18-2811(L)

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

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

APPELLANTS' JOINT REPLY BRIEF ON REMAND

DAVID ESSEKS
EUGENE INGOGLIA
ALEXANDER BUSSEY
ALLEN & OVERY LLP
1221 Avenue of the Americas
New York, NY 10020
(212) 610-6300

DONALD B. VERRILLI, JR.
ELAINE J. GOLDENBERG
JONATHAN S. MELTZER
DAHLIA MIGNOUNA
JACOBUS P. VAN DER VEN
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, DC 20001
(202) 220-1100

Attorneys for Defendant-Appellant Robert Olan

(Counsel continued on following page)

COLLEEN P. CASSIDY
BARRY D. LEIWANT
FEDERAL DEFENDERS OF
NEW YORK, INC.
52 Duane Street, 10th Floor
New York, New York 10007
(212) 417-8700

Attorneys for Defendant-Appellant
David Blaszczak

ALEXANDRA A.E. SHAPIRO
DANIEL J. O'NEILL
ERIC S. OLNEY
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

– and –

BARRY H. BERKE
DANI R. JAMES
KRAMER LEVIN NAFTALIS &
FRANKEL LLP
1177 Sixth Avenue
New York, New York 10036
(212) 715-9100

Attorneys for Defendant-Appellant Theodore Huber

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

TABLE OF AUTHORITIES
(Continued)

Page(s)

FEDERAL STATUTES

INTRODUCTION

After doing incalculable damage to the careers, reputations, and emotional well-being of defendants Blasczcak, Huber, and Olan, the government now confesses that it lacks statutory authority to prosecute *all* of the substantive charges that formed the heart of its case (aside from the Title 15 securities-fraud charges as to which the jury acquitted). The government also concedes that defendants' §1349 conspiracy convictions must be reversed because the objects of that alleged conspiracy were the very substantive offenses as to which the government has confessed error.

Given all that, it is remarkable that the government presses for affirmance of the Count One and Seventeen conspiracy convictions on harmless-error grounds. As Judge Kearse recognized in her dissent, it is impossible to determine whether the jury rested its verdict on those counts on the impermissible conversion object (the 18 U.S.C. § 641 offense) or the free-floating "conspiracy to defraud the United States" on which the government now relies. Even putting that dispositive point aside, defendants introduced substantial evidence refuting the government's allegation that they conspired to defraud the United States. The government therefore cannot come close to meeting the demanding harmless-error standard.

But the problems with the government's position run far deeper. Its contention that defendants conspired to defraud the United States by obstructing government functions through deceitful means stretches the scope of 18 U.S.C. § 371 far beyond the breaking point—and far beyond what the Constitution allows. The conduct alleged here is light years away from the kinds of plainly and unmistakably

wrongful actions that courts have found necessary to uphold convictions for conspiracy to defraud the United States. This case involves no effort to bribe government officials, falsify submissions to thwart government investigations, or anything of a similar ilk. To the contrary, what the government alleges is that defendants intended to obstruct the functioning of CMS by (i) obtaining from a CMS employee a prediction about what reimbursement rates CMS planned to propose in a Notice of Proposed Rulemaking, thus creating a risk that the proposal would become public and members of the public would lobby for changes in the proposal before rather than after that Notice issued; and (ii) seeking to alter CMS's policy by providing accurate information to a CMS consultant, with which the consultant agreed, about overcharges for certain medical procedures. If those actions constitute criminal obstruction of CMS's functions, then there is no limit to what the government can charge under §371. Even worse, what the government characterizes as obstruction are the actions of citizens exercising their First Amendment rights to petition their government.

At this point, it should be clear that the government's last-ditch effort to salvage the §371 convictions is just another variation on the theme that runs through its now-abandoned misuse of the wire-fraud, conversion, and Title 18 securities-fraud statutes. The government would like to prosecute honest-services fraud, without proving bribes or kickbacks, whenever it believes that a government employee has misused his position for private ends. And the government would like to prosecute tipper-tippee insider-trading fraud without having to prove that the tipper received a personal benefit and that tippees knew of that benefit. As the government

now concedes, binding Supreme Court precedent denies it the statutory authority to achieve what it desires under all of the substantive provisions defendants were convicted of violating. To allow the government to achieve the same improper ends through an amorphous "conspiracy to defraud the United States" would be wrong for the very same reasons. It should not be countenanced.

ARGUMENT

I. As A Matter Of Law, Defendants' Conduct Does Not Violate Section 371.

The Count One and Count Seventeen convictions should be reversed because the government's effort to stretch the "*Klein* conspiracy" theory to cover this case fails as a matter of law. The government's boundless interpretation is unsupported by the statutory text and "would raise a multitude of constitutional problems," including grave due-process and First Amendment concerns. *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005).

1. Section 371 criminalizes conspiracies to "defraud the United States." 18 U.S.C. § 371. The term "defraud" has a well-understood meaning: "to deprive another of property rights by dishonest means." *United States v. Coplan*, 703 F.3d 46, 59-60, 62 (2d Cir. 2012). To be sure, §371 has been interpreted more broadly to encompass certain conspiracies whose object is to obstruct government functions by deceitful means. *See id.* at 61-62 (discussing *Klein* conspiracy's history). But many courts, including this one, have raised the alarm about the judicially created "concept of interfering with a proper government function," which gives §371 a "special capacity for abuse because of the

vagueness of the concept." *United States v. Goldberg*, 105 F.3d 770, 775 (1st Cir. 1997); *see United States v. Rosenblatt*, 554 F.2d 36, 40 (2d Cir. 1977) ("The terms 'conspiracy' and 'defraud,' when used together, have a 'peculiar susceptibility to a kind of tactical manipulation which shields from view very real infringements on basic values of our criminal law.'").[1]

Accordingly, it is imperative that courts limit the §371 defraud provision to "plainly and unmistakably" unlawful conduct. *United States v. Gradwell*, 243 U.S. 476, 485 (1917). The Supreme Court has repeatedly reversed convictions for conduct that is not "plainly and unmistakably" prohibited, to ensure that people are not sent to prison without fair notice. For example, in *Hammerschmidt v. United States*, 265 U.S. 182 (1924), the Court reversed convictions under the defraud clause for advocating disobedience of the Selective Service Act. The Court held

---

[1] For present purposes, defendants assume that §371 extends to a limited category of conspiracies to obstruct government functions by deceitful means. However, Supreme Court decisions reading "defraud" in §371 to reach beyond property reflect a "bygone era of statutory construction." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). The lack of any textual basis for extending the statute beyond property fraud raises grave constitutional concerns. *See Coplan*, 703 F.3d at 61 (government "appears implicitly to concede that the *Klein* conspiracy is a common law crime, created by the courts," which "alone warrants considerable judicial skepticism"). To the extent precedent binds this Court on that issue, *see id.* at 61-62, defendants respectfully preserve it for further review.

that "a mere open defiance of the governmental purpose to enforce a law by urging persons subject to it to disobey it" is not included "within the legal definition of a conspiracy to defraud the United States." *Id.* at 189. And in *Gradwell*, the Court held that the defraud provision did not prohibit the defendants from "causing and procuring" unqualified voters to vote. 243 U.S. at 478-79. The Court reasoned that "there are no common-law offenses against the United States" and that such election fraud was not, at the time, "plainly and unmistakably" prohibited. *Id.* at 485. Likewise, in *Tanner v. United States*, 483 U.S. 107 (1987), the Court invoked the rule of lenity and, in light of "ambiguous statutory language," refused to extend the statute to schemes that are directed at third-party contractors rather than at the government itself. *Id.* at 129, 131-32.

The "plainly and unmistakably" unlawful conduct that the Supreme Court and this Court have previously relied on to sustain a *Klein* conspiracy conviction has involved bribes or efforts to thwart a government investigation through falsified submissions or false statements—as the principal decisions the government relies on (Govt.Remand.Br.14-17) illustrate. In *Haas v. Henkel*, the defendant bribed a government employee to falsify official reports and to convey information in those reports to the defendant. *See* 216 U.S. 462, 477-79 (1910). In *United States v. Peltz*, the defendant obtained details of an SEC investigation by bribing a government employee with prostitutes and promises of money. *See* 433 F.2d 48, 50-51 (2d Cir. 1970). Other cases in which courts have upheld §371 convictions involved similar behavior. *See, e.g.*, *United States v. Rosengarten*, 857 F.2d 76 (2d Cir. 1988) (false income-tax deductions); *United States v. Gurary*, 860

F.2d 521, 523 (2d Cir. 1988) (fraudulently misstating taxable income); *see also In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1040 (2d Cir. 1984) (Kearse, J.) ("a common denominator in the cases in which a § 371 conviction has been upheld is the defendant's agreement to make a false representation").

Here, the government has not alleged, much less proved, that defendants paid bribes to alter government actions or made false representations to obstruct government investigations. To the contrary, as the government's confession of error lays bare, defendants did *nothing* independently unlawful or improper. As a matter of law, therefore, defendants cannot be convicted of a *Klein* conspiracy. *See generally Gradwell*, 243 U.S. at 485; *Coplan*, 703 F.3d at 62-72 (reversing where record was equivocal on whether defendant had lied); *United States v. Mastronardo*, 849 F.2d 799, 804-05 (3d Cir. 1988) (reversing because regulations did "not even intimate" that conduct was illegal); *United States v. Varbel*, 780 F.2d 758, 760-62 (9th Cir. 1986) (same); *United States v. Porter*, 591 F.2d 1048, 1055-57 (5th Cir. 1979) ("fraud" on government's right to have Medicare "conducted honestly and fairly" was not "plainly and unmistakably" within §371's scope).

2. This case is a textbook example of the dangers of an unbounded *Klein* conspiracy doctrine. The conspiracy alleged by the government consists of two things: (i) seeking to obtain, through a consultant, predictive information about what Medicare reimbursement rates CMS would formally propose (in a notice of proposed rulemaking) for certain radiation-oncology treatments; and (ii) seeking to influence CMS to reduce proposed rates for certain genetic-testing services by providing a CMS consultant with

analyses showing potential overcharges for such services. No person of reasonable intelligence could possibly have been on notice that such conduct constitutes a criminal effort to obstruct the workings of CMS. *See Skilling v. United States*, 561 U.S. 358, 402-03 (2010).

The government asserts that premature disclosure of proposed reimbursement rates might interfere with CMS's functioning by triggering unwanted lobbying to alter proposed rates. Unsurprisingly, nothing of the sort occurred. The proposed rates were issued on schedule and in their original form, and the government offered no evidence that *anyone* sought to lobby for different rates as a result of the disclosures. *See Blaszczak*, 947 F.3d 19, 47 (2d Cir. 2019) (Kearse, J., dissenting); *see also* p. 16, *infra*. But even if it had, such actions cannot be considered improper interference. CMS sometimes discloses information before rulemaking proposals formally issue, *see* pp. 15-16, *infra*, and any lobbying triggered by premature disclosures (authorized or unauthorized) is *protected by the First Amendment*.

The government's allegations about defendants' efforts to influence the rates set for genetic testing are even more outlandish. Those efforts did not obstruct CMS's work—they *assisted it*. CMS gained a new perspective on reimbursement rates for genetic-testing services from the information Blasczcak provided—one with which CMS's consultant ultimately agreed. A760; *see* pp. 19-21, *infra*. Remarkably, the government nonetheless has argued that Blaszczak's email sharing his views with a CMS consultant violated §371 because it sought to "alter" government "policy." A3176. At the risk of belaboring the obvious, such communication is core political speech fully protected by the First Amendment.

The Due Process Clause precludes using the *Klein* conspiracy theory to impose criminal liability in those circumstances. As the Supreme Court explained when addressing vagueness problems with the analogous honest-services fraud statute, "[t]o satisfy due process a penal statute [must] define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." *Skilling*, 561 U.S. at 402-03 (citation omitted). If the facts here establish criminal obstruction of a government function, then virtually any action that might alter government policy will suffice, including lobbying and investigative journalism. No ascertainable standard marks the boundary between lawful and unlawful conduct. And because the conduct here is so far beyond anything previously found to violate §371, prior precedent cannot supply the fair notice that due process requires. Arbitrary enforcement is inevitable under that unbounded theory.

Indeed, the government seeks to use §371's "defraud" clause to prosecute the *precise* type of "honest services fraud" that *Skilling* said could not be constitutionally reached under the honest-services statute. *Skilling* held that interpreting the honest-services statute to cover any conduct beyond the traditional "core" of bribes and kickbacks "raise[d]" serious "due process concerns." 561 U.S. at 408. Without such objectively corrupt conduct, it was impossible for anyone to know exactly what constituted depriving the government of "honest services," *id.* at 402-03, 407-08, and a range of innocuous conduct could be criminalized. So too here. The government's theory is that a CMS employee did not provide it with honest services, yet there is no evidence

that the employee was paid off. Just as "honest services fraud" had to be confined to bribes and kickbacks to avoid unconstitutional vagueness, *id.* at 408, *Klein* conspiracy liability must be confined to its traditional core of "plainly and unmistakably" illegal behavior.

3. The First Amendment also bars §371 liability here. The alleged obstruction on which the government's case rests is political speech seeking to influence government policy. Such speech is at the core of what the First Amendment protects. Absent any independently unlawful conduct such as paying a bribe or falsifying government submissions, a §371 "defraud" conspiracy cannot be predicated on claims that the alleged conspirators sought to alter government policy. "The First Amendment protects the right of an individual to . . . petition his government" and "engage in advocacy." *Smith v. Ark. State Highway Emps.*, 441 U.S. 463, 464 (1979); *accord E.R.R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961). Even routine political activities—such as lobbying elected officials or organizing a protest—would risk prosecution under the government's interpretation of §371. *See McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016) (interpreting criminal law narrowly to avoid "chill[ing]" interaction between government and constituents).

More broadly, the government's sweeping interpretation directly threatens the investigative journalism that is vital to our democracy. On that view, §371 would criminalize any agreement between a government whistleblower and a journalist to reveal confidential information, thus branding the whistleblower and journalist as criminal conspirators. The government will always be able to argue that disclo-

sure of "confidential" information, even purely regulatory information about agency policymaking, might cause some hypothetical or incidental interference with an agency. The government downplays that risk, noting that its theory "requires proof of deceitful or dishonest means." Govt.Remand.Br.23. Yet the government claims that the very act of disclosing confidential government information itself establishes the requisite "dishonest" or "deceitful" means. *See id.* at 22. Thus, under the government's reading, the need to prove deceit provides no protection at all.

For all those reasons, this Court should interpret the defraud clause to cover only cases involving bribes or impeding a government investigation through false statements—and, on that basis, the Court should reverse.

II. At A Minimum, The Conspiracy Convictions Must Be Vacated Because The Error Was Not Harmless Beyond A Reasonable Doubt

If the Court does not reverse Counts One and Seventeen, it must at least vacate those convictions. As Judge Kearse concluded, it is quite possible that the convictions rested on the legally invalid conversion object. *See* 947 F.3d at 49. That precludes a harmless-error finding. Further, defendants vigorously contested the *Klein* conspiracy charges, the government's evidence was far from overwhelming, and the record contains considerable evidence that would support acquittals on those charges.

A. *The harmless-error standard is demanding*. Because the jury was told it could convict on Counts One and Seventeen based on a legally invalid theory and then returned only a general verdict, the convictions on those counts are flawed under *Yates*. The government concedes that the convictions cannot stand unless there is "overwhelming evidence" that the "*Yates* errors were harmless beyond a reasonable doubt." Govt.Remand.Br. 10; *id.* at 13. But it analyzes the proof under a much more forgiving sufficiency-of-the-evidence standard—one that asks only whether this Court "can" conclude that there is sufficient evidence from which a jury could convict on conspiracy to defraud the United States. *Id.* at 14. The government also erroneously proceeds as though the evidence should be taken in the light most favorable to it.

But harmless-error review is *not* conducted under a sufficiency-of-the-evidence analysis. *See United States v. Silver*, 864 F.3d 102, 122, 123-24 (2d Cir. 2017) (distinguishing harmlessness and sufficiency standards); *see also McDonnell*, 136 S. Ct. at 2374-75. To establish harmless error the government must "show beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained," *i.e.*, that "the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *United States v. Reed*, 756 F.3d 184, 190 (2d Cir. 2014) (citation omitted). Vacatur is therefore required if it is "*possible*" the jury "*may* have convicted . . . for conduct that is not unlawful." *McDonnell*, 136 S. Ct. at 2375 (emphasis added); *see* 947 F.3d at 49 (Kearse, J., dissenting); *Silver*, 864 F.3d at 122 (vacating because it was "conceivable that a properly instructed rational jury" would not have convicted). Only if the government's theory of

guilt was both "uncontested" and "supported by overwhelming evidence" can it be "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *United States v. Newman*, 773 F.3d 438, 451 (2d Cir. 2014) (quoting *Neder v. United States*, 527 U.S. 1, 18 (1999)), *abrogated on other grounds by Salman v. United States*, 137 S. Ct. 420 (2016). As a matter of law, that standard cannot be met where defendants "elicit[] evidence sufficient to support a contrary finding." *Id.*; *accord United States v. Quattrone*, 441 F.3d 153, 179 (2d Cir. 2006); *id.* at 179-81 (harmless error foreclosed because defense presented "innocent explanations" with "some basis in the record").

B. *Under the correct standard of review, the instructional error was not harmless as to Count One.*

1. *Impossibility of knowing whether jury based conviction on legally invalid object.* As Judge Kearse concluded in her dissent, it is "impossible to tell" whether the jury based its conspiracy convictions on a legally invalid object. 947 F.3d at 49. In other words, this Court cannot determine, beyond a reasonable doubt, that "the guilty verdict actually rendered in *this* trial was surely unattributable to the error." *Reed*, 756 F.3d at 190 (citation omitted).

The district court told the jury that it could convict on §371 conspiracy if there was an agreement by defendants to accomplish any one of three objects: conversion; Title 15 securities fraud; or conspiracy to defraud the United States. *See* A1048-49. The jury acquitted on the Title 15 charges, and the government now concedes that the conversion object was legally invalid. *See* A1037-38 (incorrectly instructing jury that "any information from CMS" was government property). But conversion was the first object listed in the jury instructions and on the verdict

sheet. *See* A1108, 3087. And the jury convicted defendants on the substantive conversion counts. If the jury determined that the government had proved the conversion object, it had no need to even consider the "defraud the United States" object on which the government now rests this entire prosecution.

It is extremely likely that the jury did just that. In fact, it is *exactly what the government told the jury to do*. At the end of its rebuttal, shortly before deliberations began, the government told the jury to "take the jury form and mark guilty on Count One, *because that is a conspiracy to steal government information*." A1032 (Tr. 3923) (emphasis added). That exhortation is a direct reference to the conversion object, and mentions *none* of the elements the jury would have needed to find to convict on the *Klein* conspiracy object. Moreover, the government gave the jury no other guidance as to the relevant count. In the rest of its summation, the government barely mentioned §371, alluding to a conspiracy to defraud the United States only while listing all of the charges for the jury without elaboration (A1009-10), and in a cryptic assertion that Niles Rosen "didn't know" that defendants "were trying to use him to improperly impede CMS's process" (A1016). The government's summation thus confirms that "any reasonable juror would have convicted on the basis of the Government's primary" (and legally invalid) "theory." *United States v. Joseph*, 542 F.3d 13, 19 & n.5 (2d Cir. 2008) (citation omitted); *see also*, *e.g.*, *Silver*, 864 F.3d at 122-24 (finding instructional error was not harmless based on government's summation); *United States v. Skelos*, 707 F. App'x. 733,

737 (2d Cir. 2017) (same).[2]

Accordingly, it is clear that the jury "may have convicted [defendants] for conduct that is not unlawful." *McDonnell*, 136 S. Ct. at 2375; *see Neder*, 527 U.S. at 15-16 (asking "whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained" (citation omitted)); *see also* 947 F.3d at 49 (Kearse, J., dissenting) (the jury "may . . . have found only that [defendants] agreed to engage in conduct that was alleged to violate 18 U.S.C. § 641, 1343, or 1348 but that did not come within the definitions of those sections"). Thus, the error cannot be harmless.

2. *Record evidence falls far short of showing harmless error*. Examination of the evidence that the government says supported the *Klein* conspiracy count dictates exactly the same conclusion. The government's theory of guilt was neither "uncontested" nor "supported by overwhelming evidence." *Newman*, 773 F.3d at 451. To the contrary, defendants vigorously "contest[ed]" two elements of conspiracy to defraud the United States, *id.*: (a) specific intent

---

[2] In rendering guilty verdicts on the invalid counts, the jury did not make any findings suggesting it must have found the elements of a *Klein* conspiracy. No count of conviction required the same type of "deceit" required for conspiracy under §371's "defraud" clause—the instructions on conversion did not require any intent to deceive, and the instructions on the Title 18 fraud counts centered around the property-based question of "embezzlement" and otherwise relied heavily on the erroneous instruction that CMS information is property. *See* A1038, 1044-45.

to obstruct the government's lawful functioning, and (2) deceit or dishonesty. There was "evidence sufficient to support" the view that the government did not prove either one beyond a reasonable doubt. *Id.*

a. *No harmlessness as to specific intent to obstruct government functioning.* Even though none of defendants' actions were independently unlawful, the government claims that the §371 convictions should survive on the ground that CMS kept information about regulatory proposals strictly confidential; premature disclosure of such information had real effects on the agency; defendants "understood that their actions obstructed the lawful functions of CMS by compromising the confidentiality of the subject information"; and defendants specifically intended that obstructive effect in addition to their profit-seeking intent. *See* Govt.Remand.Br.17-21.[3] But, as to each link in the government's chain, there was evidence from which the jury could have found the opposite.

First, CMS did not keep information of this kind strictly confidential. Instead, CMS authorized various officials to release confidential information as they saw fit, and they did so. A493 (Tr. 313-314). Director Blum selectively disclosed to an industry group drug-utilization data that was relevant to an upcoming rule proposal. *E.g.*, A483, 493, 498-504, 2355-66. His subordinates likewise discussed pro-

[3] The government also points (at 20) to statements by the panel majority about the "serious interference" element of conversion—but the majority applied a sufficiency standard, and in any event addressed only interference with government *property*, which concededly was not at issue here.

posed rules with people outside CMS before proposals were publicly released. *E.g.*, A855-56, 861-64; A779-81 (predecisional information shared with staff at numerous government agencies). The jury thus had a firm basis to reject the government's position that CMS's proper functioning depended on strict confidentiality.

Second, there was no evidence that the disclosure of information about regulatory proposals actually affected CMS's functioning, and the only suggested hypothetical effects would have resulted from constitutionally protected speech. For instance, one CMS employee stated that when "predecisional materials[] get leaked, that . . . begins to trigger lobbying," and that such lobbying could make his "job . . . more tough." A467 (Tr. 209-10); *see* A504 (Tr. 360-61). And another stated that release of "predecisional information" could "create opposition to the policies that CMS was trying to adopt." A840 (Tr. 2378-79). In other words, the supposed effects were vague and hypothetical, and what CMS was purportedly trying to avoid was activity that the First Amendment protects. Prompting such activity can hardly amount to criminal obstruction, *see* Huber.Op.Br.59-61, and "mak[ing] the government's job more difficult" is not sufficient to constitute obstruction, *United States v. Caldwell*, 989 F.2d 1056, 1060 (9th Cir. 1993). In all events, as to the particular proposed rule at issue, there was no effect at all: CMS issued the proposed rule on time and just as it had planned, without any negative consequences. *See* 947 F.3d at 47 (Kearse, J., dissenting). Thus, a jury could easily conclude that defendants had no reason to think that the government's functioning would be obstructed within the meaning of the "defraud" clause.

Third, the evidence that defendants "understood

that their actions obstructed the lawful functions of CMS" is thin at best, and there is plenty of evidence to the contrary. For instance, there was a good deal of evidence that it was routine for industry analysts to have "conversations with key officials and staff" at CMS and, on that basis, made predictions about what actions CMS was likely to take. A2992; *see* A2993-94. Tellingly, other analysts made predictions virtually identical to the prediction Blaszczak made about the 2012 radiation-oncology proposal that is the heart of the government's case. *See, e.g.*, A655-56 (Tr. 1216-23); A2008, 2972, 3006-14; *see also* A849, 2957-59, 2964-71, 3006-14. That evidence gave the jury a firm ground to conclude that Huber and Olan would not have had any reason to think that Blaszczak's predictions were illegitimate, such that they might negatively affect CMS's functions.

The government points to a snippet of cooperating witness Fogel's testimony conclusorily stating that obtaining information about a proposed rule would disrupt CMS's processes and baldly asserting that Fogel had discussed the topic with Huber and Olan. But other evidence established that Fogel was an entirely unreliable witness who changed his statements, A617, and lied to the government repeatedly, A547-48, 601, 620-30, including about his ongoing drug, gambling, and fraud crimes, A549, 601-02, 621-28. That bears directly on whether his testimony can support a harmless-error finding. *See, e.g.*, *United States v. Kaiser*, 609 F.3d 556, 567 (2d Cir. 2010) (finding instructional error prejudicial even under plain-error standard because jury had "ample reason" to "question the credibility of" government's cooperators). Further, Fogel's testimony

is hardly "overwhelming" proof that defendants believed they were doing anything wrong or even out of the ordinary.[4]

Finally, the government's specific-intent argument is illogical. The *whole point* of defendants' alleged scheme (in the government's telling) was to take short positions assuming that certain companies' stock price would fall when the government announced the proposed rate cut. Obstructing CMS's functioning, and impeding CMS from issuing that proposal, would have frustrated such a scheme.[5]

This Court thus cannot conclude that the evidence overwhelmingly required the jury to find that defendants specifically intended CMS to function poorly in "design[ing] and promulgat[ing] rules pertaining to Medicare reimbursement rates." A1048 (jury instructions defining "conspiracy to defraud"). That alone defeats harmless error.

b. *No harmlessness as to deceit.* There was likewise ample basis for the jury to acquit based on lack of deceit. Even on a sufficiency standard, courts have repeatedly reversed "defraud" clause convictions for lack of deceit if the conduct was not plainly

---

[4] The government also cites an email in which Huber reported that Blaszczak had said that bringing attention to the government's regulatory proposal could cause "the industry [to] go[] bananas" and "squash[] changes." A2001. But that proved that defendants' goals were aligned with CMS—and, again, lobbying is *part* of CMS's lawful functioning, not some unlawful interference with it.

[5] *See* A2001. Obstruction as a foreseeable consequence or collateral effect is not enough for specific intent. *See* Olan.Op.Br.50 (collecting cases).

fraudulent—*i.e.*, a lie or bribe. *See* Huber.Op.Br.34-36, 59-61 (collecting cases). Here, under the far more demanding harmlessness standard, the government's evidence falls far short.

The government does not cite a *single false statement* by any defendant. Instead, the government relies on two supposed examples of deceit: Blaszczak's interactions with Niles Rosen, and the allegation that "Blaszczak was paid by Huber and Olan . . . to get confidential CMS information they knew should have been kept within the agency." Govt.Remand.Br.22-23. Those examples do not remotely support the conclusion that, absent the instructional error, the jury necessarily would have found the requisite deceit.

To the contrary, the jury could readily have concluded that the Niles Rosen incident points in *exactly the opposite direction*. The Deerfield fund where Huber, Olan, and cooperating witness Fogel worked held a short position in a genetic testing company called Myriad Genetics. Deerfield's investment thesis was that Myriad's tests were reimbursed by CMS at rates that gave Myriad a better than 90% gross profit margin, and that CMS and private insurers would cut those rates, leading to reduced profits and a falling stock price, which in turn would benefit Deerfield's short position. *See, e.g.*, A674. As Fogel testified, Deerfield employed Blaszczak to educate CMS regarding the profit margins at Myriad, "[b]ecause if CMS knew what [we] knew about the profit margin, [our] theory was maybe they'll do something about it" and "then reimbursement might get cut, the stock price might go down, [and our] trade might work better." Tr. 1395.

CMS asked a contractor, Niles Rosen, to make

recommendations about the relevant reimbursement rates. A674 (Tr. 1396-97). In an email to Rosen, Blaszczak (a) explained that he worked at a consulting firm advising "the investment community," (b) cautioned that he "[did]n't want to know what are the rates you are recommending to CMS nor should I expect you to ever tell me that," (c) detailed his view that reimbursement for certain types of genetic testing was absurdly high, (d) and urged Rosen to look at the costs involved in the genetic testing and asked Rosen whether cost was an input in his analysis. A2431-36.

That email contained nothing false or deceptive, and the government does not claim otherwise. Instead, it argues that Olan doubted that Rosen would answer the question, A1982 ("I think the odds of DB getting shut down by [R]osen are 103%"), and suggests (at 22) that defendants therefore believed it was wrong to ask. But asking a question, even one that may not be answered, is hardly deceitful. And while Rosen declined to answer (while encouraging Blaszczak to "[p]lease feel free to write me anytime that you wish to express opinions"), Rosen told CMS staff that he agreed with Blaszczak and concluded that CMS was "overpaying" for "some of" the tests. A760 (Tr. 1907), A2431. And CMS itself later answered Blaszczak's question: a senior CMS official told Blaszczak just weeks later that Rosen had looked at the cost of the tests. A677 (Tr. 1409), A2006. The evidence thus powerfully supports the view that the whole incident was legitimate lobbying. *See* A849 (Tr. 2416-17) (CMS official: "like any member of the public," consultants like Blaszczak "can share information about CMS's policies and try to inform us about what they think [are] the policies that CMS should adopt"); *see also* A852 (Tr. 2435-

37), A855 (Tr. 2446-47); Tr. 1276-79.

As for the proposition that Olan and Huber hired Blaszczak to get information from CMS that they knew was not supposed to be shared, there was substantial evidence that Olan and Huber believed it was proper to receive the information. As the government conceded below, there was no evidence that Olan and Huber (or even Fogel) knew the specific source of Blaszczak's information or the specific means by which he obtained it. *See, e.g.*, A556 (Tr. 686), A662 (Tr. 1253-54), A664-65 (Tr. 1266-70). Although the government offered evidence that Olan and Huber knew that Blaszczak conferred with CMS employees, the evidence showed that this was common among Washington analysts and that the allegedly illegal tip from Blaszczak was separately reported by other analysts to Olan and Huber in similar form, indicating that it was anything but secret. *See* p. 17, *supra*. Moreover, the prediction was received with some skepticism by Huber and with disbelief by Olan; they even created analyses and considered strategies to hedge against the likelihood that CMS would not do what Blaszczak had predicted (Olan put that chance at 85%, Huber at 80%). *E.g.*, A3056-3064, 555, 666-67, 964, 966, 2973-74; Tr.1200-03. The prediction also turned out to be wrong in significant part. A578-79, 659-68, 2567-70.[6]

Finally, Huber and Olan behaved in a way that

[6] The government's string citation to unexplained portions of the record (Govt.Remand.Br.22) consists largely of conclusory statements from the discredited Fogel—many of which are a gloss on emails and other documents that are susceptible to a perfectly innocent reading. *See, e.g.*, A578 (Tr. 781).

evidenced their good faith. For example, the emails from Blaszczak that the government characterized as an "illegal tip" were shared openly within Deerfield, including with the firm's general counsel. *E.g.*, A553-68, 650-51, 821, 1995-98. Deerfield's retention of Blaszczak as a consultant also was vetted by Deerfield's legal department. A810-25, 983-86, 2035-37.

C. *The error on Count Seventeen, as to which only Blaszczak was convicted, was not harmless.* The government offers no argument specific to that count—only the same claim as under Count One that receiving "leaked" information impeded CMS's general interest in preventing "leaks" and was therefore sufficient to establish a §371 conspiracy to defraud the United States. Govt.Remand.Br.17-19.[7] The government has no plausible argument that it produced sufficient evidence to prove the alternative *Klein* conspiracy alleged in Count Seventeen, much less that the jury would "have necessarily found" it proven. *United States v. Ferguson*, 676 F.3d 260, 277 (2d Cir. 2011).

The government presented no evidence for the *Klein* conspiracy theory on Count Seventeen and did not argue it to the jury. Rather, the government presented only a conversion theory on both Visium

---

[7] The government asserts that defendants' remand brief did not contest this count, Govt.Remand.Br.12 n.6, but defendants expressly incorporated all arguments made in their prior briefs, including the pages of Blaszczak's opening brief making insufficiency and *Yates* arguments as to Count Seventeen. Joint.Remand.Br.3 n.1; Blaszczak.Op.Br. 64-66. And the government's initial brief never responded to Blaszczak's Count Seventeen arguments.

counts, Seventeen and Eighteen (charging substantive conversion). Its sole witness was Christopher Plaford, who testified that Blaszczak predicted a rate cut of 3 to 3.5% in home healthcare reimbursement, in line with other consultants, and that Plaford understood that the prediction was based on non-public information. A748-53, 3039-46; SPA53-62. There was no evidence that Blaszczak intended to obstruct a governmental function or that his use of leaked information about the proposed rate change actually obstructed CMS's work. And when discussing with the jury the minimal evidence on the Visium counts—Plaford's testimony—the government did not differentiate between the conversion and conspiracy counts. Instead, the government lumped counts Seventeen and Eighteen together as conversion: "a scheme to steal CMS information with Christopher Plaford." A1021-22. There was no mention of obstructing or impeding government function. *Id.*; *see* p. 13, *supra*.

III. The Conspiracy Convictions Must Be Reversed Because The Evidence Was Insufficient To Establish Conspiracy To Defraud The United States

For many of the reasons discussed, the evidence was insufficient to establish the specific-intent-to-obstruct and deceit elements of a *Klein* conspiracy. *See United States v. Pauling*, 924 F.3d 649, 662 (2d Cir. 2019) (on sufficiency review, the Court is "obliged to view the evidence with all reasonable inferences drawn in the Government's favor, but . . . may not permit that rule to displace the even more important rule that all elements of an offense must be proven beyond a reasonable doubt" (citation omitted)). In undertaking sufficiency review, this Court

need "give no deference to impermissible speculation" and "may not credit" unreasonable inferences even if they are "within the realm of possibility." *Id.* at 656-57. Reversal is required if there is insufficient evidence as to even a single element.[8]

First, the government failed to establish that defendants had a specific intent to obstruct government functioning—especially given that, as the government now agrees, none of their actions were independently unlawful. Huber and Olan sought information from a consultant (and many other sources), as is standard for analysts, and did not think that the information was illicit. *See* p. 21, *supra*. They also had no reason to suspect that simply dealing with the consultant could affect CMS rule-promulgation in any way—and, of course, the government put in no evidence that anything they did actually affected CMS functioning. *See id.* at 15-18. Moreover, had the obstruction issue even crossed their minds, there is every reason to believe that they would have affirmatively wanted to *avoid* any interference with CMS's issuance of rate-setting proposals and rules. *See id.* at 18. And Blaszczak's interaction with Rosen shows merely an intent to lobby the government—which cannot possibly establish an intent to obstruct. *See id.* at 19-21.

Second, as to deceit, the evidence establishes that

---

[8] Defendants also reaffirm the portions of their original briefs that further detail the sufficiency arguments on *Klein* conspiracy. The panel declined to reach those arguments, finding no need to do so "[b]ecause each of the conspiracy convictions was predicated on substantive counts for which there was sufficient evidence." 947 F.3d at 43 n.4. The government now concedes those counts must fall.

defendants were unfailingly open and truthful about their actions—including in Blaszczak's interactions with Rosen, in which Blaszczak explained who he was and why he was contacting Rosen. *See* pp. 19-21, *supra*. And while the government insists that *any* agreement whereby a government employee releases confidential information is deceitful as a matter of law for purposes of the "defraud" clause, that cannot be true, especially as to those who do not work for the government themselves. If the government were right, then a journalist who arranges to get a tip about confidential information from a federal insider is defrauding the government and committing a serious crime.

The insufficiency of the evidence here is especially striking given the close scrutiny that is appropriate as to *Klein* conspiracy charges and the fact that this case does not involve the bribes or falsehoods that mark other *Klein* conspiracy cases. Defendants have not engaged in "plainly and unmistakably" prohibited conduct. *Gradwell*, 243 U.S. at 485. But they have been subject to years of prosecution and terrible uncertainty about whether they might be forced to go to prison for conduct that the government now *admits* did not violate any substantive federal law. This Court should not perpetuate defendants' ordeal; it should reverse the §371 convictions and end this case, which should never have been brought in the first place.

CONCLUSION

The convictions should be reversed or, in the alternative, vacated.

Dated: April 12, 2021

/s/ *Alexandra A.E. Shapiro*
Alexandra A.E. Shapiro
Daniel J. O'Neill
Eric S. Olney
SHAPIRO ARATO BACH LLP
500 Fifth Avenue, 40th Floor
New York, New York 10110
(212) 257-4880

Barry H. Berke
Dani R. James
KRAMER LEVIN NAFTALIS & KRANKEL LLP
1177 Sixth Avenue
New York, New York 10036
(212) 715-9100

Attorneys for Defendant-Appellant Theodore Huber

/s/ *Colleen P. Cassidy*
Colleen P. Cassidy
Barry D. Leiwant
FEDERAL DEFENDERS OF NEW YORK, INC.
52 Duane Street, 10th Floor
New York, New York 10007
(212) 417-8700

Attorneys for Defendant-Appellant David Blaszczak

/s/ *Donald B. Verrilli, Jr.*
Donald B. Verrilli, Jr.
Elaine J. Goldenberg
Jonathan S. Meltzer
Dahlia Mignouna
Jacobus P. van der Ven
MUNGER, TOLLES & OLSON LLP
601 Massachusetts Ave. NW
Suite 500E
Washington, DC 20001
(202) 220-1100

David Esseks
Eugene Ingoglia
Alexander Bussey
ALLEN & OVERY LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 610-6300

Attorneys for Defendant-Appellant Robert Olan

CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for Defendant-Appellant Robert Olan certifies that the foregoing brief is 25 pages long (and otherwise complies with the rules for pamphlet briefs in Local Rule 32.1(a)(2)) and that defendants have a motion pending in this Court, to which the government consented, to extend the page limit for the foregoing brief (as originally set in a January 29, 2021 Order in this case) to 25 pages.

/s/ *Donald B. Verrilli, Jr.*
Donald B. Verrilli, Jr.

CERTIFICATE OF SERVICE

I hereby certify that, on April 12, 2021, I electronically filed the foregoing brief with the United States Court of Appeals for the Second Circuit using the CM/ECF system and that parties or their counsel of record are registered ECF filers and will be served by the CM/ECF system.

Dated: April 12, 2021

s/ *Donald B. Verrilli, Jr.*
Donald B. Verrilli, Jr.