagan* approved the misappropriation doctrine for situations in which a defendant has sworn "fidelity to the source of the information" and stands bound by a "duty of loyalty." 521 U.S. at 655. The Second Circuit turned that reasoning on its head by holding that Kosinski had the requisite relationship because he was duty-bound to be "independent" of Regado and could *not* "align[]" his interests with the company's. Pet.App.18a-20a, 24a. But alignment of interests is the essence of what it means to be a fiduciary, since "it is elemental that a fiduciary owes a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect." *Birnbaum v. Birnbaum*, 73 N.Y.2d 461, 466 (1989).

Many of the other factors the Second Circuit discussed—and the way it applied them—could apply just as easily to numerous non-fiduciary relationships. For example, a CEO travelling crosstown to finalize a major deal with another company might select a car service based on its "reputation" and "experience and skill," exactly the reasons the court of appeals believed Regado selected Kosinski. Pet.App.17a-18a. Certainly, the CEO "entrust[s]" the driving to the driver and expects him to be discreet while she takes a conference call from the back seat. *Id.* After reading the Second Circuit's decision, the driver very well might wonder if that 10-minute car ride had transformed him into the CEO's fiduciary, with all the attendant duties and responsibilities that come with such a role. And, had the driver deduced that there

was a deal in the works and bought a few shares in the CEO's company, he would have every reason to fear criminal liability for having "defrauded" the CEO in breach of his newfound exalted status.

The Second Circuit's decision fails to articulate any clear lines defining this critical element of the offense, which can convert otherwise lawful securities trading into a federal crime. The Second Circuit's standardless "test" makes it impossible for a defendant to know the dispositive facts that "separat[e] legal innocence from wrongful conduct." *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 73 (1994); *see Staples v. United States*, 511 U.S. 600, 605 (1994) (scienter generally "require[s] that the defendant know the facts that make his conduct illegal"). Indeed, the decision exemplifies the vagueness problems that inhere when criminal liability turns on the presence or absence of fiduciary status, let alone when any "fiduciary-*like*" relationship will do.

This Court dealt with a similar issue eleven years ago in *Skilling* by insisting that "duty" should bear its traditional, narrow meaning when it comes to the federal "honest services fraud" statute. That statute, like the securities fraud provisions at issue here, requires the government to prove a breach of a fiduciary or similar duty of trust and confidence. Justice Scalia argued that the statute was unconstitutionally vague, in part because "[t]he indefiniteness" of the fiduciary duty element taints the offense with a "fundamental indeterminacy." *Skilling*, 561 U.S. at 419, 421 (concurring in judgment). He observed that lower courts were all over the map when it comes to fiduciary duties,

discerning such relationships in a plethora of circumstances that lack any clear unifying thread; the courts, he noted, were even divided over "the *source* of the fiduciary obligation—whether it must be positive state or federal law." *Id.* at 417. Tying criminal liability to fiduciary duty, he opined, "provides no 'ascertainable standard of guilt.'" *Id.* at 416 (quoting *L. Cohen Grocery Co.*, 255 U.S. at 89).

The *Skilling* majority adopted a narrow construction of the statute to avoid a due process problem. It responded to Justice Scalia's concerns by pointing out that it had cabined the offense to situations in which "[t]he existence of a fiduciary relationship, under any definition of that term, [is] usually beyond dispute." *Id.* at 407 n.41. The Court then provided, as examples, the quintessentially fiduciary relationships that exist between public officials and their constituents, employees and their employers, and union officials and their membership. *Id.*

If insider-trading fraud is likewise confined to cases in which the existence of a fiduciary or fiduciary-like duty is "beyond dispute," there would be no vagueness problem. But the Second Circuit *expanded* the duty (and the crime) to reach an indeterminate and boundless range of relationships. Its decision lays the groundwork for different cases to be judged according to different tests and cannot even identify a single body of law that should govern.

Given the patchwork of competing and occasionally contradictory theories, tests, and factors in the Second Circuit's decision, it now becomes impossible for anyone—or anyone's counsel—to reliably determine whether a given relationship does, or does not, expose

her to prison under §10(b). The Second Circuit's standardless approach creates confusion in an exceptionally important area that demands clarity and predictability. This Court's intervention is urgently needed, particularly because of the Second Circuit's nationwide influence on securities law.

III. The Harmless-Error Ruling Defies This Court's Constitutionally-Based Teachings On Appellate Review Of Criminal Convictions

A trial court's failure to properly instruct a jury on an element of the offense is a constitutional error that deprives the defendant of his Sixth Amendment right to have the jury find each element beyond a reasonable doubt. *See Neder v. United States*, 527 U.S. 1, 12 (1999). In assessing whether such an error can be overlooked as "harmless," a reviewing court must inquire "not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993). "That must be so," this Court explained, "because to hypothesize a guilty verdict that was never in fact rendered—no matter how inescapable the findings to support that verdict might be—would violate the jury-trial guarantee." *Id.*

In declaring any instructional error on the duty element harmless, the Second Circuit at once abdicated its responsibility and dramatically overstepped its proper role. The court found harmless error without conducting any harmless-error review at all. Instead, it simply repurposed its *sufficiency* findings under its own various alternative theories of

fiduciary duty. But the two analyses are fundamentally distinct. Sufficiency review asks whether the government adduced enough evidence from which a reasonable jury *could* find a defendant guilty beyond a reasonable doubt. *See Musacchio v. United States*, 136 S. Ct. 709, 715 (2016). Harmless-error review, by contrast, requires the government to prove "'beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.'" *Neder*, 527 U.S. at 15 (quoting *Chapman v. California*, 386 U.S. 18, 24 (1967)). The Second Circuit's decision inexcusably conflates the two.

Had it conducted a proper inquiry, the court could not have concluded the instructional error was harmless. The jury was instructed on one theory and one theory only: that Kosinski owed Regado a duty of trust and confidence if, and only if, he had "agree[d] to maintain information in confidence." Pet.App.78a-79a. As charged, the jury was presented with no path to convict *except* by following the confidentiality instruction, and so the instruction necessarily "contribute[d] to the verdict obtained." *See Neder*, 527 U.S. at 15. If the instruction recited an incorrect statement of law, therefore, it was clearly "possible" that the jury "convicted [Kosinski] for conduct that is not unlawful," and the error was by definition *not* harmless. *McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016); s*ee Stromberg v. People of State of Cal.*, 283 U.S. 359, 369-70 (1931) (conviction that may have rested "exclusively" upon an invalid theory "must be set aside"); *see also Chiarella*, 445 US at 237 n.21 ("We may not uphold a criminal conviction if it is impossible to ascertain whether the defendant has been punished for noncriminal conduct."). Indeed, as long as "the defendant contested the [erroneously

charged] element and raised evidence sufficient to support a contrary finding"—as Kosinski did here—a reviewing court "cannot conclude beyond a reasonable doubt that the jury verdict would have been the same absent the error…[and] should not find the error harmless." *Neder*, 527 U.S. at 19.[5]

But the Second Circuit sidestepped the proper harmless-error analysis entirely. Rather than evaluating the jury's *actual* verdict, the court empaneled itself in a hypothetical jury box and sustained the convictions using *its own* factual findings relating to theories of fiduciary duty that Kosinski's jury never had the opportunity to consider.

That ruling squarely conflicts with this Court's decisions. This Court has long held that an appellate court "cannot affirm a criminal conviction on the basis of a theory not presented to the jury." *Chiarella*, 445 U.S. at 236; *see McNally v. United States*, 483 U.S. 350, 361 (1987) (court cannot affirm on a basis for which "there was nothing in the jury charge that required such a finding"). "[E]ven assuming the Court of Appeals was correct on the law, the conviction should not have been affirmed on that basis" because it was "never submitted to the jury." *McCormick*, 500 U.S. at 269-70. Other circuits have faithfully applied this basic proposition, which serves to protect a defendant's Sixth Amendment rights. *See*, *e.g.*, *United States v. Munguia*, 704 F.3d 596, 604-05 (9th Cir. 2012); *United States v. Serawop*, 410 F.3d 656, 669-70 (10th Cir. 2005). *See also United States v. Annamalai*,

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[5] Among other things, the CSRA specified that Kosinski was an independent contractor, disclaimed any agency relationship, and, unlike the CDA that it expressly superseded, imposed no restriction on Kosinski's use of Regado's confidential information.

939 F.3d 1216, 1231 (11th Cir. 2019) (sufficiency review); *United States v. Dann*, 652 F.3d 1160, 1174 (9th Cir. 2011) (same); *United States v. Mendez*, 528 F.3d 811, 816 n.1 (11th Cir. 2008) (same); *United States v. Winfield*, 997 F.2d 1076, 1081 (4th Cir. 1993) (same).

Chiarella, in fact, involved the same issue posed here—whether an insider-trading conviction can be affirmed under a new theory of duty that emerged only after the trial. The defendant in that case purchased stock of the target of an imminent acquisition. The jury was instructed that the defendant owed a duty to the counterparties of his trades; the Court held that this misstated the law and required reversing his conviction. The government argued that the conviction should be sustained regardless of the erroneous instruction, because the defendant owed a duty to the acquiring company, the source of his information. This Court refused to consider the argument, saying: "The jury was not instructed on the nature or elements of a duty owed by petitioner to anyone other than the sellers,...[and] we will not speculate upon whether such a duty exists, whether it has been breached, or whether such a breach constitutes a violation of §10(b)." 445 U.S. at 236-37.

"Courts are essentially passive instruments of government. They do not, or should not, sally forth each day looking for wrongs to right." *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020) (quotation marks and citation omitted). Accordingly, "appellate courts are not free to revise the basis on which a defendant is convicted simply because the same result would likely obtain on retrial." *Dunn v. United States*, 442 U.S. 100, 107 (1979). When "[a]

reviewing court…engage[s] in pure speculation—its view of what a reasonable jury would have done…the wrong entity judges the defendant guilty." *Sullivan*, 508 U.S. at 281 (quotation marks omitted).

Just as the Court could not affirm the conviction in *Chiarella* based on a theory not presented to the jury, here the Second Circuit should not have relied on alternative theories of fiduciary duty never considered by Kosinski's jury to deem any instructional error was harmless. By doing so the court substituted its judgment for the jury's and defied this Court's precedents. It is imperative that courts of appeals confronted with unconstitutional jury instructions uniformly conduct harmless-error review in a manner that respects the defendant's Sixth Amendment right to jury trial. This Court should grant review to ensure that the Second Circuit conforms its harmlessness review to the law. That is especially important because here, the result was to affirm a conviction based on reasoning that deprives market participants of fair notice as to when a relationship gives rise to the duty of "trust and confidence" that triggers insider-trading liability.

CONCLUSION

For the foregoing reasons, this Court should grant the petition.

Respectfully submitted,

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