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,
v.

DAVID BLASZCZAK, THEODORE HUBER,
ROBERT OLAN, AND CHRISTOPHER WORRALL,
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of New York, No. 17-cr-357 (Kaplan, J.)

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS ("NACDL") IN SUPPORT OF DEFENDANTS-APPELLANTS AND REVERSAL

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. NACDL was founded in 1958. It has a nationwide membership of many thousands of direct members, and up to 40,000 with affiliates. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and fair administration of justice. NACDL files numerous amicus briefs each year in the U.S. Supreme Court and other federal and state courts, seeking to provide amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

NACDL and its members have an interest in ensuring that the criminal laws are enforced fairly and predictably. NACDL has a particular interest in this case, because the government has asserted novel and overly broad theories of what

[1] All parties to this appeal and the appeals consolidated thereunder have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), amicus states that no party's counsel authored this brief in whole or in part, and that no party or person other than amicus or its counsel contributed money toward the preparation or filing of this brief.

constitute "property" and "thing of value" for purposes of wire fraud, Title 18 securities fraud, and conversion of government property. The government's interpretation of these statutes, which the district court accepted in the jury instructions, substantially extends the breadth of these statutes and criminalizes virtually all unauthorized disclosures of government information. If affirmed, the prosecution's theory would expose individuals who work in proximity to the government to unbounded and unpredictable liability for their handling of government information.

INTRODUCTION AND SUMMARY OF ARGUMENT

The evidence at trial showed that the hedge fund Deerfield Management, where defendants Robert Olan and Theodore Huber worked as analysts, traded in the stock of a health-care firm after receiving defendant David Blaszczak's prediction about possible changes in reimbursement rates being considered by the Centers for Medicare and Medicaid Services (CMS), where defendant Christopher Worrall was employed.

To prove this conduct constituted insider trading, the prosecution bore the burden of establishing, beyond a reasonable doubt, that the four defendants knew that (i) the information had come from an insider at CMS, (ii) the insider had breached a duty by disclosing it, and (iii) the insider had done so in return for some personal benefit. *See United States v. Martoma*, 894 F.3d 64, 76 (2d Cir. 2017)

(describing the personal-benefit requirement for insider-trading liability), *petition for cert. filed*, No. 18-972 (U.S. Jan. 24, 2019). Absent such knowledge, this was not insider trading at all. It was just research analysts doing what they are supposed to do before making investment decisions: ferret out new information, perhaps unknown to others in the market and make educated judgments about the likelihood that the information is accurate (as it turned out, the CMS information was wrong in key respects) and about the likely effect on stock prices of the information, once widely known. Such research is a necessary part of efficient financial markets. *See Dirks v. SEC*, 463 U.S. 646, 658 n.17 (1983) ("[T]he value to the entire market of analysts' efforts cannot be gainsaid; market efficiency in pricing is significantly enhanced by their initiatives to ferret out and analyze information, and thus the analyst's work redounds to the benefit of all investors. … [A]nd this often is done by meeting with and questioning … insiders." (internal quotation marks and alterations omitted)).

The jury found the prosecution's evidence did not meet the rigorous standards for proving insider trading and acquitted all defendants on all insider-trading counts. That should have been the end of things.

But in this case, the prosecution took the position that information about the regulations CMS was considering was a form of government property. And the prosecution argued that it therefore did not need to prove the ordinary requisites of

insider trading. Rather, the prosecution invoked general theft and fraud statutes, which, it argued, make it a *felony*, punishable by as much as 25 years in prison, to share or receive government property without permission.

The prosecution thus contended that the defendants committed a crime not by *trading* on confidential information, but merely by sharing or obtaining it knowingly and without permission. Under the prosecution's theory, it mattered not at all whether the government insider who disclosed the information sought a personal benefit, or if he acted for some entirely different and laudatory reason (e.g., to shine light on a poor policy choice in hopes of prompting reconsideration).

The prosecution's theory thus disposed of all the strictures of insider-trading law that make room for lawful investment research, in ways that will ill serve financial markets. Even more troubling, by making the disclosure of potential regulatory changes, even by a whistleblower, a serious felony, the prosecution's theory would "cast a pall of prosecution over" many routine interactions between government employees, the press, and the public. *McDonnell v. United States*, 136 S. Ct. 2355, 2372 (2016).

This Court should not lightly assume that Congress—when it passed general laws prohibiting fraud and theft of government property—intended silently to criminalize commonplace activity at the heart of democratic government. *See Yates v. United States*, 135 S. Ct. 1074, 1088-1089 (2015) (plurality) (courts

should "resist reading [a statute] expansively" when the broad construction would permit prosecutors to charge conduct fundamentally unlike the conduct that Congress intended the offense to prohibit). Instead, applying settled law and established methods of interpreting criminal statutes, this Court should hold that government information of the sort at issue here—about contemplated regulatory changes—is not property within the meaning of the fraud or theft statutes.

This brief proceeds in three parts. Part I explains why controlling Supreme Court and Second Circuit precedent establishes that the government information at issue—information regarding CMS's proposed regulatory actions—is not "property" for purposes of either the wire fraud or Title 18 securities fraud statutes. Part II then details why this information also is outside the scope of the statute criminalizing theft of government property. Finally, Part III explains how the prosecution's theories will criminalize important First Amendment activities, reinforcing why this Court should reverse.

ARGUMENT

I. CONFIDENTIAL GOVERNMENT INFORMATION IS NOT "PROPERTY" FOR PURPOSES OF WIRE FRAUD AND TITLE 18 SECURITIES FRAUD

The district court instructed the jury that it could consider "confidential government information" to be "property" under the Title 18 securities fraud statute, 18 U.S.C. § 1348, and the wire fraud statute, 18 U.S.C. § 1343

(collectively, the "fraud statutes").[2] A-1100 (Jury Instructions). That instruction conflicts with the settled understanding of what constitutes "property" under the fraud statutes. This Court should reverse.

A. Wire Fraud And Title 18 Securities Fraud Protect A Victim's Property, Not Regulatory, Rights

To sustain charges under the fraud statutes, the government must establish that "the thing obtained [was] property in the hands of the victim." *Cleveland v. United States*, 531 U.S. 12, 15 (2000). "[P]roperty" can be either tangible or intangible, but in either case the analysis is "limited in scope to the protection of property rights" and does not include other non-property interests that a victim may have in the thing obtained. *Carpenter v. United States*, 484 U.S. 19, 25 (1987). Thus, as this Court consistently has held, "[t]o sustain a conviction for wire fraud," the government "must prove that the defendant acted with specific intent to obtain money or property by means of a fraudulent scheme that contemplated harm to the *property interests* of the victim." *United States v. Carlo*, 507 F.3d 799, 801 (2d Cir. 2007) (per curiam) (emphasis added); *see also United*

[2] The analysis of "property" for purposes of Title 18 securities fraud is guided by cases interpreting the same term in the wire fraud and mail fraud statutes. *See United States v. Schwartz*, 924 F.2d 410, 416 (2d Cir. 1991) ("Because the mail fraud and the wire fraud statutes use the same relevant language, we analyze them the same way."); *United States v. Motz*, 652 F. Supp. 2d 284, 296 (E.D.N.Y. 2009) ("[B]ecause 'the text and legislative history of 18 U.S.C. § 1348 clearly establish that it was modeled on the mail and wire fraud statutes,' the Court's analysis should be guided by the caselaw construing those statutes.").

States v. Males, 459 F.3d 154, 158 (2d Cir. 2006) (focusing on whether the scheme "was intended to deprive another of property rights").

In contrast, schemes to impair a public entity's regulatory interests fall outside the ambit of the fraud statutes. *See, e.g.*, *Cleveland*, 531 U.S. at 20-23 (holding government's interest in unissued video poker licenses was "purely regulatory" and not "property" under mail fraud statute); *United States v. F.J. Vollmer & Co.*, 1 F.3d 1511, 1521 (7th Cir. 1993) ("It is well established that the government's regulatory interests are not protected by the mail fraud statute.").

In determining whether the government has a property or regulatory interest, the Supreme Court in *Cleveland* "examined a number of factors" including "the regulatory as opposed to revenue collecting nature" of the thing obtained, alienability, and the "significance of the right to exclude." *Fountain v. United States*, 357 F.3d 250, 256 (2d Cir. 2004) (citing *Cleveland*, 531 U.S. at 20-27). The Court placed the "most weight" on the first factor—the regulatory or revenue collecting nature of the alleged property. *Id.* For example, in considering whether unissued video poker licenses were "property," the Supreme Court emphasized that the State's "intangible rights of allocation, exclusion, and control amount to no more and no less than [the State's] sovereign power to regulate." *Cleveland*, 531 U.S. at 23. Thus, if the government's "core concern is regulatory," *id.* at 20, the rights at issue are not property rights protected under the fraud statutes. *See also*

United States v. Evans, 844 F.2d 36, 42 (2d Cir. 1988) (holding government's interest in unissued export permit was "ancillary to a regulation, not to property," and thus was not protected by mail fraud and wire fraud statutes).

B. CMS Does Not Have A Property Interest In Information Regarding A Regulatory Decision

The government's "core concern" regarding the information at issue in the wire fraud and Title 18 securities fraud counts against the defendants in this case—"confidential information related to CMS's proposed radiation oncology rule," A-92 to A-93 (¶¶ 81, 83 (Superseding Indictment))—was purely regulatory. The proposed rule related to how much the government would reimburse for certain services. A fraudulent effort by a program participant to induce the government to overpay would be an effort to deprive the government of money or property and thus well within the scope of the fraud statutes. But a scheme simply to find out what reimbursement rates the government was contemplating does not imperil the government's fisc in any way.

The government essentially admitted as much in the District Court. When pressed in post-trial motions to explain how a leak of information about the proposed regulation could injure the government, the prosecution identified three forms of potential harm: Such a leak could "negatively affect[] CMS in carrying out its *regulatory* responsibilities," could "undermine the agency's *regulatory*

deliberative process," and could "result in 'suboptimal' healthcare *policy*." A-3151 (emphasis added).

Of course, our constitutional system is built on a contrary premise: that "secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors," *New York Times Co. v. United States*, 403 U.S. 713, 724-725 (1971) (Douglas, J., concurring), and that disclosure of information generally *improves* regulation and leads to *better* policy, *see Buckley v. Valeo*, 424 U.S. 1, 67 (1976) (per curiam) ("Sunlight is … the best … disinfectant." (citing Brandeis, *Other People's Money* 62 (National Home Library Foundation ed. 1933))). That this prosecution was explicitly premised on such an anti-democratic assumption ought to give the Court significant pause.

But even granting the government's premise—that premature disclosure of information about government plans might, in some instances, lead to undesirable regulatory consequences—these consequences are explicitly *regulatory* in nature, even in the government's framing. Disclosure did not cause the government to suffer financially, which this Court has described as the "critical, perhaps threshold consideration" for application of the fraud statutes. *Fountain*, 357 F.3d at 257. At most, the prosecution claimed disclosure could cause the government to do a less good job administering a regulatory system. Under well-settled law, this is simply not the stuff of fraud prosecutions. *See Cleveland*, 531 U.S. at 20 (fraud statutes

do not apply where the government's "core concern is regulatory"); *United States v. Schwartz*, 924 F.2d 410, 417 (2d Cr. 1991) (fraud does not lie where the government's interest is "no different than its interest in propounding and enforcing its other regulations with broad based applications"). *See also Sekhar v. United States*, 570 U.S. 729, 738, 740-741 (2013) (Alito, J., concurring) (under the extortion statute, "internal recommendations regarding government decisions are not property").

To be sure, the Supreme Court in *Carpenter*, on which the government relied heavily below, affirmed a fraud conviction based on a scheme to steal and trade on "confidential business information." 484 U.S. at 25. But it was critical in *Carpenter* that the scheme involved a very particular business—the Wall Street Journal—and a very particular kind of information—the planned content of future columns. The Journal obviously held much more than a "regulatory" interest in its forthcoming columns. These columns were, in the *Carpenter* Court's words, the Journal's "stock in trade." *Id.* at 26 (internal quotation marks omitted). It requires no great leap of logic to find that a newspaper has a property interest in the only thing it sells—the particular stories it plans to print—and that misappropriating such valuable, confidential information is a form of fraud.

Here, by contrast, the information about future regulatory actions is not something the government ever sells, much less its entire stock in trade. And the

government can identify only hypothetical regulatory injury from disclosure of the information, unlike the obvious commercial loss at issue in *Carpenter*.[3] Nothing in *Carpenter* remotely supports finding that the government had a property interest in the information at issue here. Indeed, no Court of Appeals has ever affirmed a fraud conviction premised on obtaining "confidential" information about the government's regulatory plans. Doing so would have profound and concerning consequences. *See* Section III, *infra*. This Court should reverse.

II. CONFIDENTIAL GOVERNMENT INFORMATION IS NOT A "THING OF VALUE" OR "PROPERTY" FOR PURPOSES OF SECTION 641

Section 641 is a general statute that punishes "[s]tealing, larceny, and its variants and equivalents," when aimed at the federal government's property. *Morissette v. United States*, 342 U.S. 246, 260 (1952). Section 641 defines the property to which it applies to include any "record, voucher, money or thing of value of the United States or of any department … thereof," 18 U.S.C. § 641, and

[3] The government's proffered injury is also very different from the injury at issue in *United States v. Grossman*, 843 F.2d 78 (2d Cir. 1988). There, this Court affirmed the wire fraud conviction of a law firm associate who tipped relatives based on confidential information about an upcoming transaction involving a firm client. This Court concluded that the information was property, even though not offered for sale by the law firm, because failure to preserve the confidentiality of the information could cause commercial harm to the law firm. *Id.* at 85-86. Here, of course, the government identifies only hypothetical regulatory, not actual commercial, harm from disclosure of the information.

criminalizes both the unauthorized taking of government property and the receipt of that property, knowing it was taken without permission.

The prosecution's theory at trial was that *all* information the government has designated as confidential, whether by statute, rule, regulation, or even longstanding practice, is a "thing of value" and thus property within the meaning of Section 641. In accordance with that theory, the district court instructed the jury that "any information from CMS … that was confidential [] was property belonging to the United States" for purposes of Section 641. A-1079 (Jury Instructions).

This Court should reject this interpretation of Section 641. Had Congress wished to make *all* disclosures of "confidential" information a felony, punishable by up to ten years in prison, surely it would have said so. The Court should not lightly assume that Congress intended to hide a sweeping government-secrecy law in Section 641, a routine recodification of existing offenses prohibiting theft of government property. *See Morissette*, 342 U.S. at 269 n.28 (Section 641 "was not intended to create new crimes but to recodify those then in existence"). Congress, after all, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001).

A. Congress Has Developed A Measured, Deliberate, And Tailored Regime For Controlling Government Information

There are important reasons to be wary about criminalizing the free flow of information about the government's plans. The Supreme Court has long recognized that "[t]he public interest in having free and unhindered debate on matters of public importance [is] the core value of the Free Speech Clause of the First Amendment." *Pickering v. Board of Educ. Twp. High Sch. Dist. 205, Will Cty.*, 391 U.S. 563, 573 (1968). "The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information." *New York Times*, 403 U.S. at 723-724 (Douglas, J., concurring). The Constitution's Framers recognized that robust institutions and a free society require "the power of reason as applied through public discussion," and so by including the First Amendment "they eschewed silence coerced by law—the argument of force in its worst form." *Whitney v. California*, 274 U.S. 357, 375-376 (1927) (Brandeis, J., concurring).

There is an enormous variety of information that the government deems confidential. Some of that information affects national security, some may be relevant to the safety of informants, and some may risk nothing more than embarrassment of senior officials or administrative inconvenience. In keeping with both the broad spectrum of information the government labels as confidential, and the important First Amendment values at stake, there are separate, measured,

and differentiated regimes of disciplinary, civil, and criminal sanctions in place that aim to reconcile control over various types of government information with the needs of democratic governance.

For example, regulations promulgated pursuant to the Ethics in Government Act of 1978 specify that "[a]n employee shall not engage in a financial transaction using nonpublic information, nor allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure." 5 C.F.R. § 2635.703(a). Violation of this regulation renders the government employee subject to employment discipline, including possible termination, but is not itself a crime. *See id.* §§ 2635.102(g), 2635.106.

Congress has singled out misuse of certain kinds of government information for more serious punishment. For example, 18 U.S.C. § 1905 makes it a misdemeanor, punishable by no more than one year in prison, for a government employee to disclose private financial and business information (e.g., tax returns) learned during the course of government employment. Congress has also enacted statutes making it a misdemeanor to disclose information from a bank examination report, *id*. § 1906, or information related to an examination by a farm credit examiner, *id.* § 1907. Congress also made it a felony for federal employees to disclose, in violation of agency rules, information (such as crop reports) that might

affect the value of agricultural products. But in doing so, it placed an important caveat, specifying that "[n]o person shall be deemed guilty of a violation of any such rules, unless prior to such alleged violation he shall have had *actual knowledge* thereof." *Id.* § 1902 (emphasis added).

There are also specific protections regarding law-enforcement and national-security information. For example, Rule 6(e) of the Federal Rules of Criminal Procedure establishes a comprehensive system of secrecy and authorized disclosures of matters occurring before grand juries, Fed. R. Crim. P. 6(e)(2)-(3), authorizes courts to enforce this regime through the contempt power, *id*. 6(e)(7), and prohibits the imposition of an obligation of secrecy on any person not named in the rule, *id*. 6(e)(2)(A).

With respect to classified information, Congress and the executive have enacted numerous federal statutes and regulations to ensure the secrecy of sensitive national-security information—and these laws carefully calibrate the need for government secrecy and First Amendment protections. *See, e.g.*, 32 C.F.R. Part 2001 (regulations safeguarding classified national-security information); *id.* Part 2002 (regulations safeguarding controlled unclassified information). The federal offense of disclosure of classified information, 18 U.S.C. § 798, requires proof that the leak occurred in a "manner prejudicial to the safety or interest of the United States or for the benefit of any foreign government to the detriment of the United

States." *Id.* § 798(a). Similarly, the anti-leaking provisions of 18 U.S.C. § 793, which apply to disclosure of wholly intangible national-defense information, require proof that "the possessor has reason to believe [the information] could be used to the injury of the United States or to the advantage of any foreign nation." *Id.* § 793(d)-(e).

B. Expanding Section 641 To Criminalize Virtually Any Unauthorized Disclosure Of Confidential Government Information Would Vitiate Congress's Measured, Deliberate, And Tailored Regime For Controlling Government Information

The prosecution's interpretation of Section 641 replaces the existing nuanced system for regulating disclosure of confidential government information with a single, one-size-fits-all rule: All unauthorized disclosures of information the government views as confidential, on any topic at all, are felonies, punishable by up to ten years in prison. But when Congress has addressed confidential government information directly, it has incorporated careful limits on the information covered, the conduct proscribed, and the penalties imposed. This powerfully suggests that Congress never intended for Section 641—a statute facially aimed at routine theft—to have such breathtaking scope.

The Supreme Court rejected a similar misinterpretation of a general theft statute in *Dowling v. United States*, 473 U.S. 207 (1985). There, the Supreme Court addressed a conviction under the National Stolen Property Act, 18 U.S.C. § 2314, for interstate transport of bootleg records that were "'stolen, converted, or

taken by fraud' only in the sense that they were manufactured and distributed without the consent of the copyright owners of the music[]." 473 U.S. at 208. Section 2314, like Section 641, is a general theft statute, and the plain language of the statute, which covers "any goods, wares, merchandise, securities or money," would seem facially broad enough to encompass bootleg records, which are, after all, both merchandise and goods. Nonetheless, the *Dowling* Court reversed the conviction.

Surveying the history of copyright-enforcement provisions, the Court emphasized that "[n]ot only has Congress chiefly relied on an array of civil remedies to provide copyright holders protection against infringement, but in exercising its power to render criminal certain forms of copyright infringement, it has acted with exceeding caution." *Dowling*, 473 U.S. at 221 (citation omitted). The Court criticized the government's effort to apply the general stolen-property law to this unique species of intellectual property, explaining that by treating an unauthorized reproduction of intangible information as no different from a stolen thing, "[t]he Government thereby presumes congressional adoption of an indirect but blunderbuss solution to a problem treated with precision when considered directly. To the contrary, the discrepancy between the two approaches convinces us that Congress had no intention to reach copyright infringement when it enacted § 2314." *Id.* at 226.

Section 641 is just as much a "blunderbuss" solution to the issue of confidentiality as Section 2314 was to the question of copyright infringement. And, if anything, "precision" is even more important here than in the copyright context, given the enormous tensions between secrecy and democratic governance. *Dowling* provides a clear basis to reject the government's attempt to expand Section 641, a general anti-theft offense, into an all-purpose tool for prosecuting leaks.

Nothing in this Court's decision in *United States v. Girard*, 601 F.2d 69 (2d Cir. 1979), forecloses this result. *Girard* affirmed the Section 641 conviction of a DEA agent who retrieved from a DEA database the identities of informants and sold the information to a former colleague turned drug dealer. *Girard* was decided before *Dowling* and based its expansive construction of Section 641 on analogies to intellectual property law. *See id*. at 71 (citing civil cases recognizing "[t]he existence of a property in the contents of unpublished writings"). But *Dowling* emphasized the special nature of intellectual property and the perils of applying general theft statutes to it, holding that "the property rights of a copyright holder have a character distinct from the possessory interest of the owner of simple 'goods, wares, or merchandise,' … [so] interference with copyright does not easily equate with theft, conversion, or fraud." 473 U.S. at 217. *Dowling* therefore casts doubt on *Girard*'s reasoning, and this Court is free to disregard *Girard* in light of

Dowling. *See In re Zarnel*, 619 F.3d 156, 168 (2d Cir. 2010) ("[I]f there has been an intervening Supreme Court decision that casts doubt on our controlling precedent, one panel of this Court may overrule a prior decision of another panel." (internal quotation marks omitted)).

Girard is also distinguishable. *Girard* involved information in specific government records, *see* 601 F.2d at 70 (describing the specific reports that were obtained), and this Court's affirmance of the Section 641 conviction thus finds some support in the plain text of the statute, which lists "records" as among the species of government property protected. But that reasoning does not cover the information at issue here—predictions about the likely outcome of a regulatory decision—which is not alleged to have been located in any specific government record.[4]

In short, *Girard* does not require this Court to accept the prosecution's premise that *all* confidential government information is a "thing of value," unauthorized disclosure of which is a felony.

[4] Violations of Section 641 are felonies if "the value of [the] property … exceed[s] the sum of $1,000." 18 U.S.C. § 641; *see also United States v. Lee*, 833 F.3d 56, 66 (2d Cir. 2016). This monetary requirement further reinforces that the statute is focused on traditional property, not on information about regulatory actions.

III. THE PROSECUTION'S INTERPRETATIONS OF "PROPERTY" AND "THING OF VALUE" CRIMINALIZE CORE FIRST AMENDMENT ACTIVITY

The government's theories of "property" and "thing of value" in this case are not only wrong but also pose grave threats to core First Amendment activities.

Discussion of proposed regulatory changes—even changes the government would prefer to keep "confidential" until final—is at the heart of ordinary, necessary activity in a functioning democracy. Government officials may wish to discuss possible regulatory changes with constituents who will be impacted, in order to learn of likely impacts and assess whether the benefits of the changes outweigh their costs. Constituents may want to learn what their government is doing, so that they can plan for it and perhaps persuade the government to adopt a different course. And the press appropriately and routinely seeks to learn of regulatory changes in advance, so that it can fulfil its role of informing the public of the government's plans.

But who would dare engage in such beneficial activities if doing so risks felony prosecution?

Consider a government employee, believing the government is about to enact a misguided policy, who makes an interstate telephone call to a journalist and relays "confidential" information about the planned policy. Assume the employee does so in the hope that the journalist's newspaper will publish the article, that the publication will lead to public pressure, and that the pressure will lead the

government to reverse its misguided decision. Further, assume the information will help the newspaper increase its circulation. On the prosecution's theory in this case, the employee, the journalist, and the newspaper would be well advised to consult with counsel before proceeding, for this conduct would satisfy each element of the fraud and theft offenses for which the defendants were convicted.

It would violate Section 641, as charged in this case, because on the prosecution's theory all "confidential" information is the government's property, the information was disclosed without permission, the disclosure was intended to deny the government the "use and benefit" of the property in precisely the manner identified by the prosecution here—undermining the government's ability to implement a chosen policy—and the information was worth more than $1,000 to the ultimate recipient, the newspaper.

On the prosecution's theory, this conduct would also violate the fraud statutes, for similar reasons: It would constitute a scheme to deprive the government of what the prosecution contends is government "property"—that is, the information about regulatory plans—and to convert that property to one's own use (that is, to run a profitable newspaper story).

The prosecution may protest that it would never bring such a case. But the vibrant public discourse guaranteed by the First Amendment requires greater protection than a prosecutor's indulgence. *See McDonnell*, 136 S. Ct. at 2372-

2373 ("[W]e cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010))). When, as here, "the most sweeping reading of [a] statute would fundamentally upset" constitutional constraints on federal prosecution, it "gives … serious reason to doubt the Government's expansive reading … and calls for [courts] to interpret the statute more narrowly." *Bond v. United States*, 572 U.S. 844, 866 (2014).

Indeed, in construing the federal bribery statute, the Supreme Court recently rejected the government's "expansive interpretation" of "official act" in order to avoid making routine interactions into prosecutable felonies. *McDonnell*, 136 S. Ct. at 2372. The *McDonnell* Court explained that public officials routinely "arrange meetings for constituents, contact other officials on their behalf, and include them in events." *Id.* Indeed, "[t]he basic compact underlying representative government *assumes* that public officials will hear from their constituents and act appropriately on their concerns." *Id.* Treating these routine and desirable actions as "official act[s]" within the meaning of the bribery statutes would "cast a pall of potential prosecution over these relationships." *Id.* It would leave officials wondering "whether they could respond to even the most commonplace requests for assistance," and "citizens with legitimate concerns might shrink from participating in democratic discourse." *Id.*

These concerns apply equally here: Discussing planned regulatory changes is a basic part of democratic governance. The prosecution's contention that all confidential government information is property would lead officials to "wonder whether they could respond to even the most commonplace requests for" information. *McDonnell*, 136 S. Ct. at 2372. Prudent officials, anxious to avoid getting close to prosecutable conduct, would mitigate risk by saying less and withholding more. Government employees "with legitimate concerns" about their employer's actions and constituents eager to learn of the government's plans would both "shrink from participating in democratic discourse" for fear of prosecution. *Id.*

There are robust laws already in place that appropriately punish actual insider trading without undermining First Amendment freedoms.[5] This Court need not "fear that wrongdoing will go unpunished because the government can prosecute defendants under other existing laws, and indeed is doing so." *Evans*, 844 F.2d at 42. But the convictions in this case depend on an extraordinarily broad theory of government "property" that is inconsistent with core First Amendment

[5] The recently enacted STOCK Act, for example, makes explicit that insider-trading laws apply to federal employees. *See* Stop Trading on Congressional Knowledge Act of 2012, Pub. L. No. 112-105, § 4, 126 Stat. 291, 292 (codified at 15 U.S.C. § 78u-1). But unlike the prosecution's theories here, the STOCK act incorporated the traditional elements of insider trading. *See id.*

values. This Court should not arm the government with such a potent weapon. The convictions should be reversed.

CONCLUSION

For the reasons set forth above, *amicus* respectfully requests that this Court vacate the defendants' convictions and remand for further proceedings.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 5,366 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied on the word count feature of this word processing system in preparing this certificate.

/s/ *Peter Neiman*
PETER NEIMAN