18-2811(L)

18-2825(CON),18-2867(CON),18-2878(CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

DAVID BLASZCZAK, THEODORE HUBER, ROBERT OLAN, CHRISTOPHER WORRALL,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT THEODORE HUBER

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INTRODUCTION

The government's brief confirms the fundamental flaws pervading this prosecution. Frustrated with what it derides as "technical" elements of insider-trading law, the government seeks a license to evade them via novel, breathtakingly expansive theories of fraud, property, and conversion. These theories are foreclosed by binding precedent and would criminalize swaths of innocent conduct—not just legal trading, but also constitutionally-protected political activity and free expression. The Court should reject this lawless request to flout settled law, which would give prosecutors virtually unfettered power to imprison people for conduct that Congress never criminalized.

The government concedes insider trading is not fraudulent under Title 15 unless the tippee knew of a personal benefit to the tipper, but insists that "fraud" somehow means something different under Title 18. This ignores binding precedent (and its own prior admissions) confirming that fraud is fraud, regardless of which Title or Section the fraud statute appears in. In a brazen invitation to defy controlling Supreme Court and Second Circuit decisions, the government offers up a hodge-podge of district court opinions and various other non-binding "authorities"—including *dissents* from the very cases that compel reversal. It posits an "embezzlement" fraud theory conspicuously absent from any controlling decision *and* inconsistent with the government's non-binding "authorities."

The government's other legal arguments are equally indefensible. For instance, it purports to assert a property interest in a bureaucrat's musings about hypothetical policy decisions but can't meaningfully distinguish the binding decisions precluding that argument. Inventing its own standard again, the government would treat any government employee's passing reference to the government's regulatory function as its "property." This lacks support in law or logic and ignores the Supreme Court's history of *narrowing* the wire-fraud statute (*McNally*, *Cleveland*, *Skilling*, *McDonnell*)—the next chapter of which (*Kelly v. United States*, No. 18-1509) may further restrict the definition of "public property." Another example is the government's failure to address that Blaszczak's predictions are not a "record, voucher, money" or something similar under §641. Instead it devotes multiple pages to an argument nobody made, the irrelevant question whether intangible property is a "thing of value."

At the end of the day, however, there is a more fundamental defect that taints the entire case: The government failed to prove that Theodore Huber acted with criminal intent—even on its own erroneous view of the law. The government acknowledges that, for every count, it had to prove that Huber knew the information was unauthorized. Yet it identifies nothing in the record sufficient even to support a reasonable inference that Huber had any clue Blaszczak's 2012 radiation-oncology-rates "tips" were stolen from CMS. Accordingly, no

reasonable jury could have found him guilty beyond a reasonable doubt, and the judgment must be reversed in its entirety, even if the Court declines to address any of the government's audacious attempts to upend settled law.[1]

I. THE TITLE 18 FRAUD CHARGES MUST BE REVERSED

Insider trading is a peculiar species of fraud. Fraud typically involves misrepresentations or direct deceit, but people who trade on inside information rarely make any statement to the "victim" at all. As this Court has observed, "insider trading does not necessarily involve deception, and it is easy to imagine an insider trader who receives a tip and is unaware that his conduct was illegal and therefore wrongful." *United States v. Kaiser*, 609 F.3d 556, 569 (2d Cir. 2010). That is why, over the past four decades, the Supreme Court has carefully limited what insider trading is actually deceptive and thus fraudulent.

The rules it has established are clear: A "tipper" commits fraud only if he discloses information in violation of a duty by "secretly converting" it "for personal gain." *O'Hagan v. United States*, 521 U.S. 642, 653 (1997) (quoting Brief of United States); *see Dirks v. SEC*, 463 U.S. 646, 662-63 (1983). A "tippee" commits fraud only if he "acquires the tipper's duty" and "breache[s] [it] himself[] by trading on the information with full knowledge that it [was] improperly

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[1] Pursuant to Rule 28(i), Huber joins Olan's brief in its entirety, and Points I, II.A, II.B, III, and IV of Blaszczak's brief.

disclosed." *Salman v. United States*, 137 S. Ct. 420, 423, 428 (2016). That is why the "tippee must be aware…that the tipper received a personal benefit." *United States v. Martoma*, 894 F.3d 64, 76 (2d Cir. 2018).

The government labors to refute this view of the law, but its analysis rests principally on dissents and district court opinions and clashes with well-settled doctrine. Although the Supreme Court initially developed this doctrine in cases brought under Title 15, its analysis about what is *fraudulent* was not tethered to any statutory language unique to §10(b) or Rule 10b-5, and was reaffirmed in subsequent cases that also charged wire fraud. The meaning of "deception" and "fraud" does not change depending on the Title or Section number of the fraud offense.

The government urges this Court to defy binding precedents in favor of an amorphous and unbounded "embezzlement" fraud theory that would sweep in a vast array of non-criminal fiduciary breaches. This theory would criminalize a breathtaking range of innocent conduct—not only some legal securities trading, but also much constitutionally-protected activity by people who don't even trade, such as whistleblowers and those to whom they leak information. The Court is duty-bound to reject this lawless invitation to invent new crimes. If the government desires the power to prosecute trading that is currently legal, the proper audience is Congress, not this Court.

A. Tippee Fraud Requires Proof The Tippee Knew The Tipper Disclosed Information In Breach Of A Duty For Personal Gain

1. *The Supreme Court's Insider-Trading Fraud Requirements Do Not Vary Depending On The Fraud Statute*

The Supreme Court's analysis of what the government must prove to establish a "fraudulent" insider-trading scheme was never limited to the specific text of §10(b) or Rule 10b-5. (*See* Huber.Br.20-24). Instead, it was grounded in the long-settled presumption that undefined statutory terms incorporate their established common-law meanings, and that "fraud" is a "paradigmatic example" of this rule. *E.g.*, *Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 1999 (2016); (Huber.Br.24-30). And where different statutes share a common element—here, fraud—that element must be construed consistently in each statute. *E.g.*, *Sekhar v. United States*, 570 U.S. 729, 732-33 (2013); *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987); (Huber.Br.24, 30).[2]

The government disregards these hornbook principles and accuses Appellants of adding "additional elements" to the Title 18 fraud statutes in insider-trading cases. (GBr.49-50). But it fails to appreciate that fraud requires different types of proof in different cases. For example, where the government alleges fraud

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[2] The government's reliance on *Durland v. United States*, 161 U.S. 306 (1896), is misguided. "*Durland*…did not hold, as the Government argues, that the [mail-fraud] statute encompasses more than common-law fraud." *Neder v. United States*, 527 U.S. 1, 24 (1999).

by omission, the jury must find "a duty to disclose," *United States v. Szur*, 289 F.3d 200, 211 (2d Cir. 2002), even though this is unnecessary in a simple misrepresentation case. Similarly, for public-corruption wire fraud, juries must find a "*quid pro quo*" involving bribes or kickbacks for "official action," *United States v. Ganim*, 510 F.3d 134, 149 (2d Cir. 2007), after being instructed on what types of acts qualify, *McDonnell v. United States*, 136 S. Ct. 2355, 2373-75 (2016); *United States v. Silver*, 864 F.3d 102, 118 (2d Cir. 2017). And for "right to control" fraud, the jury must find that the scheme could "result in economic harm to the victim." *E.g.*, *United States v. Finazzo*, 850 F.3d 94, 110-12 (2d Cir. 2017). The Supreme Court has likewise held that, in the insider-trading context, the government must prove that the tippee knew of a personal benefit. Without such knowledge, *there is no fraud*.

Because "a charge…adequate and proper in one case may not play the same role in another case," a "district court must tailor its instructions to the facts of the case before it." *United States v. Regan*, 937 F.2d 823, 828 (2d Cir. 1991). Accordingly, courts must instruct the jury about the requirements of the particular species of alleged fraud. Indeed, in this very case the district court instructed—at the government's request (A-404)—that information qualifies as "property" for wire fraud if it is "confidential material, non-public," a principle neither self-evident nor commanded by the statutory text. (A-1045/3970).

The government would eviscerate all this caselaw, in favor of bare instructions that wire fraud involves a "scheme to defraud," knowing participation, and use of the wires (GBr.49)—without elaboration, explanation, or qualification. The fallacy in this argument is exposed by how off-base the government's supposed authorities are: *Clark v. Martinez* held that a deportation statute's language had the same meaning for each of three enumerated categories of covered aliens. 543 U.S. 371, 378 (2005). If anything, this supports our argument that "fraud" has the same meaning in different anti-fraud statutes. *Pasquantonio v. United States* rejected an argument (not made here) that the wire-fraud statute couldn't be charged because another criminal statute more precisely targeted the defendant's conduct. 544 U.S. 349, 358-59 (2005). Neither case permits courts to ignore elements that the Supreme Court has held essential to establishing criminal insider-trading fraud.

To be sure, wire fraud has "different elements" and a "broader reach" than §10(b). (GBr.50, 53). But the differences are irrelevant to what constitutes fraudulent insider trading. Wire fraud can occur in many different contexts so long as an interstate or international wire is deployed, whereas §10(b) only applies to frauds "in connection with the purchase or sale" of securities. But nothing in *Chiarella*, *Dirks*, or *O'Hagan* defining fraudulent insider trading turned on

§10(b)'s "in connection with" requirement.[3] Rather, the Court looked to the common law, just as it does for other antifraud provisions, including wire fraud (on which §1348 is premised). (Huber.Br.24-27, 32). There is no legal basis for dispensing with the elements essential to proving that otherwise innocent trading is "fraud."

2. The Government's "Embezzlement" Theory Contravenes Binding Precedent And Would Sweep In Much Non-Criminal Conduct

Next, the government wages an elaborate campaign to convert the Title 18 fraud statutes into the all-purpose anti-insider-trading weapon that the Supreme Court has repeatedly refused to sanction. To do this, the government fashions a novel "embezzlement" fraud theory out of a patchwork of dissents and district court opinions. This theory might provide fodder for an interesting law review article, but is nowhere to be found in the controlling majority opinions—some of which were issued in the same cases as the non-binding dissents the government apparently prefers. In addition to flouting the controlling law, this theory raises conceptual anomalies and would criminalize innocent, constitutionally-protected conduct.

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[3] The debate between majority and dissent in *O'Hagan* concerned whether misappropriation satisfies §10(b)'s "in connection with" element, not what insider trading is *fraudulent*.

First, the government tries to drive a wedge between the Title 15 and Title 18 antifraud provisions, supposedly because Title 15 focuses on corporate officers' abuse of their positions, whereas wire fraud focuses on "embezzlement of property committed to one's…trust." (GBr.54). From this premise, the government maintains that tipping schemes involving corporate insiders (the "classical theory") require proof of personal benefit, whereas tipping schemes involving misappropriation by corporate outsiders (the "misappropriation theory") do not. (GBr.53-56). That argument is dead wrong.

For starters, this Court has repeatedly held that *Dirks*' personal-benefit and tippee-knowledge requirements apply in misappropriation cases, just as they do in "classical" insider-trading cases like *Dirks*. *Martoma*, 894 F.3d at 73 n.5 (*Dirks* "also applies under the misappropriation theory"); *United States v. Newman*, 773 F.3d 438, 446 (2d Cir. 2014) ("elements of tipping liability are the same" under either theory), *abrogated on other grounds by Salman*, 137 S. Ct. 420. As the Court put it in *SEC v. Obus*, the "Supreme Court's tipping liability doctrine was developed in a classical case, *Dirks*…, but the same analysis governs in a misappropriation case." 693 F.3d 276, 285-86 (2d Cir. 2012); *see also Salman*, 137 S. Ct. at 425 n.2 (government did not dispute this point). The government assures the Court that this "case does not present the question whether *Dirks*'s personal-benefit analysis applies in Title 15 misappropriation cases" (GBr.55

n.12), but neglects to mention that this Court has already answered "yes" to the question multiple times and the government itself embraced those holdings in its proposed instructions here. (A-397-98).

Even if a panel were somehow free to jettison binding Circuit precedents and take a fresh look, it would be bound to reach the same result under the controlling Supreme Court decisions. The government pretends *Carpenter* involved a special Title 18 embezzlement theory different from Title 15 fraud. But the Supreme Court disagrees. In *O'Hagan*, the Court expressly equated the two theories as "fraud of the same species" and incorporated *Carpenter*'s embezzlement doctrine of "misappropriation" for Title 15. 521 U.S. at 652, 654. Indeed, the Court did so at the government's request, quoting its brief for the proposition that *Carpenter* "'is a particularly apt source of guidance here, because the mail fraud statute (like Section 10(b)) has long been held to require deception, not merely the breach of a fiduciary duty.'" *Id.* at 654; *see also United States v. Chestman*, 947 F.2d 551, 571 (2d Cir. 1991) (en banc); (Huber.Br.25-27, 30).[4]

[4] The government has no answer to the Solicitor General's unequivocal concessions in its Supreme Court briefs (*see* Huber.Br.26-28), but tries to explain away its past proposed instructions. (GBr.64-66). All to no avail. In *Stewart* the government conceded that the §10(b) scheme-to-defraud instructions (including personal benefit) "apply equally here [to wire fraud]." *United States v. Stewart*, No. 15 Cr. 287 (LTS) (S.D.N.Y.), Dkt.109 at 20, 33. And in *Walters* the government represented it had "no objection to the defendant's formulation" of wire fraud, which similarly incorporated

The Supreme Court has also made personal benefit a critical element of misappropriation insider-trading fraud under both Title 15 and Title 18. *See O'Hagan*, 521 U.S. at 653-54 (fiduciary "who pretends loyalty to the principal while secretly converting the principal's information *for personal gain* dupes or defrauds the principal") (emphasis added); *Carpenter*, 484 U.S. at 27-28 ("person who acquires…information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge…*for his own personal benefit*") (emphasis added). (*See also* Huber.Br.22, 26). The government finds it significant that *Carpenter* did not "reference…any of the concerns" about corporate-insider breaches "that animated the *Dirks* Court." (GBr.59). But it did not have to, because the personal benefit there was clear: the tipper had a near-"spousal relationship" with one of the tippees and disclosed the information so the tippees would share their profits with him. *United States v. Winans*, 612 F. Supp. 827, 829 (S.D.N.Y. 1985); *see Carpenter*, 484 U.S. at 23.

Second, the government's embezzlement theory makes no sense, because the distinctions it draws are specious. There is no talismanic significance to the "classical theory" of insider trading. It's just a label the Court applies to cases where the tipper happens to be an insider of the corporation whose securities are

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the §10(b) scheme-to-defraud instructions wholesale (including personal benefit and tippee knowledge). *United States v. Walters*, No. 16 Cr. 338 (PKC) (S.D.N.Y.), Dkt.95 at 6; *see id.* Dkt.91 at 32.

traded, rather than someone who owes their duty to some other party. Such corporate insiders, just like the newspaper employee in *Carpenter* or the lawyer in *O'Hagan*, breach their fiduciary duties by "misappropriating" information "entrusted to [their] care by another." *O'Hagan*, 521 U.S. at 654. There is no reason to create different sets of elements depending on the identity of the tipper's employer, which is presumably why this Court has refused to do that.

Also, under the government's theory, "classical" wire-fraud tipping-and-trading cases would have different elements from "misappropriation" tipping-and-trading cases, since the government admits "classical" tipping cases require proof of personal benefit. (GBr.51-53). Yet such a distinction can't be squared with the government's insistence that wire fraud doesn't have "extra" elements in *any* insider-trading cases. All of which further demonstrates why it would not only be lawless, but also unworkable and unwise for this Court to defy the binding authorities foreclosing the government's theory.

The government's tortured attempt to reconcile its theory with the Supreme Court's "disclose-or-abstain from trading" doctrine (GBr.62-63) also illustrates the incoherence of its position. At bottom, the government seeks to untether "embezzlement" from fraud, but somehow still permit fraud prosecutions for embezzlement. The law is that because deception is the hallmark of fraudulent schemes, an insider-trader can avoid fraud liability by disclosure prior to trading.

For a corporate insider, this entails disclosing the inside information to shareholders. *O'Hagan*, 521 U.S. at 652. On the other hand, because "the deception essential to the misappropriation theory involves feigning fidelity to the source of the information, if the fiduciary discloses to the the source that he plans to trade on the nonpublic information, there is no decept[ion]" and thus no fraud. *Id*. at 655. Yet the government dismisses this *O'Hagan* holding as merely one example of something "courts have at times suggested," in an impenetrable passage suggesting that disclosure isn't a defense to deception if there was a non-disclosure policy. (GBr.62). But of course there *was* a non-disclosure policy both in *O'Hagan*, where a law firm partner exploited confidential client information for trading profits, and in *Carpenter*, where a reporter did the same with his employer's secret information. If the point of this head-spinning argument is that "embezzlement" fraud doesn't require a fraudulent breach of duty, that is plainly wrong. The entire basis for fraud liablity in both *O'Hagan* and *Carpenter* was that someone breached his fiduciary duty by disclosing and/or exploiting his principal's confidential information for personal profit and concealing that conduct. (GBr.62).

Third, the government insists that embezzlement requires only "putting…property to a use other than the one for which it was entrusted" (GBr.59), a standard which, unlike "personal benefit," sweeps in *any* unauthorized use of a principal's information. In reality, however, the rule applied in the

government's own citations for this proposition is indistinguishable from the Supreme Court's "personal benefit" test. The government's authorities merely say that the embezzler does not have to keep the property himself, but can breach his duty by misusing the property to benefit someone else. *See Republic of Iraq v. ABB AG*, 768 F.3d 145, 166 (2d Cir. 2014) (embezzlement where "insider's misconduct benefits only himself or a third party"); *United States v. Armstrong*, 206 F. App'x 618, 620 (8th Cir. 2006) (embezzlement where company owner diverted 401K contributions and health insurance premiums "for his own purposes," including transfer to a partner, *see* No. 03-cr-246 (S.D. Iowa), Dkt.147-1 at 7-8); *United States v. Young*, 955 F.2d 99, 103 (1st Cir. 1992) (defendant transferred funds to daughter's company "to help his family, and thereby to help himself"); *United States v. Santiago*, 528 F.2d 1130, 1135 (2d Cir. 1976) (union president who diverted money to general fund "benefited indirectly because of his status as a salaried officer and creditor of the union"); *United States v. Harrelson*, 223 F. Supp. 869, 870 (E.D. Mich. 1963) (embezzlement where defendant used union funds for political purposes); 3 Wayne R. LaFave, *Substantive Criminal Law* §19.6(b) (3d ed.) (embezzlement even if defendant acts "to benefit his wife or son"). But *Dirks* and its progeny likewise recognize such indirect personal benefits, for example where the tipper "makes a gift of confidential information to a trading relative or friend," *Dirks*, 463 U.S. at 664, or steals the information "to

benefit the tippee," *Martoma*, 894 F.3d at 76 (citing *Dirks*). If anything, these authorities further demonstrate that personal benefit is consistent with, and indeed necessary for, "embezzlement" insider-trading fraud.

Fourth, if a person entrusted with confidential information could commit wire fraud by putting the information to any "use other than the one for which it was entrusted," a vast array of presently innocent acts would be criminalized, raising serious due process and First Amendment problems that this Court is duty-bound to avoid by narrowing construction. *See*, *e.g.*, *Skilling v. United States*, 561 U.S. 358, 406 (2010). A whistleblower who discovers financial fraud at his company would risk a felony conviction by alerting the press, as would the reporter who publishes the story. A State Department staffer who sees a confidential memo about a deadly disease risk in a foreign country and tweets an unauthorized travel warning to the American public could be imprisoned for wire fraud. And so on. There are good reasons the Supreme Court has refused to criminalize mere fiduciary breaches. More is required. Personal benefit is what transforms a fiduciary breach into fraud. *Dirks*, 463 U.S. at 662.

Finally, as to §1348, the government cites two non-binding district court decisions from Georgia and jury instructions from a district court in this Circuit,

none of which grappled with Huber's arguments. (GBr.67).[5] The government also cites legislative history that §1348 was intended to avoid "technical legal requirements" of Title 15. (GBr.68). But, as the Senate Report makes clear—and the government conspicuously avoids mentioning—the "technical legal requirement" Congress had in mind was §10(b)'s "purchase or sale" requirement. S. REP. NO. 107-146, at 6 & n.9 (2002). There is no evidence that Congress intended to discard decades of Supreme Court caselaw defining insider-trading fraud. Quite the contrary. Because §1348 uses language—"scheme or artifice…to defraud"—that had acquired a settled meaning by the time of the statute's enactment, this Court "must infer…that Congress mean[t] to incorporate the established meaning of these terms." *Neder*, 527 U.S. at 21.

B. The Government Failed To Prove The Requisite Knowledge

There was no evidence that Huber knew who provided Blaszczak's predictions about the 2012 radiation oncology rate change, let alone whether Blaszczak's source received any personal benefit from the "tip." (Huber.Br.32). Grasping at straws, the government attempts to conjure up the necessary proof from other bits of evidence (GBr.116-20), none of which suffice.

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[5] The government erroneously claims §1348 does not require false representations or material omissions. (GBr.43, 69 n.14). It cites only an irrelevant anti-spoofing Seventh Circuit manipulation case and a line of dicta in *United States v. Mahaffy*, which actually involved fraudulent omissions. 693 F.3d 113, 125-26 (2d Cir. 2012).

For example, the government cites an email in which Blaszczak mentioned that he met with a "friend" at CMS. But Blaszczak expressly identified that friend as a woman—not Worrall—and there is no evidence their meeting had anything to do with the charged trades. (SA-20). The government also relies on Fogel's testimony that Blaszczak had "friends and relationships" at CMS, his former employer. (A-688-89/1467-68, A-563/723). That is plainly insufficient. The prosecution had to prove that Huber knew that the source intended the disclosure as "a gift of confidential information" for "trading." *Dirks*, 463 U.S. at 664; *see Salman*, 137 S. Ct. at 428 ("gift of trading information is the same thing as trading by the tipper followed by a gift of the proceeds"); *Martoma*, 894 F.3d at 79 (personal benefit if insider "deliberately disclos[es] valuable, confidential information…with the expectation that the tippee will trade on it"). The government assumes that if a friend gave information to Blaszczak, the friend must have done so as a gift for trading, but this assumption is, if anything, belied by the evidence. Indeed, the record demonstrates many more plausible reasons for the communications. For instance, CMS personnel routinely shared information with third parties to assist CMS in its decision-making, not as gifts. (Huber.Br.9). In short, that Blaszczak had friends at CMS says nothing at all about *why* they shared information with him.

The government's suggestion that it was reasonable to infer that Huber knew the information was disclosed for personal benefit because it was "nonpublic and confidential" (GBr.117) is foreclosed by *Newman*. (*See* Huber.Br.33). The government pretends the *Newman* defendants did not know the information originated with corporate insiders, but itself argued that knowledge of personal benefit should be inferred because "both defendants knew they were receiving material, nonpublic information from insiders at Dell and NVIDIA." Brief for United States at 61, *Newman*, No. 13-1837(L) (2d Cir.), ECF No. 179; *accord id.* at 17, 19, 21 (analysts told defendants information came from company insiders). Indeed, this Court found testimony that an analyst expressly told one *Newman* defendant the information came from an insider ("someone within Dell") insufficient to show knowledge of personal benefit. 773 F.3d at 453. Regardless, *Newman* unequivocally holds that the nature of the information, without more, is insufficient to support an inference that a remote tippee knew the motive for the disclosure. *Id.* at 454-55.

The evidence of Huber's knowledge of personal benefit was non-existent, which is probably why the jury acquitted on the §10(b) charges despite convicting on Title 18 fraud. A properly instructed jury also would have acquitted under Title 18.

C. Predictions About CMS Rates Are Not Government "Property"

Controlling precedents establish that "intangible[s]" are not government property if the government's "core concern" in them "is regulatory" and not financial. *Cleveland v. United States*, 531 U.S. 12, 20, 23 (2000); *see also Sekhar*, 570 U.S. at 737 ("employee's yet-to-be-issued [policy] recommendation" was not "property"); *Fountain v. United States*, 357 F.3d 250, 256-57 (2d Cir. 2004) (distinguishing "regulatory" from "revenue-collecting nature" of taxes owed). As this Court explained in *Fountain*, "in the context of government regulation, monetary loss presents a critical, perhaps threshold consideration" in determining whether "property" has been taken. 357 F.3d at 257. Here the alleged "property" is predictions about future rate changes made during an evolving, "complicated" process involving multiple "perspectives within [CMS]" and input from legislators and "industry groups." (A-474-75/237-40). The government itself calls the information "regulatory," admits that forecasting policy is "essential to [the government's] regulatory function," and declines to assert any financial interest in it. (GBr.90). Accordingly, these predictions were not property in the government's hands.[6]

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[6] Despite the government's assertion (GBr.86-87), defendants expressly "preserve[d]" the argument that "government information is not 'property'" for their sufficiency challenge. (A-332; Dkt.251 at 12). *See Musacchio v.*

The government ignores or misconstrues the binding precedents foreclosing its arguments. For instance, it asserts a property interest in its confidential information because private parties have property rights to their confidential business information. (GBr.87). But the Supreme Court rejected this very argument in *Cleveland*. Drawing a sharp contrast between public and private property rights, it held that in the government's hands, state-issued licenses lack the essential attributes of property, because unlike analogous private property, such as a "brand name, business strategy, or other [intangible] product," government licenses cannot be "trade[d] or s[old] in the open market." 531 U.S. at 24. A private party, by contrast, has a conveyable property interest in such licenses. *See*, *e.g.*, *Nnebe v. Daus*, 644 F.3d 147, 158 (2d Cir. 2011) ("a taxi driver has a protected property interest in his license"); *Spinelli v. City of New York*, 579 F.3d 160, 169 (2d Cir. 2009) (party had "a property interest in her gun dealer license"). And unlike the government, private parties do "transfer…property right[s]" when issuing licenses to other private parties. *In re Gucci*, 126 F.3d 380, 389 (2d Cir. 1997). *Sekhar*—conspicuously absent from the government's brief—also confirms that, whereas a private company may have a property interest in a column recommending stocks to its readers, a government "employee's…

United States, 136 S. Ct. 709, 715 (2016) (sufficiency of evidence is analyzed under actual elements, not elements in jury charge).

recommendation[s]" are not "property." 570 U.S. at 737; *accord id.* at 740-41 (Alito, J., concurring in judgment) ("*Cleveland*…supports the conclusion that internal recommendations regarding government decisions are not property.").

Carpenter relied on the fact that "[c]onfidential *business* information has long been recognized as property," 484 U.S. at 26 (emphasis added), whereas there is no corollary history treating *government* information as property in the government's hands because the government cannot sell the property and thereby incur "losses and gains" like a "business venture" would. *Cleveland*, 531 U.S. at 24. The government cites *United States v. Grossman* (GBr.88), but ignores its holding that "confidential *business* information" is "considered 'property'" because it has "commercial value." 843 F.2d 78, 86 (2d Cir. 1988) (emphasis added). Indeed, information itself is the stock-in-trade for private businesses like the one in *Carpenter*, which sold newspapers,[7] and the law firm in *Grossman*, which provided legal advice. *Id.* ("maintaining the confidentiality of the information was of commercial value" to firm); *see also United States v. Hedaithy*, 392 F.3d 580, 600 (3d Cir. 2004) (distinguishing *Cleveland*; victim had property

[7] The government points to *Carpenter*'s citation of *Snepp v. United States*, 444 U.S. 507 (1980) (GBr.91), but *Carpenter* cited *Snepp* solely for the undisputed proposition that government "employee[s] ha[ve] a fiduciary obligation" to the government. 484 U.S. at 27.

interest because it was "private business…in pursuit of a profit-seeking endeavor").

To hold otherwise would criminalize routine political activity and protected expression. Government employees continuously disclose confidential information to the press, Congress, and others who will face criminal liability for "embezzlement" if the judgment below is affirmed. Even if this Court were not duty-bound by the controlling authorities to construe "property" in the hands of the government narrowly, it must do so to avoid the "significant constitutional concerns" presented by the government's boundless interpretation, which threatens to chill protected speech and political discourse. *McDonnell*, 136 S. Ct. at 2372; *accord*, *e.g.*, *Branti v. Finkel*, 445 U.S. 507, 514 (1980) ("even an employee with no contractual right to retain his job cannot be dismissed for engaging in constitutionally protected speech").

The government tries to distinguish a "regulatory power," which is not property, from something that is merely "essential to [the government's] regulatory function," which supposedly is. (GBr.90). This purported distinction is absent from the binding authorities and makes no sense. Why should actions "essential" to the exercise of regulatory power be treated differently from the exercise of the power itself? And what exactly is the distinction between the two? For example, would courts treat the drafting of a regulation, or a closed-door hearing, as the

exercise of regulatory power or merely actions essential to it? Had Congress truly intended this to serve as the dividing line between what does and does not constitute property, "it would have spoken with more clarity than it did" in §1343 and §1348. *Marinello v. United States*, 138 S. Ct. 1101, 1108 (2018).

Nor does *Cleveland* "read 'property' out of the statute entirely and leave only 'money.'" (GBr.89). *Cleveland* applies only to "intangible[s]"; its holding does not defeat the government's property interest in tangible property like land, buildings, or shell casings—which in any event have an ascertainable commercial value and can generate revenue for the government. Even intangibles can be government property if "the State's core concern" is not "regulatory," *Cleveland*, 531 U.S. at 20, but that was not true here.

The government's cases do not compel a different result. *Pasquantonio* involved tax collection, so the government's right was revenue-enhancing, not merely regulatory. The opposite is true here. *United States v. Girard*, 601 F.2d 69 (2d Cir. 1979), is a §641 conversion case predating *Cleveland* and *Fountain*, where the converted "records" fell within the statute's plain meaning (*see infra* at 29-30). And *United States v. Czubinski*, 106 F.3d 1069 (1st Cir. 1997), discusses "property" only in dicta. *Id*. at 1074.[8]

[8] *United States v. Middendorf*, 2018 WL 3443117 (S.D.N.Y. Jul 17, 2018), was a nonbinding pretrial decision that, like the government here, misconstrued the governing law and disregarded *Fountain*.

II. THE CONVERSION CHARGE FAILS FOR MULTIPLE REASONS

Multiple independent grounds compel reversal of the §641 conviction: no "property" was converted; there was no proof that Huber knew Blaszczak's predictions were unauthorized; there was no deliberate interference with any property right; and the predictions were not a "thing of value." (Huber.Br.38-55). We explain elsewhere (*supra* Point I.C and *infra* Point IV) why the government failed to prove the requisite property interest or knowledge. The government's challenges to the remaining arguments fail too.

A. There Was No Serious Interference With Any Property Right

There was not a "shred of evidence" that Huber "seriously interfered with the government's ownership rights." *United States v. Collins*, 56 F.3d 1416, 1421 (D.C. Cir. 1995). The government now effectively concedes that it "failed to...establish that the dangers CMS sought to avoid by maintaining confidentiality of predecisional information actually came to pass." (GBr.108; *see also* Huber.Br.53-55). Yet the government insists that even a harmless disclosure of information can seriously interfere with its rights and purports to distinguish "information" from other types of property, because "the law" supposedly relieves it of any burden to establish "actual[] harm[]" for informational disclosures. (GBr.108-09).

That distinction is illusory, which is why the government cites no §641 "law" or principled reason supporting it. Assuming §641 covers mere "information" (which it doesn't), its serious-interference requirement doesn't simply evaporate. To our knowledge, every court addressing the issue has required proof of serious interference with intangible property. *See*, *e.g.*, *Collins*, 56 F.3d at 1420-21 (no conversion of "intangible" property where there was no proof defendant "seriously interfered" with "government's ownership rights"); *United States v. May*, 625 F.2d 186, 191-92 (8th Cir. 1980) (requiring "serious interference" for conversion of "intangibles"). Presumably that is why the government requested and obtained a jury instruction requiring such proof at trial. (Huber.Br.54).

The "law" the government cites (GBr.109) is a few cases where proof of a serious interference was undisputed, so the court had no reason to address whether such proof was necessary. *See United States v. Matzkin*, 14 F.3d 1014, 1019-21 (4th Cir. 1994); *United States v. McAusland*, 979 F.2d 970, 974-76 (4th Cir. 1992); *United States v. Barger*, 931 F.2d 359, 367-69 (6th Cir. 1991); *Girard*, 601 F.2d at 70-71. And there plainly was a serious interference in each one: In *Matzkin* and *McAusland*, defendants used competitors' bidding information to corrupt the process for awarding government contracts, *Matzkin*, 14 F.3d at 1019-21; *McAusland*, 979 F.2d at 974-76; in *Barger*, the defendants stole physical copies of

a "valuable" government handbook, 931 F.2d at 367-69; and in *Girard*, a DEA agent assisted an illegal drug smuggling operation using the DEA's own files, 601 F.2d at 70-71. If anything, these cases underscore the need to prove a serious interference.

Nor can the government meet this burden by asserting a hypothetical risk of a serious interference that was not realized. The government claims (GBr.108) that "leaks can jeopardize the agency's process and mission by spurring premature, one-sided lobbying," but concedes that there was no such (constitutionally-protected) lobbying here. The "imposition of criminal punishment can't be made to depend on…the degree of risk posed by a crime's imagined 'ordinary case.'" *Davis*, 139 S. Ct. at 2326. The question is instead what happened in the "real[] world," *id.* at 2327, and the government suffered no real-world harm.

B. There Was No "Thing Of Value"

If "thing of value" were sufficiently broad to cover predictions about policy changes, the preceding statutory terms—"record," "voucher," and "money"—would have no "role in the statute." *McDonnell*, 136 S. Ct. at 2369. To avoid rendering these terms "superfluous," this Court must interpret "thing of value" to mean something "similar in nature," *id.*, or "in kind as well as in degree," *Begay v.*

United States, 553 U.S. 137, 143 (2008), to records, vouchers, and money. (*See* Huber.Br.41-47).[9]

Section 641's title—"Public money, property or records" —confirms this narrow interpretation of "thing of value." *See*, *e.g.*, *Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998) ("title of a statute" and "heading of a section" are useful "tools" for statutory construction). "Money" and "records" simply mirror the statutory terms inapplicable here. "Property" signals that anything which is not "money" or "records" must be government "property" to be within §641's ambit. And, as explained (*supra* Point I.C), the information at issue here was *not* government property. Like the words surrounding "thing of value" in the statute itself, the statutory "heading conveys no suggestion that the section prohibits" disclosure of predictions about changes to government policies. *Yates v. United States*, 135 S. Ct. 1074, 1083 (2015) (plurality); *accord id.* at 1090 (concurrence).

Moreover, Blaszczak's predictions bear no resemblance to "record[s], voucher[s], [and] money," and the government does not suggest that they do. Instead the government responds to a straw man, erroneously claiming that defendants argue that "thing of value" can never include "confidential information" or "intangible property." (GBr.76, 72; *accord* GBr.70, 78). But we

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[9] Contrary to the government's suggestion (GBr.77 n.16), defendants preserved this argument in their motion for acquittal. (Dkt.362 at 4).

never said that. There may be cases in which the government's information or intangible property is (or bears a sufficient resemblance to) records, vouchers, and money to qualify as a "thing of value." The point is that *this* is not such a case, because *predictions about policy changes* do not qualify.

The government ignores the recent Supreme Court precedents compelling this conclusion (*see* Huber.Br.41-45), relying instead upon outdated Circuit-level cases that eschew the requisite textual analysis in favor of legislative history or other methods that directly contradict the text. (GBr.70-80). This "approach is a relic from a 'bygone era of statutory construction.'" *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019) (quoting Brief for United States) (criticizing 1970s Circuit authority that "inappropriately resort[ed] to legislative history before consulting the statute's text and structure"). The government's case law is "fatally undercut" by the subsequent "Supreme Court[]" precedent. *Finkel v. Stratton Corp.*, 962 F.2d 169, 174-75 (2d Cir. 1992); (*see* Huber.Br.41-45).

Even if they were good law, the government's cases would be inapposite. Those cases involved a government record[10] and/or property with a "readily

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[10] *United States v. Nichols*, 820 F.2d 508, 509 (1st Cir. 1987) ("record was queried" by defendant); *United States v. Elefant*, 999 F.2d 674, 675 (2d Cir. 1993) (defendant "removed from the FBI office [the] confidential memorandum"); *McAusland*, 979 F.2d at 973-74 (defendants obtained "copies of the government's evaluations of…price proposals" and "draft of the government's Acquisition Plan"); *Barger*, 931 F.2d at 361 (defendant

ascertainable and quantifiable" cash value that directly impacted the fisc.[11] *Girard* exemplifies why the government's cases do not control. Girard was a drug smuggler who "secure[d] reports on four men whose names were furnished him by DEA agents." 601 F.2d at 70. These "DEA records" were "kept in computerized files, and the DEA hoped to identify [Girard's] inside source by monitoring access to the four names in the computer bank." *Id*. "In this manner, the DEA learned that Girard's informant was Lambert," a DEA agent, "who obtained the reports through a computer terminal." *Id*. Because the defendants knowingly accessed and converted the "DEA's computerized records," *id.* at 71, their actions—unlike Huber's—fell under §641's plain meaning.

"admitted sending a copy of…a government document…to [co-conspirator's] sister, and displayed another copy of the manual and explained how to use it"); *United States v. Jeter*, 775 F.2d 670, 673 (6th Cir. 1985) (defendant stole "copy of the transcripts" of grand jury proceedings); *United States v. Friedman*, 445 F.2d 1076, 1078 (9th Cir. 1971) ("secret grand jury transcript"); *Collins*, 56 F.3d at 1419-20 (government "computer time," "storage," and "photocopies").

[11] *May*, 625 F.2d at 191-92 ("salaries"); *see also Matzkin*, 14 F.3d at 1020 ("amount of a confidential, competitive bid"); *United States v. Croft*, 750 F.2d 1354, 1361 (7th Cir. 1984) (monetary loss of "between $40,000 and $50,000"); *McAusland*, 979 F.2d at 973-74 (evaluation of bids for government contracts). *Morissette v. United States* reversed without reaching how to define "thing of value," but also involved assets with a readily ascertainable monetary value. 342 U.S. 246, 247-48 (1952) (property worth $84).

Nor does it matter that the electronic records in *Girard* were computerized rather than "physical" (GBr.76), because it was undisputed that, whether tangible or intangible, they were in fact "records." Here the government offered no proof that Blaszczak's predictions about 2012 radiation oncology rate changes emanated from any stolen record. Even assuming Worrall was Blaszczak's source, there was no evidence showing how he formulated his prediction, let alone that he did so based upon a record. For example, there was no email to Deerfield attaching a record, no record produced from Worrall's files, and no testimony that anyone showed the contents of a record to any defendant. Any suggestion that Worrall converted a record—as opposed to, for instance, hearing a rumor—much less that Huber knew of any converted record is therefore pure impermissible "speculation." *United States v. Pauling*, 924 F.3d 649, 656-57 (2d Cir. 2019).[12]

Likewise, the two Fourth Circuit decisions the government emphasizes (GBr.74-76) involved records, and those records related to the "amount[s] of…confidential, competitive bid[s]" for government contract work. *Matzkin*, 14

[12] The §641 charges were based solely upon alleged "radiation oncology" disclosures from "May 2012 through…July 2012." (A-89 ¶77). The government claims (GBr.16) Blaszczak "provided draft language from CMS regulations and CMS presentations," but relies upon correspondence from 2007, 2009, and 2013 that does not involve radiation oncology. (*See* A-596 (2009 document concerning "dialysis"); A-2039 (2007 document concerning "RESP/RMD"); A-2389-95, A2407-13 (2013 documents concerning "renal disease")).

F.3d at 1020; *accord McAusland*, 979 F.2d at 972 (conversion of "information about…competitor's bids"). The defendants used the converted records to either "increase [their] bid," *Matzkin*, 14 F.3d at 1021, or avoid bidding lower than they otherwise might have, *McAusland*, 979 F.2d at 972-74. That deprived the government of revenue, unlike the circumstances here.

C. §641 Should Be Construed Narrowly To Avoid Absurd Results And Serious Constitutional Problems And In Favor Of Lenity

The government does not dispute that its interpretation of §641 would criminalize reporters' use of confidential tips, whistleblowers exposing fraud and corruption within the government, servicemen and women innocently relaying their combat experience, and government scientists who harmlessly apply their research in a personal setting. Yet it refuses to accept any narrowing construction that would avoid these and other absurd results which violate due process and infringe free speech. *See McDonnell*, 136 S. Ct. at 2372 (rejecting "Government's expansive interpretation" because it "would raise significant constitutional concerns"); *United States v. Granderson*, 511 U.S. 39, 56 (1994) (court must apply "sensible construction" of statute to avoid "unjust or…absurd conclusion[s]"); (Huber.Br.47, 50-51).

The government claims that narrowing is unnecessary here because 5 C.F.R. §2635.703 and CMS's nondisclosure policy already limit the statute's scope. (GBr.81-82). Yet the government ignores the reasons both purported limitations

fall short. (Huber.Br.39-40). As explained, §2635.703 does not limit the scope of §641 on its own, because it only prohibits the use of confidential information if its disclosure was otherwise "improper." This means the government must point to something else—such as another law, rule, or regulation—that would render the disclosure at issue "improper" under the regulation. Only then would §2635.703 prohibit the use of the information disclosed. (Huber.Br.39-40). The government does not dispute this, yet points to nothing else rendering the disclosures here "improper" and thus prohibited by §2635.703.

The CMS policy is equally deficient. During the relevant time, the policy went unenforced and was subject to change at the CMS director's whim. (Huber.Br.40; A-477/251, A-493/313-14, A-515/404-07). Because nothing was actually prohibited by the alleged policy, and there was no consequence for violating it, the alleged policy was, in reality, no policy at all. Nor did CMS publish it, "leaving the people in the dark" about what, if anything, was actually prohibited. *Sessions v. Dimaya*, 138 S. Ct. 1204, 1224 (2018) (Gorsuch, J., concurring in part and in judgment).

Finally, the government claims the same §641 cases distinguished above provided fair notice. (GBr.80). But this case is wholly unprecedented. Never before has the government attempted to prosecute "conversion" of mere predictions, and "a precedent will only provide fair notice…if it is analogous in

nearly every respect to the dispute being adjudicated." *Morgan v. Swanson*, 755 F.3d 757, 763 (5th Cir. 2014). The government's cases, by contrast, involved things like "transcripts," "manuals," "Acquisition Plan[s]," and "confidential memorand[a]." *Elefant*, 999 F.2d at 675; *McAusland*, 979 F.2d at 973-74; *Barger*, 931 F.2d at 361; *Jeter*, 775 F.2d at 673. These items plainly qualify as "records," "money," and/or something similar, and thus (unlike policy predictions) unsurprisingly fell under §641.

Nor was it "reasonably clear at the relevant time that the defendant's conduct" would prompt the government to repurpose a 100-year old conversion statute to punish securities trading that was legal under the federal securities laws. *United States v. Lanier*, 520 U.S. 259, 267 (1997). "Even if you think it's *possible* to read [§641] to impose such…punishment, it's *impossible* to say that Congress surely intended that result…." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019). "Applying constitutional avoidance to narrow a criminal statute, as th[e Supreme] Court has historically done," is compelled by "the rule of lenity." *Id*.

III. THE CONSPIRACY CHARGES FAIL

The government doesn't dispute that if the substantive fraud counts fail, the §1349 count must also be reversed. Yet it attempts to salvage the §371 count with the same meritless §10(b) and §641 arguments refuted above, and others as to "conspiracy to defraud" that contradict the indictment and misconstrue the law.

1. The government failed to establish two necessary elements of conspiracy to defraud: an agreement to (1) "obstruct a lawful function of the Government" and (2) use "deceitful or dishonest means." *United States v. Coplan*, 703 F.3d 46, 61 (2d Cir. 2012). (*See* Huber.Br.57-62). On obstruction, the government claims defendants wanted to "obstruct[] CMS's mission" by placing information about the potential rate cuts in the public domain, thus giving "'industry lobbyists and others a chance to…stop a proposed cut.'" (GBr.120 (quoting A-564/724)). But the government cites no supporting evidence, and its claim directly contradicts the government's theory. The government accuses the Deerfield defendants of "mak[ing] profitable trades in public companies that would be adversely affected by the [rate] cuts" Blaszczak had predicted. (GBr.21). Because their profits depended on these cuts, and Deerfield's short sales would lose money without them, the last thing defendants wanted was to prevent the cuts from happening. Accordingly, the evidence the government cites (GBr.121) confirms that Deerfield intended to "stay [m]um" about Blaszczak's predictions, not to publicize them. (A-2001).

The government's argument that Huber contemplated using "deceitful or dishonest means" (GBr.124-25), is equally spurious. This element requires proof (nonexistent here) of an agreement to commit fraud or bribery. (Huber.Br.59-61). *Haas v. Henkel*, 216 U.S. 462 (1910), and *United States v. Peltz*, 433 F.2d 48 (2d

Cir. 1970), both refute the government's position. In *Haas*, two defendants "bribe[d]" a third, an "associate statistician of the Bureau of Statistics," to "falsif[y] cotton crop reports" and help them trade "in advance of th[ei]r official issue." 216 U.S. at 472, 477. The defendants therefore knew of the personal benefit received by the insider because they were the ones who provided it—the prerequisite for insider-trading fraud absent from this case. *See also Peltz*, 433 F.2d at 52 (insider in *Haas* committed "deceit" by "act[ing] to promote private benefit in breach of his duty"). The *Haas* defendants also conspired to falsify government reports. *Haas* therefore demonstrates that fraud or bribery, absent here, are necessary to establish an agreement to use deceitful or dishonest means. (*See* Huber.Br.59-61 (citing cases)).

In *Peltz*, the defendant similarly entered "an agreement" with an SEC official to obtain information in exchange for "female company" and the "expect[ation] [of] money as well." 433 F.2d at 50-51. As in *Haas*, the defendant himself supplied the "private benefit" to the insider, and thus intended to commit both fraudulent insider trading and bribery. *Id*. at 52.[13] The government cites no

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[13] *Peltz*'s holding on obstruction of a government function (GBr.122-23) is inapposite. There "the United States and the [SEC] [were defrauded] of their rights to have their business conducted impartially and according to law and to have the securities laws administered impartially and according to their terms." 433 F.2d at 49. By contrast, there is no suggestion that defendants intended for or caused CMS to act with partiality or misapply laws.

case affirming a §371 conspiracy-to-defraud conviction based on alleged insider trading in the absence of a bribe or the defendant's knowledge of a personal benefit.

2. A finding of insufficiency as to each of the three objects of the §371 count would require a reversal with instructions to enter a judgment of acquittal. *See*, *e.g.*, *Coplan*, 703 F.3d at 62-72. And at a minimum, because at least one of the objects (§641) was "legally insufficient," and it is impossible to say which object the jury found proven, a new trial is required if this Court reverses on that object. *United States v. Garcia*, 992 F.2d 409, 416 (2d Cir. 1993); (*see also* Huber.Br.61-62).

The government ignores the multiple legal grounds for reversal of the §641 object. (*See* Huber.Br.61; GBr.116). For instance, whether a "thing of value" was converted "present[s] legal issues" of "statutory construction," *Heublein, Inc. v. United States*, 996 F.2d 1455, 1461 (2d Cir. 1993), as do the constitutional problems posed by the government's interpretation. *See*, *e.g.*, *Stromberg v. California*, 283 U.S. 359, 367-70 (1931) (reversing conviction where it was "impossible to say" if jury convicted on unconstitutional theory); *Bachellar v. Maryland*, 397 U.S. 564, 571 (1970) ("[S]ince petitioners' convictions may have rested on an unconstitutional ground, they must be set aside."). The same is true

for the improper conscious avoidance instruction, which also involves a "question of law." *United States v. Dove*, 916 F.2d 41, 45 (2d Cir. 1990).

IV. EVEN UNDER THE GOVERNMENT'S VIEW OF THE LAW, INSUFFICIENT EVIDENCE OF SCIENTER DOOMS ALL COUNTS

A. The Government Does Not Dispute That It Had To Prove Huber Knew Blaszczak's Information Was Disclosed Improperly

For each count, the government had to prove Huber knew Blaszczak's source was a CMS employee prohibited from disclosing the information.

The government acknowledges such proof is essential to Title 18 fraud even under its view of the law. While disclaiming any obligation to establish Huber knew the "tipper" received a personal benefit, it concedes that proof of "embezzlement and knowledge" thereof *was* required. (GBr.59-61, 64; *see also* GBr.55 (invoking possession-of-stolen-property standard, which requires proof defendant knows property was stolen, *e.g.*, 18 U.S.C. §2315)). And Huber would have no idea government information had been "embezzled" unless he also knew that it was disclosed "in an unauthorized manner." *E.g.*, *Morissette v. United States*, 342 U.S. 246, 272 (1952). Moreover, the government's theory appears to be that the Deerfield defendants "aid[ed] and abet[ted] the embezzler" (GBr.64), which requires "full knowledge of the circumstances constituting the charged offense." *Rosemond v. United States*, 572 U.S. 65, 77 (2014). Huber cannot have aided and abetted an unlawful disclosure without knowing it was unlawful.

Conversion under §641 requires the same showing. The government claims it was irrelevant whether defendants knew "which subsection of the Code of Federal Regulations prohibited the leaking." (GBr.111-12). But regardless of the particular law implicated by the disclosures, the government admits it had to prove, more generally, that defendants "knew the unauthorized nature of the disclosures they were receiving." (*Id.*; *see also* A-1038/3945 (jury instructions requiring such proof)).

Likewise, "to convict…for…conspiracy under 18 U.S.C. §371, the government had to prove that [defendant] agreed to and participated in a scheme that he knew had an illegal objective." *United States v. Wiley*, 846 F.2d 150, 153 (2d Cir. 1988). The government was therefore required to "show that [Huber] had some knowledge of the unlawful aims of the conspiracy"—"that is, in this case, that [Huber] knew [Blaszczak] was dealing in stolen [information]." *United States v. Reyes*, 302 F.3d 48, 53 (2d Cir. 2002); *accord Wiley*, 846 F.2d at 153.[14]

B. The Government Failed To Prove Scienter

There is no proof that Huber knew (or took any "deliberate actions to avoid learning," *Global-Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754, 769 (2011)) that Blaszczak's predictions about the 2012 radiation oncology rates were stolen.

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[14] The government admits the §10(b) object imposed an even higher burden—knowledge of personal benefit. (GBr.117).

1. The government claims Huber knew the predictions reflected "nonpublic" or "confidential" information, and assumes that he therefore knew they were improperly disclosed. (*See*, *e.g.*, GBr.95, 112). It relies primarily on Jordan Fogel's testimony that he and the Deerfield defendants knew Blaszczak's predictions were confidential (A-563-64/722-25, A-570/750, A-574/764, 767, A580/790, A-688-89/1467-68; SA-26), and a few emails arguably suggesting the same (A-1922 (Blaszczak source attending "closed-door meeting"); A-2443 (certain information "not out there"); A-2002 ("not on radar screens").[15]

But knowing the predictions were "nonpublic" or "confidential" is not sufficient; the government had to prove Huber knew they was *stolen*. There are constantly leaks from the federal government without any theft or violation of law. Every day, someone in the administration reveals an erstwhile secret to the press, a whistleblower exposes public corruption, and juicy tidbits are exchanged at a Capitol Hill water cooler and spread by word of mouth. From Huber's standpoint, learning such a tidbit would raise no red flag that anything had been stolen. In fact, the government doesn't dispute that Huber knew it was "very common" for

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[15] The government repeatedly cites the same handful of transcript pages and emails (GBr.82-83, 92-96, 110-14) and tacks on additional citations that do not support the proposition. The latter merely suggest that the Deerfield defendants knew that Blaszczak's predictions originated within CMS (A-555/680-81, A-598/869); that Blaszczak's advice was "unique" (A-1908); or that Blaszczak's sources would be unwilling to answer his questions (A-1982).

CMS employees to preview rule changes or to selectively disclose other "confidential" CMS information to third parties like Deerfield. (A-641/1096; *see also* Huber.Br.9; A-642-44/1100-06, A-2997, A-542/551, A-538-39/523-27). This would have led Huber to conclude that the disclosures at issue were *proper*, not prohibited. This is not a situation like a corporate merger, where a sophisticated investor like Huber would know that insiders are duty-bound to keep nonpublic developments strictly under wraps. What happened here was the opposite: Huber came upon information from a government agency that is known to leak like a sieve.

The government concedes that those who receive information "through legitimate means neither embezzle confidential information nor aid and abet the embezzler." (GBr.64). As this implies, it is insufficient to show that the information is "confidential"; the government must separately prove that its disclosure was illicit. *See*, *e.g.*, *Newman*, 773 F.3d at 454-55 (where "investor relations personnel routinely 'leaked'" for company purposes, outsider's receipt of "proprietary information….cannot, without more, permit an inference" that its disclosure was "improper"); *cf. Rehaif v. United States*, 139 S. Ct. 2191, 2197 (2019) (where facts defendant knows "can be entirely innocent," he "may well lack the intent needed to make his behavior wrongful"). Indeed, Fogel refused to confirm that CMS consistently maintained the confidentiality of proposed rule

changes. In the testimony the government relies upon (GBr.112), he conceded that prospective rule changes were "*[u]sually* not" disclosed ahead of time and remained "nonpublic in *most* cases." (A-563-64/723-24 (emphasis added); *see also* A-563/723 (CMS employees "*typically*[] didn't talk" to Deerfield) (emphasis added)). That means there were *some* cases in which CMS employees shared their predictions with outsiders. Fogel never suggested that there was any formal rule prohibiting such disclosures, and his testimony assumes that there was none.

2. The government also avers that "substantial" evidence showed defendants were aware of "the unauthorized nature of the disclosures." (GBr.94, 112; *accord* GBr.82, 94-95). But none of the cited proof suggests Huber knew that Blaszczak's predictions about the 2012 radiation oncology rates were illegally obtained.

The single snippet suggesting a disclosure might be prohibited is but an irrelevant aside. (*See* GBr.96, 112 (citing A-567/737-38)). There Fogel attributed to the Deerfield defendants his own purported belief that disclosures by "Niles Rosen" were "unauthorized." (*Id.*). But Rosen was a CMS contractor who dealt solely with coding issues unrelated to the charged tipping-and-trading scheme. (*See* Huber.Br.13-14). And it is undisputed that Rosen disclosed nothing to defendants, so even if his information had been relevant, nothing he did gave rise

to any fraud, conversion, or conspiracy. (Huber.Br.13-14; Olan.Br.13-14; A-2431-33).

The Rosen evidence does not permit a reasonable inference of the requisite knowledge. That Rosen lacked authority to discuss coding doesn't mean *Worrall* was prohibited from making predictions about *rate cuts* (assuming he made any). Even if such an inference were "within the realm of possibility," it "is nevertheless unreasonable because it is not logically based on another fact known to exist," and thus the kind of "guesswork" and "speculation" insufficient to establish proof beyond a reasonable doubt. *Pauling*, 924 F.3d at 656-57, 662 (reversing conviction because even inference that was "likely" or "probable" did not satisfy government's burden); *accord Coplan*, 703 F.3d at 76 (reversing conviction based upon "speculation and surmise"); *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994) (same).

If anything, the record negates any inference that Huber thought Blaszczak's predictions were illegally obtained. The Deerfield defendants knew that CMS employees routinely made such disclosures. Fogel also conceded that Deerfield "had a history of losing money" on trades based upon Blaszczak's erroneous predictions. (A-659/1239; *see* Olan.Br.8-9). This belies any inference that Blaszczak had official information from someone in the know at CMS. (A-664-65/1266-70). The trivial percentage of Huber's compensation attributable to these

trades further undermines any inference of scienter: there would have been little upside (and huge downside) to using illegally obtained information to trade.[16] *Slayton v. Am. Exp. Co.*, 604 F.3d 758, 776 (2d Cir. 2010) ("motive can be a relevant factor, and personal financial gain may weigh heavily," in determining "scienter").

Because the evidence of scienter was insufficient on each count, even accepting the government's view of the law, all convictions must be reversed irrespective of Huber's remaining arguments.

CONCLUSION

The Supreme Court has commanded courts to exercise "restraint" when construing criminal statutes, an area "where [the Court] typically find[s] a 'narrow interpretation' appropriate." *Dowling v. United States*, 473 U.S. 207, 213 (1985). Turning this directive upside-down, the government urges this Court to adopt an astonishingly broad interpretation of federal criminal fraud and conversion statutes. That interpretation conflicts with numerous binding decisions of the Supreme Court and this Court, and would criminalize not only much legal securities trading, but also routine political activity and protected expression. This Court must reject the government's invitation to confer such virtually unfettered power on federal

[16] The government cites inapposite testimony about *Fogel*'s bonus to dispute that Huber's compensation was based upon seniority. (GBr.14 (citing A-552-53, A-567)).

prosecutors, for it cannot "rely upon prosecutorial discretion to narrow the statute[s'] scope." *Marinello*, 138 S. Ct. at 1108. If the government wants the insider-trading prohibitions in existing law to be expanded, it should direct that argument to Congress, the only branch that can define crimes, *see United States v. Wiltberger*, 18 U.S. 76, 95 (1820)—not ask courts to radically expand other laws never intended to cover the conduct, and imprison unsuspecting securities traders without fair notice.

The judgment should be reversed.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENT, AND TYPE STYLE REQUIREMENT

1. On July 10, 2019, Defendants-Appellants Theodore Huber and Robert Olan filed an Unopposed Joint Motion to Enlarge the Word Count, seeking permission to extend the word limit for their respective reply briefs to 10,000 words each. (Dkt.212). That motion remains pending as of the filing deadline. Consequently, the undersigned counsel of record for Huber certifies pursuant to Fed. R. App. P. 32(g) that the foregoing brief contains 9,782 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the Word Count feature of Microsoft Word 2016.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font of Times New Roman.

Dated: July 17, 2019

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