**UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT**

**Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500**

**MOTION INFORMATION STATEMENT**

**Docket Number(s):** 18-2811-cr

Caption [use short title]

**Motion for:** Leave to File a Brief as Amicus Curiae in Support of Reversal.

United States v. Blaszczak

Set forth below precise, complete statement of relief sought:

The National Association of Criminal Defense Lawyers seeks leave to file a brief as amicus curiae in support of reversal.

**MOVING PARTY:** National Association of Criminal Defense Lawyers

☐ Plaintiff ☐ Defendant

☐ Appellant/Petitioner ☐ Appellee/Respondent

**OPPOSING PARTY:** N/A

**MOVING ATTORNEY:** Peter Neiman

**OPPOSING ATTORNEY:** N/A

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Court-Judge/Agency appealed from: U.S. District Court for the Southern District of New York (Lewis A. Kaplan, U.S. District Judge)

**Please check appropriate boxes:**

Has movant notified opposing counsel (required by Local Rule 27.1):
☑ Yes ☐ No (explain):

Opposing counsel's position on motion:
☑ Unopposed ☐ Opposed ☐ Don't Know

Does opposing counsel intend to file a response:
☐ Yes ☑ No ☐ Don't Know

**FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:**

Has request for relief been made below? ☐ Yes ☐ No

Has this relief been previously sought in this Court? ☐ Yes ☐ No

Requested return date and explanation of emergency:

Is oral argument on motion requested? ☐ Yes ☑ No (requests for oral argument will not necessarily be granted)

Has argument date of appeal been set? ☑ Yes ☐ No If yes, enter date: April 21, 2021

**Signature of Moving Attorney:**
/s/ Peter Neiman **Date:** 2/12/2012

Service by: ☑ CM/ECF ☐ Other [Attach proof of service]

# 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 REVERSAL**

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February 12, 2021

## CORPORATE DISCLOSURE STATEMENT

Amicus curiae is not owned by a parent corporation. No publicly held corporation owns more than ten percent of stock in amicus.

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## INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a nonprofit bar association dedicated to advancing the fair administration of justice. It has a nationwide membership of many thousands of private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges.

NACDL has an interest in this case because the government has asserted novel and overly broad theories of what constitute "property" and a "thing of value" for purposes of wire fraud, Title 18 securities fraud, and conversion of government property. The Panel's decision substantially extends the breadth of these statutes to criminalize virtually all unauthorized disclosures of government information. If not reexamined, it would expose individuals 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

[1] The parties to this appeal 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.

Centers for Medicare and Medicaid Services (CMS), where defendant Christopher Worrall was employed. 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 the prosecution argued that if a government agency designates information as "confidential," it becomes government property. Therefore, the government contended, it is a *felony* under general theft and fraud statutes to share or receive that information without permission—*even if nobody trades on the confidential information or receives a personal benefit for disclosing it*. Unfortunately, the Panel majority (over the dissent of Judge Kearse) accepted that argument, finding that information the government designates as confidential is property, and that "the relevant 'interference' with [the government's] ownership of confidential information [i]s complete upon the unauthorized disclosure." *United States v. Blaszczak*, 947 F.3d 19, 38 (2d Cir. 2019). The Panel therefore affirmed defendants' convictions under general fraud and theft statutes.

The prosecution's theory that confidential government information is property cannot survive the Supreme Court's subsequent decision in *Kelly v. United States*, 140 S. Ct. 1565 (2020). *Kelly* rejected the very theories about what suffices to create a government property interest on which this prosecution relied. *Kelly* holds that neither "[t]he State's 'intangible rights of allocation, exclusion,

and control'" nor the imposition of incidental bureaucratic costs are sufficient to create a property interest, explaining that "[t]o rule otherwise … would be … 'a sweeping expansion of federal criminal jurisdiction.'" *Id.* at 1572, 1574 (quoting *Cleveland v. United States*, 531 U.S. 12, 23-24 (2000)).

The Supreme Court remanded this case for reconsideration in light of *Kelly*. The prosecution's theory that confidential information is government property is wrong, as *Kelly* establishes. It also dangerous. It would turn the general fraud and theft statues into an official-secrets act and makes sharing information with the press a crime, notwithstanding the media's centrality to democratic government. The prosecution's theory would thus "cast a pall of potential 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 reverse the convictions.

## ARGUMENT

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

*Kelly* forcefully distinguished schemes to deprive the government of property—which the fraud statutes criminalize—from activity that impacts the government's interest as a regulator. The case concerned two officials convicted under the wire fraud statute for reallocating traffic lanes at the George Washington Bridge normally reserved for vehicles from Fort Lee, N.J., snarling the town in

gridlock as an act of political retribution. 140 S. Ct. at 1568-1571. The officials had claimed, falsely, that the realignment was for a traffic study. *Id*. The Court reversed their convictions, holding that the lane realignment was an "exercise of regulatory power" because the officials "exercised the regulatory rights of 'allocation, exclusion, and control'—deciding that drivers from Fort Lee [would get] fewer lanes." *Id*. at 1573. The Court rejected the government's argument that the labor costs incurred by the public agency in collecting data for the fake traffic study transformed the scheme into a *property* fraud because "the labor costs were an incidental (even if foreseen) byproduct of [the officials'] regulatory object." *Id*. at 1573-1574.

*Kelly* held that conduct impacting the government's rights of "allocation, exclusion, and control" interfere with the government's regulatory function, not its property interests. That holding disposes of this case. Labelling information as confidential is deciding about the "allocation and control" of that information, by excluding the public from it. Accessing information labelled as confidential without the government's permission therefore amounts only to "alter[ing] a regulatory decision," not "the taking of property," 140 S. Ct. at 1573.

Disclosing information about regulatory plans the government would prefer to keep confidential can no doubt be disruptive. It perhaps can, as the government theorized, make its deliberations over planned regulations less efficient. But the

First Amendment reflects the premise that "[s]unlight is … the best of disinfectants," *Buckley v. Valeo*, 424 U.S. 1, 67, n. 80 (1976) (per curiam) (citing Brandeis, Other People's Money 62 (1933)), and that it is "[s]ecrecy," not disclosure, that "perpetuat[es] bureaucratic errors," *New York Times Co. v. United States,* 403 U.S. 713, 724 (1971) (Douglas, J., concurring). The fraud statutes therefore do not criminalize disclosure of regulatory plans, an act that targets the government's regulatory, not property, interests.

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

The prosecution's claim that any information the government labels as confidential is a "thing of value" for purposes of Section 641 is also unsustainable under *Kelly*, for the reasons explained by defendants-appellants. *See* ECF No. 286. The prosecution's claim is also wrong because it would defeat Congress's efforts to enact nuanced and thoughtful regulations of confidential information while safeguarding core First Amendment conduct.

Congress enacted separate regimes of disciplinary, civil, and criminal sanctions to reconcile control over various types of government information with the needs of democratic governance. Where the criminal law protects sensitive government information, Congress generally included *mens rea* elements to ensure, for example, that the defendant acted in knowing derogation of duty. *See, e.g.*, 18 U.S.C. § 1902 (no prosecution for disclosure of information affecting the

value of agricultural products unless defendant had actual knowledge of applicable rules). Offenses with less restrictive *mens rea* requirements cover only national security information or classified information. *See, e.g.*, 18 U.S.C. §§ 793, 798. More general constraints on disclosure have lesser penalties. For instance, there is a civil service regulation providing 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 … by knowing unauthorized disclosure." 5 C.F.R. § 2635.703(a). Violation of this regulation renders a federal employee subject to 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 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. And specific provisions govern law-enforcement 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 other person, *id.* 6(e)(2)(A).

The prosecution's expansive interpretation of Section 641 replaces this nuanced system with a one-size-fits-all rule: All unauthorized disclosures of confidential government information of any kind are felonies, punishable by up to ten years in prison. But the Court should not lightly assume that Congress intended to hide a sweeping government-secrecy law in Section 641, a general theft statute. *See Whitman v. American Trucking Ass'n*, 531 U.S. 457, 468 (2001) (noting Congress "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").

The Supreme Court rejected a similar misinterpretation of a general theft statute in *Dowling v. United States*, 473 U.S. 207 (1985). *Dowling* 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. 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." *Id.* at 221 (citation omitted). The Court criticized 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. This Court should not read Section 641 as an all-purpose tool for prosecuting leaks, thereby sweeping away Congress's more targeted framework of statutes and regulations regulating information disclosure.

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

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. 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).

There are important reasons to be wary about criminalizing the free flow of information about the government's plans. The "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 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).

Discussion of proposed regulatory changes—even changes the government would prefer to keep "confidential"—is at the heart of ordinary, necessary activity in a functioning democracy. Elected officials may wish to discuss possible regulatory changes with constituents who will be affected to learn of likely impacts

and assess whether the benefits of contemplated changes outweigh their costs. Constituents may want to learn what their government is doing, so that they may plan or advocate for 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 about government policymaking.

In order to avoid converting routine interactions into felonies, the Supreme Court recently rejected the government's "expansive interpretation" of "official act" in the federal bribery statute. *McDonnell*, 136 S. Ct. at 2372. It 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.* *Kelly* reaffirmed this direction, admonishing that "[f]ederal prosecutors may not use property fraud statutes to 'set[] standards of disclosure and good government.'" 140 S. Ct. at 1574 (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987) (alteration in original)).

These concerns apply equally here: Discussing planned regulatory changes is a basic part of governance. The theory 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. 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.* Important First Amendment activity would be chilled.

Consider: a government employee learns, from documents labeled "confidential" by agency leaders, that they plan to enact a regulation that agency experts conclude will disserve the public but enrich a political appointee's patron. So, the employee calls a journalist and relays this information in the hope that publication will create public pressure and cause the agency to change course. The journalist—recognizing that an article on this topic will generate clicks (and profits) for her newspaper—posts a story featuring the information. Under the Panel majority's decision, the government has a "property interest" in the information leaked because the government considers it confidential, and the "relevant 'interference' with [the government's] ownership" needed to establish a crime "[i]s complete upon the unauthorized disclosure" of the information to the journalist. *Blaszczak*, 947 F.3d at 38. Under the decision, therefore, both the whistleblower and the journalist have committed felonies—they have taken (or

obtained) the government's property without authorization—and so they could face years in prison.

There are robust laws already in place that appropriately punish actual insider trading without undermining First Amendment freedoms. Those laws require, among other things, that the disclosing insider act for personal benefit, and thus do not criminalize whistleblowing. *See Dirks* v. *SEC*, 463 U.S. 646, 663 (1983). This Court need not fear that wrongdoing will go unpunished because the government can prosecute defendants under other existing laws—and indeed it does so. But the convictions in this case depend on a boundless theory of government "property" that is inconsistent with core First Amendment values. This Court should not arm the government with such potent weapons.

## CONCLUSION

For the reasons set forth above, *amicus* respectfully requests that this Court vacate the defendants' convictions.

Respectfully submitted,

/s/ *Peter Neiman*

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February 12, 2021

## 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 2,605 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*
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