No. 20-1161

In the Supreme Court of the United States

EDWARD J. KOSINSKI, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether sufficient evidence supported the jury's finding that petitioner, a doctor who led a clinical trial on behalf of a pharmaceutical company, had a duty not to trade on material, nonpublic information about the trial.

2. Whether the misappropriation theory of insider trading is unconstitutionally vague as applied to petitioner.

3. Whether the court of appeals correctly found that an alleged error in the jury instructions was harmless.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-40a) is reported at 976 F.3d 135. The opinions of the district court (Pet. App. 41a-56a, 57a-72a) are not published in the Federal Supplement but are available at 2017 WL 3527694 and 2018 WL 9988663.

JURISDICTION

The judgment of the court of appeals was entered on September 22, 2020. The petition for a writ of certiorari was filed on February 19, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Connecticut, petitioner was convicted on two counts of insider-trading securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff and

17 C.F.R. 240.10b-5. Judgment 1. He was sentenced to six months of imprisonment, to be followed by two years of supervised release. *Ibid.*

1. Regado Biosciences, Inc., a publicly traded pharmaceutical company, launched a clinical trial of a drug designed to prevent blood clots in heart patients. Pet. App. 3a. Petitioner, a doctor, served as a principal investigator for the trial in 2013. *Id.* at 3a, 5a. In that role, petitioner recruited subjects, determined their suitability, monitored their reaction to the drug, and reported the results. *Id.* at 3a.

Petitioner's written agreement with Regado required him to maintain in "strict confidence" the information he received in the course of the trial. Pet. App. 6a. The agreement also required him to file a financial disclosure form, which in turn directed him to inform Regado if the value of his Regado stock exceeded $50,000. *Ibid.* In October 2013, roughly four months after signing the agreement with Regado, petitioner began to buy Regado shares. *Id.* at 7a. His holdings of Regado shares grew to more than $50,000 by February 2014 and more than $250,000 by May 2014, but he never disclosed that fact to Regado. *Id.* at 7a-8a.

In June 2014, the clinical trial's management team sent petitioner an email informing him that subjects had suffered severe allergic reactions to the drug and that the enrollment of new patients accordingly had to be paused. Pet. App. 8a. The next morning, before the information in the email was made public, petitioner sold all of his Regado shares. *Ibid.* Regado made the information public a few days later, and its stock price dropped by nearly 58%. *Ibid.* By selling his shares earlier, petitioner avoided a loss of approximately $160,000. *Ibid.*

Then, in July 2014, the management team sent petitioner an email informing him that a patient at another study site had died from an allergic reaction to the drug and that the study would have to be canceled. Pet. App. 8a-9a. Two days later, before that information was made public, petitioner bet that Regado's stock price would fall further: he bought "put options" that entitled him to sell Regado shares for $2.50 each. *Ibid.* Regado subsequently announced that the clinical trial was being canceled because of the allergic reactions. *Id.* at 9a. Its stock price dropped from $2.80 to $1.10; petitioner bought 5000 shares for around $1.10 each; and he then exercised his put options to sell the same number of shares for $2.50 each. *Ibid.* He reaped a profit of around $3300 from those transactions. *Ibid.*

2. A federal grand jury indicted petitioner on two counts of insider-trading securities fraud, in violation of 15 U.S.C. 78j(b) and 78ff and 17 C.F.R. 240.10(b)-5. See Indictment 1-6. The first count was based on petitioner's sale of shares after he learned of the study's suspension; the second was based on his purchase of the put options after he learned of the study's cancelation. See Indictment 3-4.

The district court denied petitioner's motion to dismiss the indictment. Pet. App. 56a. A jury found him guilty on both counts. *Id.* at 58a. The court then denied his motion for a judgment of acquittal or a new trial. *Id.* at 57a-72a. The court sentenced him to six months of imprisonment, to be followed by two years of supervised release. Judgment 1.

3. The court of appeals affirmed. Pet. App. 1a-40a.

The court of appeals explained that petitioner's conviction rests on the "misappropriation theory" of insider trading, under which a person commits securities fraud

if he "misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information." Pet. App. 13a (quoting *United States* v. *O'Hagan*, 521 U.S. 642, 652 (1997)). The court made clear that, in order to obtain a conviction under that theory, the government must prove, among other things, that the defendant misappropriated the information "in breach of a fiduciary duty or similar relationship of trust and confidence." *Id.* at 14a (quoting *United States* v. *Falcone*, 257 F.3d 226, 230 (2d Cir. 2001) (Sotomayor, J.)).

The court of appeals rejected petitioner's contention that insufficient evidence supported a finding that petitioner had a fiduciary relationship with Regado. Pet. App. 10a-30a. The court observed that, under *Dirks* v. *SEC*, 463 U.S. 646 (1983), persons such as "underwriter[s], accountant[s], lawyer[s], or consultant[s]"—so-called "temporary insiders"—may owe fiduciary duties because they have "entered into a special confidential relationship * * * and are given access to information solely for corporate purposes." Pet. App. 14a-15a (quoting *Dirks*, 463 U.S. at 655 n.14 and *United States* v. *Chestman*, 947 F.2d 551, 567 (2d Cir. 1991) (en banc), cert. denied, 503 U.S. 1004 (1992)). The court found that "[petitioner's] role as a principal investigator * * * fit squarely within *Dirks*'s recognition of 'temporary insiders' who play fiduciary-like roles." *Id.* at 16a (citation omitted). The court noted that petitioner "was entrusted with Regado's information solely because of his duty to ensure the integrity and accuracy of the * * * clinical trial"; that petitioner "would not have been provided this information absent his 'explicit acceptance of a duty of confidentiality'"; and that peti-

tioner "further agreed to disclose if his holding of Regado stock exceeded $50,000." *Id.* at 16a-17a (citation omitted). "Under these circumstances," the court determined, "[petitioner] qualified as a temporary insider of Regado." *Id.* at 17a.

The court of appeals further determined that, "[s]eparate and apart from whether [petitioner] qualified as a 'temporary insider,'" petitioner's relationship with Regado was "fiduciary in nature" because it was "based upon trust and confidence." Pet. App. 17a. The court noted that Regado knew that the clinical trial "could become a matter of life and death" and that it chose petitioner, "a distinguished physician," to use his "experience and skill" in conducting that trial. *Id.* at 17a-18a. The court further observed that petitioner "expressly agreed to keep Regado's information confidential" and that his relationship with Regado was "'marked by' his service of 'the interests of the party entrusting him with [the] information.'" *Id.* at 18a (brackets omitted).

The court of appeals then explained that petitioner's misappropriation of the confidential information for personal gain "vitiate[d] the principal investigator's critical function, by fixing his attention on his own monetary gain and depriving the company of the independent assessment [it sought]." Pet. App. 18a. And the court recognized that "[w]hen a sponsor such as Regado files an application for the approval of a particular drug, * * * it makes representations to the FDA, which in turn the FDA necessarily relies on, about the integrity of the study performed by principal investigators. Allowing principal investigators to trade on the nonpublic inside information entrusted to them in the course of a study would thus undermine that study's integrity, the

very reason why principal investigators are vested with independence from the drug's corporate sponsor." *Ibid.* The court accordingly found "sufficient evidence that [petitioner's] role as a principal investigator clothed him with fiduciary status." *Id.* at 19a.

The court of appeals also rejected petitioner's contention that the district court committed reversible error by instructing the jury that "a person has a requisite duty of trust and confidence whenever a person agrees to maintain information in confidence." Pet. App. 30a (citation omitted). The court of appeals declined to decide whether that instruction was erroneous, because it found that any error was in all events harmless. *Ibid.* The court observed that the trial evidence "overwhelmingly established that [petitioner] had a fiduciary or fiduciary-like duty to Regado," and it was "'convinced that a rational jury would have found [petitioner] guilty absent the error.'" *Ibid.* (citation omitted).

ARGUMENT

Petitioner contends (Pet. 16-35) that (1) the court of appeals erroneously held that a mere agreement to keep information confidential establishes a duty of trust and confidence, (2) the court's interpretation renders the securities-fraud statute unconstitutionally vague, and (3) the court misapplied the harmless-error standard in holding harmless any error in the district court's jury instructions. Those contentions lack merit. The court of appeals' decision is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is unwarranted.

1. Section 10(b) of the Securities Exchange Act of 1934 (Exchange Act), ch. 404, 48 Stat. 891 (15 U.S.C. 78j(b)), makes it unlawful to use a "manipulative or deceptive device or contrivance" in connection with the

purchase or sale of securities and in violation of rules prescribed by the Securities and Exchange Commission (SEC). SEC Rule 10b-5(a), in turn, prohibits the use of a "device, scheme, or artifice to defraud" in connection with the purchase or sale of securities. 17 C.F.R. 240.10b-5(a).

This Court has recognized two main forms of insider trading that violate Section 10(b) and Rule 10b-5. See *United States* v. *O'Hagan*, 521 U.S. 642, 651 (1997). First, under the "classical" theory, a corporate insider commits securities fraud if he trades on material, nonpublic information, in violation of a fiduciary duty to the corporation's shareholders. *Ibid.* Second, under the "misappropriation" theory—the theory at issue here—a person commits securities fraud "when he misappropriates confidential information for securities trading purposes, in breach of a duty owed to the source of the information." *Id.* at 652. The misappropriator engages in deception by pretending "loyalty to the principal while secretly converting the principal's information for personal gain." *Id.* at 653 (citation omitted). In order to establish a conviction under the misappropriation theory, the government must show, among other things, that the defendant had a "fiduciary relationship" or a similar "'relationship of trust and confidence'" with the source of the information. *Id.* at 652, 662 (citation omitted).

The court of appeals correctly found sufficient evidence that, in the circumstances of this case, petitioner had the requisite relationship of trust and confidence with Regado. See Pet. App. 12a-20a. As the court observed, Regado secured petitioner's services because he was a "distinguished physician" and because it had "faith and confidence in [his] reputation as a prominent

* * * cardiologist." *Id.* at 17a-18a. It "entrusted" petitioner with confidential information about the clinical trial so that he could "ensure the integrity and accuracy" of the trial and protect the "health of his patients." *Id.* at 16a. Petitioner also signed a contract that expressly required him to hold that information in "strict confidence," which the court of appeals interpreted to prohibit petitioner from trading on that information. *Id.* at 19a-20a. Indeed, the court found that Regado "would not have provided this information had [petitioner] not agreed to keep the information confidential." *Id.* at 19a.

The court of appeals additionally observed that petitioner agreed to inform Regado if the value of his shares in it exceeded $50,000—a contractual term that suggests that Regado sought to avoid "a conflict between [petitioner's] financial interest and his duty to objectively gather and report information about [the drug's] safety and effectiveness." Pet. App. 19a. The court emphasized that financial disconnection and objectivity are critical in this context because "[w]hen a sponsor such as Regado files an application for the approval of a particular drug, * * * it makes representations to the FDA, which in turn the FDA necessarily relies on, about the integrity of the study." *Id.* at 18a; see *ibid.* ("Allowing principal investigators to trade on the nonpublic inside information entrusted to them in the course of a study would thus undermine that study's integrity, the very reason why principal investigators are vested with independence from the drug's corporate sponsor.").

As the court of appeals also explained, this Court's decision in *Dirks* v. *SEC*, 463 U.S. 646 (1983), supports the conclusion that petitioner had a relationship of trust

and confidence with Regado. In *Dirks*, this Court recognized that persons such as "underwriter[s], accountant[s], lawyer[s], or consultant[s] working for the corporation * * * may become fiduciaries" when they have "entered into a special confidential relationship in the conduct of the business of the enterprise and are given access to information solely for corporate purposes." *Id.* at 655 n.14. Here, petitioner had a special confidential relationship with Regado, and Regado provided him the information on which he traded "solely because of his duty to ensure the integrity and accuracy of the * * * clinical trial." Pet. App. 16a. Although *Dirks* involved the classical theory rather than the misappropriation theory, the court of appeals correctly understood that the two theories can "overlap[]" and that the legal principles developed in one context can provide useful guidance in the other. *Id.* at 15a (citation omitted); see, *e.g.*, *O'Hagan*, 521 U.S. at 675 (relying on *Dirks* in a misappropriation case).

2. Petitioner contends that the court of appeals erroneously held that "a confidentiality agreement by itself establishes a duty of 'trust and confidence.'" Pet. 18 (capitalization and emphasis omitted); see Pet. i ("simple agreement to keep information confidential by itself"); Pet. 13 ("a confidentiality agreement by itself"). He argues (Pet. 20) that this Court's precedents require a relationship of "'trust *and* confidence'" and that the court of appeals "effectively excise[d] the words 'trust' and 'and.'"

Petitioner, however, misreads the court of appeals' opinion. The court reiterated that it found the evidence sufficient to obtain a conviction under the misappropriation theory based on a requirement to prove that petitioner had a relationship of trust *and* confidence with

Regado. See, *e.g.*, Pet. App. 13a-14a, 17a, 19a-20a, 23a-24a. Further, in assessing the sufficiency of the evidence, the court did not rely on the confidentiality agreement standing alone; rather, it considered that agreement in conjunction with other circumstances, such as the trust that Regado reposed in petitioner as a physician, the parties' understanding that petitioner would use the confidential information for the clinical trial rather than for personal gain, and the necessity of independence for purposes of FDA approval. See pp. 7-8, *supra*. Indeed, the court noted—but expressly declined to address—a possible alternative ground for affirmance under 17 C.F.R. 240.10b5-2(b)(1), which provides that there is a "duty of trust or confidence" when "a person agrees to maintain information in confidence." See Pet. App. 20a n.5 (citation omitted). Nor did the court rely on the confidentiality agreement standing alone in reviewing the jury instructions. To the contrary, it assumed that the district court had erred in instructing the jury that a person has the requisite relationship of trust and confidence "whenever [he] agrees to maintain information in confidence," and then found that any error was harmless. *Id.* at 30a.

In any event, the court of appeals' analysis is correct even on petitioner's own view of the "relationship of trust and confidence." He appears to acknowledge (Pet. 20) that such a relationship exists when a fiduciary has a duty "to refrain from using his principal's information to trade for his own benefit." The court found precisely such a duty here: it determined that Regado "entrusted" petitioner with its confidential information "solely" in order to promote "the integrity and accuracy of the * * * clinical trial," not in order to enable petitioner to enrich himself. Pet. App. 16a; see *id.* at 21a

(rejecting petitioner's contrary interpretation of the agreement).

To the extent that petitioner contends (Pet. 24-25) that the court of appeals' decision conflicts with the Fifth Circuit's decision in *SEC* v. *Cuban*, 620 F.3d 551 (2010), that contention lacks merit. In *Cuban*, the Fifth Circuit concluded that the government can establish a relationship of trust and confidence by showing that the parties shared an implicit understanding that the confidential information would not be used for a party's "own personal benefit." *Id.* at 557. But as just explained, the court of appeals found that the government made that showing here. See p. 10, *supra*. Any assertion of a circuit conflict rests on petitioner's mistaken view that the court in this case, unlike the Fifth Circuit in *Cuban*, relied solely on the promise of confidentiality to establish the requisite duty. The legal standard applied by the court of appeals is correct and does not conflict with the standard applied by the Fifth Circuit.

Petitioner's challenge here ultimately boils down to a disagreement with how the court applied that standard in this case. See, *e.g.*, Pet. 24 (questioning the court's interpretation of the terms of Regado's agreement with petitioner). That factbound contention does not warrant further review. See Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."); *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). That is particularly so given that the court of appeals and district court both agreed that petitioner had the requisite relationship of trust and confidence. See *Kyles* v. *Whitley*, 514 U.S. 419, 457

(1995) (Scalia, J., dissenting) ("[U]nder what we have called the 'two-court rule,' the policy [in *Johnston*] has been applied with particular rigor when district court and court of appeals are in agreement as to what conclusion the record requires.") (citing *Graver Tank & Mfg. Co.* v. *Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949)).

3. Petitioner next contends (Pet. 26-31) that the trust-and-confidence component of the misappropriation theory of insider trading, as interpreted by the court of appeals, is unconstitutionally vague. That contention likewise does not warrant this Court's review.

As an initial matter, petitioner forfeited his vagueness challenge by failing to raise it below. The court of appeals' interpretation of the misappropriation theory broke no new ground; rather, it applied the court's precedents on insider trading. See, *e.g.*, Pet. App. 15a (citing *United States* v. *Chestman*, 947 F.2d 551, 567 (2d Cir. 1991) (en banc), cert. denied, 503 U.S. 1004 (1992)); *id.* at 23a (discussing the "factors" highlighted in "*Chestman*"); see also Pet. 15 (noting that the court applied "formulations * * * that were quoted in *Chestman*"). If petitioner believed that the securities laws, as interpreted in those precedents, were void for vagueness, he could have raised that claim in the district court or the court of appeals. Yet he failed to do so, and, accordingly, neither court addressed any such challenge. See Pet. App. 10a-11a (identifying issues raised on appeal); *id.* at 64a (identifying issues raised in the district court). This Court is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and its ordinary practice "precludes a grant of certiorari * * * when 'the question presented was not pressed or passed upon below,'" *United States* v. *Williams*, 504 U.S. 36, 41

(1992) (citation omitted). Even if the Court were to review petitioner's claim, moreover, it would be subject to review only for plain error—a standard that petitioner has not attempted to satisfy. See Fed. R. Crim. P. 52(b).

In any event, petitioner's contention lacks merit. This Court has explained that a criminal statute is not void for vagueness merely because it uses "a qualitative standard." *Johnson* v. *United States*, 576 U.S. 591, 604 (2015). Indeed, "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." *Nash* v. *United States*, 229 U.S. 373, 377 (1913). Examples of qualitative standards in criminal law include malice, willfulness, recklessness, negligence, and proximate cause. The concept of a relationship of "trust and confidence" likewise lacks mathematical precision, but that does not render it unconstitutionally vague. See *Salman* v. *United States*, 137 S. Ct. 420, 428-429 (2016) (rejecting vagueness challenge to a different element of insider trading). Further, the Court has explained that, ordinarily, a person who "engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." *United States* v. *Williams*, 553 U.S. 285, 304 (2008) (citation omitted). For the reasons discussed above, petitioner's relationship with Regado clearly constitutes a relationship of trust and confidence under the standard that he himself agrees is applicable. See p. 10, *supra*.

Petitioner's contention (Pet. 27) that the court of appeals "endorsed a mélange of competing and often counterintuitive theories, tests, and factors" is not germane to the disposition of his case. The court observed that

petitioner's challenge failed under *any* potentially applicable test—including tests that petitioner himself proposed—as a matter ancillary to its core "trust and confidence" determination. For example, petitioner now criticizes (Pet. 15) the court for applying a multi-factor test derived from its previous decision in *United States* v. *Chestman*, *supra*, but the court engaged in a "detailed analysis of *Chestman*" only "because of the extensive reliance on these factors in [petitioner's] briefing," Pet. App. 25a. The court's determination that petitioner's challenge fails under any applicable standard merely confirms that petitioner's conduct was "clearly proscribed" by the law, *Williams*, 553 U.S. at 304; it does not suggest that the law is vague.

4. Finally, petitioner contends (Pet. 31-35) that the court of appeals erred in finding harmless any error in the district court's instruction to the jury that "a person has [the] requisite duty of trust and confidence whenever [the] person agrees to maintain [the] information in confidence." Pet. App. 30a-31a (citation omitted). That contention, too, does not warrant further review.

An error in instructing the jury on the elements of a crime is subject to harmless-error review. See, *e.g.*, *Neder* v. *United States*, 527 U.S. 1, 15 (1999). An instructional error is harmless if "it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Ibid.* (citation omitted). The court of appeals found that standard satisfied here. It found that "the trial evidence overwhelmingly established that [petitioner] had a fiduciary or fiduciary-like duty to Regado," and it was "convinced 'that a rational jury would have found [petitioner] guilty absent the error.'" Pet. App. 30a (citation omitted).

Contrary to petitioner's contention (Pet. 31-32), the court of appeals did not conflate harmless-error review with sufficiency-of-the-evidence review. The court instead articulated and applied the correct legal test for harmless-error review. See Pet. App. 30a ("Even where an instruction is erroneous, we will affirm if it is 'clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error.'") (citation omitted). Petitioner correctly observes (Pet. 31-32) that sufficiency review focuses on whether a rational jury *could* have found the defendant guilty, while harmlessness review focuses on whether a rational jury *would* have done so. The court here, however, found the error harmless because it was convinced "that a rational jury *would* have found [petitioner] guilty absent the error." Pet. App. 30a (emphasis added; citation omitted).

Petitioner also errs in contending (Pet. 33-35) that the court of appeals' harmlessness holding improperly rests on a theory that was never presented to the jury. The government argued in closing that petitioner "intentionally violate[d] a duty of trust and confidence to Regado." 11/27/17 Trial Tr. 7; see *ibid.* ("The evidence showed that beyond a reasonable doubt Dr. Kosinski owed a duty of trust and confidence to Regado."); see also *id.* at 8, 14-15. And the district court instructed the jury that the government was required to prove that petitioner "had a duty of trust and confidence to Regado." Pet. App. 78a. The theory that petitioner was subject to a duty of trust and confidence thus *was* presented to the jury.

Petitioner notes (Pet. 32) that the court went on to provide the jury an incorrect definition of the term "duty of trust and confidence." But under this Court's precedents, an error in defining an element constitutes

harmless error if the court of appeals finds beyond a reasonable doubt that the mistake did not contribute to the verdict. See, *e.g.*, *Pope* v. *Illinois*, 481 U.S. 497, 502 (1987). The court of appeals made just such a determination here, see Pet. App. 30a, and petitioner's fact-bound challenge to the court's application of the harmless-error standard does not warrant further review, see Sup. Ct. R. 10; *Johnston*, 268 U.S. at 227.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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