No. 15-137

IN THE
Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.

TODD NEWMAN AND ANTHONY CHIASSON,
Respondents.

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

BRIEF FOR RESPONDENT ANTHONY CHIASSON IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence was insufficient to prove that the corporate insiders in this case received a personal benefit from disclosing information to particular tippees.

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INTRODUCTION

For the past five years, the Federal Government has pursued Anthony Chiasson on a doctrinally novel and perpetually shifting theory that he illegally traded on inside information. Although the Government's failure to establish two independent elements of that crime led the Second Circuit to vacate Chiasson's convictions and order the indictment against him dismissed, the Government now petitions for this Court's review because it fears that the Second Circuit's opinion contained a single sentence that courts might misconstrue.

Enough is enough. The Government's protean prosecution of this case has already devastated

Chiasson's business and taken a heavy toll on him, his wife, and his young children. This Court's review would prolong this ordeal for no reason: The outcome of this case would be the same, whether or not this Court agreed with the Government's misreading of the decision below. That is because the question presented implicates just one of two independent grounds for the judgment below: that the Government failed to prove that the corporate insiders in this case disclosed nonpublic information for their personal benefit. The petition does not seek review of the Second Circuit's entirely separate holding that the Government presented "absolutely no testimony or any other evidence" that Chiasson *knew* the information was disclosed for a personal benefit. Pet. App. 28a. Thus, however this Court might decide the question presented, the Government's distinct failure to establish the requisite knowledge would require dismissal of the indictment. That makes this case an exceptionally poor vehicle for deciding the question presented, and is reason enough to deny certiorari.

In any event, the question presented does not meet any of the criteria for this Court's review. The Government contends that the Second Circuit's determination that the evidence here was insufficient to prove a personal benefit conflicts with this Court's decision in *Dirks* v. *SEC*, 463 U.S. 646 (1983). According to the Government (at 18), the Second Circuit "erase[d]" *Dirks*' holding that an insider receives a personal benefit when he gifts a friend with nonpublic information. But the Second Circuit expressly followed *Dirks* when it held that an insider may obtain such a benefit through "a gift of confidential information to a trading relative or

friend." Pet. App. 25a (internal quotation marks omitted); *see Dirks*, 463 U.S. at 664. In applying that rule here, the Second Circuit simply concluded that the evidence presented at trial failed to establish that the insiders' disclosures constituted "gifts." Indeed, the Government's case was so weak that it abandoned a "gifting" theory as to one of the insiders at trial, and the Second Circuit found the evidence as to the other "even more scant." Pet. App. 28a. This Court's review would thus boil down to a fact-intensive inquiry into the sufficiency of the evidence—something the Government routinely counsels this Court to avoid.

The Government also contends that the Second Circuit's decision conflicts with decisions of the Seventh and Ninth Circuits. Not so. The Government's success in those cases was dictated by their far more compelling facts, not by any difference in the legal standard. In *United States* v. *Salman*, 792 F.3d 1087 (9th Cir. 2015), the insider explicitly testified that he gave information to his brother in order to benefit him, thus establishing the necessary intent. Evidence of an extremely close relationship between the brothers further confirmed that the information was given as a gift. Similarly, in *SEC* v. *Maio*, 51 F.3d 623 (7th Cir. 1995), the evidence showed that the insider and the tippee were decade-long friends who routinely did favors for each other, permitting an inference that the disclosure of information was just one gift among many. In this case, by contrast, Chiasson was a remote tippee who knew nothing of the insiders or their motives, and even the initial tippees were but casual acquaintances of the insiders. There was no direct evidence that either insider intended to make a gift of trading profits.

The Second Circuit rejected the Government's claim on the facts, and its statement of the law was perfectly consistent with the decisions of its sister circuits.

Finally, the Government contends that the Second Circuit's decision threatens to disrupt the securities markets. If that were true, one would think that the Government could point to at least *one* circuit case among the twelve courts of appeals in which similar facts produced a different outcome. The Government's failure to do so is testament to the Second Circuit's straightforward application of this Court's 32-year-old decision in *Dirks*. And the Government's continued success in insider-trading cases in the months following the decision below confirms that nothing has changed. No court has read the decision below to alter insider-trading law in the manner that the Government argues in its petition. To the contrary, the real threat to market stability is the possibility of a grant of certiorari in this case. A grant would signal that the law under *Dirks* is up for debate, and chill analysts from engaging in precisely the kind of dogged investigation *Dirks* described as "necessary to the preservation of a healthy market." 463 U.S. at 658.

For these reasons, the petition should be denied.

STATEMENT

1. Anthony Chiasson was a portfolio manager at a hedge fund called Level Global Investors, L.P. Pet. App. 2a. Like virtually all hedge funds, Level Global relied on analysts to gather information from and about public companies, and to develop financial models to help guide the fund's investment decisions. The information those analysts collected often came

from the officers, directors, or other insiders of public companies. *See id.* at 30a-32a. By "'ferret[ing] out'" information from such sources, those analysts not only helped Level Global but also contributed to the health of the financial markets. *Dirks*, 463 U.S. at 658.

One of Chiasson's analysts at Level Global was Spyridon Adondakis. Pet. App. 5a. In 2008 and 2009, Adondakis relayed certain bits of earnings information to Chiasson about two companies, Dell, Inc., and NVIDIA Corp., before that information became public. *Id.* at 4a. Adondakis told Chiasson that the information originated from a NVIDIA "contact" and "someone within" Dell. Tr. 1708, 1878. Because Adondakis himself had obtained this information only through intermediaries, he had never met or spoken with either source, and did not know anything about the circumstances under which they had disclosed the information. Tr. 2217-18, 2333. As a consequence, Adondakis could not convey—and Chiasson did not know—the sources' names, their relationships with the people they had told, or why they came to disclose the information. Pet. App. 29a.

Leaks of the kind Adondakis relayed to Chiasson were hardly unusual. "NVIDIA and Dell's investor relations personnel routinely 'leaked' earnings data in advance of quarterly earnings." *Id.* at 31a; *see, e.g.*, Tr. 352-357, 567-598, 697-704, 717-726, 1503-12 (describing detailed leaks and advance information from Dell); Def. Exs. 126, 208, 866, 900, 903, 951, 952, 994, 1175 (same); Tr. 1006-13 (from NVIDIA); Def. Exs. 2146, 2198, 2199 (same). And NVIDIA and Dell were hardly unique. Analysts "routinely solicited information from companies," and corporate insiders "frequently" obliged, letting analysts know

whether their "assumptions were 'too high or too low' or in the 'ball park.'" Pet. App. 31a. Against this backdrop, Chiasson made trades in NVIDIA and Dell stock based on the information he received from Adondakis. *Id.* at 4a.[1]

2. After raiding Level Global's offices in 2010, the Federal Government charged Chiasson and Todd Newman, a portfolio manager at a different hedge fund, with criminal violations of the federal securities laws. Pet. App. 2a; *see* 18 U.S.C. §§ 2, 371; 15 U.S.C. §§ 78j(b), 78ff; 17 C.F.R. §§ 240.10b-5, 240.10b5-2. Over the course of a six-week trial, the Government sought to trace several of their trades back to allegedly fraudulent disclosures by insiders at Dell and NVIDIA.

a. *Dell.* The evidence showed that Chiasson was four levels removed from the source of Adondakis's information about Dell—an employee in Dell's investor relations department named Rob Ray. Pet. App. 5a. Ray did not testify at trial, and he was never charged with a crime or alleged to be a co-conspirator. *See id.*

According to the evidence, Ray shared advance information about Dell's consolidated earnings with Sandy Goyal, an analyst at Neuberger Berman who

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[1]Because such disclosures were typically selective, it is hardly surprising that Chiasson declined to disclose his analyst's sources to a colleague at a competing hedge fund. *See* Pet. 7 (quoting instant message conversation between Chiasson and an "acquaintance"). Nor is there anything untoward about Chiasson's advice to Adondakis to keep reports on Level Global's internal reporting system "quick" or "high level," so long as they accurately reflected the rationale for a trade. Tr. 1785, 1894-95; *see* Gov't Ex. 928.

once worked at Dell and attended the same business school as Ray. *Id.* at 5a, 24a. Goyal's relationship with Ray "was not very close or personal"; Goyal did not even consider them to be "friends." Tr. 1411; *see also* Pet. App. 24a ("not 'close' friends"). But Goyal occasionally gave Ray "career advice"—"little more than the encouragement one would generally expect of a fellow alumnus or casual acquaintance." Pet. App. 27a. Goyal gave this advice freely "because he routinely did so for industry colleagues." *Id.* And indeed, "the evidence showed that Goyal began giving Ray 'career advice' over a year before Ray began providing any insider information." *Id.*

Goyal relayed what Ray told him to Jesse Tortora, an analyst at Diamondback Capital Management, LLC. *Id.* at 5a. Tortora testified that Goyal told him only that he had a "source" at Dell, who "like[d] to talk stocks." Tr. 415. Tortora passed the information on to a circle of analyst friends, including Adondakis. Pet. App. 5a. As noted, Adondakis did not know who originated the tips and never spoke with Goyal. Tr. 2217-18. He knew only that Goyal had a source at Dell, and that is all he told Chiasson. Tr. 2218-19; *see* Pet. App. 29a.[2]

b. *NVIDIA*. The evidence showed that Chiasson was also four levels removed from the source of Adondakis's information about NVIDIA. Pet. App. 5a. That source was an employee in NVIDIA's finance unit named Chris Choi—though Adondakis never told Chiasson that the source worked at

[2]Nor did Adondakis know about any payments Diamondback made to Goyal as part of Goyal's consulting relationship with Diamondback. *See* Tr. 1188, 2212.

NVIDIA. *Id.* at 5a, 29a. Like Ray, Choi did not testify at trial, and he was never charged with a crime or alleged to be a co-conspirator. *See id.* at 5a.

Choi discussed NVIDIA's earnings numbers with Hyung Lim, a "casual acquaintance[]" and "family friend" from church, with whom he occasionally socialized. *Id.* at 25a, 28a. Choi never got anything from Lim, and there was no direct evidence about Choi's motives for providing the information to Lim. Lim, who did testify, recited only that he would ask Choi questions, and Choi frequently answered his questions about NVIDIA's performance. Tr. 3068-69.

Lim passed the information to Danny Kuo, an analyst at Whittier Trust, who then shared it with the same group of analyst friends to which Adondakis and Tortora belonged. Pet. App. 5a. Adondakis knew only that Kuo had a friend, and that the friend had a NVIDIA contact. Adondakis did not know who Choi or Lim were, and as noted, he told Chiasson only that the information came from a "NVIDIA contact"—not even that the source was employed by NVIDIA. Tr. 1878; *see* Pet. App. 29a. Chiasson knew nothing about why or to whom the NVIDIA "contact" had disclosed this information.[3]

3. At the close of the Government's case, Chiasson moved for acquittal, arguing that the evidence was insufficient to establish two separate elements of

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[3]Although Adondakis testified that he told Chiasson that "a friend of Jesse Tortora [*i.e.*, Kuo] would be getting information from NVIDIA through a friend of his [*i.e.*, Lim] who he went to church with," there was no evidence that Adondakis knew or told Chiasson anything about Lim's relationship to Choi. Tr. 1878-79.

insider-trading liability under *Dirks*: first, that the insiders, Ray and Choi, received a personal benefit from disclosing the confidential information; and second, that Chiasson knew that they had. Pet. App. 6a. Chiasson also asked that the jury be instructed that it could not convict unless the Government proved the second of these elements. *Id.* The Government opposed this instruction, arguing that the jury was not required to find that Chiasson knew that the insiders had disclosed information for their personal benefit. *See* Tr. 3601-02.

The District Court reserved decision on the acquittal motion and refused to give the requested instruction. Pet. App. 6a-7a. The jury found Chiasson guilty on all counts. *Id.* at 8a. The court then denied his acquittal motion, sentenced Chiasson to 78 months' imprisonment, and ordered him to pay a $5 million fine and to forfeit another $1.4 million. *Id.* at 8a & n.2.

4. The Second Circuit granted Chiasson bail pending appeal. Then, in December 2014, the court issued an opinion by Judge Parker, joined by Judges Winter and Hall, vacating the convictions for three independent reasons and remanding for the District Court to dismiss the indictment with prejudice. *Id.* at 34a.

a. The Second Circuit first held that the District Court erred in refusing to give Chiasson's requested instruction on knowledge. *Dirks*, the Second Circuit explained, requires the Government to show that a tippee like Chiasson knew that the insider disclosed the information in breach of a fiduciary duty. *Id.* at 14a. Because there is no breach unless the insider receives a personal benefit, the Government must

prove that the tippee knew that the insider received such a benefit. *Id.* at 15a-22a. The Second Circuit concluded that the instructions as given "failed to accurately advise the jury of the law." *Id.* at 21a. It further concluded that the error was not harmless. *Id.* at 22a. The court explained that "both Chiasson and Newman contested their knowledge of any benefit received by the tippers and, in fact, elicited evidence sufficient to support a contrary finding." *Id.* at 23a. Because their knowledge was not "uncontested and supported by overwhelming evidence," it was not "clear beyond a reasonable doubt that a rational jury would have found [them] guilty absent the error." *Id.* (internal quotation marks omitted).

b. The Second Circuit next held that the Government's evidence was insufficient in two separate respects.

First, it held that the "[t]he circumstantial evidence in this case was simply too thin to warrant the inference that the corporate insiders received any personal benefit in exchange for their tips." *Id.* at 24a. The court noted that "'[p]ersonal benefit is broadly defined to include * * * the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend.'" *Id.* at 25a. But it cautioned that "[t]his standard, although permissive, does not suggest that the Government may prove the receipt of a personal benefit by the mere fact of a friendship, particularly of a casual or social nature." *Id.* To hold otherwise would reduce the personal-benefit requirement to "a nullity." *Id.* Accordingly, the court explained that a personal benefit may not be "inferred from a personal relationship between the tipper and tippee," absent "proof of a meaningfully close personal relationship

that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature. In other words, * * * this requires evidence of a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the latter." *Id.* at 26a (internal quotation marks and brackets omitted).

The Second Circuit then considered whether Ray's relationship with Goyal and Choi's relationship with Lim could support an inference either of a *quid pro quo* or of an intention to "make a 'gift' of the profits earned on any transaction based on [the] confidential information." *Id.* at 28a. After reviewing the record, the court concluded that the evidence could not support any such inference; indeed, if the relationships between the insiders and the tippees in this case could permit an inference of a "'benefit,' practically anything would qualify." *Id.* at 25a.

Second, the Second Circuit held that, "[e]ven assuming that the scant evidence" of the insiders' personal benefit was sufficient, "the Government presented absolutely no testimony or any other evidence that Newman and Chiasson knew" they were trading on information disclosed for the purpose of obtaining a personal benefit, "or even that [they] consciously avoided learning of these facts." *Id.* at 28a. On the contrary, it was "largely uncontroverted that Chiasson and Newman, and even their analysts, who testified as cooperating witnesses for the Government, knew *next to nothing* about the insiders and *nothing* about what, if any, personal benefit had been provided to them." *Id.* at 28a-29a (emphases added).

The Second Circuit considered the Government's argument (at 30) that the timing and specificity of the disclosures supported an inference of knowledge. But the court held that "even if [the] detail and specificity" of the information Chiasson and Newman received "could support an inference as to the *nature* of the source, it cannot, without more, permit an inference as to that source's improper *motive* for disclosure." Pet. App. 32a. That was "especially true here, where the evidence showed that corporate insiders at Dell and NVIDIA regularly engaged with analysts and routinely selectively disclosed the same type of information." *Id.* at 33a; *see also supra* pp. 5-6. The Government's evidence of the defendants' knowledge was therefore insufficient, even if the insiders had disclosed information for personal benefit. Pet. App. 33a.

The Second Circuit denied the Government's request for rehearing en banc without dissent.

ARGUMENT

I. THE SECOND CIRCUIT FAITHFULLY APPLIED THIS COURT'S DECISION IN *DIRKS*

1. In *Dirks*, this Court addressed when trading on material nonpublic information violates the federal securities laws. The Court reaffirmed that there is "no general duty" to disclose material nonpublic information before trading on it. *Dirks*, 463 U.S. at 654. Indeed, "a duty to disclose * * * does not arise from the mere possession of nonpublic market information." *Id.* (internal quotation marks omitted). Rather, a duty to disclose arises only "from the existence of a fiduciary relationship." *Id.* A fiduciary relationship exists "between the shareholders of a

corporation and those insiders who have obtained confidential information by reason of their position within that corporation." *Chiarella* v. *United States*, 445 U.S. 222, 228 (1980). So when a corporate insider "fails to disclose material nonpublic information before trading on it and thus makes secret profits," he violates the securities laws. *Dirks*, 463 U.S. at 654 (internal quotation marks omitted).

The Court also discussed the issues that arise when a corporate insider does not trade on material nonpublic information himself, but rather passes that information on to someone else who does. In *Dirks*, the Securities and Exchange Commission argued that the tippee (*i.e.*, the recipient of the inside information) automatically inherits the tipper's (*i.e.*, the insider's) duty to disclose. *Id.* at 655. On that view, "*anyone* who knowingly receives nonpublic material information from an insider has a fiduciary duty to disclose before trading." *Id.* at 656 (emphasis added).

The Court in *Dirks* emphatically rejected that position. "In effect," the Court explained, "the SEC's theory of tippee liability * * * appears rooted in the idea that the antifraud provisions require equal information among all traders." *Id.* at 657. That theory "conflicts with the principle set forth in *Chiarella* that only *some* persons, under *some* circumstances, will be barred from trading while in possession of material nonpublic information." *Id.* (emphases added). Moreover, the Court continued, the SEC's rule would "have an inhibiting influence on the role of market analysts," who "ferret out and analyze information" by "meeting with and questioning corporate officers and others who are insiders." *Id.* at 658 (internal quotation marks omitted). As the

SEC itself recognized, "market efficiency in pricing is significantly enhanced by [such] initiatives" to obtain nonpublic information. *Id.* at 658 n.17. Banning analysts from trading on such information would deter those sorts of efforts, which—far from being unethical—are "necessary to the preservation of a healthy market." *Id.* at 658.

At the same time, the Court acknowledged the "need for a ban on *some* tippee trading." *Id.* at 659 (emphasis added). Insiders are "forbidden by their fiduciary relationship from personally using undisclosed corporate information to their advantage," and they should not be allowed to achieve "the same improper purpose" by "giv[ing] such information to an outsider." *Id.* Thus, when insiders make material nonpublic information available to outsiders "*improperly*"—*i.e.*, "for their personal gain"—they breach a fiduciary duty to their shareholders. *Id.* at 659-660. The Court recognized that it would be similarly unlawful for outsiders to "knowingly participate" in such a breach. *Id.* at 659. And so the Court held that "the tippee's duty to disclose or abstain" is "derivative" of the insider's: A tippee is prohibited from trading on material nonpublic information only when he "knows or should know" that "the insider has breached his fiduciary duty to the shareholders by disclosing the information." *Id.* at 660.

The Court then carefully limited the circumstances under which an insider's disclosure constitutes a breach of a fiduciary duty. The Court framed "the test" as "whether the insider personally will benefit, directly or indirectly, from his disclosure." *Id.* at 662. "Absent some personal gain, there has been no breach of duty to stockholders." *Id.* The "focus" of the inquiry, the Court explained, should be "on

objective criteria, *i.e.*, whether the insider receives a direct or indirect personal benefit from the disclosure, such as a pecuniary gain or a reputational benefit that will translate into future earnings." *Id.* at 663. And the Court identified certain "objective facts and circumstances that often justify" an "inference" of personal gain. *Id.* at 664. "For example, there may be a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, or an intention to benefit the particular recipient." *Id.* The Court also explained that an inference of personal gain may be justified "when an insider makes a gift of confidential information to a trading relative or friend," because the "tip and trade resemble trading by the insider himself followed by a gift of the profits to the recipient." *Id*.

The Court acknowledged that "[d]etermining whether an insider personally benefits from a particular disclosure * * * will not always be easy." *Id.* Still, the Court expressed confidence that its rule was necessary to provide "a guiding principle for those whose daily activities must be limited and instructed by" the securities laws. *Id.* Without such guidance, analysts and traders would be "forced to rely on the reasonableness of the [Government's] litigation strategy"—which "can be hazardous." *Id.* at 664 n.24.

2. The Second Circuit, which has considerable experience with insider-trading cases, faithfully followed *Dirks* in this case. The court recognized that, under *Dirks*, Chiasson could be liable only if the insiders disclosed the information to obtain some personal benefit. Pet. App. 12a. And it recognized that "personal benefit is broadly defined to include not only pecuniary gain, but also *inter alia*, any

reputational benefit that will translate into future earnings and the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend." *Id.* at 25a (internal quotation marks and brackets omitted). Applying that standard to the record here, the court found that the evidence "was simply too thin to warrant the inference that the corporate insiders received any personal benefit in exchange for their tips." *Id.* at 24a. There is nothing remarkable about that fact-bound application of *Dirks*.

3. Unhappy with the Second Circuit's determination that the evidence was insufficient, the Government asserts that the Second Circuit departed from *Dirks*. The Government's entire argument rests on a single sentence from the Second Circuit's opinion, which states: "To the extent *Dirks* suggests that a personal benefit may be inferred from a personal relationship between the tipper and tippee, where the tippee's trades 'resemble trading by the insider himself followed by a gift of the profits to the recipient,' we hold that such an inference is impermissible in the absence of proof of a meaningfully close personal relationship that generates an exchange that is objective, consequential, and represents at least a potential gain of a pecuniary or similarly valuable nature." *Id.* at 25a-26a (citation omitted) (quoting *Dirks*, 463 U.S. at 664).

The Government argues (at 18) that the Second Circuit's use of the word "exchange" cannot be reconciled with *Dirks*' statement that liability may exist "when an insider makes a gift of confidential information to a trading relative or friend." 463 U.S. at 664. According to the Government, *Dirks*' use of the

word "gift" implies that a tippee may be held liable in the absence of any "exchange" whatsoever.

It is the Government—not the Second Circuit—that has misread *Dirks*. *Dirks* holds that a tippee may be held liable only if the insider has breached a fiduciary duty by disclosing the information to the tippee. *Id.* at 660. And *Dirks* further holds that "[a]bsent some personal gain, there has been no breach of duty." *Id.* at 662. Thus, in every case of tippee-trading liability, the insider must get *something* in return for the disclosure: The Government must show that the insider disclosed information and—*in exchange*—obtained some "personal gain." *Id.* *Dirks* did not carve out an exception to that rule for gifts to relatives or friends. Rather, it held that the insider might "receive[] a direct or indirect personal benefit" by making what amounts to a "gift of confidential information to a trading relative or friend." *Id.* at 663-664. The Second Circuit's use of the word "exchange" merely reflects *Dirks*' requirement that the insider must obtain such a personal benefit—and that such a benefit must be proven, not simply taken for granted.

The Government nevertheless maintains (at 19) that the word "exchange" is too narrow because it implies something akin to "a *quid pro quo*." But nothing in the Second Circuit's decision suggests that it intended such a narrow meaning. Take, for example, the sentence immediately following the one on which the Government focuses: "In other words, * * * this requires evidence of a relationship between the insider and the recipient that suggests a *quid pro quo* from the latter, *or an intention to benefit the latter*." Pet. App. 26a (emphasis added) (internal quotation marks omitted). That sentence—

which the Government completely ignores—makes clear that an "exchange" need not take the form of a *quid pro quo*. In language drawn nearly verbatim from *Dirks*, the Second Circuit recognized that the personal benefit the insider receives can be that which comes from fulfilling "an intention to benefit" the tippee, as when the insider gives information as a gift to a relative or friend. *Dirks*, 463 U.S. at 664.

That is how other courts have understood the decision below. *See, e.g.*, *United States* v. *Gupta*, No. 11-cr-907, 2015 WL 4036158, at *3 (S.D.N.Y. July 2, 2015) (Rakoff, J.). And it is precisely the understanding of "exchange" pressed by the Government before the Ninth Circuit when it argued that an insider improperly disclosed information "*in exchange for* the personal benefit of appeasing and benefiting his brother." *See* United States' Answer to Appellant's Suppl. Br. 8, *Salman*, 792 F.3d 1087 (9th Cir. Apr. 30, 2015) (No. 14-10204), ECF No. 40-1 (emphasis added). Even the SEC, which did not sign the petition for certiorari in this case, *cf. United States* v. *O'Hagan*, 521 U.S. 642 (1997), has acknowledged that the decision below "did not purport to distinguish or limit *Dirks*. * * * [T]he reasoning of the panel shows that it expressly recognized that a gift of trading profits constitutes a 'personal benefit.'" Mem. of SEC in Opp'n to Def. Holley's Mot. To Vacate or Set Aside Consent J. 10, *SEC* v. *Holley*, No. 11-cv-205 (D.N.J. Feb. 13, 2015), ECF No. 56.

As a fallback position, the Government contends that even if the Second Circuit did not completely do away with the "gift category of personal benefit," it improperly "limited that category" to circumstances in which "the insider's relationship to the friend or relative is 'meaningfully close.'" Pet. 20 (quoting

Pet. App. 26a). The Government is wrong. The Second Circuit's conclusion follows directly from *Dirks*: The mere disclosure of confidential information by an insider cannot support an inference that the insider's purpose was to benefit himself by gifting confidential information to the tippee. *See Dirks*, 463 U.S. at 661-662 ("All disclosures of confidential corporate information are not inconsistent with the duty insiders owe to shareholders."). Something more is required to justify an inference that the disclosure was an improper gift. The Second Circuit reasonably concluded that a "meaningfully close" friendship might suffice, but that, standing alone, the casual acquaintanceships in this case could not.[4] That commonsense conclusion is entirely in keeping with *Dirks*.

Finally, at the close of its discussion of *Dirks*, the Government tips its hand. The Government's problem is not really with the decision below; it is with *Dirks* itself. The Government asserts (at 21) that an insider violates his fiduciary duty by disclosing

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[4]Because it was not possible to infer any personal benefit from the nature of the insider-tippee relationships themselves, the Government was without any evidence to prove that either insider made "a gift of confidential information to a trading relative or friend." *Dirks*, 463 U.S. at 664; *see infra* p. 25. As the Second Circuit explained, there was no evidence to warrant "any inference that Choi intended to make a 'gift' of the profits earned on any transaction based on confidential information." Pet. App. 28a. Nor was there any evidence to warrant any inference that Ray disclosed information to Goyal with the intention that Goyal would use it to trade Dell stock. Goyal, in fact, did not trade Dell stock. He relayed the information to others who traded, but he did not tell Ray that he was doing so. Tr. 1611.

information unless the insider "has a valid business purpose for selective disclosure" or "mistakenly believes that information is not material or is already in the public domain." But that turns *Dirks* on its head. *Dirks* does not require the insider to prove some "legitimate" reason for his disclosure to avoid liability. Pet. 21. To the contrary, under *Dirks*, an insider is not liable unless the *Government* proves that "the insider personally will benefit, directly or indirectly, from his disclosure. *Absent some personal gain, there has been no breach of duty to stockholders*." 463 U.S. at 662 (emphasis added). And the circumstances under which an insider may disclose information without receiving a personal benefit are hardly limited to the two scenarios the Government acknowledges. The Court in *Dirks* made clear that mistaken disclosures were only an "example" of the type of disclosure that would not constitute a breach. *Id.* Even disclosures that violate company policy or confidentiality obligations are not necessarily made for the insider's personal benefit. *See* Selective Disclosure and Insider Trading, 64 Fed. Reg. 72,590, 72,593 (proposed Dec. 28, 1999) (noting that selective disclosures can be made for many reasons not unlawful under *Dirks*). The Government may wish to pursue prosecutions that go beyond what *Dirks* contemplated, but that is no reason to revisit precedent that has been on the books since the Burger Court.

II. THERE IS NO CONFLICT AMONG THE CIRCUITS

The Second Circuit's faithful adherence to *Dirks* helps explain why the Government cannot identify a circuit split. Despite its claim that the decision

below would allow "conduct long understood as prohibited under *Dirks* [to] elude criminal prosecution," Pet. 32, the Government identifies only *two* decisions that supposedly conflict with the Second Circuit's decision. *See Salman*, 792 F.3d 1087; *Maio*, 51 F.3d 623. Contrary to the Government's suggestion (at 22-25), neither decision would have come out differently in the Second Circuit. Both *Salman* and *Maio* involved the sort of evidence of the insider's improper purpose that *every* court agrees is sufficient under *Dirks* to prove an illicit disclosure of information.

1. In *Salman*, the evidence that the insider, Maher Kara, "breached his fiduciary duties could not have been more clear": Maher himself "testified that he disclosed the material nonpublic information for the purpose of benefitting and providing for his brother Michael." 792 F.3d at 1094. Specifically, Maher testified that, "by providing Michael with inside information, he intended to 'benefit' his brother and to 'fulfill[] whatever needs he had.'" *Id.* at 1089. The Ninth Circuit concluded that Maher's testimony was "direct evidence that the disclosure was intended as a gift of market-sensitive information." *Id.* at 1094. If the Second Circuit had been presented with the same testimony, it would have reached the same conclusion. The decision below expressly contemplated proof of a personal benefit based on evidence of an insider's "'intention to benefit'" a friend or relative. Pet. App. 26a. Indeed, in *Salman*, the Government itself vigorously argued that Maher's testimony satisfied the *Dirks* rule as articulated by the decision below. *See* United States' Answer to Appellant's Suppl. Br. 7-8, *Salman*, 792 F.3d 1087

(9th Cir. Apr. 30, 2015) (No. 14-10204), ECF No. 40-1.

Even without this testimony, the evidence in *Salman* would have been sufficient in the Second Circuit. The insider and the tippee in *Salman* were brothers who "enjoyed a close and mutually beneficial relationship." 792 F.3d at 1089. Maher "love[d] [his] brother very much," and when Michael gave a toast at Maher's wedding, "Michael described how he spoke to his younger brother nearly every day and described Maher as his 'mentor,' his 'private counsel,' and 'one of the most generous human beings he knows.' Maher, overcome with emotion, began to weep." *Id.*; *see also id.* (summarizing testimony that "Michael helped pay for Maher's college," "stood in for their deceased father at Maher's wedding," and "coached Maher in basic science to help him succeed at his job"). The brothers' relationship in *Salman* is precisely the sort of "meaningfully close" relationship that would justify an inference of personal benefit under the decision below and *Dirks*. Pet. App. 26a.

It is true that the defendant in *Salman* argued that the decision below held that liability may not exist unless the insider's benefit is "tangible." 792 F.3d at 1093. The Ninth Circuit explained that "[t]o the extent [the decision below] can be read to go so far," it would "decline to follow it." *Id.* But the Ninth Circuit then held that the decision below could *not* be read to "go so far": "*Newman* itself recognized that the '"personal benefit is broadly defined to include not only pecuniary gain, but also, *inter alia*, * * * the benefit one would obtain from simply making a gift of confidential information to a trading relative or friend."'" *Id.* at 1093-94 (quoting Pet. App. 25a); *see also SEC* v. *Conradt*, No. 12-cv-8676, 2015 WL

4486234 (S.D.N.Y. July 23, 2015) (Rakoff, J.) (explaining that the decision below "could not, and did not, overrule any binding precedent, nor were the arguments it accepted in any material way novel").[5] The supposed split is therefore illusory: Both the Ninth and the Second Circuits agree that "[p]roof that the insider disclosed material nonpublic information with the intent to benefit a trading relative or friend is sufficient to establish the breach of fiduciary duty element of insider trading." 792 F.3d at 1094; *see also* Pet. App. 26a.

2. The Government's attempt to manufacture a conflict with the Seventh Circuit is similarly unavailing. In *Maio*, the Seventh Circuit upheld the district court's finding that the insider, Louis Ferrero, made an "improper gift of inside information to [Michael] Maio, a trading friend." 51 F.3d at 632. Like the brothers in *Salman*, Maio and Ferrero had a longstanding, mutually beneficial, and meaningfully close relationship. Indeed, "the record show[ed] that Ferrero's tipping was just one of many favors that he ha[d] done for Maio through the years by reason of their friendship." *Id.* Maio and Ferrero met in the 1970s through a mutual friend, Ronald Palamara. *Id.* at 627. "Over the years of their mutual friendship," the three men "traveled to Las Vegas together to gamble or attend prize fights and they regularly attended each other's family weddings." *Id.* "[P]erhaps the best evidence of their close friendship"

[5]Given that Judge Rakoff, sitting on the Ninth Circuit by designation, was the author of the *Salman* opinion, his recognition in *SEC* v. *Conradt* that the decision below made no new law further undermines the Government's claim of a circuit split.

was that, shortly before he died, Palamara asked Ferrero to "look after three people for him: his younger son, his long-time secretary, and Michael Maio." *Id.* Ferrero "had no problem accepting this commitment" because Maio had helped him become president of the company Palamara founded, and because he considered Maio a "good friend." *Id.* In the course of "look[ing] after" Maio, Ferrero gave him a substantial no-strings-attached loan, as well as other assistance. *Id.* Maio and Ferrero thus enjoyed precisely the sort of "meaningfully close" relationship that the Government failed to prove existed between the insiders and tippees below. Pet. App. 26a.

The Government does not mention this record. It claims instead that *Maio* turned on an "inference of personal benefit" drawn from "the absence of 'some legitimate reason' for the disclosure." Pet. 24-25 (quoting *Maio*, 51 F.3d at 633). Not true. What the Seventh Circuit's opinion actually says is: "Absent some legitimate reason for Ferrero's disclosure, * * * the inference that Ferrero's disclosure was an improper gift of confidential information is unassailable." *Maio*, 51 F.3d at 633. In other words, the inference might have been "[]assailable" if there had been "some legitimate reason" for the disclosure. But the absence of any such "legitimate reason" is not what justified the inference in the first place. Rather, as the Seventh Circuit's opinion makes clear, the inference that Ferrero disclosed the information as a gift was drawn from "the backdrop created by [the] close friendships" among Ferrero, Maio, and Palamara. *Id.* at 627. That is why the Seventh Circuit's opinion "begin[s] with a brief review of the relationships between these people"—"because those relationships help establish the nature of Ferrero's

disclosure, and ultimately the liability of Maio." *Id.* Confronted with the same record, the Second Circuit's decision would have been no different.

3. A comparison of the facts in *Salman* and *Maio* with those in this case only makes the insufficiency of the evidence here more stark. In this case, neither insider testified at trial, so unlike in *Salman*, there was no direct evidence of their motivations. And the circumstantial evidence fell far short of what was presented to the Seventh and Ninth Circuits. With respect to the Dell tipping chain, the evidence showed that Ray and Goyal were "not 'close' friends." Pet. App. 24a. Indeed, the evidence that Ray gifted the information to Goyal was so weak that the Government abandoned that theory at trial. Instead, the Government urged that Goyal bought and paid for the information with career advice—a *quid pro quo* theory not even implicated by the question presented. The Government's *post hoc* adoption of a gift theory shows that the Government is grasping at straws. As for the NVIDIA tipping chain, "[t]he evidence of personal benefit was even more scant. Choi and Lim were merely casual acquaintances." *Id.* at 28a. And unlike in *Maio*, "[t]he evidence did not establish a history of loans or personal favors between the two." *Id.* There was nothing about the relationship from which to infer that Choi intended to make a gift of NVIDIA trading profits to Lim.

Dirks recognized that whether "an insider personally benefits from a particular disclosure" is "a question of fact." 463 U.S. at 664. And given that the facts of each case are different, it should come as no surprise when courts applying *Dirks* find the evidence sufficient in one case but not in another.

That is what happened here. The Government might disagree with the Second Circuit's decision that the evidence in this case was insufficient to prove that the insiders personally benefited. But that decision is perfectly consistent with the decisions of other courts of appeals, which have applied the same standard to the unique facts of the cases before them. As just another fact-bound application of *Dirks*, the Second Circuit's decision creates no conflict. Because the Government is left only to speculate (at 34) that "other courts may follow" the Second Circuit's supposed misreading of *Dirks*, this Court's review is unwarranted.

III. THIS CASE IS A POOR VEHICLE FOR DECIDING THE QUESTION PRESENTED

The petition should be denied for another reason: This case, despite the Solicitor General's imprimatur, is not an appropriate vehicle for this Court's review. The petition asks this Court to consider a single element of a tippee-trading claim: the insider's personal benefit. But that is not the only element the Government must prove. As the Second Circuit explained, the Government must also prove the entirely separate element of knowledge—that the tippee "*knew* the information was confidential and divulged for a personal benefit." Pet. App. 21a (emphasis added); *see also Dirks*, 463 U.S. at 659.

In this case, the Second Circuit held that the evidence was insufficient on the element of personal benefit, but also rendered two separate holdings on the element of knowledge. Pet. App. 3a. First, the Second Circuit held that the District Court failed "to instruct the jury that the Government had to prove beyond a reasonable doubt that Newman and Chias-

son knew that the tippers received a personal benefit for their disclosure." *Id.* at 22a. And second, the court of appeals held that "the Government presented *no* evidence that Newman and Chiasson knew that they were trading on information obtained from insiders in violation of those insiders' fiduciary duties." *Id.* at 3a (emphasis added).

1. The second of these holdings is itself adequate to support the judgment below. The Government must prove beyond a reasonable doubt *every* element of the offense. *Jackson* v. *Virginia*, 443 U.S. 307, 314 (1979). So when the evidence at trial is insufficient on any single element, the conviction must be vacated and the indictment dismissed with prejudice. *Burks* v. *United States*, 437 U.S. 1, 16 (1978).

The Government has not petitioned for review of the Second Circuit's holding that the evidence was insufficient to prove Chiasson's knowledge; the petition presents only a single question concerning the personal-benefit issue. Thus, even if this Court were to reverse the Second Circuit on the question presented, the judgment below would stay the same: The indictment would have to remain dismissed with prejudice because the Government failed to prove the essential element of knowledge. The question presented is not outcome-determinative.

The Government asserts (at 30) that "the legal question of what constitutes a personal benefit" could affect the "quantum of evidence [that] will suffice to show knowledge." But the Second Circuit reviewed all of the evidence that the Government argued established a personal benefit. *See* Pet. App. 27a-28a. And it held that "[*e*]*ven assuming that the scant evidence * * * was sufficient to permit the inference of*

a personal benefit," the Government presented "*absolutely no testimony or any other evidence*" that Chiasson "knew" that the insiders obtained a personal benefit, or even that he "consciously avoided" learning whether they had. *Id.* at 28a (emphases added); *see also id.* at 3a, 28a-29a. In other words, *even if* the Government was correct that a personal benefit could be inferred from "the mere fact of a friendship," *id.* at 25a, there was *still* no evidence that Chiasson had the requisite knowledge, because he knew *nothing* about Ray's relationship with Goyal or Choi's relationship with Lim. Certainly Chiasson had no knowledge that they were friends, or even acquaintances. Thus, no matter what "quantum of evidence will suffice to show knowledge," Pet. 30, the Government cannot meet it.[6]

The tippees' complete ignorance of the circumstances of the insiders' disclosures makes this case an outlier, and other insider-trading cases will not

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[6]The Government does not dispute that Adondakis never told Chiasson the sources' names, or why they came to disclose the information. Instead, the Government suggests (at 30) that the accuracy and timing of the disclosures could support an inference that Chiasson consciously avoided learning that the insiders acted for the purpose of obtaining a personal benefit. The Second Circuit categorically rejected that argument, holding that such evidence could not "permit an inference as to [a] source's improper motive for disclosure." Pet. App. 32a (emphasis omitted). Indeed, the evidence established that Dell, NVIDIA, and other companies selectively disclosed advance information as a routine part of doing business. *See supra* pp. 5-6. Nor could a rational jury infer that Chiasson knew of the tippers' motives from the bare fact that he may have known that they were insiders. Pet. App. 32a; *see also Gordon* v. *Sonar Capital Mgmt. LLC*, No. 11-cv-9665, 2015 WL 4554194, at *5 (S.D.N.Y. July 30, 2015) (Rakoff, J.).

feature the same vehicle problem. Evidence of knowledge was totally lacking in this case because Chiasson was a "remote tippee[] many levels removed from [the] corporate insiders." Pet. App. 16a. Even Adondakis and Tortora, who were less removed, "disavowed" any knowledge about whether the insiders received any personal benefit. *Id.* at 30a. In most of the insider-trading cases the Government brings, the defendants are not as removed as Chiasson is here, and there typically is some evidence that they knew that the insiders personally benefited. *See id.* at 16a ("We note that the Government has not cited, nor have we found, a single case in which tippees as remote as Newman and Chiasson have been held criminally liable for insider trading."). For example, in *Salman*, the insider tipped his younger brother, who in turn tipped the defendant, his brother-in-law. 792 F.3d at 1088-89. In *Maio*, the insider and the defendants were friends. 51 F.3d at 627. And there are other cases, pending in the lower courts, in which the defendants are insiders or first-level tippees. *See, e.g.*, *United States* v. *Riley*, No. 15-1541 (2d Cir.) (appeal docketed May 8, 2015); *United States* v. *Martoma*, No. 14-3599 (2d Cir.) (appeal docketed Sept. 19, 2014). Thus, if this Court is interested in the question presented, it should await a better vehicle—one in which the defendants' utter lack of knowledge is not an independent basis for the judgment below.

2. The Second Circuit's other holding on knowledge also counsels against this Court's review. Hoping to escape the consequences of its total failure to prove knowledge, the Government argued—and the District Court agreed—that the jury need not be told to find knowledge of a personal benefit at all. Pet. App.

6a-8a. The Second Circuit concluded that this omission was erroneous. *Id.* at 21a-22a. It further concluded that the error was not harmless beyond a reasonable doubt, because Chiasson's knowledge was not "'uncontested and supported by overwhelming evidence.'" *Id.* at 23a (quoting *Neder* v. *United States*, 527 U.S. 1, 18 (1999)).

The petition does not seek review of either of these conclusions, and neither one would be affected by a decision on the question presented. This Court's review would therefore have no bearing on whether Chiasson's conviction should stand. Given the Second Circuit's independent holdings on knowledge, the petition should be denied.

IV. THIS COURT'S REVIEW WOULD NOT BENEFIT THE SECURITIES MARKETS

The Government asserts (at 25-26) that the Second Circuit's "alteration of the *Dirks* standard frustrates key purposes of the securities laws," threatening the very functioning of the securities markets. But that assertion rests on a faulty premise: The Second Circuit has not "alter[ed]" *Dirks* at all. As explained above, the Second Circuit's opinion is perfectly consistent with *Dirks*. *See supra* pp. 15-19.

The Government's own prosecution record since the decision below further refutes any notion that the sky is falling. Defendants have repeatedly failed in their attempts to use the decision below to undermine insider-trading cases brought against them. *See Salman*, 2015 WL 4068903; *SEC* v. *Conradt*, 2015 WL 4486234; *United States* v. *Whitman*, No. 12-cr-125, 2015 WL 4506507 (S.D.N.Y. July 22, 2015); *Gupta*, 2015 WL 4036158; *SEC* v. *Jafar*, No. 13-cv-4645, 2015 WL 3604228 (S.D.N.Y. June 8, 2015);

SEC v. *Payton*, No. 14-cv-4644, 2015 WL 1538454 (S.D.N.Y. Apr. 6, 2015); *United States* v. *Riley*, No. 13-cr-339, 2015 WL 891675 (S.D.N.Y. Mar. 3, 2015); *United States* v. *McPhail*, Crim. A. No. 14-10201, 2015 WL 2226249 (D. Mass. May 12, 2015); *SEC* v. *Sabrdaran*, No. 14-cv-04825, 2015 WL 901352 (N.D. Cal. Mar. 2, 2015); *United States* v. *Mazzo*, No. 12-cr-269 (C.D. Cal. Jan. 23, 2015), ECF No. 312.

That is because the decision below "could not, and did not, overrule any binding precedent, nor were the arguments it accepted in any material way novel." *SEC* v. *Conradt,* 2015 WL 4486234, at *2. Rather, the Second Circuit merely followed *Dirks* and held that a personal benefit could not be inferred in this case from the casual nature of the insider-tippee relationships alone. That narrow, fact-bound decision does not stand in the way of the Government's prosecutions in other cases, where there may be ample evidence of a strong relationship (as in *Maio* and *Salman*), or other evidence of an intention to benefit (as in *Salman*).

Indeed, although the Government asserts that the decision below worked a sea change in securities law, it cites (at 32 n.8) only a *single* case in which the decision below has led to a defendant-friendly outcome. *See United States* v. *Conradt*, No. 12-cr-887, 2015 WL 480419 (S.D.N.Y Jan. 22, 2015). That is hardly persuasive in the face of *ten* decisions, cited above, favoring the Government. Moreover, in *Conradt*, the district court simply vacated the defendants' guilty pleas; the Government vacated the indictments of its own volition. *Id*. And the *Government* prevailed in two challenges brought by the same defendants based on the decision below in

companion SEC cases. *SEC* v. *Conradt*, 2015 WL 4486234; *Payton*, 2015 WL 1538454.

If anything, it is a grant of certiorari that would threaten upheaval in the markets. For well over thirty years, market participants have relied on the *Dirks* rule barring trading on inside information only when that information is provided by a source who obtains some personal benefit from the disclosure. Because the Second Circuit, with its vast experience in securities regulation, simply applied *Dirks* to the facts at hand, a grant will signal that the *Dirks* rule is subject to change, leaving market participants uncertain of when and how using material nonpublic information could lead to criminal liability. That uncertainty will have a chilling effect on analysts tasked with "'ferret[ing] out'" information about publicly traded companies. *Dirks*, 463 U.S. at 658. Yet, "the value to the entire market of [those] efforts cannot be gainsaid." *Id.* at 658 n.17 (internal quotation marks and brackets omitted). A robust dialogue between public companies, their employees, and investors is a critical feature of capital markets, helping ensure "market efficiency in pricing," *id.*, and uncover "information that corporations may have reason to withhold from the public," *id.* at 658 n.18. By signaling that the "line * * * between permissible and impermissible disclosures" might be up for grabs, certiorari would serve only to inhibit this healthy dialogue, which "redounds to the benefit of all investors." *Id.* at 658 n.17.

The negative effects of granting review are all the more likely given that the petition seems to advocate a rule that would bar trading based on *any* material nonpublic information—a rule this Court has consistently repudiated. *See id.* at 657; *Chiarella*, 445

U.S. at 232. Under the Government's rule, proof of any form of personal relationship between the insider and the tippee would suffice to establish a breach of a fiduciary duty. And if that were true, the "personal benefit requirement would be a nullity." Pet. App. 25a. There are exceedingly few scenarios in which a tippee could uncover information from an insider with whom he had *no* prior relationship.[7] Thus, the Government's theory has the potential not only to chill but to freeze completely the flow of nonpublic information into the market by criminalizing the use of all selectively disclosed information.[8]

Finally, even if the Government believes that such a freeze would benefit the markets, its arguments are addressed to the wrong branch of government. This Court long ago held that the securities laws do not support criminal liability based solely on trading on nonpublic information. *Chiarella*, 445 U.S. at 233. And even if there were any ambiguity on that point, the rule of lenity would counsel against an

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[7]The Government's assertion (at 21) that a defendant may overcome this difficulty by providing evidence of a "legitimate purpose" for the insider's disclosure has it backwards. Nothing in *Dirks* remotely suggests that a tippee is guilty of a felony unless he can prove that the insider acted with a proper purpose. *See supra* pp. 19-20. The burden is on the Government to prove every element of the crime, including that the tippee knew that the insider disclosed confidential information for an improper purpose. *See Dirks*, 463 U.S. at 660.

[8]Even the SEC declined to go so far, taking care to tailor its regulation of selective disclosures of nonpublic information by issuers to reduce the risk of chilling the flow of marketplace information. *See* Selective Disclosure and Insider Trading, 65 Fed. Reg. 51,716, 51,733 (Aug. 24, 2000).

interpretation of the securities laws that would expand criminal liability. *See Yates* v. *United States*, 135 S. Ct. 1074, 1088 (2015); *Leocal* v. *Ashcroft*, 543 U.S. 1, 12 n.8 (2004). Thus, if the Government truly believes that it needs to prosecute conduct like that in this case, it should take its petition not to this Court, but to Congress.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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