No. 21-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2021

DAVID BLASZCZAK,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether information about a proposed government regulation is "property" and a "thing of value" belonging to the regulatory agency such that its disclosure can constitute the federal crimes of fraud or conversion.

2. Whether this Court's holding in *Dirks v. SEC*, 463 U.S. 646 (1983), that insider trading fraud requires proof of a breach of duty for a personal benefit, applies equally to insider trading fraud charged under Title 18 and Title 15, which proscribe fraud in virtually identical language.

PARTIES TO THE PROCEEDING

Petitioner David Blaszczak and Robert Olan, Theodore Huber and Christopher Worrall were defendants in the Court of Appeals.

Respondent United States of America was appellee in the Court of Appeals.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

United States v. David Blaszczak, Theodore Huber, Robert Olan, Christopher Worrall, Nos. 2018-2811, 2018-2825, 2018-286, and 2018-2878 (consolidated) (2d Cir.), consolidated judgment entered on December 30, 2019; and

United States of America v. David Blaszczak, Theodore Huber, Robert Olan, Christopher Worrall, No. 17 CR 357 (LAK) (S.D.N.Y.), judgments as to Robert Olan and Theodore Huber entered on September 21, 2018.

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The opinion for the United States Court of Appeals for the Second Circuit and the dissent is reported at 947 F.3d 19, and appears at Pet. App. 1a-31a. The District Court did not issue a written opinion on the questions presented. The Second Circuit's order denying rehearing en banc appears at Pet. App. 32a. Its order denying panel rehearing appears at Pet. App. 33a.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231. It entered judgment on September 21, 2018, and denied rehearing on April 10, 2020. The Second Circuit had jurisdiction under 18 U.S.C. § 3742(a) and 28 U.S.C. § 1254(1). This Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT STATUTORY PROVISIONS

Section 1343 of Title 18 of the United States Code prohibits the devising of "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," that is executed "by means of wire, radio or television communications."

Section 1348 of Title 18 of the United States Code prohibits the execution of "a scheme or artifice – to obtain by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale" of "any security of an issuer with a class of securities registered under section 12 of the Securities and Exchange Act of 1934" and that is required to file reports under section 15(d) of the Act.

Section 641 of Title 18 makes it a crime to "embezzle[], steal[], purloin[], or knowingly convert[] any record, voucher, money, or thing of value of the United States or of any department or agency thereof."

STATEMENT OF THE CASE

A divided panel of the Second Circuit made two important rulings that greatly expand criminal liability in ways that contravene decades of this Court's jurisprudence meant to contain such expansion.

The first important issue is the majority's unprecedented ruling, over a strong dissent by Judge Kearse, that confidential information about proposed government regulatory changes is "property" under the fraud statutes and "a thing of value" in the government's hands under 18 U.S.C. § 641, so that someone who conveys or receives such information is guilty of fraud or conversion just as if they received stolen government funds. Pet. App. 13a-16a. This holding is contrary to this Court's decisions in *Cleveland v. United States*, 531 U.S. 12 (2000), and *Kelly* v. *United States*, 140 S. Ct. 1565 (2020) just decided last term after the Second Circuit decided this case and denied rehearing.

The panel majority rejected the defendants' contention that government regulatory information is not "property" under *Cleveland* because it has no economic value and is a function of the government's regulatory role as a sovereign, not a property holder. The majority instead relied on *Carpenter v. United States*, 484 U.S. 19, 25-26 (1987), which held that a newspaper's "confidential business information" in articles before publication was property – its "stock in trade" "to be distributed and sold." Pet. App. 14a. Based on *Carpenter*'s holding with respect to proprietary *business* information, the majority ruled that the government's "right to exclude" the public from its information and its investment of resources to maintain confidentiality made the information "property." Pet. App. 15a-16a.

Judge Kearse dissented on the ground that this case was squarely governed by *Cleveland* because the government information had no economic value and the government's role as a property holder was not implicated. Pet. App. 28a-30a. Unlike the newspaper business in *Carpenter*, Judge Kearse reasoned, the government was not selling information, but simply regulating. Pet. App. 29a.

After the Second Circuit denied rehearing, this Court decided *Kelly*, 140 S. Ct. 1565, which adopted Judge Kearse's reading of *Cleveland* and rejected the reasoning of the Circuit majority that the "right to exclude" created a property interest and that government employee resources spent maintaining confidentiality created an economic interest in the information. *Kelly* held that the government's rights of "allocation, exclusion, and control" of access to government resources involve a "quintessential exercise of regulatory power," not property rights, and that employee time spent to keep information confidential does not create a "property" interest where the employee time was incidental to the scheme and not its object. *Id*. at 1572-74. As Judge Kearse explained in dissent, if government regulatory information is not "property," it cannot be "thing of value" under section 641, and all of the counts must be vacated. Pet. App. 28a, 30a-31a.

The second important ruling is the Second Circuit's adoption of a novel theory of insider trading fraud under Title 18 that sweeps away the longstanding elements of insider trading established by this Court. The panel majority affirmed the convictions of the defendants for wire fraud and securities fraud in violation of 18 U.S.C. §§1343 and 1348 on the government's new theory that tipping and trading on government information constitutes "fraud" under these statutes without the elements of breach of confidential duty for a personal benefit required for an insider trading conviction under *Dirks v. SEC*, 463 U.S. 646 (1983). Those elements were charged in the Title 15 counts covering the same conduct, and the jury acquitted all the defendants of all insider trading charges under Title 15. As a novel backup, however, the very same conduct was charged as a scheme to defraud under the Title 18 fraud sections – which contains the same language as Title 15 – and the government convinced the district court that the Title 18 fraud offenses did not require proof that a duty of confidence was breached for a personal benefit. The jury, freed of the need to find the insider trading elements, convicted Blaszczak and his codefendants of several counts of wire fraud and securities fraud under 18 U.S.C. §§1343 and 1348.

The panel majority affirmed on the ground that the personal benefit requirement is not in the texts of any of the statutes, but is a "judge-made doctrine" that is unique to Title 15. It ignored *Dirks*' holding that a breach of duty for a personal benefit is required to establish that insider trading constitutes "fraud," *Salman v. United States*, 137 S. Ct. 420, 427 (2016); *Carpenter v. United States*, 484 U.S. 19, 27-28 (1987); *Dirks*, 463 U.S. at 662 and that the texts of Title 18 and Title 15 proscribe "fraud" in virtually identical terms. This Court has long held that tipping or trading on tipped information does not constitute fraud at all unless the tipper breached a fiduciary duty to the source of the information to obtain a personal benefit. *O'Hagan v. United States*, 521 U.S. 642, 653-54 (1997); *Dirks v. SEC*, 463 U.S. at 662; *Chiarella v. United States*, 445 U.S. 222, 233. The Second Circuit's ruling upends decades of this Court's jurisprudence carefully delineating the stringent requirements to establish fraud by tipping or trading on inside information.

This decision not only "conflicts with relevant decisions of this Court," Sup. Ct. R. §10(c). If it stands, it will have an enormous impact on the administration of justice and a chilling effect on relations between government and constituents. Any leak of information from a government agency can now be charged as conversion. And any tipping of information or trading on tips from any source can be prosecuted as Title 18 insider trading fraud, regardless of whether a duty of confidence was breached in exchange for a personal benefit. As the majority opinion acknowledged, the government need no longer bother charging traditional insider trading; it need only charge the same conduct as Title 18 fraud and dispense with the insider trading elements. Pet. App. 37a. The majority concluded that such "policy considerations" were not its concern. Pet. App. 37a. They should, however, concern this Court, which has restrained before the government's novel use of existing statutes to expand the scope of the criminal law without an act of Congress. *See McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016); *Skilling v. United States*, 561 U.S. 358, 409-11 (2010); *McNally v. United States*, 483 U.S. 350 (1984). Because the overwhelming majority of insider trading cases are brought in the Southern District of New York, this decision will have an outsized impact on the enforcement of securities law and the securities industry in general.

This case is an ideal vehicle to stop judicial expansion of criminal liability for leaks and information sharing that does not constitute insider trading. The impact of the novel use of the Title 18 fraud statutes could not be clearer: each defendant was acquitted of all Title 15 insider trading charges, which properly required proof of a breach of a duty of confidence in exchange for personal benefit. They were only convicted of offenses based on tipping and trading charged under the Title 18 wire fraud and securities fraud sections, for which the court did not require proof of those elements. Likewise, on the "property" question, if government information is not property, none of the convictions can stand.

The Government's Theory and Charges

The government alleged that David Blaszczak, a consultant who advised investors in the healthcare industry and tried to predict regulatory changes, obtained nonpublic information about proposed regulatory changes promulgated by the Center for Medicare and Medicaid Services ("CMS") from his friend and former colleague at CMS, David Worrall, and passed them on in his predictions to his client Deerfield Management, specifically cooperating witness Fogel, who shared some of them with co-defendants Theodore Huber and Robert Olan. Pet. App. 8a. It charged Blaszczak with obtaining and transferring non-public information from CMS in this way about two proposed reimbursement rule changes, in radiation oncology and ESRD. Pet. App. 9a. Blaszczak and Worrall were also charged with the same conduct with respect to a third rule change in NxStage reimbursement but were both acquitted of all charges related to that rule. Pet. App. 11a-12a.

The same basic conduct was charged in three different ways: as insider trading securities fraud in violation of 15 U.S.C. §§ 78j(b) & 78ff and 17 C.F.R. § 240.10b-5 (counts 4-8 and 14); as wire fraud in violation of 18 U.S.C. §1343 (counts 9,12, and 15); as securities fraud in violation of 18 U.S.C. § 1348 (counts 10 and 16); and as conversion of government property in violation of 18 U.S.C. § 641 (counts 3, 11, and 13). Pet. App. 8a, 11a. Two conspiracies were also charged against all four defendants, one to convert government property, commit Title 15 securities fraud, and defraud the United States in violation of 18 U.S.C. § 371 (count 1) and one to commit wire fraud and Title 18 securities fraud in violation of 18 U.S.C. § 1348. Pet. App. 11a.

In addition, Blaszczak was charged alone with conversion and conspiracy to convert information about another CMS rule by obtaining information about another proposed rule from an unidentified CMS source and using it to predict a change in the home health care rule to a different hedge fund analyst, at Visium, who cooperated with the government on this case and others. Pet. App. 8a, 10a-11a.

The Trial

The evidence established that Blaszczak had worked for CMS, had many friends and contacts there, and was hired for his advice about upcoming CMS regulatory changes by clients who invested in the health care industry, including Deerfield. Pet. App. 8a-9a. CMS shared information and data underlying its rules changes with the pubic and industry stakeholders, through formal and informal meetings. C.A. App. 515-16, 474-76, 849-51. Its goal was to share the data used in its rate-setting process, "so the public could replicate the changes to the rates that CMS [was] proposing or has adopted." C.A. App. 850. CMS kept the text of any proposed rule change confidential until it was published. C.A. App. 465, 840.

In May, 2012 Blaszczak predicted forthcoming rate changes in radiation oncology reimbursement to Fogel, who shared the information with Huber and Olan, and Deerfield subsequently shorted stock in companies that would be affected by the rule change. Pet. App. 9a. Blaszczak's prediction was partially accurate, but partly wrong. Pet. App. 24a-25a. He accurately predicted the size of the cuts, which were recommended by the relevant medical society in published articles, but he incorrectly predicted that they would apply to all facilities. The published proposed rule did not apply to most facilities. C.A. App. 578-79, 659-668, 2567-2570. The evidence that Blaszczak's prediction came from Worrall consisted of Blasczczak's friendship with Worrall, who still worked at CMS (although not on the radiation oncology rule) and the fact that Blaszczak and Worrall met for lunch at CMS on May 8, the day before Blaszczak emailed Fogel to say he had an update on the radiation oncology rule. Pet. App. 9a, 25a. There was no evidence that Worrall received a penny from Blaszczak and no one at Deerfield even knew who Worrall was. C.A. App. 556, 1010.

In June, 2013, Blaszczak accurately predicted to Fogel the proposed rate cut in ESRD treatments but was wrong about the phase-in period, and Fogel thereafter shorted stock in the affected companies. Pet. App. 9a-10a, 24a-25a. C.A. App. 580-82, 585. The government's evidence that Worrall was the source of this information was, in addition to his friendship with Blaszczak, the fact that he worked on the underlying data that justified the rule change, which was publicly disclosed. C.A. 491-92, 495-96. The jury acquitted Worrall of all charges based on the ESRD rule. Pet. App. 11a-12a.

A small portion of the trial, at the very end, was devoted to the charges that Blaszczak converted and conspired to convert CMS information when he predicted the home healthcare reimbursement cut in 2013 to Christopher Plaford at a different hedge fund, Visium. Plaford, who had pled guilty to crimes beyond the conversion in this case, testified that Blaszczak predicted the range of the rate cut and said that it was based on his interactions with unidentified CMS people working on the rule at CMS. Pet. App. 10a. Plaford had already shorted stocks in anticipation of that cut, but testified that he maintained his short based on Blaszczak's prediction. Pet. App. 10a. No specific CMS source of this information was ever alleged.

Blaszczak's defense was that he did not obtain confidential non-public information from Worrall or any unauthorized government sources. Pet. App. 24a-25a. The evidence established that much of CMS's data and thinking was shared with the public and particularly with stakeholders in the health care industry, both formally and informally. Blaszczak contended that his predictions about rules changes came from various public sources, including independent studies that CMS relied on, the agency's own voluntary and published disclosures, and his own long experience in the health care field, including working at CMS. Pet. App. 24a-27a.

The Jury Instructions and Verdict

The district court rejected the defense contention, based on *Cleveland*, 531 U.S. 12, that government regulatory information could not be considered "property" and that therefore the evidence was insufficient to prove fraud under the Title 18 or conversion of a "thing of value" under section 641. Pet. App. 13a. It charged to the jury the government theory that CMS's information about regulatory changes was its "property" and "thing of value."

On the Title 15 charges, the jury was instructed that it could convict only if it found all the elements of insider trading: that Worrall had a duty of trust and confidence to his employer that he breached by revealing material non-public information to Blaszczak in exchange for a personal benefit and that each tippee knew that. Pet. App. 11a. With respect to the Title 18 wire fraud and securities fraud counts, however, the district court refused to instruct the jury on the need to find that an insider breached his duty of confidence in exchange for a personal benefit and that the others knew this. Pet. App. 11a.

Instead, the court allowed the jury to convict each defendant of wire fraud if it found "the fraudulent appropriation to oneself of the money or property entrusted to one's care by someone else." Pet. App. 11a. The jury was allowed to convict each defendant of securities fraud if it found that he engaged in "a scheme to embezzle or convert confidential information from CMS by wrongfully taking that information and transferring it to his own use or the use of someone else." Pet. App. 11a.

Significantly, the jury acquitted all defendants of all the insider trading charges under Title 15. Pet. App. 11a. The jury convicted the defendants of some of the wire fraud and securities fraud charges based on the same conduct of tipping and trading on non-public information. Pet. App. 11a-12a. All four defendants were convicted of either Title 18 wire fraud or securities fraud, or both, based on the radiation oncology prediction. Notably, Worrall (the alleged insider source) was acquitted of all charges relating to the ESRD prediction, but Blaszczak was convicted of wire fraud with respect to that prediction. Pet. App. 11a-12a.

The jury also convicted all four defendants of conversion with respect to the radiation oncology rule prediction and convicted Blaszczak of conversion with respect to the ESRD rule prediction and the home health care rule change predicted to Visium. Pet. App. 11a-12a.

The Court Of Appeals' Affirmance of the Convictions

Blaszczak and his codefendants appealed the convictions on the grounds, *inter alia*, 1) that fraud by insider trading, whether charged under title 15 or 18, required proof that the insider's duty of confidence was breached for a personal benefit and the tippees knew that, and 2) that regulatory information does not constitute government property or a thing of value under this Court's decision in *Cleveland*, 531 U.S. 12.

A divided panel of the Second Circuit held that regulatory information may be considered "property" in the hands of the government. Pet. App. 14a-16a. Rather than following *Cleveland*, the majority instead relied on this Court's holding in *Carpenter*, 484 U.S. at 26, that the contents of the Wall Street Journal's articles before publication was property because the Journal had "a property right in keeping confidential and making exclusive use" of the information before it was published. Pet. App. 14a-15a. The Circuit majority quoted *Carpenter*'s reasoning that the Journal's prepublication information was "stock in trade, to be gathered at the cost of enterprise, organization, skill, labor and money, and to be distributed and sold to those who [would] pay money for it." Pet. App. 14a, *quoting Carpenter*, 484 U.S. at 26. Although CMS was not a business, but a government regulatory agency, and its regulatory information was not its "stock in trade" to "be sold to those who would pay money for it," the majority decided that *Carpenter* controlled this case rather than *Cleveland*, 531 U.S. at 22-22, which held that government licenses are not property because they are a function of its regulatory role as a sovereign and not its economic role as a property holder. Pet. App. 14a-15a.

Acknowledging that "*Cleveland* remains good law," the Court of Appeals cited its own opinion in *Fountain v. United States*, 357 F.3d 250, 256 (2d Cir.

2004) that "*Cleveland* had only a modest effect on the existing legal landscape," and read the holding of *Pasquantino v. United States*, 544 U.S. 349, 357 (2005), that tax revenue is "property," as limiting the reach of *Cleveland*. Pet. App. 14a. The Second Circuit majority concluded that CMS's "right to exclude" others from its information was "comparable" to the Wall Street Journal's proprietary rights to its stories in *Carpenter* and therefore "squarely implicates the government's role as property holder." Pet. App. 15a. The majority also construed the "time and resources" that CMS "invest[ed]" in "generating and maintaining the confidentiality of nonpublic predecisional information" as creating an economic interest, as well as a regulatory interest, in confidentiality. Pet. App. 15a.

Having held that CMS's regulatory information was "property" regardless of *Cleveland*, the majority went on to hold that it was also a "thing of value" under section 641, following its 40-year-old holding that stolen government records about DEA informants was a "record" under the statute but the information could also be a "thing of value." *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979). Pet. App. 21a.

On the Title 18 insider trading convictions, the Circuit majority held that the elements of insider trading established in *Dirks* do not apply to the Title 18 fraud provisions. Pet. App. 17a-18a. It concluded that the breach of duty of confidence for a personal benefit requirement was a “judge-made doctrine premised on the Exchange Act’s statutory purpose” of eliminating the use of inside of inside information for personal advantage, and was unique to that statute. Pet. App. 17a-18a. Citing a footnote in a concurrence in *O’Hagan*, 521 U.S. at 682 n.1, the majority held that the embezzlement theory recognized in *Carpenter* included “no additional requirement that an insider breach a duty to the owner of the property,” let alone that “an insider tipped confidential information in exchange for a personal benefit.” Pet. App. 18a.

As support for the proposition that fraud by insider trading is broader under Title 18 than Title 15, the Circuit majority cited, without elaboration, a statement in the legislative history of section 1348 (the Sarbanes-Oxley Act of 2002) to the effect that it was meant to “supplement the patchwork of existing technical and securities law violations with a more general and less technical provision.” Pet. App. 18a. It did not explain how this applied to the similarly-worded fraud provision in section 1343, which has been on the books since 1952, but has only now been used to prosecute insider trading without the insider trading elements.

Finally, the Circuit majority acknowledged that the government could now prosecute all insider trading cases under the general fraud statutes and avoid the *Dirks* elements of insider trading, but declined to rest its interpretation of the fraud statutes “on such enforcement policy considerations.” Pet. App. 19a.

Judge Kearse dissented from the holding that CMS regulatory information could be “property” or a “thing of value,” in an opinion that would have vacated all counts of conviction on this ground. Pet. App. 28a-31a. Judge Kearse concluded that this case was squarely governed by *Cleveland*, not *Carpenter,* and that information about “a planned CMS regulation” is not “property” or a “thing of value.” Pet. App. 29a. Noting that “CMS is not a business; it does not sell, or offer for sale, a service or a product; it is a regulatory agency,” Judge Kearse reasoned that “[u]nlike the information that was planned for publication by the news publisher victim in *Carpenter*, information is not CMS’s ‘stock in trade... CMS does not seek buyers or subscribers; it is not in competition; it is an agency of the government that regulates the conduct of others.’” Pet. App. 29a. Like the licenses in *Cleveland,* CMS’s information is a function of its role as a regulator, not as a buyer or seller of property. Crucially, Judge Kearse noted that CMS regulates “whether or not any information on which is regulation is premised is confidential” and whether or not its substance or timing remains confidential or is disclosed. Pet. App. 29a. The information held by CMS had no economic value to CMS and could not be considered “property” or a “thing of value” just because it kept the information confidential. Pet. App. 29a-30a.

The Second Circuit denied rehearing and rehearing *en banc* on April 10, 2020. Pet. App. 32a. On July 14, 2020, following this Court's decision in *Kelly*, the Second Circuit stayed its mandate.

REASONS FOR GRANTING THE WRIT

Each ruling in this single case constitutes an unprecedented and breathtaking expansion of criminal liability based on the exchange of information. The Second Circuit's expansion of the general "fraud" statutes to criminalize tipping and trading on information that is not based on a breach of duty of confidence for a personal benefit sweeps aside decades of careful Supreme Court jurisprudence delineating the elements of insider trading. The panel majority's extension of the meaning of "property" for purposes of the criminal fraud and conversion statutes to include government regulatory information is directly contrary to this Court's holding last term in *Kelly* that the government's regulatory right to exclude and control does create a "property" interest. Further, it contravenes decades of precedent restricting the judicial expansion of criminal liability to vindicate claims of corruption outside the bounds of statutory offenses.

Moreover, given the pre-eminence of the Southern District of New York in prosecuting insider trading cases, this decision will have an outsized impact on the legal landscape. Either of these rulings, if left standing, will have enormous impact on freedom of information and speech, the relationship between government and constituents, and free exchange of information in the securities industry. This case and the rulings obtained by the government here represent extreme prosecutorial overreach of the kind this Court has curtailed. *See, e.g. Skilling*, 561 U.S. at 409-411; *McDonnell*, 136 S. Ct. 2355; *McNally*, 483 U.S. 350.

Petitioner's co-defendants Huber and Olan have filed a petition for certiorari in this case and petitioner adopts herein its reasons for granting the writ in this case. The arguments made by Huber and Olan apply equally to Blaszczak.

I. The Second Circuit's Ruling that Government Regulatory Information Constitutes Government "Property" and a "Thing of Value" Conflicts With This Court's decisions in Cleveland and Kelly and Greatly Expands Criminal Liability Without an Act of Congress.

In *Cleveland,* this Court ruled that a state gaming license is not "property" under the federal fraud statutes and therefore lying to obtain such a license is not federal fraud. 531 U.S. at 15. The Court reasoned that the state government's "core concern" in licensing was "regulatory," not economic, and its licensing decisions "implicate the government's role as sovereign, not as property holder." *Id*. at 24. The Court explained that the government's "intangible rights of allocation, exclusion, and control amount to no more and no less than [the State's] power to regulate," and do not create a property interest. In refusing to extend the federal fraud statutes beyond "traditional concepts of property,"*id*. at 24, the Court acted within its long tradition of narrowly construing the fraud statutes to restrain the government overreach through novel theories beyond the statutory mandate. It followed *McNally*, 483 U.S. 350, which construed the mail fraud statute narrowly to protect only property rights, not the right to "honest services." *Cleveland*, at 531 U.S. at 25. That tradition has continued since *Cleveland*. *See, e.g. McDonnell*, 136 S.Ct. at 2373 (rejecting the "'standardless sweep' of the government's reading" of the federal bribery statute, which would subject public officials to "prosecution, without fair notice, for the most prosaic interactions."); *Skilling*, 561 U.S. at 409-411 (construing narrowly again the "honest services" amendment to the fraud statutes to reach only bribery and kickbacks, and not the government's theory of "undisclosed self-dealing by a public official or private employee").

Yet the Second Circuit majority treated *Cleveland* as a kind of outlier, that "while []remaining good law," had "only a modest effect on the existing legal landscape" and was essentially limited to its facts. Instead, it oddly relied on *Carpenter*, 484 U.S. at 25-26, which ruled that "confidential *business* information"– the "stock in trade" of a newspaper's prepublication articles that it sells -- can be property. (Emphasis added). *Carpente*r has no bearing on government regulatory information, and its confidential business information was distinguished in *Cleveland* on that very ground. *See* 531 U.S. at 19, 23.

With the *Kelly* decision last term, this Court reaffirmed in no uncertain terms *Cleveland* and its principle that government regulatory matters are not the subject of "property" rights. The Court held that a scheme by public officials to close traffic lanes on a bridge for political retribution, and create a sham study justifying the closure, was not fraud because the object of the scheme was not property. 140 S. Ct. 1565. Rejecting the government's theories that taking control of the bridge was a taking of government property and that the employee costs of the lane closings deprived the government of property, *Kelly* directly relied on *Cleveland* and amplified its reasoning on "the distinction between property and regulatory power." *Kelly*, 140 S. Ct. at 1572. No matter how deceptive the lane closing scheme was, its aim was not property but the misuse of regulatory rights of "allocation, exclusion, and control." *Id*. at 1572-73.

The Court contrasted interference with the government's regulatory rights with fraud to obtain government property. To be fraud, the very object of the scheme must be to obtain something of economic value to the government, like schemes to use the services of government employees for personal enrichment, for example for home renovations. *Id*. at 1573. Although employee time was used in *Kelly* to create the sham traffic study that justified the lane closing, like the costs of issuing the license in *Cleveland*, it was "incidental to "and not the object of the scheme, and could not turn the plan into a scheme to obtain property from the government. *Id*. at. 1573-74.

Citing *McNally* and *Cleveland*, the Court identified the fundamental problem with expansive theories of property: "If U.S. Attorneys could prosecute as property fraud every lie a state or local official tells[], the result would be – as *Cleveland* recognized – "a sweeping expansion of federal criminal jurisdiction." *Kelly*, 140 S. Ct. at 1574. "And if those prosecutors could end-run *Cleveland* just by pointing to the regulation's incidental costs, the same ballooning of federal power would follow." *Id.*

That is exactly what happened in this case. Although *Cleveland* had been on the books for 20 years, the government convinced two courts that it did not really have to be followed and that government regulatory information could be considered property based on CMS's "right to exclude" the public from its information and its use of employee resources to maintain confidentiality. Pet. App. 33a-34a. *Kelly* makes abundantly clear that neither of these factors turn information about future regulatory plans into government "property." CMS's decisions about what to keep confidential and what to reveal are "quintessential" regulatory decisions, *Kelly*, 140 S. Ct. at 1572-73, like the decision whether to issue a state license in *Cleveland*, and involve no property rights.

The Second Circuit's expansive ruling on the meaning of property under the fraud statutes directly contravenes *Cleveland* and *Kelly* and allows open-ended prosecution of government leaks as fraud and conversion. Any leak of confidential government information that violates the agency's "right to exclude" and frustrates its employees' efforts to keep the information confidential – in other words, any leak – can be prosecuted as fraud or conversion. As this Court warned in *Cleveland* and *Kelly*, such a result would be "a sweeping expansion of federal criminal jurisdiction" without Congressional action. Only this Court can stop it by granting review.

II. The Second Circuit's Ruling that the Established Insider Trading Elements Do Not Apply to Insider Trading Fraud Charged Under Title 18 Conflicts With Decades of This Court's Precedents and Dramatically Expands Criminal Liability For Information Sharing.

For decades, this Court has held that fraud by insider trading requires proof that the tipper breached his duty of confidence in exchange for a personal benefit and that the tippees knew that. *Salman v. United States*, 137 S.Ct. 420, 427 (2016); *Carpenter v. United States*, 484 U.S. 19, 27-28 (1987); *Dirks*, 463 U.S. 646. Without those elements, there is no fraud. There is "no general duty" to "forgo actions based on material nonpublic information." *Chiarella*, 445 U.S. at 233. Such a duty arises only from a fiduciary duty and fraud occurs when a fiduciary breaches his duty of confidence for a personal benefit. *O'Hagan*, 521 U.S. at 654 ("A fiduciary who '[pretends] loyalty to the principal while secretly converting the principal's information for personal gain,'...'dupes' or defrauds the principal"). The "test" for such a breach "is whether the insider personally will benefit ... from his disclosure. Absent some personal gain, there has been no breach of duty." *Dirks*, 463 U.S. at 662. These elements, and the requirement that tippees know of the breach for a personal benefit, were reaffirmed in *Salman*, 137 S. Ct. at 427.

These elements are not spelled out in any statute but are required by this Court to establish "fraud" by insider trading, which is typically charged under Title 15 and SEC Rule 10(b), which proscribes any "device, scheme, or artifice to defraud,' or "fraud or deceit," "in connection with the purchase or sale" of securities. 18 U.S.C. § 1343, the wire fraud statute, similarly proscribes using the wires to commit any "scheme or artifice to defraud" or "involving false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1348, enacted in 2002 in the wake of the Enron accounting frauds, proscribes "a scheme or artifice" "to obtain by means of false or fraudulent pretenses, representations, or promises, any money or property" in connection with the purchase or sale of securities. These statutes all proscribe general "fraud." What makes tipping or trading on tipped information "fraud" under any of these statutes are the same elements: a breach of duty of confidence by the tipper for a personal benefit and knowledge of that by the tippees. *See Dirks*, 463 U.S. at 661-664; *Chiarella*, 445 U.S. at 230, 234-35; *O'Hagan*, 521 U.S. at 653-55.

This Court's decisions make clear that the elements of breach of duty of confidence for a personal benefit are required to prove any fraud by insider trading, whether under Title 15 or 18. In *Carpenter*, this Court affirmed the wire and mail fraud convictions under an embezzlement theory of a Wall Street Journal reporter who tipped his employer's confidential business information to others – the contents of an article before it was published – in exchange for a share of their trading profits. 448 U.S. 19. The tipping constituted "fraud" because "a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit." *Id*. at 27-28. *O'Hagan* extended the embezzlement theory to Title 15 and held that the elements – "converting the principal's information for personal gain"– are the same for both Title 15 and Title 18 because they are "fraud of the same species." 521 U.S. at 653-54.

The Second Circuit's ruling that insider trading charged under Title 18 can be proven without establishing a breach of confidence for a personal benefit – the essence of insider trading fraud – contravenes all of these precedents. Moreover, it makes no sense that virtually identical proscriptions of a "scheme to defraud" should require markedly different levels of proof. The meaning of "fraud" cannot change from one statute to another. Statutory terms should be construed consistently. *See, e.g.*, *Pasquantino v. United States*, 544 U.S. at 355 n.2; *Neder v. United States*, 527 U.S. 1, 21 (1999); *Carpenter*, 484 U.S. at 25 n. 6; *Envtl Def. v. Duke Energy Corp.*, 549 U.S. 561, 574 (2007).

The Second Circuit's radical departure from precedent sweeps away decades of careful jurisprudence delineating the elements of insider trading liability – an offense never specifically defined by Congress and with which care must be taken. Its reasons for such radical reinvention of insider trading liability do not withstand scrutiny, especially given the stakes. The Second Circuit notes that the personal benefit test is not in the text of any of the fraud statutes, but is a "judge-made doctrine" and concludes that *Dirks* is limited to Title 15 because it is premised on Congress having enacted the title 15 fraud provisions with the limited 'purpose of *** eliminat[ing] [the] use of inside information for personal advantage.' Pet. App. 17a-18a. It then concludes that the embezzlement theory recognized in *Carpenter* requires no proof of personal benefit because it is impossible to embezzle without committing fraud. Pet. App. 18a. Everything about this is wrong and the analysis is backward.

None of the fraud statutes spells out the insider trading elements; they are equally general about proscribing "fraud." This does not mean that what constitutes "fraud" varies from statute to statute. *Dirks* spells out what is required to establish "fraud" on the basis of tipping or trading on nonpublic information: Fraud requires a "breach of duty" and [w]hether disclosure is a breach of duty" "depends in large part of the purpose of the disclosure." 541 U.S. at 662. "[T]he test is whether the insider will benefit directly or indirectly from his disclosure. Absent some personal gain, there has been no breach of duty." *Id*. There is no "general duty" to "forgo actions based on material, nonpublic information." *Chiarella,* 445 U.S. at 233. It is only the breach of duty, proven by the personal benefit test, that makes the use of inside information *fraud*.

The Second Circuit's theory that embezzlement does not require proof of personal benefit is wrong as well and its analysis is circular. The embezzlement in *Carpenter* was affirmed as Title 18 fraud based on the employee's violation of his fiduciary duty for a share of trading profits. This Court explained: "[A] person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information *for his own personal benefit.*" 484 U.S. 27-28 (Emphasis added). In applying the embezzlement theory to Title 15 – “fraud of the same species” as wire fraud-- this Court reiterated that it is the breach of fiduciary duty for personal benefit that “constitutes fraud akin to embezzlement,” *O’Hagan*, 521 U.S. at 654 (“A fiduciary who ‘[pretends] loyalty to the principal while secretly converting the principal’s information for personal gain,’ ... ‘dupes’ or defrauds the principal.”)

The Second Circuit’s ruling allows prosecutors to bypass the long-established requirements of insider trading fraud by simply charging another version of “fraud” under Title 18 that does not require such proof. This ruling makes no sense and it places open-ended discretion in the hands of prosecutors. Without proof that information was tipped for a personal benefit, the linchpin of breach of duty, any sharing of information can be prosecuted as fraud. This decision violates this Court’s rule that criminal liability under the fraud statutes may not be expanded unless “Congress has spoken in clear and definite language.” McNally, 483 U.S. 359-60. Particular care should be taken when dealing with insider trading, an offense that has never actually been proscribed by Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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September 4, 2020