Nos. 20-306 and 20-5649

IN THE

Supreme Court of the United States

ROBERT OLAN AND THEODORE HUBER,

Petitioners,

v.

UNITED STATES,

Respondent.

DAVID BLASZCZAK,

Petitioner,

v.

UNITED STATES ,

Respondent.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT CHRISTOPHER WORRALL IN SUPPORT OF GRANTING THE PETITIONS

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QUESTIONS PRESENTED

1. Whether information about a proposed government regulation is "property" or a "thing of value" belonging to a federal, state, or local regulator such that its unauthorized disclosure can constitute fraud or conversion under federal criminal law.

2. Whether this Court's holding in *Dirks v. SEC*, 463 U.S. 646 (1983), requiring proof of "personal benefit" to establish insider-trading fraud, applies to Title 18 statutes that proscribe fraud in language virtually identical to the Title 15 anti-fraud provisions at issue in *Dirks*.

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RESPONDENT'S BRIEF IN SUPPORT OF THE PETITIONS FOR CERTIORARI

Respondent Christopher Worrall respectfully requests that this Court grant petitions for writs of certiorari, one filed by Robert Olan and Theodore Huber in No. 20-306 and another filed by David Blaszczak in No. 20-5649, to review the decision of the Second Circuit in this case. Worrall files this combined respondent's brief in support of both petitions.[1]

STATEMENT OF THE CASE

These petitions present critical questions about the reach of criminal prohibitions the government is now using to prosecute insider trading. The case warrants review for all the reasons stated in the Olan-Huber and Blaszczak petitions. The Second Circuit's decision conflicts with precedent, forces strange and untenable conclusions about what conduct constitutes property fraud, and confuses the enforcement regime governing insider trading.

Worrall writes separately to emphasize the serious implications of the Second Circuit's decision, especially for government employees, for due process and the separation of powers. The decision below may—the uncertainty is part of the problem—subject untold numbers of government employees to criminal prosecution and conviction for sharing any nonpublic information for any reason. The specter of this threat is all the more alarming because the government would not even have to prove that a particular disclosure was corrupt. The equivocal nature of the evidence used to obtain Worrall's conviction illustrates the point.

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[1] Pursuant to this Court's Rule 12.6, on September 16, 2020 Respondent Worrall gave notice to all parties of his intention to participate as a party in these cases.

Worrall maintains that the government failed to present sufficient evidence that he tipped any nonpublic information at all. Putting that aside, however, the Second Circuit's construction of the statutes at issue will result in convictions based on evidence just as likely to exist in cases of innocent disclosure as in cases of corrupt disclosure. If the criminal law is to reach so far, it should at least be at the behest of Congress—not that of inventive prosecutors.

I. Procedural Background

The Government's indictment charged Worrall, together with petitioners Olan, Huber, and Blaszczak, with various crimes arising out of supposed insider trading. Pet.App. 1a–2a.[2] The government's theory was that Worrall, an employee of a government agency called the Centers for Medicare & Medicaid Services ("CMS"), gave Blaszczak so-called predecisional information—the changes that proposed or final CMS reimbursement rules, not yet issued, would make to Medicare reimbursement rates for particular medical procedures—and that Blaszczak then tipped that information to Huber, Olan, and others at hedge fund Deerfield Capital Management, who traded on it. Pet.App. 2a.

Specifically, the indictment alleged that Worrall gave Blaszczak: (1) information about a proposed rule, released in July 2012, cutting reimbursable treatment times for two radiation oncology treatments; (2) information about a proposed rule, released in July 2013, cutting reimbursement rates for end stage renal disease ("ESRD") treatments; (3) information about the final rule, released in November 2013, concerning the

[2] For convenience, this brief refers to the Petitioners' Appendix in No. 20-306.

same ESRD treatments; and (4) an internal CMS report relating to ESRD that was relevant to the business of NxStage Medical, Inc. See Pet.App. 7a–8a. On the basis of these allegations, the government charged Worrall in sixteen counts: substantive counts of wire fraud (18 U.S.C. §1343), conversion of government property (18 U.S.C. §641), securities fraud under Title 15 (15 U.S.C. §78j(b)), and securities fraud under Title 18 (18 U.S.C. §1348), as well as two conspiracy counts.

All four defendants were tried together in a roughly month-long trial. See Pet.App. 8a, 9a. The jury acquitted Worrall of the conspiracy counts. It acquitted Worrall of all counts related to the proposed and final ESRD rules and the NxStage report. Of the eight substantive counts related to the July 2012 radiation oncology proposed rule, the jury acquitted Worrall of the Title 15 securities fraud and the Title 18 securities fraud counts. The jury convicted Worrall, however, of one count of wire fraud and one count of conversion of government property related to that proposed rule. Pet.App. 9a–10a.

On appeal, Worrall primarily argued that the evidence was insufficient to sustain his conviction because the government had failed to prove either that he had advance knowledge of the radiation oncology rule change, or that he had tipped it. He also joined the arguments made by Huber, Olan, and Blaszczak that (1) CMS predecisional information is not a "thing of value" under the conversion-of-government-property statute or "property" under the wire-fraud statute and (2) the wire-fraud statute requires the government to prove, in an insider-trading case, that the supposed tipper provided nonpublic information in exchange for a personal benefit, a requirement missing from the district court's jury instructions.

The Second Circuit rejected these arguments. Among other things, it held that the jury could have found Worrall "had access" to the radiation-oncology rule change because he knew people who knew the information. It also concluded the jury could have found Worrall tipped the information when Worrall and Blaszczak had lunch in the CMS cafeteria at around the time that Blaszczak allegedly passed on certain aspects of the radiation oncology rule change to an associate of Olan and Huber at Deerfield. See generally Pet.App. 36a–38a.

On the legal issues, the Second Circuit reached two critical holdings. It first concluded that regulatory information—such as the content of to-be released CMS reimbursement rules—constitutes "property" in the government's hands for purposes of the wire-fraud statute.[3] The Second Circuit principally relied on *Carpenter v. United States*, 484 U.S. 19 (1987), in which this Court held that the details of a *Wall Street Journal* column, which a *Journal* employee tipped to a stockbroker who traded on the information, were "confidential business information [that] has long been recognized as property" and thus were a proper predicate for a violation of the wire-fraud statute. 484 U.S. at 26. The Second Circuit found it "most significant that CMS possesses a 'right to exclude' that is comparable to the proprietary right recognized in *Carpenter*." Pet.App. 16a.

By contrast, the Second Circuit found that *Cleveland v. United States*, which held that the mail fraud statute "does not reach fraud in obtaining a state or

[3] The court reached the same conclusion with respect to the Title 18 securities-fraud statute. Because Worrall was acquitted of all charges under that law, this brief focuses on the Second Circuit's holding with respect to wire fraud.

municipal license" to operate video poker machines (531 U.S. 12, 20 (2000)), was inapplicable. See generally Pet.App. 15a–18a.[4] *Cleveland* held that the licenses were not property because they had no economic value to the government, and no economic value at all until issued to private parties, and the state's right to control the issuance of its licenses "implicate[d] [its] role as sovereign, not as property holder." *Id.* at 24. CMS's role is similarly regulatory. Nonetheless, the Second Circuit found that "CMS's right to exclude the public from accessing its confidential predecisional information squarely implicates the government's role as property holder, not as sovereign." Pet.App. 16a.

Having found that CMS predecisional information constitutes "property" under the wire fraud statute, the Second Circuit proceeded to find it also constitutes a "thing of value" under the conversion-of-government-property statute, 18 U.S.C. §641. The court relied on a forty-year-old circuit precedent, *United States v. Girard*, 601 F.2d 69 (2d Cir. 1979), which it construed as holding that "confidential information can itself be a 'thing of value' under Section 641." Pet.App. 30a.

Second, the Second Circuit concluded that the insider-trading elements of Title 15 do not necessarily apply when the government prosecutes insider trading under the wire fraud statute.[5] Specifically, this

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[4] "The mail and wire fraud statutes share the same language in relevant part, and accordingly [the Court] appl[ies] the same analysis to both sets of offenses." *Carpenter v. United States*, 484 U.S. 19, 25 n.6. (1987); compare 18 U.S.C. §1341 (mail fraud) with 18 U.S.C. §1343 (wire fraud).

[5] Again, while the court reached the same conclusion with respect to the Title 18 securities-fraud statute, this brief focuses on the wire-fraud holding. See *supra* n.2.

Court held in *Dirks v. SEC*, 463 U.S. 646 (1983), that a defendant accused of tipping inside information may not be liable under 15 U.S.C. §78j(b) unless the government proves he breached a fiduciary duty by disclosing material, nonpublic information in exchange for a "personal benefit." 463 U.S. at 663. This Court reiterated this requirement four years ago in *Salman v. United States*, __ U.S. __, 137 S. Ct. 420 (2016). Yet, while recognizing that the wire fraud statute and the Title 15 securities-fraud statute "share similar text and proscribe similar theories of fraud," the Second Circuit held that "the personal-benefit test does not apply to the wire fraud" statute. Pet.App. 25a. According to the court, the personal-benefit test "is a judge-made doctrine premised on the Exchange Act's statutory purpose," and therefore could be disregarded despite the absence of a textual basis for treating the similarly worded statutes differently.

Judge Kearse dissented on the "property" issue. She concluded that *Cleveland* directly applied to the similarly regulatory context here, and that the contents of "a planned CMS regulation" do not constitute "property" for purposes of wire fraud or "a thing of value" for purposes of conversion. Pet.App. 46a. Emphasizing 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 concluded that "[u]nlike the information that was planned for publication by the news publisher in *Carpenter*, information is not CMS's 'stock in trade.'" Pet.App. 46a, 47a (quoting *Carpenter*, 484 U.S. at 26). Instead, she continued, just like the state issuer of video-poker licenses in *Cleveland*, CMS acts as a regulator, rather than a buyer or seller of property, and it does so "whether or not any information on which its regulation is premised is confidential." Pet.App. 47a. Judge Kearse therefore would

have held that all the convictions—including Worrall's conviction for wire fraud and conversion—should be vacated. Pet.App. 50a.

Worrall and petitioners all moved for panel rehearing and rehearing en banc, which the Second Circuit denied on April 10, 2020. Pet.App. 57a. On July 14, 2020, after this Court issued its decision in *Kelly v. United States*, __ U.S. __, 140 S. Ct. 1565 (2020), discussed further below, the Second Circuit stayed its mandate.

II. Factual Background

The conviction of Worrall that the Second Circuit upheld rested on the slenderest of reeds. Worrall was acquitted of all charges but two, and those two were based on the government's theory that he tipped Blaszczak the contents of CMS's proposed radiation oncology rule, which was released on July 6, 2012. See Pet.App. 4a. Even if the proposed rule change was confidential, in order to prove that Worrall tipped it, the government had to prove that he knew it.[6]

Worrall started at CMS as a summer intern in 1999. He worked his way up, and by mid-2012 he was a data analyst. He did not work on the payment systems for Medicare reimbursement. He did not work on reimbursement rule changes. And he did not work on radiation oncology issues.

The government's case depended on a single lunch that Worrall had with Blaszczak on May 8, 2012. The

[6] The following summary of the facts is adopted from Worrall's opening brief on appeal to the Second Circuit, which cites the trial record as appropriate. See Br. of Defendant-Appellant Christopher Worrall, *United States v. Blaszczak et al.*, No. 18-211-cr(L) (2d Cir.), Dkt. 128 at 1–4, 9–16.

two were friends, and occasionally socialized. According to the government, during a meal in the CMS cafeteria after Worrall had signed Blaszczak into CMS, Worrall told Blaszczak about the upcoming radiation oncology rule change. The next day, the government claimed, Blaszczak shared that information with Deerfield, and it then found its way to Huber and Olan.

No evidence exists that Worrall knew in advance of its public release what the radiation oncology reimbursement rate cut was going to be. The government hypothesized that Worrall learned about contemplated rules from his work as a data analyst. But that theory collapsed when the government's first witness—a senior CMS official—testified that Worrall's work had nothing to do with radiation oncology or the formulation of reimbursement changes. The government then suggested that Worrall might have received some document about radiation oncology or attended some meeting at which it was discussed. Yet, though investigators seized every scrap of electronic communication from Worrall's CMS email box, his calendar, his personal and work phones, and his laptop, the government found no evidence that Worrall received a single email, memorandum, calendar invitation, or any other document that mentions the 2012 radiation oncology reimbursement changes in advance of their public release. And not a single CMS employee—not even one of those who actually prepared the 2012 radiation oncology reimbursement rule—ever placed Worrall at any meeting or on any phone call involving that topic. In fact, *no witness* and *no document* tied Worrall to any work on radiation oncology in 2012.

The government was thus left to speculate that Worrall must have learned about the radiation oncology reimbursement cut *somehow*. But Blaszczak (a former CMS employee himself) had many sources of information at CMS. His practice was to attend meetings in CMS's building, walk the halls looking to run into someone he knew, chat with staff, and the like. Cooperating witnesses testified that Blaszczak's sources regarding upcoming regulations were CMS personnel who actually worked on the particular regulation in which he was interested. And he numbered among his sources employees of the very CMS subgroup (of which Worrall was never a member) that generated the proposed 2012 radiation oncology rule. Thus, Blaszczak could have learned the information at issue from others who, unlike Worrall, were in a position to know.

To be sure, the Second Circuit held that the evidence sufficed to support Worrall's conviction. And although Worrall disagrees with that holding, he recognizes it is not part of the case as it comes to this Court. Even putting aside whether the evidence was sufficient, however, the Second Circuit could not have affirmed Worrall's conviction but for its watered-down interpretation of the relevant statutes. The government offered no evidence that Worrall made a penny of profit from the trading or obtained any other personal benefit from it. Indeed, no evidence suggests Worrall knew about the trades effectuated by the other defendants (or even of Deerfield's existence). Thus, the Second Circuit's capacious reading of the conversion and wire-fraud statutes allowed it to affirm his conviction based on the fact that Worrall had lunch with the wrong person at the wrong time.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's Decision Conflicts With This Court's Decisions And Expands The Reach Of Several Criminal Statutes Beyond What Their Text Warrants.

The Second Circuit's decision is incompatible with this Court's holdings regarding the meanings of "property" and "fraud" as used in the relevant statutes. In particular, the Second Circuit's conclusion that confidential government information about possible regulatory action can constitute property directly conflicts with this Court's holdings in *Cleveland* and *Kelly*. And the conclusion that statutes criminalizing fraud do not require evidence that a supposed insider tipped information in exchange for a personal benefit conflicts with this Court's holdings in *Dirks* and *Salman*.

By misreading these binding precedents, the Second Circuit has endorsed an impermissible expansion of several criminal statutes that, if not corrected, will have far-reaching and harmful effects.

A. Whether A Proposed Change In Government Regulation Constitutes "Property" And A "Thing of Value" Merits Review

1. *Cleveland* and *Kelly* confirm that inherently regulatory activities of government agencies do not implicate property for the purposes of the mail- and wire-fraud statutes.

In *Cleveland*, this Court held that licenses are not government property, and therefore, that lying to obtain a state license is not mail fraud. 531 U.S. at 15. The Court rejected the argument that the State's right to control gaming licenses transformed those licenses into property in the government's hands. *Id.* at 23. In-

stead, the Court held that the "intangible rights of allocation, exclusion, and control amount to no more and no less than [the State's] sovereign power to regulate." *Id.* The "State's right of control," this Court made clear, "does not create a property interest[.]" *Id.*

Relying on *Cleveland*, this Court held in *Kelly* that a scheme to take control of lanes in the George Washington Bridge toll plaza was "a scheme to alter [] a regulatory choice" and "not one to appropriate the government's property." ! U.S. __,140 S. Ct. 1565, 1572 (2020). As in *Cleveland*, the "regulatory rights of allocation, exclusion, and control" at issue did not amount to property rights for purposes of the wire-fraud statute. *Id.* at 1573. (quotations omitted).

2. The Second Circuit's decision is irreconcilable with these precedents. Concluding that the "predecisional" information here constituted property under the wire-fraud statute, the panel "f[ou]nd it most significant that CMS possesses a 'right to exclude' that is comparable to the property right recognized in *Carpenter*." Pet.App. 16a. But *Cleveland* expressly recognized that "[a] right to exclude in [a] governing capacity"—as opposed to the commercial context of the information in *Carpenter*—"is not one appropriately labeled 'property.'" *Cleveland*, 531 U.S. at 24.

The Second Circuit also rested its decision on the proposition that the government's expenditure of resources to maintain confidentiality transforms predecisional information into property. Pet.App.17a. But *Cleveland* and *Kelly* expressly reject that theory as not "sufficient to establish" a "property right." *Cleveland* 531 U.S. at 22; *see also Kelly*, 140 S.Ct. at 1572–73. As *Kelly* made clear, "a property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme." *Id.* at 1573. Whatever costs

CMS incurred in this case, they were at best an incidental byproduct of the alleged scheme, not the target of that scheme.

The same errors infect the Second Circuit's (largely unreasoned) conclusion that proposed government regulations are a "thing of value" for purposes of the conversion statute. Conversion requires that property be expropriated for the use of another. See, e.g., *Morissette v. United States*, 342 U.S. 246, 260 (1952) (noting that the crimes grouped in 18 U.S.C. §641 "are invasions of rights of property"); *United States v. Evans*, 572 F.2d 455, 471 (5th Cir. 1978) ("it is an essential element of a violation of . . . [Section] 641 that the government suffer some actual property loss."). But, as Judge Kearse recognized, planned rule changes are not "a 'thing of value' to CMS" that can be converted because CMS undertakes its regulatory activity "regardless of whether information as to the substance or timing of a planned regulation remains confidential" or not. Pet.App. 46a, 47a. If the predecisional information at issue here is not property in the government's hands—and as explained above, it is not—it cannot be a "thing of value" "that is susceptible to conversion." Pet.App. 47a (Kearse, J., dissenting).

3. The Second's Circuit's errors are consequential. *Cleveland* and *Kelly* hold that exercises of government regulatory power are not property for the purposes of the wire fraud statue. Yet the Second Circuit's decision holds that *information about* the objects of government regulation are property. That makes little sense, and it implies untenable results. For example, someone who deceptively obtains gaming licenses could not be prosecuted because such licenses are not property, but someone who discloses confidential information about the government's regulation of those same licenses could be prosecuted. Similarly, while

the deceitful conduct that perverted the regulatory decisions in *Kelly* could not support a wire-fraud conviction, the implication of the Second Circuit's reasoning is that disclosing confidential information about those decisions might. Such absurdities illustrate the confusion the Second Circuit's decision has created.

For these reasons, and the additional reasons articulated in the Olan-Huber Petition and the Blaszczak Petition, the Second Circuit's decision regarding whether government predecisional regulatory information constitutes property warrants review.

B. Whether The "Personal Benefit" Requirement Applies When Insider-Trading Is Prosecuted Under The Wire Fraud Statute Merits Review

1. As this Court's opinions in *Dirks* and *Salman* confirm, the exchange of inside information for a personal benefit is what makes insider-trading fraudulent under the anti-fraud statutes.

In *Dirks*, a civil proceeding brought by the SEC, this Court found that a financial analyst, who disclosed nonpublic information without obtaining any personal benefit for himself in exchange, did not violate the Title 15 securities fraud statute. This Court reasoned that "[i]n determining whether the insider's purpose in making a particular disclosure is fraudulent . . . the initial inquiry is whether there has a been a breach of duty by the insider." *Dirks*, 463 U.S. at 663. That is, the insider does not "deceive, manipulate, or defraud"—as the statute requires—unless he or she breaches a duty to the source of the information. *Id.* (quoting *Aaron v. SEC*, 446 U.S. 680, 686 (1980)).[7]

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[7] In *Dirks* itself, the tipper was an employee of the company whose shares were ultimately traded, so his duty ran to the

And "the test" in determining whether a breach of duty has occurred "is whether the insider personally will benefit, directly or indirectly, from his disclosures." *Id.* Thus, if there is no personal benefit, according to *Dirks*, there is no fraud.

Salman reaffirmed the holding of *Dirks*. There, this Court again stressed that "the disclosure of confidential information without personal benefit is not enough" to establish a criminal breach of duty. *Salman v. United States*, 137 S. Ct. 420, 427 (2016).

2. The Second Circuit's decision cannot be squared with these precedents. The court held that the term "fraud" has a different meaning for purposes of Title 15 securities fraud than it does in the Title 18 fraud statutes. The court based this striking conclusion on its apparent assumption that "the personal-benefit test is a judge-made doctrine premised on the Exchange Act's statutory purpose." Pet.App. 22a. This is wrong. As explained above, the personal benefit test follows from the statute's prohibition of fraud. *See also* Karen E. Woody, *The New Insider Trading*, 52 Ariz. St. L.J. 594, 619 (2020) ("What the Second Circuit misses is that insider trading is not civil securities *fraud* unless it meets the elements of the Dirks personal benefit test.") (emphasis added). And, of course, fraudulent conduct is as essential to wire fraud as it is to Title 15 securities fraud.

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shareholders of that company. See *Dirks*, 463 U.S. at 660. In *O'Hagan v. United States*, this Court recognized that insider trading also includes situations in which an insider misappropriates nonpublic information in violation of a duty to the source of that information, even if the trading ultimately occurs in the shares of an unrelated company. See *United States v. O'Hagan*, 521 U.S. 642, 653 (1997). In this case, the government relied on the latter theory.

The other basis for the Second Circuit's decision is its assertion that "the personal-benefit test finds no support in the embezzlement theory of fraud recognized in *Carpenter*." Pet.App.23a. This too is wrong.

As noted above, *Carpenter* upheld the conviction of a *Wall Street Journal* employee who tipped the contents of a forthcoming column to a stockbroker who traded on the basis of that confidential business information. *Carpenter*, 484 U.S. at 24. In doing so, the Court likened the employee's conduct to embezzlement, which it found encompassed within the meaning of "fraud" in the wire-fraud statute. The Court defined embezzlement as "'the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another.'" *Id.* at 27 (quoting *Grin v. Shine*, 187 U.S. 181, 189 (1902)).

In applying that definition to the facts, the Court cited the "general proposition" that "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* but must account to his principal for any profits derived therefrom." *Id.* at 27–28 (quoting *Diamond v. Oreamuno*, 248 N.E.2d 910, 912 (N.Y. 1969)) (emphasis added). The facts of *Carpenter* itself fit comfortably within that proposition. The tipper "passed along to his co-conspirators confidential information belonging to the Journal, pursuant to an ongoing scheme to share profits from trading." *Id.* at 27. Thus, *Carpenter* hardly supports the Second Circuit's conclusion that, when the government labels an alleged insider-trading scheme "embezzlement," the personal-benefit requirement disappears.

3. Once again, the Second Circuit's error is sure to spawn confusion and inconsistency. As this Court has

recognized in the context of corporate information, the disclosure of nonpublic information is often appropriate. See *Dirks*, 463 U.S. at 658 ("It is commonplace for analysts to ferret out and analyze information, and this often is done by meeting with and questioning corporate officers and others who are insiders.") (quotation marks and citation omitted). This is even more true in the context of government information, which whistleblowers, journalistic sources, and others commonly have non-corrupt reasons for disclosing. The personal-benefit requirement is the very criterion that separates corrupt disclosures from non-corrupt disclosures.

The Second Circuit effaced that requirement from the criminal law governing insider trading. If its decision stands, only a prosecutor willing to assume an unnecessary burden of proof would charge insider-trading under Title 15. If all leaks of government deliberations are now to be criminalized, it should be Congress that does the criminalizing, not courts.

The Second Circuit has also created a confounding asymmetry between civil and criminal enforcement. The SEC is the expert agency charged with policing the securities markets through civil investigations, enforcement proceedings, and the like. It will continue to be bound by the personal-benefit requirement, as its remit is to enforce Title 15 statutes such as Section 10(b) and Rule 10b-5. Thus, under the Second Circuit's rule persons who disclose nonpublic information without any personal benefit will not be civilly liable in an SEC proceeding, but may well be criminally liable for violating the wire-fraud statute (or the Title 18 securities-fraud statute). Commentators have already recognized that this result "could mean the end of the SEC's role in policing insider trading given that the

agency only has civil authority to do so." Woody, 52 Ariz. St. L.J. at 600.

For these reasons, and the additional reasons articulated in the Olan-Huber Petition and the Blaszczak Petition, the Second Circuit's decision to read the personal benefit requirement out of the definition of fraud warrants review.

II. By Diluting The Elements Required To Prove Criminal Insider-Trading, The Second Circuit's Decision Contradicts Constitutional Principles And Countenances Prosecutions And Convictions Based On Equivocal Evidence.

In addition to creating a regime governing insider trading that is overinclusive, self-contradictory, and confusing, the Second Circuit's errors erode critical protections afforded to criminal defendants as a matter of due process and separation of powers principles. It also risks allowing the government to obtain convictions on the basis of conduct that bears little resemblance to what Congress targeted in enacting the statutes at issue. These serious consequences will fall first on government employees, who now risk criminal prosecution for sharing information about the government's policymaking.

1. "The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has often been recognized by this Court." *Bouie v. City of Columbia*, 378 U.S. 347, 350–51 (1964). This principle of "fair notice" is "the first essential of due process of law." *United States v. Davis*, 139 S. Ct. 2319, 2325 (2019) (quotation marks omitted). Moreover, "[o]nly the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has

to write statutes that give ordinary people fair warning about what the law demands of them." *Id.* at 2323.

As Madison warned long ago:

> It will be of little avail to the people that the laws are made by men of their own choice if the laws be so voluminous that they cannot be read, or so incoherent that they cannot be understood; if they be repealed or revised before they are promulgated, or undergo such incessant changes that no man, who knows what the law is today, can guess what it will be tomorrow.

The Federalist No. 62, at 381 (Clinton Rossiter ed., 1961).

As a corollary to these principles, this Court has also emphasized that clearly circumscribed interpretations of criminal statutes safeguard "the requirement that *a legislature* establish minimal guidelines to govern law enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983) (emphasis added); see also *United States v. Harriss*, 347 U.S. 612, 617–24 (1954) (narrowly interpreting statute to avoid void-for-vagueness problems). Expansive interpretation of statutes, by contrast, empowers prosecutors to pursue "new form[s] of misbehavior without need for congressional action." John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of A White-Collar Crime*, 21 Am. Crim. L. Rev. 1, 27 (1983). "When you combine a broad federal criminal code with unclear statutory provisions, the inevitable result is that lawmaking passes from the hands of the legislature into the hands of prosecutors and judges." Shon Hopwood, *Clarity in Criminal Law*, 54 Am. Crim. L. Rev. 695, 703. (2017). Broad interpretation creates the risk that "[a]s criminal law expands, both

lawmaking and adjudication pass into the hands of police and prosecutors; law enforcers, not the law, determine who goes to prison and for how long. The end point of this progression is clear: criminal codes that cover everything and decide nothing, that serve only to delegate power to district attorneys' offices and police departments." William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 Mich. L. Rev. 505, 509 (2001).

2. While these constitutional concerns often arise in the context of a vague statute, they are not limited to that context. "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language." *Bouie*, 378 U.S. at 352. Honoring this principle, this Court does not give criminal statutes their broadest possible reading. On the contrary, it is vigilant against the dangers of overbroad construction. See, e.g., *McDonnell v. United States*, 136 S. Ct. 2355, 2367–68 (2016) (adopting "a more bounded interpretation of 'official act'" under the federal anti-bribery statutes, in part to avoid constitutional concerns); *Yates v. United States*, 574 U.S. 528, 536 (2015) (plurality) (narrowly interpreting statutory term "tangible objects" to "cover only objects one can use to record or preserve information"); *United States v. Santos*, 553 U.S. 507, 514 (2008) (plurality) ("The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them."); *Liparota v. United States*, 471 U.S. 419, 427 (1985) (narrowly interpreting *mens rea* requirement of a criminal statute to avoid criminalizing conduct Congress likely did not target).

With respect to the mail- and wire-fraud statutes specifically, this Court has been careful to enforce the

limitations of the statutes Congress passed. In addition to *Cleveland* and *Kelly*, discussed above, this Court earlier rejected the original "honest-services" fraud theory by insisting on the statutory requirement of a fraud that deprived the victim of "money or property." See *McNally v. United States*, 483 U.S. 350, 359 (1987). And it limited the subsequently passed honest-services fraud statute to the core of the theory that Congress recognized—bribery and kickback schemes. See *Skilling v. United States*, 561 U.S. 358, 409 (2010). This circumspection recognizes—and guards against—the potential for abuse by an enterprising prosecutor. *See* Hopwood, *Clarity in Criminal Law*, 54 Am. Crim. L. Rev. at 703–04 (noting that broad judicial interpretation of the mail- and wire-fraud statutes has empowered prosecutors to define the boundaries of the laws).

3. The Second Circuit's decision squarely implicates these constitutional concerns. By holding that all government information is property subject to the wire-fraud and conversion-of-government-property statutes, the panel has turned any agency's confidentiality rules into a criminal code. Most agencies, like CMS, have restrictions on the disclosure of what one might call predecisional information, but Congress has seen fit to criminalize such disclosures in only a few instances. See, e.g., 18 U.S.C. §793 (confidential national defense information); 18 U.S.C. §794 (similar); 18 U.S.C. §798 (classified information); 50 U.S.C. §783(a) (classified national-security information to foreign government); 18 U.S.C. §1030(a)(1) (national-defense or foreign-relations information accessed by computer).

The federal government has 2.1 million employees. Julie Jennings & Jared C. Nagel, Cong. Research Serv., R43590, *Federal Workforce Statistics: OPM and*

OMB at 1 (2019).[8] State governments presumably have millions more. *See* Lisa Jessie & Mary Tarleton, U.S. Census Bureau, G12-CG-EMP, *2012 Census of Governments: Employment Summary Report* at 9 (2014).[9] According to the Second Circuit, all of them are now subject to criminal prosecution if they disclose some piece of government information in violation of some agency rule or regulation. The courts will have to decide the scope of such federal, state, and local regulations, whether they are ambiguous, and other questions arising from the Second Circuit's sweeping holding. Without instruction from Congress, there is no warrant for courts to wade into this morass.

It gets worse. The Second Circuit's decision introduces ambiguities as to *when* certain kinds of information become property the disclosure of which subjects government employees to criminal liability. If the contents of an agency's proposed rule are property, what about something in a draft proposed rule? Is that information property if the draft is later significantly altered? Must the information be written down to become property? Or, does a rumor about the direction of a rule change constitute property? Only if it turns out to be accurate? What about an employee's impression about the stated priorities of a rulemaking supervisor? The Second Circuit does not answer these questions, and its decision does not suggest a principled way to do so. Indeed, the court upheld the convictions here without evidence of where the information Blaszczak was supposedly told came from (a draft

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[8] Available at https://fas.org/sgp/crs/misc/R43590.pdf (last accessed 10/6/2020).

[9] Available at https://www2.census.gov/govs/apes/2012_summary_report.pdf (last accessed 10/6/2020).

rule, an overheard conversation, etc.) and without evidence Worrall himself ever knew the information. The only thing that was known was that Blaszczak's information was partially wrong. Pet.App. 6. In any event, such questions illustrate the degree of uncertainty that the Second Circuit's holding has imposed on government employees, as well as the extent of the discretion it has bestowed on prosecutors.

4. The Second Circuit's decision implicates constitutional concerns for another reason. The ruling removed a requirement of wire fraud, eliminating the personal-benefit test that determines whether an insider's disclosure of information is fraudulent. It thereby includes within the scope of a statute criminalizing wire *fraud* conduct that no one previously believed the law targeted (because it was not fraudulent conduct). And in many cases, as noted above, the disclosures caught within the suddenly expanded prosecutorial web will be *beneficial* disclosures. Cf. *Liparota*, 471 U.S. at 426 (rejecting interpretation of statute that would "criminalize a broad range of apparently innocent conduct").

The facts of *Dirks* itself present one such example. Dirks, an officer of a broker-dealer, was told by a former employee of another company called Equity Funding that the company might be engaging in fraudulent accounting practices. 463 U.S. at 648–49. The tipper wanted Dirks to investigate the concerns and, if verified, expose the truth. Dirks did investigate them, speaking to several other employees of Equity Funding, and even tried (initially without success) to get *The Wall Street Journal* to publish an article detailing the allegations. *Id.* at 649–650. Thus, the tippers had not been out for their own gain, and that doomed the SEC's case. See *id.* at 667 ("The tippers received no monetary or personal benefit for revealing

Equity Funding's secrets, nor was their purpose to make a gift of valuable information to Dirks.").

Under the Second Circuit's rule, however, the government could have successfully *prosecuted* Dirks for a crime. That is because the Second Circuit relieves the prosecution of the burden of proving what the SEC was not able to show in *Dirks*—not just disclosure, but a corrupt disclosure. The upshot is that many other defendants will, like Worrall and the other defendants here, be charged and convicted of a fraud crime without the government having to prove the critical element of fraud. Such convictions go far beyond what the wire-fraud statute (and the Title 18 securities-fraud statute) warrant, criminalize conduct Congress never targeted, and stigmatize citizens with prosecution (or indeed conviction) who did not have fair notice that they were crossing the line.

5. Finally, the Second Circuit's ruling also means that prosecutors will be able to obtain convictions on the basis of equivocal evidence. As explained, the personal benefit requirement holds the government to the burden to prove fraud by forcing it to come forward with evidence that the supposed tipper acted corruptly. With that element removed, the remaining requirements for conviction will be less effective at filtering out innocent conduct.

For example, Worrall's conviction does not rest on evidence of corrupt behavior such as has existed in other cases. See, e.g., *Salman*, 137 S.Ct. at 424 (upholding conviction where insider "testified that he shared inside information with his brother to benefit him and with the expectation that his brother would trade on it" and on one occasion provided information instead of money). Rather, the government was able to rely on equivocal evidence that will frequently exist

in situations of innocent disclosure. Worrall and Blaszczak were friends and they had lunch; the next day, Blaszczak predicted what the 2012 radiation oncology rule change would be; and during the same period, Blaszczak spoke to, was able to meet with, and did arrange to meet with CMS employees who, unlike Worrall, actually worked on the rule change.

Whether or not such evidence is legally sufficient to satisfy even the watered-down versions of the statutes as the Second Circuit construed them, it lacks the indicia of fraud that should turn leaking of government information into a crime. If the Second Circuit's decision stands, Worrall's conviction will not be the last to be based on such equivocal evidence. Cf. Kevin B. Muhlendorf Et Al., Westlaw Journal Derivatives, 26 No. 07, *Political Intelligence and Government Contracting: Impact of* Blaszczak *Opinion on Insider Trading Prosecutions* at 10 (2020) (noting that the *Blaszczak* opinion "make[s] it easier for prosecutors to bring insider trading-related charges").

CONCLUSION

For reasons stated herein and in the petitions for writs of certiorari, this Court should grant one or both of the petitions.

Respectfully submitted,

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