No. 20-_____

In the

Supreme Court of the United States

ROBERT OLAN AND THEODORE HUBER
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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 & FRANKEL LLP
1177 Sixth Avenue
New York, New York 10036
(212) 715-9011

Counsel for Petitioner Theodore Huber

DONALD B. VERRILLI, JR.
Counsel of Record
ELAINE J. GOLDENBERG
JONATHAN S. MELTZER
JACOBUS P. VAN DER VEN
MUNGER, TOLLES & OLSON LLP
1155 F Street NW, Seventh Fl.
Washington, DC 20004-1357
(202) 220-1100
Donald.Verrilli@mto.com

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

Counsel for Petitioner Robert Olan

QUESTIONS PRESENTED

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

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

PARTIES TO THE PROCEEDING

Petitioners Robert Olan and Theodore Huber were defendants-appellants in the court of appeals.

Respondent United States of America was appellee in the court of appeals.

Respondents David Blaszczak and Christopher Worrall were defendants-appellants in the court of appeals.

RELATED PROCEEDINGS

The proceedings directly related to this petition are:

United States of America v. *David Blaszczak, Theodore Huber, Robert Olan, Christopher Worrall*, Nos. 2018-2811, 2018-2825, 2018-2867, and 2018-2878 (consolidated) (2d Cir.), consolidated judgment entered on December 30, 2019; and

United States of America v. *David Blaszczak, Theodore Huber, Robert Olan, Christopher Worrall,* No. 17 CR 357 (LAK) (S.D.N.Y.), judgments as to Robert Olan and Theodore Huber entered on September 21, 2018.

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INTRODUCTION

In recent years, this Court has been forced—again and again—to rein in overzealous enforcement of the federal criminal law by prosecutors whose charging decisions, particularly in fraud cases, reflect little regard for the statutory text enacted by Congress, principles of fair notice, and the federal-state balance. *E.g.*, *Kelly* v. *United States*, 140 S. Ct. 1565 (2020); *McDonnell* v. *United States*, 136 S. Ct. 2355 (2016); *Bond* v. *United States*, 572 U.S. 844 (2014); *Skilling* v. *United States*, 561 U.S. 358 (2010). This is another such case. The government secured convictions here, which a divided Second Circuit panel affirmed, by interpreting federal fraud and conversion statutes in ways that vastly exceed the limits imposed by the statutes' language and this Court's precedents.

First, the panel majority endorsed the government's novel theory that individuals commit criminal fraud and conversion by disclosing or obtaining confidential government information about potential regulations, even though the information has no economic value to the government. As Judge Kearse explained in her dissent, however, and as this Court's recent decision in *Kelly* confirms, treating that kind of government information as property conflicts directly with *Cleveland* v. *United States*, 531 U.S. 12 (2000).

Second, the panel majority erased the personal-benefit requirement from criminal insider-trading law, concluding that individuals commit fraud by using confidential information in making investment decisions even absent any proof that the source of the information received a personal benefit in exchange for the disclosure. That decision is irreconcilable with four decades of this Court's precedents, from *Dirks* v. *SEC*, 463 U.S. 646 (1983), to *Salman* v. *United States*,

137 S. Ct. 420 (2016), which establish that trading on inside information is not fraudulent unless the person who provided the information disclosed it for a "personal benefit."

Both of those rulings cry out for review by this Court. Deeming the unauthorized disclosure of nonproprietary government information to be a theft of property stretches the concepts of fraud and conversion far beyond what the text of the relevant statutes will bear. The result is to criminalize not only the routine activities of investment analysts but also those of whistleblowers, journalists, and publishers. Indeed, if leaked government information constitutes government property, wire fraud and criminal conversion occur many times daily in Washington, D.C., and state capitols across the country.

In like manner, the Second Circuit's elimination of the personal-benefit requirement transforms the prohibition on insider-trading *fraud* into a sweeping and amorphous prohibition on all trading in material nonpublic information, no matter how obtained. For nearly 40 years, courts, prosecutors, and market participants have understood that the personal-benefit requirement this Court established in *Dirks* and reaffirmed in *Salman* marks "the line between permissible and impermissible disclosures and uses" of nonpublic information. *Dirks*, 463 U.S. at 658 n.17. The ruling below makes all of that precedent irrelevant—a true sea change in the law. That change deprives financial professionals of *Dirks*'s clear "guiding principle," *id.* at 657-658, thereby exposing them to imprisonment merely for doing their jobs and chilling the analysis of information on which the health of securities markets depends. And that change also creates bizarre anomalies, criminalizing conduct as to which the SEC—the

expert agency charged with regulating the securities markets—could not bring a civil enforcement action.

OPINIONS BELOW

The Second Circuit's opinion is published at 947 F.3d 19. The district court did not issue a written opinion on the questions presented.

JURISDICTION

The Second Circuit issued its opinion and entered judgment on December 30, 2019, Pet.App.1a, and denied rehearing on April 10, 2020, Pet.App.57a. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. Pet.App.58a.

STATEMENT

1. a. The Centers for Medicare & Medicaid Services ("CMS") establishes the rates at which Medicare and Medicaid reimburse healthcare providers for services. Each year, the agency reevaluates those rates in notice-and-comment proceedings and promulgates new price-setting regulations. C.A.App.474. CMS's reimbursement rates are a subject of great public interest. They determine the cost of healthcare services provided to tens of millions of Americans and affect many members of the healthcare industry.

During the period in which the events at issue occurred, CMS relied on an exchange of information with interested parties to better inform its rulemaking process. That dialogue occurred both before and after CMS formally proposed rules for public comment, including in private conversations. *E.g.*, C.A.App.515-

516, 779-781, 964. Information flowed in both directions: CMS gathered input about particular procedures and the equipment, cost, and time required to provide them, and it shared non-public information relevant to draft regulations, including pricing methodologies. C.A.App.862-864; see C.A.App.523, 641, 857, 2772-2774.

CMS exchanged information with patients, hospitals, and healthcare companies as well as with members of Congress, congressional staff, and industry analysts. C.A.App.527-528, 849, 2602. For example, industry analysts advocated positions to CMS and closely tracked CMS's actions and anticipated actions. Those analysts' publications openly referred to their "conversations with key officials and staff" at CMS and, on that basis, made predictions about what actions CMS was likely to take. C.A.App.2992-2994; see, *e.g.*, C.A.App.2957-2959, 2964-2971, 3006-3014; see also C.A.App.849 (CMS official: consultants "share information about CMS's policies and try to inform us about * * * policies that CMS should adopt").

CMS had a generally worded, internal non-disclosure policy for confidential information. But CMS's practice of selective disclosure made it exceedingly difficult for members of the public to know who was authorized to disclose such information or whether a particular piece of confidential information had been released on an authorized basis. C.A.App.477-478, 493, 538-539, 2043-2045.

b. Petitioners Olan and Huber were analysts at Deerfield, a healthcare-focused investment fund. Their job was to "ferret out and analyze information"—a role "necessary to the preservation of a healthy mar-

ket." *Dirks*, 463 U.S. at 658. They made recommendations to others at Deerfield but did not make trading decisions. C.A.App.553, 570.

Defendant David Blaszczak, a former CMS employee, was retained by various investor clients, including Deerfield, as a consultant. C.A.App.553, 570, 638, 812, 827. Deerfield's legal and compliance officers knew that he continued to speak to his former CMS colleagues and approved use by Deerfield's analysts of the information he provided. C.A.App.810-825, 983-986, 2035-2037; see C.A.App.821 (discussing that Blaszczak "spoke to officials at CMS"). Olan and Huber made no secret of the fact that Blaszczak transmitted information to Deerfield. They circulated the information by email to a large group that included in-house lawyers and compliance personnel; discussed Blaszczak's communications and shared investment recommendations with the general counsel and others; and memorialized their analysis in a permanent database that anyone at Deerfield could access. *E.g.*, C.A.App.553-560, 650-651, 821, 1995-1998.

c. It was in that context that the alleged unlawful tip underlying this prosecution occurred. On May 9, 2012, while CMS was considering its annual proposed reimbursement rule for radiation-oncology treatments, Blaszczak predicted to Deerfield analyst Jordan Fogel that CMS would cut those reimbursement rates "in half"—consistent with new, public information from a medical association about the length of those treatments. C.A.App.1985. Fogel relayed Blaszczak's prediction by email to a large group at Deerfield, including Huber and Olan. *Ibid.* Petitioners treated Blaszczak's prediction not as definitive "inside" information, but as legitimate intelligence. The following day, Deerfield placed an order to short

shares of a radiation-device manufacturer. C.A.App.2574.

The government alleged that Blaszczak based his prediction on confidential information he received from a CMS employee, defendant Christopher Worrall. Pet.App.4a. According to the government, information flowed from Worrall at CMS to Blaszczak, Worrall's former colleague, and then to Fogel and to petitioners. It is undisputed that Fogel, Olan, and Huber had no idea who Worrall was, much less what if any information he might have provided to Blaszczak, why he provided it, or whether he received any benefit in exchange for providing it. C.A.App.556, 1010.[1]

When the proposed rule issued, CMS proposed a lower reimbursement rate based on reduced treatment times, but applied it only to certain facilities not responsible for most radiation treatments. Blaszczak had incorrectly predicted that the reduction would apply across the board. C.A.App.578-579, 659-668, 2567-2570.

Deerfield made approximately $2.7 million in profits on the trades—an amount the firm considered disappointing. C.A.App.659, 2573-2578, 2587-2925. Because Olan's and Huber's compensation was based on seniority and overall firm performance, not particular trades, their share of those profits was miniscule. C.A.App.979, 2924.

2. a. The government charged Olan and Huber with violating Section 10(b) of the Securities Exchange

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[1] Olan and Huber also recognized that Blaszczak was "wrong at least as much as he was right." C.A.App.964-966; see C.A.App.606. They created analyses based on the view that CMS would not do what Blaszczak predicted (Olan put that chance at 85%, Huber at 80%). C.A.App.3056-3064; see C.A.App.966, 2973.

Act of 1934 and Rule 10b-5 (Title 15 fraud provisions), as it typically does when prosecuting alleged insider-trading fraud. To prove fraud by remote tippees such as Huber and Olan under those provisions, the government must show that the source of confidential information disclosed it in exchange for a personal benefit and that the tippees knew of the benefit. *Salman*, 137 S. Ct. at 423, 426-428. But here the government also charged the alleged insider trading in additional ways, bringing Title 18 charges for defrauding the government of its property in violation of the federal wire-fraud statute (18 U.S.C. 1343); conversion of government property (18 U.S.C. 641); Title 18 securities fraud (18 U.S.C. 1348); and conspiracy (18 U.S.C. 371, 1349).

In adding those Title 18 charges, the government sought to extend existing law in two ways. First, the government contended that confidential government information about proposed regulations—in this case, predictions about what reimbursement rates CMS would propose—constitutes government property under the wire-fraud, conversion, and Title 18 securities-fraud statutes. The government introduced no evidence that the information here had economic value to the government or that its disclosure caused the government economic loss, arguing only that disclosure could increase lobbying or otherwise make the regulatory process less smooth. C.A.App.504.

Second, the government contended that to establish insider trading under Title 18's fraud statutes—as opposed to under Title 15—it was not required to prove that the source of the information sought any personal benefit in exchange for disclosure, or that petitioners knew that the information was disclosed for such a benefit. The government contended that it

needed to prove only that Olan and Huber knew that the information originated in an unauthorized disclosure from a government source.

The government presented no evidence that Olan or Huber knew the identity of the source or the nature of the circumstances in which Blaszczak allegedly obtained confidential information about the proposed rule, let alone that they knew of any personal benefit to a CMS employee. *E.g.*, C.A.App.556, 1010.[2]

b. The district court instructed the jury that "information about CMS's proposed radiation oncology rule" was U.S. property for purposes of Section 641, Title 18 securities fraud, and wire fraud. Pet.App.64a-67a, 89a-91a.

The court also instructed that Olan and Huber could be guilty of Title 15 securities-fraud charges only if they had knowledge that a "tipper" at CMS "disclosed the information in violation of a duty of confidentiality and that it was disclosed in exchange for a personal benefit." Pet.App.82a-83a. Olan and Huber requested that the court give the same instruction with respect to the Title 18 fraud counts, but the court refused. Pet.App.9a.

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[2] The government relied principally on Fogel's testimony. Fogel, who cooperated, claimed that he intuited from Blaszczak's level of assurance that his information was confidential, describing this as a "subliminal wink-wink," C.A.App.662; see C.A.App.557, 582, 599—but admitted that Blaszczak often acted "as if he was certain when he really wasn't." C.A.App.661. Unable to provide anything more specific, Fogel responded "yes" to a vague question asking whether he discussed "illegal edge" with Huber and Olan. C.A.App.567. Moreover, Fogel was unreliable: he changed his statements, C.A.App.617, and lied to the government repeatedly, C.A.App.547-548, 601, 620-630, including about ongoing drug, gambling, and fraud crimes, C.A.App.549, 601-602, 621-628.

Olan and Huber moved for acquittal on multiple grounds, including that (1) the purportedly confidential CMS information was not property within the meaning of the Title 18 statutes, and (2) there was no evidence that they knew any CMS tipper disclosed information for a personal benefit and therefore no evidence of any fraud. Dkt.251 (S.D.N.Y.). The district court reserved decision.

The jury acquitted all defendants of all Title 15 charges—undoubtedly because no evidence established any personal benefit to any tipper, much less "tippee" knowledge of any such benefit—but convicted them of wire fraud and conversion. The jury also convicted petitioners of the Section 1348 and conspiracy charges. Pet.App.2a, 9a-10a, 87a-90a, 96a-108a. The district court denied the motions for acquittal orally at sentencing and sentenced both Olan and Huber to three years of imprisonment and a substantial fine. Pet.App.10a, 53a-56a.

3. On December 30, 2019, a divided panel of the Second Circuit affirmed, with Judge Kearse dissenting.

a. The panel majority endorsed the government's proposed expansion of federal criminal law. First, the majority held that confidential information regarding agency deliberations over a proposed regulation is government "property" under Sections 1343 and 1348 and a "thing of value" under Section 641. Analogizing to confidential proprietary information sold by a private business, the majority asserted that "CMS's right to exclude the public from accessing" regulatory information "implicates the government's role as property

holder," particularly given that the government "invests * * * resources into generating and maintaining * * * confidentiality." Pet.App.16a-17a.[3]

Second, the majority concluded that a Title 18 insider-trading conviction does not require proof of a tipper's benefit or tippee knowledge of that benefit. Eschewing any analysis of the statutory text, which mirrors that of Section 10(b)/Rule 10b-5, the majority stated that the personal-benefit test is "premised" on Section 10(b)'s "statutory purpose" rather than constituting (as this Court has long held) the very thing that makes insider trading "a scheme to defraud." Pet.App.22a. The majority also asserted that personal benefit is irrelevant to an "embezzlement theory of fraud." Pet.App.23a. The majority acknowledged that its decision permits the government to "avoid the personal-benefit test altogether" simply by charging insider trading under Title 18 rather than Title 15. Pet.App.25a.

b. Judge Kearse dissented. She concluded that a defendant who uses information about "the substance and timing" of "a planned CMS regulation" does not obtain government "property" or convert a "thing of value" to the government.[4] Pet.App.46a-47a.

As Judge Kearse explained, this Court's holding in *Cleveland* establishes that "property" does not encompass a regulatory "right[] of * * * control," and—"[l]ike the gaming licenses in question in *Cleveland* * * * —

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[3] As the majority explained, the court of appeals was required to adjudicate petitioners' sufficiency challenge on that issue by determining what the governing legal principle actually is, unconstrained by the jury instructions. Pet.App.13a (citing *Musacchio* v. *United States*, 136 S. Ct. 709, 715 (2016)).

[4] On that basis, Judge Kearse would have reversed or vacated all of Olan's and Huber's convictions. Pet.App.50a.

the predecisional CMS information has no economic impact on the government until after CMS has actually decided what regulation to issue and when the regulation will take effect." Pet.App.49a. She reasoned that "CMS is not a business; * * * it is a regulatory agency" that "adopts its preferred planned regulation" regardless of whether information about those plans becomes public. Pet.App.46a-47a; see *ibid.* ("CMS does not seek buyers or subscribers; it is not in a competition; it is an agency of the government that regulates * * * whether or not any information on which its regulation is premised is confidential"). Accordingly, she concluded, confidentiality does not "enhance[] the value of the information" to CMS, and disclosure does not "deprive[]" the agency "of anything that could be considered property." Pet.App.48a.

c. On April 10, 2020, the Second Circuit denied petitions for rehearing. Pet.App.57a. On July 14, 2020, following this Court's decision in *Kelly*, the Second Circuit stayed its mandate.[5]

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision in this case vastly expands the scope of federal criminal law in disregard of the statutory text, this Court's precedents, and fundamental, constitutionally based principles of interpretation.

The divided panel's holding that confidential government information about regulatory actions is property under the federal fraud and conversion statutes is irreconcilable with the text of those provisions, which

[5] Just hours after issuance of the 2-1 decision in this case, Judge Droney, who had joined Judge Sullivan in the majority, retired. Judge Walker subsequently joined the panel when it stayed the mandate.

criminalize conduct that causes *economic* loss. That holding directly conflicts with this Court's decisions in *Cleveland* and *Kelly*, both of which unanimously and unambiguously foreclose wire-fraud prosecutions for conduct that causes the government no economic harm. It resurrects the boundless "honest services" theory of fraud that this Court has repeatedly rejected. And it criminalizes a vast swath of routine behavior on the part of government officials and employees, journalists, and analysts. It gives the government a free hand to prosecute—and thus intimidate into silence—whistleblowers, the journalists with whom they speak, and the media entities that publish their disclosures. Indeed, one cannot read a daily newspaper without encountering examples of conduct that would be wire fraud and criminal conversion under the Second Circuit's interpretation of those provisions.

The panel's elimination of the personal-benefit requirement (and concomitant knowledge requirement for tippees) in Title 18 insider-trading cases is equally cavalier in its disregard for the statutory text and this Court's precedents, and equally pernicious in the consequences it threatens. This Court held four decades ago—and reaffirmed just four years ago in *Salman*—that insider trading constitutes fraud only when an insider or other fiduciary discloses confidential information in exchange for a personal benefit. By eliminating that requirement, the Second Circuit has radically expanded the scope of criminal insider trading in a manner that defies this Court's precedents and erases the clear line that separates prohibited insider trading from the analytical work that is not only lawful but "necessary to the preservation of a healthy market." *Dirks*, 463 U.S. at 658-659 & n.17.

Most fundamentally, it is the responsibility of Congress—not overzealous prosecutors or courts implementing their own views of sound public policy—to determine what is and is not a federal crime. The Second Circuit's decision transgresses that bedrock principle.

I. The Second Circuit's Ruling That Government Regulatory Information Constitutes The Government's "Property" And "Thing of Value" Warrants This Court's Review

1. a. The Second Circuit's decision on the meaning of "property" and "thing of value" in the federal fraud and conversion statutes directly conflicts with this Court's decisions in *Cleveland* and *Kelly*. Pet.App.44a-52a (Kearse, J., dissenting).[6] This Court's plenary review is warranted.

In *Cleveland*, this Court ruled that lying to obtain a state license is not federal criminal fraud because licenses are not government "property." 531 U.S. at 15. Emphasizing that the fraud statutes do not extend beyond "traditional concepts of property," the Court reasoned that if the government's "core concern is *regulatory*" rather than "economic," the object of that concern "is not 'property' in the government regulator's hands." *Id.* at 20-22, 24. The Court therefore concluded that a "government regulator" does not "part[] with 'property' when it issues a license," even if the government has "significant control" over licenses and "receives a sub-

[6] To violate Section 1343 (wire fraud) or Section 1348 (Title 18 securities fraud), a defendant must defraud someone of money or property. *McNally* v. *United States*, 483 U.S. 350, 358-360 & n.8 (1987). To violate the conversion statute as charged here, a defendant must convert a "thing of value." 18 U.S.C. 641.

stantial sum of money" for processing, issuing, or continuing them. *Id.* at 20-22. As the Court explained, the government's "intangible rights of allocation, exclusion, and control amount to no more and no less than [the State's] power to regulate," and licensing decisions therefore "implicate[] the Government's role as sovereign, not as property holder." *Id.* at 23-24.

In *Kelly*, which set aside convictions for rerouting traffic on the George Washington Bridge, this Court reaffirmed *Cleveland*'s holding that "a scheme to alter * * * a regulatory choice is not one to appropriate the government's property." 140 S. Ct. at 1572. The Court explained that "allocating lanes as between different groups of drivers" on the bridge is a "run-of-the-mine exercise of *regulatory* power" to allocate and control resources. *Id.* at 1572-1573 (emphasis added). And the Court emphasized that, although the scheme required "the time and labor of Port Authority employees," that sort of "incidental byproduct" is not enough to show that "property fraud" occurred—because "[e]very regulatory decision," including the allocation of licenses in *Cleveland*, involves some employee labor. *Id.* at 1573-1574.

The Second Circuit's decision cannot be reconciled with those decisions. It is difficult to imagine something more "quintessential[ly] * * * regulatory," *Kelly*, 140 S. Ct. at 1572-1573, than predictive information about what regulation the government may propose. The government has no "traditional" economic interest in such regulatory information, *Cleveland*, 531 U.S. at 24, which the government does not sell. And because the government can—and did—issue exactly the regulation it planned regardless of the public's advance knowledge, disclosure of information about a regula-

tion's contents does not deprive the government of anything of value to it. Pet.App.48a-49a (Kearse, J., dissenting). In short, the government's decision about how to allocate access to that information, and when to release it, no more constitutes government property than a decision about who should obtain a license or who should be able to drive in a particular lane of a public road. See *Kelly*, 140 S. Ct. at 1572. The unauthorized disclosure of such confidential government information simply is not a property crime.

The majority here undertook no analysis of whether such information is a "traditional" form of property. Pet.App.15a. Instead, it rested its conclusion "most significant[ly]" on the government's "'right to exclude'" others from learning that information. *Id.* at 16a. But *Cleveland* held that the "right to exclude *in [a] governing capacity* is not one appropriately labeled 'property.'" 531 U.S. at 24 (emphasis added). *Kelly* held the same thing, explaining that a regulatory exclusion of certain segments of the public from certain traffic lanes did not involve any government property right. See 140 S. Ct. at 1572-1573.

The majority also posited that the regulatory information here is property because the government "invests time and resources into generating and maintaining [its] confidentiality." Pet.App.17a. But *Cleveland* held that such ancillary economic costs, like the costs of processing a license, are not "sufficient to establish" a "property right." 531 U.S. at 22. And *Kelly* likewise concluded that "incidental" costs, such as employee time and compensation associated with making a regulatory change, are irrelevant to whether the government has been deprived of any property. See 140 S. Ct. at 1573-1574.

In light of those stark conflicts, the majority was able to rule the way it did only by arrogating to itself the power to limit this Court's decision in *Cleveland* to its facts. For instance, the majority said that *Cleveland* had little effect on the "existing legal landscape" and that "*Cleveland*'s 'particular selection of factors' did not establish 'rigid criteria for defining property but instead * * * provid[ed]" only "permissible considerations." Pet.App.15a-16a (citation omitted). Those characterizations cannot be reconciled with *Cleveland*, or with subsequent decisions of this Court that relied on *Cleveland*. See *Sekhar* v. *United States*, 570 U.S. 729, 737 (2013); see also *id.* at 740-741 (Alito, J., concurring in judgment) ("*Cleveland* * * * supports the conclusion that internal recommendations regarding government decisions are not property."). Among those, of course, is *Kelly*, which made *Cleveland* the centerpiece of its reasoning. See 140 S. Ct. at 1572-1574.

In short, under the Second Circuit's analysis, both *Cleveland* and *Kelly* would have come out the opposite way. And that conflict with *Cleveland* and (now) with *Kelly* is not, as the majority suggested, obviated by the earlier decision in *Carpenter* v. *United States*, 484 U.S. 19 (1987), which concluded that "[c]onfidential *business* information has long been recognized as property." *Id.* at 26 (emphasis added). As Judge Kearse's dissent explained, *Carpenter* addressed a business's self-evident *economic* interest in *selling* information, which a government regulator lacks. Pet.App.47a (unlike the "victim in *Carpenter* * * * CMS does not seek buyers or subscribers"; it "regulates"); see *Carpenter*, 484 U.S. at 25. Tellingly, *Cleveland* distinguished *Carpenter* on precisely that basis. See 531 U.S. at 19, 23.

Moreover, as Judge Kearse concluded, the majority's erroneous interpretation of *Cleveland* equally infects its ruling that regulatory information is a "thing of value" that can be converted. Pet.App.47a (Kearse, J., dissenting). "Thing of value" cannot have a broader meaning than "property," 18 U.S.C. 641 (referring to "thing of value" as "property" and requiring monetary value), and must be read in light of the other terms with which it keeps company ("record, voucher, money"). *E.g.*, *Yates* v. *United States*, 574 U.S. 528, 534-544 (2015). The majority cited no authority for the proposition that regulatory information is a property-like "thing of value" capable of being "converted" in violation of Section 641, and *Cleveland* and *Kelly* make clear that it is not.

b. The Second Circuit's decision also conflicts with this Court's decisions in an additional respect: it flouts bedrock principles of statutory interpretation that this Court has repeatedly said are mandatory.

This Court has explained that federal criminal statutes should not be read to authorize prosecutions raising "significant constitutional concerns," *McDonnell*, 136 S. Ct. at 2372, or otherwise encroaching into "wide expanses of the law which Congress has evidenced no intention to enter by way of criminal sanction," *Dowling* v. *United States*, 473 U.S. 207, 227 (1985); see *Cleveland*, 531 U.S. at 25-26. The decision below authorizes both of those things: it criminalizes any speech about the inner workings of federal, state, or local government that involves unauthorized disclosure of confidential government information. It thereby subjects journalists, whistleblowers, and others carrying out routine and beneficial activities to arbitrary federal prosecution and harsh criminal penalties. The Second Circuit inexplicably dismissed those

problems as mere "enforcement policy concerns." Pet.App.43a.

The Second Circuit also ignored this Court's insistence on construing criminal statutes narrowly and consistent with lenity to avoid an interpretation that "fails to give ordinary people fair notice of the conduct it punishes" or is "so standardless that it invites arbitrary enforcement." *Johnson* v. *United States*, 576 U.S. 591, 595 (2015). The Court has been particularly vigilant in enforcing those interpretive principles in fraud cases—for instance, limiting mail and wire fraud to traditional property, see *McNally*, 483 U.S. at 375; *Cleveland,* 531 U.S. at 24-25, and paring honest-services fraud to its "core" to avoid vagueness concerns, *Skilling*, 561 U.S. at 404; see *Yates*, 574 U.S. at 548 ("harsher" reading of criminal statute impermissible unless Congress has "spoken in language that is clear and definite") (citation omitted).

2. Review also is warranted because the Second Circuit's decision conflicts with decisions of other circuits, none of which has ever found government regulatory information like that at issue here to be property or a thing of value within the meaning of federal criminal law.

In *United States* v. *Tobias*, 836 F.2d 449 (9th Cir. 1988), the Ninth Circuit held that classified information is not a "thing of value" under the conversion statute. *Id.* at 451. Applying *Chappell* v. *United States*, 270 F.2d 274 (9th Cir. 1959), the court explained that "section 641 should not be read to apply to intangible goods[] like classified information," which would raise "[F]irst [A]mendment problems." 836 F.2d at 451.

Similarly, in *Pearson* v. *Dodd*, 410 F.2d 701 (D.C. Cir. 1969), a common-law conversion case involving information taken from a Senator's office, the D.C. Circuit set forth a "general rule" that "ideas or information are not subject to legal protection" as property that can be converted. *Id.* at 707-708. The court of appeals made exceptions only for information "sold as a commodity on the market," for "ideas * * * formulated with labor and inventive genius" (such as "literary works or scientific researches"), and for "instruments of * * * commercial competition," none of which were at issue. *Ibid.* (footnotes omitted); see *United States ex rel. Kasowitz Benson Torres LLP* v. *BASF Corp.*, 929 F.3d 721, 726-728 (D.C. Cir. 2019) (information not government "property" when government "does not acquire [the] information for its own economic benefit but to carry out its regulatory mission").

Those decisions are irreconcilable with the Second Circuit's decision here. Had the Ninth Circuit's rule or the D.C. Circuit's reasoning been applied in this case, petitioners' convictions would not have survived.

3. Finally, the Second Circuit's interpretation of "property" and "thing of value" will have untenable consequences.

a. First, that interpretation amounts to "a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Cleveland*, 531 U.S. at 24. If the ruling below is allowed to stand, then disclosure of confidential regulatory information by a whistleblower who reveals government malfeasance, a journalist who reports that revelation, and a reformer who publicizes it would constitute violations of the federal fraud and conversion statutes punishable by *decades* in prison. See, *e.g.*, Eugene Volokh,

Journalists Might Be Felons for Publishing Leaked Governmental "Predecisional Information," Reason (Jan. 27, 2020).[7]

Such disclosures are commonplace—indeed, stories about them are published daily. See, *e.g.*, Peter Bake & Eileen Sullivan, *U.S. Virus Plan Anticipates 18-Month Pandemic and Widespread Shortages*, New York Times (Mar. 17, 2020).[8] They are essential for keeping the government accountable to the people and shining light on practices that harm the public, violate the law, or both. See, *e.g.*, Matthias Gafni & Joe Garofoli, *Captain of aircraft carrier with growing coronavirus outbreak pleads for help from Navy*, San Francisco Chronicle (Mar. 31, 2020);[9] Maddie Bender, *She Blew the Whistle on Pathogens That Escaped From a Government Lab. Now She's Being Fired*, VICE (Feb. 27, 2020).[10] And there are serious First Amendment problems associated with characterizing information that the government has designated confidential—a designation that the government can place on even the most innocuous information—as a commodity that is "stolen" at the moment of disclosure. See, *e.g.*, *United States* v. *Truong Dinh Hung*, 629 F.2d 908, 924-925 (4th Cir. 1980) (opinion of Winter, J.); see also *Bond*, 572 U.S. at 866 ("narrow[er]" interpretation of criminal statute "call[ed] for" if "most sweeping reading"

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[7] *Available at* https://reason.com/2020/01/27/journalists-might-be-felons-for-publishing-leaked-governmental-predecisional-information/.

[8] *Available at* https://www.nytimes.com/2020/03/17/us/politics/trump-coronavirus-plan.html.

[9] *Available at* https://www.sfchronicle.com/coronavirus/article/aircraft-carrier-captain-outbreak-ship-navy-help-15169227.php.

[10] *Available at* https://www.vice.com/en_us/article/bvg5xm/whistleblower-biosafety-government-lab-pathogen-leak-washington.

would "fundamentally upset" constitutional constraints); John C. Coffee Jr., *Hush!: The Criminal Status of Confidential Information after* McNally *and* Carpenter *and the Enduring Problem of Overcriminalization*, 26 Am. Crim. L. Rev. 121, 140-141 (1988).

Notably, the decision below encompasses not only confidential *federal* government information but also confidential *state* and *local* government information, all of which is now government property in the Second Circuit. That transforms a local police officer's disclosure of a body-camera video, or a journalist's report on a governor's secret criteria for staff hiring, into serious federal crimes. By "subject[ing] to" federal prosecution "a wide range of conduct traditionally regulated by state and local authorities," the Second Circuit's decision seriously destabilizes the "federal-state balance." *Cleveland*, 531 U.S. at 24-25 (citation omitted); see, *e.g.*, *Kelly*, 140 S. Ct. at 1571, 1574 (barring federal government from "us[ing] the criminal law to enforce (its view of) integrity in broad swaths of state and local policymaking"); *Bond*, 572 U.S. at 862-863, 866.

The only thing now standing in the way of those kinds of charges in the Second Circuit is prosecutorial discretion. But, as this Court has repeatedly emphasized, reliance on such discretion is not a sufficient safeguard against abuse. See, *e.g.*, *McDonnell*, 136 S. Ct. at 2372-2373 ("[W]e cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'") (citation omitted); *Marinello* v. *United States*, 138 S. Ct. 1101, 1108-1109 (2018). That is especially true here, given that whistleblowers and journalists are often thorns in the government's side. See, *e.g.*, Oliver Darcy, *White House says it is creating 'very large' dossier on* Washington Post *journalist and*

others, CNN Business (Aug. 27, 2020);[11] Anne Marimow, *A rare peek into a Justice Department leak probe*, Wash. Post (May 19, 2013).[12]

b. Second, the Second Circuit's decision would eviscerate the limits this Court has placed on "honest-services" fraud prosecutions, which seek to punish employees who deprive their employers of the "intangible right" to honest conduct. *Skilling*, 561 U.S. at 399-402; see *McNally*, 483 U.S. at 360. Interpreting a statute specific to honest-services fraud that the government chose not to charge in this case, this Court limited such prosecutions to those in which the government can prove a bribe or kickback. The Court explained that a broader rule would "involve[] the Federal Government in setting standards of disclosure and good government for local and state officials." *Skilling*, 561 U.S. at 402 (citation omitted). But under the Second Circuit's approach, deprivations of honest services—even where no bribe or kickback is involved—can be charged as federal property crimes. See Brette M. Tannenbaum, Note, *Reframing the Right: Using Theories of Intangible Property to Target Honest Services Fraud after* Skilling, 112 Colum. L. Rev. 359, 363-364, 393-395 (2012). After all, faithless government employees often disclose confidential government information in the course of advancing their own personal interests and inevitably expend government "time and resources" in doing so. Pet.App.17a. The Second Circuit's decision thus accomplishes the end-run around

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[11] *Available at* https://www.cnn.com/2020/08/27/media/white-house-dossier-journalists/index.html.

[12] *Available at* https://www.washingtonpost.com/local/a-rare-peek-into-a-justice-department-leak-probe/2013/05/19/0bc473de-be5e-11e2-97d4a479289a31f9_story.html?utm_term=.907b3e250b3b.

limitations on honest-services fraud that this Court has sought to thwart. See, *e.g.*, *Kelly*, 140 S. Ct. at 1574.

c. Third, the decision below negates a host of carefully calibrated federal statutes—many enacted well after the statutes at issue here—penalizing disclosure of confidential or classified information. Those statutes impose penalties only as to disclosure of certain information by particular actors for particular purposes. See, *e.g.*, 18 U.S.C. 793 (confidential national-defense information); 18 U.S.C. 794 (similar); 18 U.S.C. 798 (classified information); 50 U.S.C. 783(a) (classified national-security information to foreign government); 18 U.S.C. 1030(a)(1) (national-defense or foreign-relations information accessed by computer). Moreover, the penalties they impose are often limited ones. See, *e.g.*, 18 U.S.C. 1905 (one-year maximum sentence under general statute criminalizing unauthorized disclosure by government employee).

Under the Second Circuit's interpretation, federal fraud and conversion statutes would indiscriminately cover the same ground—and much more. Moreover, the applicable statutory maximum would often be far more draconian. See, *e.g.*, 18 U.S.C. 1343 (20-year maximum sentence for wire fraud). The panel majority's overbroad reading thus allows prosecutors to override Congress's considered judgments about whether and how to criminally punish disclosures of government information. See *Truong Dinh Hung*, 629 F.2d at 927 & n.21 (opinion of Winter, J.) ("It would greatly disrupt th[at] network of carefully confined criminal prohibitions * * * if the courts permitted [the federal conversion statute] to serve as a criminal prohibition against the merely willful unauthorized disclosure of any classified information.").

d. All of those consequences speak directly to the deep concerns this Court has expressed in recent years about government misuse of the fraud statutes and overbroad federal criminal liability more generally. The Second Circuit's decision permits a dangerous "ballooning of federal power" that vastly expands the scope of the fraud and conversion statutes. *Kelly*, 140 S. Ct. at 1574; see, *e.g.*, *McDonnell*, 136 S. Ct. at 2372-2373; *Skilling*, 561 U.S. at 411; *Cleveland*, 531 U.S. at 25; *McNally*, 483 U.S. at 360; see also, *e.g.*, *Marinello*, 138 S. Ct. at 1106-1109; *Yates*, 574 U.S. at 548-549. This Court's plenary review of the question presented is thus more than warranted—it is urgently needed.

II. The Second Circuit's "Personal Benefit" Ruling Conflicts With This Court's Precedents And Disrupts An Exceptionally Important Area Of The Law

This Court held in *Dirks* and reaffirmed in *Salman* that tipping and tippee trading are not *fraudulent* unless the tipper acts for a personal benefit. That personal-benefit requirement, as *Dirks* explained, is "essential" for securities markets to function efficiently: it marks a clear line "between permissible and impermissible disclosures and uses" of nonpublic information, thereby ensuring that analysts are not inhibited from "ferret[ing] out" information for the benefit of the financial markets. *Dirks*, 463 U.S. at 658-659, 664 & n.17. Yet the Second Circuit has now given prosecutors an end run around *Dirks* and its progeny, essentially erasing the requirement that the tipper benefit personally (and that tippees know of that personal benefit). That renders decades of this Court's precedents a dead letter, creates nonsensical anomalies in insider-trading law, and threatens both individual liberty and the stability of the securities markets.

Moreover, left undisturbed, the decision will have outsized influence, because venue within the Second Circuit can lie over virtually any securities trade, and because other courts often follow the Second Circuit's lead in securities matters. The question of whether the personal-benefit requirement applies in Title 18 insider-trading fraud cases therefore calls out for this Court's review.

A. The Second Circuit's Decision Conflicts With This Court's Precedents

1. Congress has never enacted a criminal statute prohibiting insider trading. Instead, the government charges insider trading as a form of "fraud," using Section 10(b) of the Securities Exchange Act of 1934 as well as other similarly worded, general anti-fraud provisions. Read in conjunction with SEC Rule 10b-5, Section 10(b) broadly proscribes employing any "device, scheme, or artifice to defraud," or "fraud or deceit," "in connection with the purchase or sale" of securities. 15 U.S.C. 78j(b); 17 C.F.R. 240.10b-5. The mail- and wire-fraud statutes likewise proscribe using the mail or wires for any "scheme or artifice to defraud" or involving "false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341, 1343. That same language is repeated in Section 1348, a securities-fraud statute enacted in 2002 to combat large-scale accounting frauds.

This Court has repeatedly concluded that trading securities on the basis of material, nonpublic information is not inherently "deceptive" or "fraudulent," and that general anti-fraud offenses like Section 10(b)/10b-5 create no "general duty" to refrain from trading on the basis of such information. *Chiarella* v. *United States*, 445 U.S. 222, 233 (1980); see *O'Hagan*

v. *United States*, 521 U.S. 642, 655 (1997); *Dirks*, 463 U.S. at 654. Rather, the Court has held, what makes insider trading deceptive, and thus fraudulent, is breaching a duty to the source of information through use of the information for "personal benefit." *Dirks*, 463 U.S. at 661-664; see *Chiarella*, 445 U.S. at 230; *O'Hagan*, 521 U.S. at 653-655.

Dirks involved a financial analyst whose clients traded on confidential information he had received from a corporate whistleblower. This Court concluded that neither the whistleblower's disclosure nor the subsequent trades were fraudulent because the whistleblower acted to expose corporate wrongdoing, not for any personal benefit. 463 U.S. at 666-667. To determine whether a disclosure is fraudulent, the Court held, "the test is whether the insider personally will benefit, directly or indirectly, from his disclosure. *Absent some personal gain, there has been no breach of duty* * * * . And absent a breach by the insider, there is no derivative breach" by any trading tippee. *Id.* at 662 (emphasis added). Personal benefit is what "determin[es] whether the insider's purpose in making a particular disclosure is *fraudulent*." *Id.* at 663 (emphasis added). The Court further explained that the personal-benefit requirement is the "essential * * * guiding principle" by which market participants should conduct their affairs in order to navigate the line separating unlawful behavior from lawful trading. *Id.* at 664; see *id.* at 658-659 & n.17.

This Court's decisions after *Dirks* confirm that a personal benefit for the tipper is essential to proving fraud under *both* Title 18 and Title 15. In *Carpenter*, the Court affirmed the mail- and wire-fraud convictions of a reporter who "embezzled" his employer's con-

fidential business information by tipping others in exchange for a share of their trading profits. That was fraud, the Court said, because "a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information *for his own personal benefit*." 484 U.S. at 27-28 (emphasis added). Similarly, in *O'Hagan*, the Court extended *Carpenter*'s embezzlement-fraud theory to Title 15. See 521 U.S. at 654. Regardless of the particular section of the U.S. Code at issue, the Court explained, a fiduciary "defrauds" his principal when he "convert[s] the principal's information *for personal gain*." *Id.* at 653-654 (emphasis added).

Most recently, in *Salman*, the Court unanimously reaffirmed *Dirks*' core holdings: "[a] tipper breaches [his] fiduciary duty" only "when the tipper discloses the inside information for a personal benefit," and "the disclosure of confidential information without personal benefit is not enough" to prove fraud. 137 S. Ct. at 423, 427. The Court rejected the government's invitation to lower the burden of proof by replacing the personal-benefit test with a standard that would have deemed conduct fraudulent "whenever the tipper discloses confidential trading information for a noncorporate purpose." *Id.* at 426.

The Court's rulings in those cases confirm that the existence of a personal benefit for the tipper is critical not only to establishing the tipper's liability for fraud but also to establishing that a downstream tippee who has traded on the tipped information has engaged in fraud. As this Court has explained, a tippee owes no fiduciary duty to the original source of the information, and therefore can be liable only on a "constructive

trust" theory under which he inherits the tipper's fiduciary duty. *Dirks*, 463 U.S. at 659-661 & n.20; *Salman*, 137 S. Ct. at 423, 427. That theory does not apply unless the tipper "has breached his fiduciary duty * * * by disclosing the information to the tippee" in exchange for a personal benefit "and the tippee *knows* * * * that there has been a breach." *Dirks*, 463 U.S. at 660 (emphasis added); see *Salman*, 137 S. Ct. at 423. If the tippee lacks that knowledge, then he has not "participate[d]" in a fraudulent scheme, *Salman*, 137 S. Ct. at 427; he has simply traded using information in his possession, see *Dirks*, 463 U.S. at 657.

2. The Second Circuit's holding that proof of personal benefit is not required in criminal insider-trading cases brought under Title 18 fraud provisions directly conflicts with those precedents and represents a sea change in insider-trading law.

The provisions of Title 18 at issue here—Sections 1343 and 1348—proscribe schemes to "defraud" in language that is identical in relevant part to the language in the Title 15 securities laws. And under this Court's precedents, the meaning of criminal "fraud" does not change from statute to statute. See, *e.g.*, *Carpenter*, 484 U.S. at 25 n.6; *Pasquantino* v. *United States*, 544 U.S. 349, 355 n.2 (2005) ("identical language" in criminal fraud statutes is construed "*in pari materia*"); *O'Hagan*, 521 U.S. at 653-654 (insider-trading fraud under Title 15 is "fraud of the same species" as Title 18 fraud); see also, *e.g.*, *Branch* v. *Smith*, 538 U.S. 254, 281 (2003); *Sekhar*, 570 U.S. at 733. The Second Circuit's decision is thus irreconcilable with this Court's decisions holding that "fraud" exists in the insider-trading context only if the source of the information has received a personal benefit for the disclosure. See

Andrew N. Vollmer, *The Second Circuit's Blaszczak Decision:* Dirks *Besieged* (Jan. 11, 2020).[13]

Nothing in the Second Circuit's opinion justifies its radical departure from precedent or vast expansion of the insider-trading crime. First, the panel asserted that the personal-benefit requirement, as set forth in *Dirks*, is "premised" on Congress having "enacted the Title 15 fraud provisions with the limited 'purpose of * * * eliminat[ing] [the] use of inside information for *personal advantage*.'" Pet.App.22a (quoting *Dirks*, 463 U.S. at 662). That is wrong. Nothing in *Dirks* limits its holding to Title 15 or suggests that the Court intended to implement some statutory purpose unique to Section 10(b). On the contrary, *Dirks* held—and reiterated no fewer than *seven times*—that personal benefit is indispensable to proving *fraud*, because absent such a benefit there has been no deceit. See 463 U.S. at 663 (personal benefit "determine[s] whether the [tipper]'s purpose * * * is fraudulent" and whether "disclosure" of information "defraud[s]"); see also *id.* at 654, 662, 666-667 & n.27. The Court also described the personal-benefit requirement as "essential" to "guid[e]" traders and analysts in their "daily activities"—and that "guiding principle" would be meaningless if the requirement disappeared in fraud provisions outside Title 15. *Id.* at 664 & n.24.

Second, the Second Circuit asserted that "*Carpenter*'s formulation of embezzlement" fraud does not require the government to prove personal benefit. Pet.App.23a. That, too, is wrong. In *Carpenter*, the Court explained that embezzlement doctrine requires a fiduciary breach for *personal benefit*: a person who acquires information through a fiduciary relationship

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[13] *Available at* https://ssrn.com/abstract=3516082.

"is not free to exploit that knowledge or information *for his own personal benefit* but must account to his principal for any *profits derived therefrom*." 484 U.S. at 27-28 (emphasis added; citation omitted). And the Court reaffirmed that point when it applied *Carpenter* to Title 15 in *O'Hagan*, explaining that a "fiduciary who * * * secretly convert[s] the principal's information for personal gain * * * 'dupes' or defrauds the principal." 521 U.S. at 653-654 (quoting U.S. Br. 17).

Finally, the Second Circuit suggested that Section 1348 should be treated differently from other fraud statutes because it has a different purpose. But interpreting statutes using atextual speculation about statutory purpose is an impermissible "relic from a 'bygone era.'" *Food Mktg. Inst.* v. *Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). And even if Section 1348's purpose were relevant, it would not support the ruling below or obviate the conflict with this Court's precedents. Congress enacted that statute to combat large-scale accounting frauds like the one that engulfed Enron Corporation. Congress accomplished that goal by eliminating some "technical legal requirements" *incidental* to fraud that were found in existing anti-fraud provisions, such as "purchase or sale" of securities or use of the interstate wires. S. Rep. No. 107-146, at 2-6 & n.9, 30 (May 6, 2002). Nothing in Section 1348's legislative history suggests that Congress intended to alter the established meaning of "fraud" in tipping cases. To the contrary, Section 1348 retains the requirement "that a defendant knowingly engaged in a scheme or artifice to defraud," *id.* at 30, and under this Court's precedents, a tipper's personal benefit is precisely what converts otherwise innocent trading into "fraud."

B. The Second Circuit's Decision Creates Nonsensical Anomalies In Insider-Trading Law

The Second Circuit's decision wipes away a four-decade history of carefully crafted limits on the scope of fraud in the insider-trading context, rendering an enormous body of caselaw—including this Court's decisions in *Dirks* and *Salman*—a nullity. Since *Dirks*, the government has continued bringing criminal insider-trading cases under Title 15, and (until this case) it has understood that when it charges insider trading as criminal fraud under Title 18, the personal-benefit requirement continues to apply.[14] This Court and other courts have thus extensively explicated what that requirement means. But if charging criminal insider-trading as a violation of Sections 1343 and 1348 obviates the need to prove that the tipper received a personal benefit and that the tippee knew of the benefit, the government will never again charge that conduct under Title 15. That would represent the culmination of a long series of efforts by the government—thus far blocked by this Court—to dilute or eliminate the personal-benefit requirement. See pp. 26-28, *supra*; *United States* v. *Newman*, 773 F.3d 438 (2d Cir. 2014), *abrogated on other grounds by Salman*.

This case is not somehow distinct, as the government has contended, because it involves so-called "embezzlement" of information. The courts of appeals

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[14] See, *e.g.*, *United States* v. *Walters*, No. 16-Cr.-338 (S.D.N.Y.), Dkt.91, at 17, 19, 32 (to establish "wire fraud," government must prove insider "anticipated receiving a personal benefit") & Dkt.95, at 6; *United States* v. *Stewart*, No. 15-Cr.-287 (S.D.N.Y.), Dkt.109, at 20, 33 (same); cf. *United States* v. *Bogucki*, No. 18-Cr.-21 (N.D.

have universally required proof of personal benefit in Title 15 embezzlement (*i.e.*, "misappropriation") tipping cases. See, *e.g.*, *United States* v. *Martoma*, 894 F.3d 64, 73 n.5 (2d Cir. 2017); *United States* v. *Bray*, 853 F.3d 18, 25 (1st Cir. 2017); *United States* v. *Evans*, 486 F.3d 315, 323 (7th Cir. 2007); *SEC* v. *Yun*, 327 F.3d 1263, 1275 (11th Cir. 2003). And the government acknowledged in *Salman* that "*Dirks*'s personal-benefit analysis applies" in such "misappropriation cases." 137 S. Ct. at 425 n.2. Yet under the Second Circuit's ruling, proof of personal benefit would be required for cases involving "embezzlement" of information brought under Title 15 but not under Title 18, even though the two statutory proscriptions are supposed to be "the same" as to whether any fraud has been committed. *O'Hagan*, 521 U.S. at 654.

The effect of that anomaly will be an irrational disparity between criminal and civil insider-trading actions, subjecting conduct that the SEC cannot pursue civilly to severe criminal penalties. The SEC is the expert agency charged with rooting out fraud in the securities markets, but it is limited to civil enforcement of Title 15 provisions such as Section 10(b)/Rule 10b-5, and therefore bound by the personal-benefit requirement set forth in this Court's precedents interpreting those provisions. It would be bizarre if trading by a remote tippee that involves no personal benefit to the

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Cal.), Dkt.162, at 42 (same for misappropriation). The government's briefs in this Court have said the same thing. See U.S. Br. 14-17, *Carpenter* v. *United States*, 484 U.S. 19 (1987) (No. 86-422) ("essential characteristic of a fraudulent breach" is that the fiduciary "benefit himself"); U.S. Br. 24, *United States* v. *O'Hagan*, 521 U.S. 642 (No. 96-842) (prohibition on using "confidential information for personal gain" under Section 10(b) "parallels the similar inquiry" under mail-fraud statute).

tipper or knowledge of benefit by the tippee, and therefore does not trigger even the monetary penalties that arise from SEC enforcement action, nevertheless subjects the tippee to criminal liability and years of imprisonment.

That absurd legal landscape is not the one that Congress enacted or that this Court's many careful insider-trading decisions countenance. But it is exactly what will happen if the Second Circuit's decision is allowed to stand. Indeed, in this very case, Olan and Huber were *acquitted* of any violation of Title 15, which the jury was charged required proof of personal benefit, yet convicted under Title 18, as to which the district court refused to instruct that proof of personal benefit was required. C.A.App.1082-1101.

C. The Second Circuit's Decision Will Harm The Securities Markets And The People Who Make Those Markets Function

By allowing prosecutors to circumvent the personal-benefit requirement, the decision below also will have profound implications for securities analysts and traders who, until now, have justifiably ordered their conduct based on *Dirks*' "guiding principle."[15] The ab-

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[15] See Adam Pritchard, *2nd Circ. Ruling Makes Messy Insider Trading Law Worse*, Law360 (Jan. 27, 2020), *available at* www.law360.com/articles/1237586/2nd-circ-ruling-makes-messy-insider-trading-law-worse; Walter Pavlo, *Appeal Court's Rush On Insider Trading Decision Will Hurt Wall Street*, Forbes (Jan. 21, 2020), *available at* https://www.forbes.com/sites/walterpavlo/2020/01/21/appeal-courts-rush-on-insider-trading-decision-will-hurt-wall-street/#4fedf07e7891; Russell G. Ryan, *Insider trading law is irreparably broken*, Wash. Post (Jan. 27, 2020), *available at* https://www.washingtonpost.com/opinions/2020/01/27/insider-trading-law-is-irreparably-broken/.

sence of that principle will "produce[] unpredictable results" and "risk[] over-deterring activities related to lawful securities sales." *Pinter* v. *Dahl*, 486 U.S. 622, 654 n.29 (1988). And it will subject market actors to criminal prosecution for simply doing their jobs in ferreting out information.

That is particularly true for remote tippees like Olan and Huber, who were not alleged to even know who provided the information. C.A.App.556, 1010. Analysts routinely receive information, including rumors about how the government might act, from a wide variety of sources. It is imperative that they have a way of sorting out, *ex ante*, which information they can legally use to trade. But if criminal liability can be imposed even though such tippees have no knowledge that the tipper was acting for his own benefit rather than for a legitimate purpose, then there is no way that they can continue to carry out their necessary functions.

The breadth and indeterminacy of the Second Circuit's new standard for establishing a tipping crime also threatens bedrock separation-of-powers and due-process principles. As discussed above, this Court has insisted that criminal statutes—and especially the fraud statutes—be interpreted narrowly. See pp. 17-18, *supra*. The panel majority in this case has done the opposite.

The Second Circuit's decision will have nationwide effects because virtually all securities transactions touch New York. Given the government's considerable discretion as to where it files cases, see 18 U.S.C. 3237(a), the decision invites prosecutors to seize on the substantially lower burden of proof they now enjoy in

the Second Circuit by funneling all but slam-dunk insider-trading cases to that venue—achieving the government's long-sought goal of eliminating the personal-benefit requirement without legislation. Such forum shopping, together with the Second Circuit's prominence in securities law, see *Morrison* v. *Nat'l Australia Bank Ltd.*, 561 U.S. 247, 260 (2010), will inhibit further percolation of the question presented and ultimately destabilize securities markets.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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 & FRANKEL LLP
1177 Sixth Avenue
New York, New York 10036
(212) 715-9011

Counsel for Petitioner Theodore Huber

DONALD B. VERRILLI, JR.
Counsel of Record
ELAINE J. GOLDENBERG
JONATHAN S. MELTZER
JACOBUS P. VAN DER VEN
MUNGER, TOLLES & OLSON LLP
1155 F Street NW, Seventh Floor
Washington, DC 20004-1357
(202) 220-1100
Donald.Verrilli@mto.com

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

Counsel for Petitioner Robert Olan

September 4, 2020

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 18-2811, 18-2825, 18-2867, 18-2878

UNITED STATES OF AMERICA,
Appellee,

v.

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

Argued: November 21, 2019

Decided: December 30, 2019

Before: KEARSE, DRONEY, and SULLIVAN, Circuit Judges.

OPINION

RICHARD J. SULLIVAN, Circuit Judge:

These consolidated appeals require us to consider whether the federal wire fraud, securities fraud, and conversion statutes, codified at 18 U.S.C. §§ 1343, 1348, and 641, respectively, reach misappropriation of a government agency's confidential nonpublic information relating to its contemplated rules. Defendants David Blaszczak, Theodore Huber, Robert Olan, and Christopher Worrall were charged with violating these statutes – and with engaging in securities fraud in violation of Section 10(b) of the Securities and Exchange Act, 15 U.S.C. § 78j(b), and SEC Rule 10b-5 ("Title 15 securities fraud") – by misappropriating confidential nonpublic information from the Centers for Medicare & Medicaid Services ("CMS"). The indictment principally alleged that

CMS employees, including Worrall, disclosed the agency's confidential information to Blaszczak, a "political intelligence" consultant for hedge funds, who in turn tipped the information to Huber and Olan, employees of the healthcare-focused hedge fund Deerfield Management Company, L.P. ("Deerfield"), which traded on it. After a one-month trial before the United States District Court for the Southern District of New York (Kaplan, *J.*), a jury found Defendants guilty of wire fraud, conversion, and, with the exception of Worrall, Title 18 securities fraud and conspiracy. The jury acquitted Defendants on all counts alleging Title 15 securities fraud.

Defendants now challenge their convictions on various grounds. For the reasons set forth below, we reject these challenges. In doing so, we hold, *inter alia*, that (1) confidential government information such as the CMS information at issue here may constitute "property" in the hands of the government for purposes of the wire fraud and Title 18 securities fraud statutes, and (2) the "personal-benefit" test established in *Dirks v. SEC*, 463 U.S. 646, 103 S.Ct. 3255, 77 L.Ed.2d 911 (1983), does not apply to these Title 18 fraud statutes. Because we also discern no prejudicial error with respect to the remaining issues raised on appeal, we affirm the judgments of the district court.

I. BACKGROUND

A. Facts

The jury returned guilty verdicts on counts charging two insider-trading schemes: (1) a scheme relating to Deerfield that involved all defendants to varying degrees, and (2) a scheme relating to another hedge fund investment manager, Visium Asset

Management, L.P. ("Visium"), that involved Blaszczak only. We recite the facts pertaining to each of these schemes in turn, construing the evidence at trial underlying the counts of conviction in the light most favorable to the prosecution. *See United States v. Kirk Tang Yuk*, 885 F.3d 57, 65 (2d Cir. 2018).

1. The Deerfield Scheme

At various times between 2009 and 2014, Olan, Huber, and fellow Deerfield partner Jordan Fogel – a cooperating witness who pleaded guilty and testified at trial – approached Blaszczak for the purpose of obtaining so-called "predecisional" information concerning CMS's contemplated rules and regulations. The three Deerfield partners knew that Blaszczak, who had worked at CMS before becoming a consultant for hedge funds, enjoyed unique access to the agency's predecisional information through his inside sources at the agency. Because other consultants did not have access to Blaszczak's sources, the Deerfield partners counted him as a particularly lucrative fount of illegal market "edge." App'x at 567, 606.

This illegal market edge first paid off for the three Deerfield partners in July 2009, after Blaszczak passed them nonpublic CMS information concerning both the timing and substance of an upcoming proposed CMS rule change that would reduce the reimbursement rate for certain radiation oncology treatments. The Deerfield partners sought to maximize this market edge by trading while "the information wasn't known to others, and ... wasn't public." *Id.* at 593. In late June 2009, Olan, Huber, and Fogel directed Deerfield to enter orders shorting approximately $33 million worth of stock in

radiation-device manufacturer Varian Medical Systems ("Varian"), a company that would be hurt by CMS's proposed rule. Blaszczak's information was consistent with the proposed rule that CMS ultimately announced on July 1, 2009, and as a result of the Varian trade, Deerfield made $2.76 million in profits.

Deerfield again traded on confidential CMS information obtained from Blaszczak in 2012. This time, Blaszczak obtained the predecisional information at issue from Worrall, a CMS employee who had previously worked with Blaszczak at the agency and remained friends with him after Blaszczak left CMS to become a hedge fund consultant. Blaszczak met Worrall at CMS's headquarters in Maryland on May 8, 2012; the following day, Blaszczak emailed Fogel to set up a phone call so that he could update him on one of Fogel's "favorite topics." *Id.* at 2439. On the call, Blaszczak provided Fogel with predecisional CMS information about additional radiation oncology reimbursement rate changes. Fogel, in turn, shared this information with Huber and Olan, and together the three of them relied on it – in combination with other confidential CMS information that Blaszczak passed them over the next few weeks – in recommending that Deerfield short millions of dollars in the shares of companies that would be hurt by the reimbursement changes. Deerfield earned profits of $2.73 million from trades relating to this radiation oncology rule, which was publicly announced on July 6, 2012.

In February 2013, shortly after Fogel moved to a different group within Deerfield, he reached out to Blaszczak in the hopes of "re-ignit[ing] the

Blaszczak-Fogel money printing machine." Supp. App'x at 6. As Fogel testified at trial, the "Blaszczak-Fogel money printing machine" meant that "Blaszczak had a long history of providing [Fogel] and [his] teammates nonpublic information that [they] could trade on, and it was a great asset to get edge for investments." App'x at 581.

Fogel did not have to wait long for the machine to reignite. In June 2013, Blaszczak told Fogel that he expected CMS to propose cutting the reimbursement rate for end-stage renal disease ("ESRD") treatments by 12 percent. Although Blaszczak did not reveal the source of his information to Fogel, the prediction was so specific – and so different from the market consensus – that Fogel believed it came "from a credible source inside of CMS." *Id.* at 582. Still, Fogel remained anxious about the outlier status of Blaszczak's prediction and continued to check in with him about his level of certainty. On June 25, 2013, less than a week before CMS announced the ESRD rule, Blaszczak told Fogel that there was "[n]o change in [his] numbers" and that he was "pretty confident" in his information. *Id.* at 2024. Fogel again took this to mean that Blaszczak obtained the information from a reliable inside source, and further inferred that the public announcement of the proposed rate cut (the timing of which was also nonpublic) was around the corner and thus less likely to change. On the basis of this confidential nonpublic information, Fogel directed Deerfield to enter orders shorting stock in Fresenius Medical Care, a public company that would be hurt by the reimbursement rate cuts. CMS publicly announced the 12 percent rate cut on July 1, 2013, and Deerfield earned approximately $860,000 in profits from the trade.

Blaszczak continued to provide Fogel with predecisional CMS information in advance of CMS's announcement of the final ESRD rule on November 22, 2013. In particular, Blaszczak informed Fogel that the final ESRD rule would keep the 12 percent rate cut but would be phased in over three to four years. Based on that information, Fogel recommended that Deerfield enter orders to short stock in Fresenius and DaVita Healthcare Partners Inc. Deerfield did so, earning profits of approximately $791,000. Immediately after CMS announced the final ESRD rule, Fogel emailed his colleagues at Deerfield to praise Blaszczak for his ESRD reimbursement predictions: "I told u guys blazcack [sic] is the man. ... [H]e has crushed it on these two rules both times round." Supp. App'x at 10.

2. The Visium Scheme

Around the same time that Blaszczak was tipping confidential CMS information to his contacts at Deerfield, he also provided similar information to Christopher Plaford, a portfolio manager at the hedge fund Visium. After subsequently pleading guilty pursuant to a cooperation agreement, Plaford testified that he used Blaszczak as a political-intelligence consultant from around 2010 to 2013, during which time Blaszczak would provide him with both public and nonpublic information concerning the healthcare industry. Plaford, like the Deerfield partners, especially valued Blaszczak's nonpublic CMS information due to the market edge it gave him. Indeed, Plaford considered Blaszczak's CMS information to be "much more accurate" than the information provided by other consultants, since it came "directly from the horse's mouth," meaning Blaszczak's friends and former colleagues at CMS.

App'x at 750–51.

In May 2013, for example, Blaszczak tipped Plaford that he expected CMS to propose cutting the reimbursement rate for home healthcare coverage by between three and three-and-a-half percent per year between 2014 and 2017. In the ensuing weeks, Plaford arranged phone calls with Blaszczak to discuss the sources of his information and thus his level of certainty, an issue that Plaford did not want to discuss over email "because it was potentially incriminating." *Id.* at 752. On the phone call, Blaszczak told Plaford that he had a "high conviction" that his information was accurate because he was "interacting directly with his counterparties in CMS [who] were working on the rule, and they were telling him ... [what] the cut would be." *Id.* Based on Blaszczak's information, Plaford directed Visium to maintain its short positions for Amedisys Inc. and Gentiva Health Services Inc., and to buy put-options in those companies. Following CMS's June 27, 2013 announcement of the proposed home healthcare rule, which included a three-and-a-half percent annual rate cut consistent with Blaszczak's information, Visium earned approximately $330,000 in trading profits.

B. Procedural History

On March 5, 2018, the government filed an eighteen-count superseding indictment in the United States District Court for the Southern District of New York setting forth allegations relating to the Deerfield scheme (Counts One through Sixteen) and Visium scheme (Counts Seventeen and Eighteen). Counts One and Two charged Defendants with participating in conspiracies centering on the

misappropriation of confidential CMS information between 2009 and 2014. In Counts Three through Ten, the indictment charged Defendants with conversion of U.S. property (Count Three), Title 15 securities fraud (Counts Four through Eight), wire fraud (Count Nine), and Title 18 securities fraud (Count Ten), relating to the misappropriation of confidential CMS information that pertained to the July 2012 proposed radiation oncology rule. Counts Eleven and Twelve charged Blaszczak and Worrall with conversion of U.S. property (Count Eleven) and wire fraud (Count Twelve) for allegedly misappropriating confidential CMS information relating to a company called NxStage Medical Inc. The remaining four Deerfield-related counts charged Blaszczak and Worrall with conversion of U.S. property (Count Thirteen), Title 15 securities fraud (Count Fourteen), wire fraud (Count Fifteen), and Title 18 securities fraud (Count Sixteen), based on the misappropriation of confidential CMS information concerning the 2013 proposed and final ESRD rules. Counts Seventeen and Eighteen charged Blaszczak alone with conspiracy and conversion of U.S. property, respectively, for providing confidential CMS information to Plaford as part of the Visium scheme.

On April 2, 2018, the case proceeded to a jury trial before Judge Kaplan. The parties rested their cases three weeks later, on April 23, 2018, and after summations, the district court charged the jury.

In particular, the district court instructed the jury pursuant to *Dirks* that, (1) in order to convict Worrall of Title 15 securities fraud, it needed to find that he tipped confidential CMS information in exchange for a "personal benefit;" (2) in order to convict Blaszczak

of Title 15 securities fraud, it additionally needed to find that he knew that Worrall disclosed the information in exchange for a personal benefit; and (3) in order to convict Huber or Olan of Title 15 securities fraud, it needed to find that Huber or Olan knew that a CMS insider tipped the information in exchange for a personal benefit. App'x at 1042–43. The district court, however, refused to give *Dirks*-style instructions on the wire fraud and Title 18 securities fraud counts. The district court instead instructed the jury that wire fraud "includes the act of embezzlement, which is ... the fraudulent appropriation to one's own use of the money or property entrusted to one's care by someone else." *Id.* at 1044–45; *see Carpenter v. United States*, 484 U.S. 19, 27, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987). The district court similarly instructed the jury, for the Title 18 securities fraud counts, that it could find the existence of a scheme to defraud if a defendant "participated in a scheme to embezzle or convert confidential information from CMS by wrongfully taking that information and transferring it to his own use or the use of someone else." App'x at 1045. For both Title 18 fraud offenses, the district court further instructed the jury that it could only convict if it found that the defendant it was considering knowingly and willfully participated in the fraudulent scheme.

On May 3, 2018, after four days of deliberations, the jury returned a split verdict. The jury acquitted all defendants on the Title 15 securities fraud counts; Blaszczak and Worrall on the offenses charged in Counts Eleven and Twelve relating to the NxStage information; and Worrall on the conspiracies charged in Counts One and Two and the substantive offenses

charged in Counts Thirteen through Sixteen. The jury nevertheless found all defendants guilty of the conversion and wire fraud offenses charged in Counts Three and Nine, respectively; all defendants but Worrall guilty of the conspiracy offenses charged in Counts One and Two as well as Title 18 securities fraud as charged in Count Ten; and Blaszczak alone guilty of the offenses charged in Counts Thirteen and Fifteen through Eighteen.

On September 13, 2018, the district court denied from the bench Defendants' post-trial motions for a new trial and/or judgment of acquittal and proceeded to sentencing. The district court sentenced Blaszczak to twelve months and one day of imprisonment, Worrall to twenty months' imprisonment, and Huber and Olan each to thirty-six months' imprisonment and fines of $1,250,000. The district court also ordered Blaszczak to forfeit $727,500, Huber to forfeit $87,078, and Olan to forfeit $98,244, and ordered joint and several restitution in the amount of $1,644.26 against all defendants to cover the costs that CMS expended on witnesses' travel in connection with the criminal investigation and trial. Finally, the district court granted all defendants bail pending appeal on the ground that the forthcoming appeal would present novel and substantial questions. *See United States v. Randell*, 761 F.2d 122, 125 (2d Cir. 1985). Defendants timely appealed.

II. JURISDICTION AND STANDARD OF REVIEW

We have jurisdiction pursuant to 28 U.S.C. § 1291. We review de novo questions of statutory interpretation, challenges to the district court's jury instructions, and the propriety of joinder. *See United States v. Gayle*, 342 F.3d 89, 91 (2d Cir. 2003); *United*

States v. Sabhnani, 599 F.3d 215, 237 (2d Cir. 2010); *United States v. Shellef*, 507 F.3d 82, 96 (2d Cir. 2007). We also review de novo the sufficiency of the evidence, *Sabhnani*, 599 F.3d at 241, recognizing, of course, that a defendant raising such a challenge "bears a heavy burden because a reviewing court must consider the evidence 'in the light most favorable to the prosecution' and uphold the conviction if '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt,'" *United States v. Aguilar*, 585 F.3d 652, 656 (2d Cir. 2009) (quoting *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)); *accord United States v. Harvey*, 746 F.3d 87, 89 (2d Cir. 2014). The district court's evidentiary rulings are reviewed for abuse of discretion. *See United States v. Nektalov*, 461 F.3d 309, 318 (2d Cir. 2006).

III. DISCUSSION

Defendants challenge their convictions on several grounds. They argue that (1) the confidential CMS information at issue is not "property" in the hands of CMS for purposes of the wire fraud and Title 18 securities fraud statutes; (2) the district court erred by refusing to instruct the jury on the *Dirks* personal-benefit test as to the Title 18 fraud counts; (3) Defendants' convictions for converting U.S. property were infected by a series of legal and factual errors; (4) the evidence at trial was insufficient on all counts; (5) Counts Seventeen and Eighteen, charging Blaszczak alone in the Visium scheme, were misjoined with the other counts; and (6) the district court made a variety of evidentiary errors. We address each of these arguments in turn.

A. "Property" under 18 U.S.C.§§ 1343, 1348

Defendants argue that their convictions for fraud under Title 18 must be reversed because there was insufficient evidence to prove that they engaged in a scheme to defraud CMS of "property." 18 U.S.C. §§ 1343, 1348.[1] The gravamen of their argument is that a government agency's confidential information is not "property" in the hands of the agency under the Supreme Court's decision in *Cleveland v. United States*, 531 U.S. 12, 121 S.Ct. 365, 148 L.Ed.2d 221 (2000), because the agency has a "purely regulatory" interest in such information, *id.* at 22, 121 S.Ct. 365.

As a preliminary matter, the government contends that Defendants failed to preserve the argument that confidential government information is not "property," since Defendants did not object to the district court's instruction that "confidential government information may be considered to be property" for purposes of Title 18 securities fraud. App'x at 1045; *see also id.* (instructing the jury, for purposes of the wire fraud counts, that the government was required to prove that a defendant

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[1] The superseding indictment charged Defendants with violating both subsections (1) and (2) of 18 U.S.C. § 1348, either of which may independently support a conviction. *See United States v. Mahaffy*, 693 F.3d 113, 125 (2d Cir. 2012). While subsection (2) proscribes a "scheme or artifice ... to obtain, by means of false or fraudulent pretenses, ... any money or property in connection with the purchase or sale of" securities, subsection (1) does not use the term "property," proscribing instead a "scheme or artifice ... to defraud any person in connection with" securities. 18 U.S.C. § 1348. Nevertheless, the government does not argue that the object of a "scheme to defraud" in subsection (1) can be anything other than "property," and thus we assume, for purposes of this case, that the "property" requirement in subsection (2) also applies in subsection (1).

intended to deprive CMS of "something of value – for example, confidential material, non-public information"). But while Defendants did not challenge the pertinent jury instructions in the district court (and have not done so on appeal), Defendants filed a Rule 29(a) motion for a judgment of acquittal on the ground that the evidence at trial was insufficient to establish that CMS's information was "property" in the hands of the agency. Contrary to the government's argument, we do not construe Defendants' Rule 29(a) motion in the district court as raising a claim distinct from their sufficiency claim on appeal; at both stages, Defendants expressly tied their sufficiency claim to the Supreme Court's decision in *Cleveland*, thus raising the broader threshold question of whether a government agency's confidential regulatory information may constitute "property" in the hands of the agency as a general matter. In answering this question, we are not bound by the district court's jury instruction that "confidential government information may be considered to be property," *id.*, since "[a] reviewing court's limited determination on sufficiency review ... does not rest on how the jury was instructed," *Musacchio v. United States*, —— U.S. ——, 136 S. Ct. 709, 715, 193 L.Ed.2d 639 (2016).

Proceeding to the merits, we afford the same meaning to the word "property" in both the wire fraud and Title 18 securities fraud statutes. *See* S. Rep. No. 107-146, at 20 (2002) (Title 18 securities fraud statute created to be comparable to Title 18 bank and healthcare fraud statutes); *Neder v. United States*, 527 U.S. 1, 20, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (Title 18 mail, wire, and bank fraud statutes should be analyzed similarly). We may also look to

cases interpreting the same word in the mail fraud statute. *See, e.g.*, *Pasquantino v. United States*, 544 U.S. 349, 355 n.2, 125 S.Ct. 1766, 161 L.Ed.2d 619 (2005). Under each of these fraud statutes, the word "property" is construed in accordance with its ordinary meaning: "something of value" in the possession of the property holder (in this context, the fraud victim). *Pasquantino*, 544 U.S. at 355, 125 S.Ct. 1766 (quoting *McNally v. United States*, 483 U.S. 350, 358, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), *superseded by statute on other grounds as stated in Skilling v. United States*, 561 U.S. 358, 130 S.Ct. 2896, 177 L.Ed.2d 619 (2010)); *see also id.* at 356, 125 S.Ct. 1766 (citing Black's Law Dictionary 1382 (4th ed. 1951) (defining "property" as "extend[ing] to every species of valuable right and interest")). In applying this general notion of property to the facts of this case, in which the fraud victim is a government agency and the claimed property is confidential information regarding contemplated regulatory action, we are guided by two precedents in particular: *Carpenter* and *Cleveland*.

In *Carpenter*, the Supreme Court held that the publication schedule and contents of forthcoming articles in a Wall Street Journal column were the Journal's "property" because "[t]he Journal had a property right in keeping confidential and making exclusive use" of the information before publication. 484 U.S. at 26, 108 S.Ct. 316. In fact, the Court noted that "[c]onfidential business information ha[d] long been recognized as property." *Id.* The Court further noted that pre-publication information was "stock in trade, to be gathered at the cost of enterprise, organization, skill, labor, and money, and to be distributed and sold to those who [would] pay money

for it." *Id.* (quoting *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 236, 39 S.Ct. 68, 63 L.Ed. 211 (1918)). The Court therefore concluded that a Journal employee fraudulently misappropriated his employer's "property" in violation of the mail and wire fraud statutes when he knowingly disclosed the Journal's confidential pre-publication information to a stockbroker who traded on it. *Id.* at 28, 108 S.Ct. 316.

By contrast, thirteen years later, the Court in *Cleveland* held that the mail fraud statute did "not reach fraud in obtaining a state or municipal license" to operate video poker machines, holding that "such a license [was] not 'property' in the government regulator's hands." 531 U.S. at 20, 121 S.Ct. 365. The Court reasoned that (1) the licenses themselves had no economic value until they were issued to a private actor, and (2) the state's right to control the issuance of its licenses "implicated [its] role as sovereign, not as property holder." *Id.* at 22–24, 121 S.Ct. 365. Thus, the Court concluded that the government's "theories of property rights ... [both] stray[ed] from traditional concepts of property" and invited a "sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Id.* at 24, 121 S.Ct. 365.

While *Cleveland* remains good law, courts have consistently rejected attempts – similar to those advanced by Defendants here – to apply its holding expansively. *See, e.g.*, *Pasquantino*, 544 U.S. at 357, 125 S.Ct. 1766 ("*Cleveland* is different from this case."); *Fountain v. United States*, 357 F.3d 250, 256 (2d Cir. 2004) (explaining that *Cleveland* had only a "modest" effect on the existing legal landscape); *United States v. Middendorf*, No. 18-cr-36 (JPO),

2018 WL 3443117, at *8–9 (S.D.N.Y. July 17, 2018) (rejecting a *Cleveland*-based argument similar to the one raised here). As the Supreme Court has clarified, *Cleveland* simply "held that a [s]tate's interest in an unissued video poker license was not 'property,' because the interest in choosing particular licensees was '*purely* regulatory' and 'could not be economic.'" *Pasquantino*, 544 U.S. at 357, 125 S.Ct. 1766 (emphasis added) (brackets omitted) (quoting *Cleveland*, 531 U.S. at 22–23, 121 S.Ct. 365). Consistent with this formulation, we have observed that *Cleveland*'s "particular selection of factors" did not establish "rigid criteria for defining property but instead ... provid[ed] permissible considerations." *Fountain*, 357 F.3d at 256. The considerations relied upon by the Court in *Cleveland* are thus in addition to considerations recognized in other cases, such as the "right to exclude" that was "deemed crucial in defining property" in *Carpenter*. *Id.*

Here, we find it most significant that CMS possesses a "right to exclude" that is comparable to the proprietary right recognized in *Carpenter*. Like the private news company in *Carpenter*, CMS has a "property right in keeping confidential and making exclusive use" of its nonpublic predecisional information. *Carpenter*, 484 U.S. at 26, 108 S.Ct. 316. In stark contrast to a state's right to issue or deny a poker license – a "paradigmatic exercise[ ] of the [state's] traditional police powers" – CMS's right to exclude the public from accessing its confidential predecisional information squarely implicates the government's role as property holder, not as sovereign. *Cleveland*, 531 U.S. at 23, 121 S.Ct. 365. This view is consistent with pre-*Cleveland* decisions from this and other Circuits. *See United States v.*

Girard, 601 F.2d 69, 71 (2d Cir. 1979) (concluding that "the [g]overnment has a property interest in certain of its private records," including the confidential information contained in those records); *United States v. Czubinski*, 106 F.3d 1069, 1074 (1st Cir. 1997) (holding that the IRS's confidential taxpayer information "may constitute intangible 'property'" under the wire fraud statute (citing *Carpenter*, 484 U.S. at 26, 108 S.Ct. 316)).

Furthermore, although we do not read *Cleveland* as strictly requiring the government's property interest to be "economic" in nature, the government presented evidence that CMS *does* have an economic interest in its confidential predecisional information. For example, the evidence at trial established that CMS invests time and resources into generating and maintaining the confidentiality of its nonpublic predecisional information – resources that are devalued when the information is leaked to members of the public. *See Carpenter*, 484 U.S. at 26, 108 S.Ct. 316; *see also, e.g.*, *Middendorf*, 2018 WL 3443117, at *9 (concluding that a statutory non-profit's confidential inspection lists were "certainly something of value to the [non-profit], which invested time and resources into their creation" (internal quotation marks omitted)). Relatedly, the selective leaking of confidential CMS information risks hampering the agency's decision-making process. Although this risk obviously implicates CMS's regulatory interests, it also implicates CMS's economic interest in making efficient use of its limited time and resources. As former CMS Director Dr. Jonathan Blum testified, leaks of confidential information could result in unbalanced lobbying efforts, which would in turn impede the agency's

efficient functioning by making it "more difficult to manage the process flow and to convince [Blum's] superiors of the right course for the Medicare program." App'x at 467. Leaks may also require the agency to "tighten up" its internal information-sharing processes, again with the result that the agency would become less efficient. *Id.* at 766; *see also EPA v. Mink*, 410 U.S. 73, 87, 93 S.Ct. 827, 35 L.Ed.2d 119 (1973) (explaining that Congress enacted the "deliberative process" exemption to the Freedom of Information Act's disclosure requirements, 5 U.S.C. § 552(b)(5), because the "efficiency of [g]overnment would be greatly hampered if, with respect to legal and policy matters, all [g]overnment agencies were prematurely forced to 'operate in a fishbowl.'" (quoting S. Rep. No. 89-813, at 9 (1965))), *superseded by statute on other grounds as stated in CIA v. Sims*, 471 U.S. 159, 190 n.5, 105 S.Ct. 1881, 85 L.Ed.2d 173 (1985).

Despite CMS's proprietary right to exclude and well-recognized economic interests, Defendants argue that the confidential CMS information at issue in this case was not "property" because there was no evidence at trial to establish that CMS suffered an actual monetary loss. In support of this argument, Defendants mainly rely on a single sentence in this Court's decision in *Fountain*: "[*Cleveland*] indicates that, in the context of government regulation, monetary loss presents a critical, perhaps threshold consideration." 357 F.3d at 257. For two reasons, this sentence cannot bear the weight Defendants place on it.

First, *Fountain*, like *Cleveland*, was not a case about confidential government information – it simply held that taxes owed to a government may

constitute "property" in its hands – and thus we do not believe that *Fountain*'s reference to "the context of government regulation" contemplated the circumstances presented here. Second, and more fundamentally, while monetary loss may generally be a useful tool for distinguishing the government's property interests from its "purely regulatory" interests, *Cleveland* did not, we emphasize, establish any "rigid criteria for defining property." *Id.* at 256. Nor do we see any reason to impose a rigid "monetary loss" criterion here. Such a requirement would be at odds with *Carpenter*, which squarely rejected the argument "that a scheme to defraud requires a monetary loss," and instead found it "sufficient that the Journal ha[d] been deprived of its right to exclusive use of the information" because "exclusivity is an important aspect of confidential business information and most private property for that matter." 484 U.S. at 26–27, 108 S.Ct. 316. Although CMS is not a private entity, *Carpenter*'s reasoning applies with equal force, since exclusivity is no less important in the context of confidential government information. *See, e.g.*, *Girard*, 601 F.2d at 71; *see also Pasquantino*, 544 U.S. at 356, 125 S.Ct. 1766 ("The fact that the victim of the fraud happens to be the government, rather than a private party, does not lessen the injury."); *Middendorf*, 2018 WL 3443117, at *8 (explaining that the "reasoning of *Carpenter* supports the conclusion that confidential information – whether held by the government [or] a private entity ... – is 'property'"). It is abundantly clear that government agencies have strong interests – both regulatory and economic – in controlling whether, when, and how to disclose confidential information relating to their contemplated rules. *See Mink*, 410

U.S. at 87, 93 S.Ct. 827 (recognizing the important "public policy ... of open, frank discussion between subordinate and chief concerning administrative action" (internal quotation marks omitted)); *supra* pp. 33–34. Although fraudulent interference with these interests may at times result in monetary loss to the fraud victim, nothing in the Title 18 fraud statutes requires that to be so.

In sum, the government's theory of property rights over a regulatory agency's confidential predecisional information does not "stray from traditional concepts of property," *Cleveland*, 531 U.S. at 24, 121 S.Ct. 365, but rather is entirely consistent with them. We therefore hold that, in general, confidential government information may constitute government "property" for purposes of 18 U.S.C. §§ 1343 and 1348, and that here, there was sufficient evidence to establish that the CMS information at issue was "property" in the hands of CMS.

B. Whether *Dirks v. SEC* applies to 18 U.S.C. §§ 1343 and 1348

Under *Dirks*, an insider may not be convicted of Title 15 securities fraud unless the government proves that he breached a duty of trust and confidence by disclosing material, nonpublic information in exchange for a "personal benefit." 463 U.S. at 663, 103 S.Ct. 3255. Similarly, a tippee may not be convicted of such fraud unless he utilized the inside information knowing that it had been obtained in breach of the insider's duty. *See United States v. Newman*, 773 F.3d 438, 447–49 (2d Cir. 2014), *abrogated on other grounds by Salman v. United States*, —— U.S. ——, 137 S. Ct. 420, 196 L.Ed.2d 351 (2016). Here, Defendants claim that the district court

erred by not instructing the jury that *Dirks*'s personal-benefit test also applied to the wire fraud and Title 18 securities fraud counts. In essence, Defendants argue that the term "defraud" should be construed to have the same meaning across the Title 18 fraud provisions and Rule 10b-5, so that the elements of insider-trading fraud are the same under each of these provisions. We disagree.

We begin by noting what the Title 18 fraud statutes and Title 15 fraud provisions have in common: their text does not mention a "personal benefit" test. Rather, these provisions prohibit, with certain variations, schemes to "defraud." 18 U.S.C. §§ 1343, 1348(1); 17 C.F.R. § 240.10b-5(a); *see* 18 U.S.C. § 1348(2) (prohibiting schemes to obtain certain property "by means of false or fraudulent pretenses"); 15 U.S.C. § 78j(b) (prohibiting the use of any "manipulative or deceptive device"). For each of these provisions, the term "defraud" encompasses the so-called "embezzlement" or "misappropriation" theory of fraud. *See United States v. O'Hagan*, 521 U.S. 642, 653–54, 117 S.Ct. 2199, 138 L.Ed.2d 724 (1997) (Title 15 securities fraud); *Carpenter*, 484 U.S. at 27, 108 S.Ct. 316 (mail and wire fraud); *see also, e.g.*, *United States v. Mahaffy*, 693 F.3d 113, 123 (2d Cir. 2012) (Title 18 securities fraud). According to this theory, "[t]he concept of 'fraud' includes the act of embezzlement, which is 'the fraudulent appropriation to one's own use of the money or goods entrusted to one's care by another.'" *Carpenter*, 484 U.S. at 27, 108 S.Ct. 316 (quoting *Grin v. Shine*, 187 U.S. 181, 189, 23 S.Ct. 98, 47 L.Ed. 130 (1902)). The undisclosed misappropriation of confidential information, in breach of a fiduciary or similar duty of trust and confidence, "constitutes fraud akin to embezzlement."

O'Hagan, 521 U.S. at 654, 117 S.Ct. 2199; *see also United States v. Chestman*, 947 F.2d 551, 566–67, 571 (2d Cir. 1991) (en banc).

While the Title 18 fraud statutes and Title 15 fraud provisions thus share similar text and proscribe similar theories of fraud, these common features have little to do with the personal-benefit test. Rather, the personal-benefit test is a judge-made doctrine premised on the Exchange Act's statutory purpose. As *Dirks* explained, in order to protect the free flow of information into the securities markets, Congress enacted the Title 15 fraud provisions with the limited "purpose of ... eliminat[ing] [the] use of inside information for *personal advantage*." 463 U.S. at 662, 103 S.Ct. 3255 (emphasis added) (internal quotation marks omitted). *Dirks* effectuated this purpose by holding that an insider could not breach his fiduciary duties by tipping confidential information unless he did so in exchange for a personal benefit. *Id.* at 662–64, 103 S.Ct. 3255; *see also Chestman*, 947 F.2d at 581 (Winter, *J.*, concurring in part and dissenting in part) (observing that whereas the theory of fraud recognized in *Carpenter* "is derived from the law of theft or embezzlement," the "*Dirks* rule is derived from securities law, and ... [is] influenced by the need to allow persons to profit from generating information about firms so that the pricing of securities is efficient"); *United States v. Pinto-Thomaz*, 352 F. Supp. 3d 287, 298 (S.D.N.Y. 2018) (Rakoff, *J.*) ("Although [the *Dirks* personal-benefit test] was novel law, the Court reasoned that this test was consistent with the 'purpose of the [Title 15] securities laws ... to eliminate use of inside information for personal advantage.'" (quoting *Dirks*, 463 U.S. at 662, 103 S.Ct. 3255)).

But once untethered from the statutory context in which it arose, the personal-benefit test finds no support in the embezzlement theory of fraud recognized in *Carpenter*. In the context of embezzlement, there is no additional requirement that an insider breach a duty to the owner of the property, since "it is impossible for a person to embezzle the money of another without committing a fraud upon him." *Grin*, 187 U.S. at 189, 23 S.Ct. 98. Because a breach of duty is thus inherent in *Carpenter*'s formulation of embezzlement, there is likewise no additional requirement that the government prove a breach of duty in a specific manner, let alone through evidence that an insider tipped confidential information in exchange for a personal benefit. *See O'Hagan*, 521 U.S. at 682 n.1, 117 S.Ct. 2199 (Thomas, *J.*, concurring in the judgment in part and dissenting in part) ("Of course, the 'use' to which one puts misappropriated property need not be one designed to bring profit to the misappropriator: Any 'fraudulent appropriation to one's own use' constitutes embezzlement, regardless of what the embezzler chooses to do with the money."); *see also United States v. Bryan*, 58 F.3d 933, 953 (4th Cir. 1995) ("Those who trade on purloined information but who do not come within the ... definition of 'insider' [set forth in *Chiarella v. United States*, 445 U.S. 222, 100 S.Ct. 1108, 63 L.Ed.2d 348 (1980), and *Dirks*] are still almost certain to be subject to criminal liability for federal mail or wire fraud."), *abrogated on other grounds by O'Hagan*, 521 U.S. 642, 117 S.Ct. 2199. In short, because the personal-benefit test is not grounded in the embezzlement theory of fraud, but rather depends entirely on the purpose of the Exchange Act,

we decline to extend *Dirks* beyond the context of that statute.

Our conclusion is the same for both the wire fraud and Title 18 securities fraud statutes. While it is true that Section 1348 of Title 18, unlike the wire fraud statute, concerns the general subject matter of securities law, Section 1348 and the Exchange Act do not share the same statutory purpose. *See United States v. Mills*, 850 F.3d 693, 699 (4th Cir. 2017) ("The doctrine of *in pari materia* is inapplicable when statutes have different purposes."). Indeed, Section 1348 was added to the criminal code by the Sarbanes-Oxley Act of 2002 in large part to overcome the "technical legal requirements" of the Title 15 fraud provisions. S. Rep. No. 107-146, at 6; *see United States v. Hoskins*, 902 F.3d 69, 81 n.5 (2d Cir. 2018) ("As a general matter, we may consider reliable legislative history where, as here, the statute is susceptible to divergent understandings and, equally important, where there exists authoritative legislative history that assists in discerning what Congress actually meant." (internal quotation marks omitted)). In particular, Congress intended for Section 1348 to "supplement the patchwork of existing technical securities law violations with a more general and less technical provision, with elements and intent requirements comparable to current bank fraud and health care fraud statutes." S. Rep. No. 107-146, at 14. Given that Section 1348 was intended to provide prosecutors with a different – and broader – enforcement mechanism to address securities fraud than what had been previously provided in the Title 15 fraud provisions, we decline to graft the *Dirks* personal-benefit test onto the elements of Title 18 securities fraud.

Finally, Defendants argue that we should extend *Dirks* beyond the Title 15 fraud provisions because otherwise the government may avoid the personal-benefit test altogether by prosecuting insider-trading fraud with less difficulty under the Title 18 fraud statutes – particularly the Title 18 securities fraud statute, which (unlike the wire fraud statute) does not require proof that wires were used to carry out the fraud. But whatever the force of this argument as a policy matter, we may not rest our interpretation of the Title 18 fraud provisions "on such enforcement policy considerations." *O'Hagan*, 521 U.S. at 678 n.25, 117 S.Ct. 2199. "The Federal Criminal Code is replete with provisions that criminalize overlapping conduct," and so "[t]he mere fact that two federal criminal statutes criminalize similar conduct says little about the scope of either." *Pasquantino*, 544 U.S. at 358 n.4, 125 S.Ct. 1766. Congress was certainly authorized to enact a broader securities fraud provision, and it is not the place of courts to check that decision on policy grounds.

Accordingly, we hold that the personal-benefit test does not apply to the wire fraud and Title 18 securities fraud statutes, and thus the district court did not err by refusing to instruct the jury on the personal-benefit test for those offenses.

C. Conversion of U.S. Property

The federal conversion statute proscribes "knowingly convert[ing] to [one's] use or the use of another ... any ... thing of value of the United States," or "receiv[ing] ... the same with intent to convert it to [one's] use or gain, knowing it to have been ... converted." 18 U.S.C. § 641. Defendants challenge their convictions under this statute on five grounds.

All defendants argue that (1) the evidence was insufficient to establish that they "seriously interfered" with CMS's ownership of its confidential information, as required to prove conversion, and (2) information is not a "*thing* of value" for purposes of Section 641. Olan, Huber, and Blaszczak further argue that (3) the conversion statute is unconstitutionally vague as applied to them, and (4) the evidence was insufficient to establish scienter. Finally, Olan and Huber contend that (5) the district court erred in giving a conscious avoidance jury instruction. We address each of these arguments in turn.

1. "Serious Interference"

Defendants first argue that there was insufficient evidence at trial to prove conversion of U.S. property because the government presented no evidence that Defendants interfered, let alone "seriously interfered," with CMS's ability to use its confidential information in the rulemaking process. Although the government agrees that "serious interference" is required, it responds that "the interference is complete when the [confidential] information is disclosed, and the interference is serious when the government has demonstrated a strong interest in maintaining confidentiality of that species of information."[2] Appellee's Br. at 109.

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[2] Because there is no dispute here, we assume without deciding that the conversion statute requires a "serious interference" with property. It is worth noting that although this court has yet to decide this issue, all of our sister Circuits to address the question have held, consistent with the common-law definition of conversion, that a "serious interference" is required. *See United States v. Collins*, 56 F.3d 1416, 1420 (D.C. Cir. 1995) ("The cornerstone of conversion is the unauthorized exercise of

We disagree with Defendants' view of how the "serious interference" standard applies when, as here, the property at issue is confidential information. By focusing on the fact that their misappropriation of confidential CMS information did not ultimately affect the rules that CMS subsequently announced, Defendants disregard the Supreme Court's teaching in *Morissette v. United States* that conversion under Section 641 extends broadly to the "misuse or abuse of [government] property." 342 U.S. 246, 272, 72 S.Ct. 240, 96 L.Ed. 288 (1952). Moreover, Defendants' argument overlooks the fact that the unauthorized disclosure of CMS's confidential nonpublic information *by definition* interferes with the agency's right to exclude the public from accessing such information. *See Carpenter*, 484 U.S. at 26, 108 S.Ct. 316 (rejecting the defendants' argument that they "did not interfere with the Journal's use of the [pre-publication] information" as "miss[ing] the point," because it sufficed that the defendants interfered with the Journal's "right to decide how to use [the information] prior to disclosing it to the public"). Thus, we agree with the government that the relevant "interference" with CMS's ownership of

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control over property in such a manner that *serious interference* with ownership rights occurs."); *United States v. Scott*, 789 F.2d 795, 798 (9th Cir. 1986) (similar); *United States v. May*, 625 F.2d 186, 192 (8th Cir. 1980) (similar); *see also* Restatement (Second) of Torts § 222A (1965). Although arguably a lesser quantum of interference might be required under the federal conversion statute, which was intended to broaden the scope of the common-law crime, *see Collins*, 56 F.3d at 1419, certainly evidence sufficient to establish "serious interference" under the common law would, at a minimum, also be sufficient to establish the requisite interference required for conversion under Section 641.

confidential information was complete upon the unauthorized disclosure.

As for the "seriousness" of the interference, we also reject Defendants' contention that their misappropriation of confidential CMS information exceeded the reach of the conversion statute simply because CMS was able to keep using the information. Defendants' argument is inconsistent with the Restatement, which sets forth a multi-factor test for determining the "seriousness of the interference" that lists "the harm done to the [property]" and "the inconvenience and expense caused to the [property owner]" as only two of six non-exhaustive factors, none of which "is always predominant." Restatement (Second) of Torts § 222A(2) & cmt. d (1965) (hereinafter "Restatement"); *see also United States v. Collins*, 56 F.3d 1416, 1420 (D.C. Cir. 1995) (citing the Restatement to interpret Section 641); *United States v. May*, 625 F.2d 186, 192 (8th Cir. 1980) (same). Moreover, Defendants' view is also in stark tension with our holding in *Girard*, where we upheld the defendants' convictions under Section 641 for engaging in a scheme to sell confidential DEA information that identified the agency's informants, even though the scheme was unsuccessful and there was no suggestion that the informants were in fact compromised. 601 F.2d at 70, 73; *see also Morissette*, 342 U.S. at 272, 72 S.Ct. 240 (explaining that "merely ... commingling" money may constitute conversion where the custodian is "under a duty to keep it separate and intact").

Thus, while the jury in this case was free to consider the fact that CMS was able to use the misappropriated information and did not suffer any monetary loss, it was also free to consider other

factors, including (1) the strength of the government's interest in maintaining confidentiality, (2) the risk of harm to the government's interests posed by the unauthorized disclosure, and (3) the extent of the unauthorized disclosure. *See* Restatement § 222A(2); *see also, e.g.*, *Girard*, 601 F.2d at 70, 73.

Applying this standard here, we conclude that there was sufficient evidence to support the jury's finding of serious interference with CMS's ownership of its confidential information. Dr. Blum testified that "[i]t's a very strong precedent and a very strong principle that every stakeholder has the right to receive the materials [concerning a rule] at the same time," because the "rule-making process is based upon the notion that the entire public that can be affected ... ha[s] the right to comment" in a manner that is fair to all stakeholders. App'x at 467. The leaking of predecisional information, Dr. Blum explained, could thus tilt the playing field against interest groups (and the public) who were not yet privy to the information, and also prematurely "trigger powerful [lobbying] forces to try and stop decisions." *Id.* CMS employee Amy Bassano echoed these views in her testimony, while adding that CMS employees were more "wary of what [stakeholders were] going to be sharing" with the agency after predecisional information had leaked. *Id*. at 767. This increased wariness, combined with the agency's tightening up of internal information-sharing protocols, "sometimes result[ed] in suboptimal [policy] outcomes." *Id.* Furthermore, all of these adverse effects harmed CMS economically by making the agency function less efficiently. *See supra* pp. 33–34.

As for other relevant factors, the jury could

reasonably infer that the disclosure of confidential information to a Washington D.C. consultant like Blaszczak – and ultimately to Blaszczak's clients – seriously risked harming the government's interests by threatening wider disclosure of the information to interested stakeholders. Indeed, the government presented evidence that Blaszczak tipped confidential information not only to hedge fund partners, who sought to use the information for trading purposes, but also to employees of healthcare companies such as Amgen, a regulated entity that stood to benefit from the very informational asymmetry that the government's confidentiality rules for predecisional information were designed to prevent. Taken together, this evidence was sufficient to support a finding that Defendants' misappropriation of CMS's confidential nonpublic information "seriously interfered" with CMS's ownership rights for purposes of the conversion statute.

2. "Thing of Value"

Defendants next argue that confidential information is not a "*thing* of value" within the meaning of the conversion statute. 18 U.S.C. § 641 (emphasis added). But as this Court explained in *Girard*, "[t]he word 'thing' notwithstanding, the phrase is generally construed to cover intangibles as well as tangibles." 601 F.2d at 71 (collecting cases). Thus, "[a]lthough the content of a writing is an intangible, it is nonetheless a thing a value." *Id.* Contrary to Defendants' strained reading of the case, we read *Girard* to hold that confidential information can itself be a "thing of value" under Section 641. *Id.*; *see also United States v. Matzkin*, 14 F.3d 1014, 1021 (4th Cir. 1994) (holding that confidential information was a "thing of value"); *United States v. Barger*, 931

F.2d 359, 368 (6th Cir. 1991) (citing, *inter alia*, *Girard* for the proposition that "information itself is enough to meet the property or 'thing of value' element of the statute."). Thus, whatever the merit of Defendants' textual argument, we are not at liberty to reconsider *Girard* here. *See, e.g.*, *Deem v. DiMella-Deem*, 941 F.3d 618, 623 (2d Cir. 2019) ("[A] published panel decision is binding on future panels unless and until it is overruled by the Court *en banc* or by the Supreme Court." (internal quotation marks omitted)).

3. Vagueness

Olan, Huber, and Blaszczak further argue that Section 641 is unconstitutionally vague as applied to them because there was no rule or regulation making clear that Worrall's disclosure of CMS's confidential information was "without authority."[3] This argument too lacks merit.

"Where, as here, we are not dealing with defendants' exercise of a first amendment freedom, we should not search for statutory vagueness that did not exist for the defendants themselves." *Girard*, 601 F.2d at 71; *see also United States v. Mazurie*, 419 U.S. 544, 550, 95 S.Ct. 710, 42 L.Ed.2d 706 (1975) ("[V]agueness challenges to statutes which do not

[3] The phrase "without authority" in Section 641 modifies only the words that follow it, "sells, conveys, or disposes," not the words preceding it, "embezzles, steals, purloins, or knowingly converts." 18 U.S.C. § 641. Nevertheless, in this context, the "without authority" requirement is implied by the definition of conversion. *See* Restatement § 228 ("One who is authorized to make a particular use of a chattel, and uses it in a manner exceeding the authorization, is subject to liability for conversion to another whose right to control the use of the chattel is thereby seriously violated.").

involve First Amendment freedoms must be examined in the light of the facts of the case at hand."). In *Girard*, we held that "statutory vagueness ... did not exist for the defendants themselves" because the defendants "must have known" that the disclosure of the identity of DEA informants was unauthorized. 601 F.2d at 71. Although we noted that the "DEA's own rules and regulations forbidding such disclosure" were relevant to the inquiry, *id.*, we did not, contrary to Defendants' suggestion, require the existence of a published rule or regulation on point. *See United States v. McAusland*, 979 F.2d 970, 975 (4th Cir. 1992) ("We do not read [*Girard*] as requiring the disclosure to be specifically proscribed by published regulations."). Nor will we impose such a sweeping extra-textual requirement here. Rather, we agree with the Fourth Circuit that "the existence of a published regulation proscribing disclosure" is not "the exclusive method of preventing vagueness." *Id.*; *see also, e.g.*, *id.* at 975–76 (rejecting defendants' as-applied vagueness challenge in light of "legends restricting disclosure" on the converted documents, "[d]efendants' behavior," and witnesses' testimony at trial that defendants "would have known that the information was not to be disclosed"); *United States v. Jones*, 677 F. Supp. 238, 241 (S.D.N.Y. 1988) ("Given the government's long[-]standing practice of maintaining the confidentiality of information relevant to on-going criminal investigations, and given the government's obvious interest in maintaining such confidentiality, the defendant could reasonably know the proscribed nature of his alleged actions.").

Here, as in *Girard*, there was ample evidence at trial to establish that Defendants "must have known"

that the disclosure of the predecisional CMS information at issue was prohibited. Although Worrall does not raise a vagueness challenge himself, it bears noting that CMS employees were subject to 5 C.F.R. § 2635.703(a) (the text of which was introduced into evidence at trial), which forbids the "improper use of nonpublic information to further [the employee's] own private interest or that of another ... by knowing unauthorized disclosure." The regulation further provides that "nonpublic information is information that the employee gains by reason of Federal employment and that he knows or reasonably should know has not been made available to the general public." *Id.* § 2635.703(b). In addition, CMS employees received extensive training on the rules prohibiting disclosure of nonpublic predecisional information.

As a former employee, Blaszczak was previously subject to these same rules and presumably had also received training on the confidential nature of predecisional information. At trial, moreover, the government's witnesses consistently testified to the fact that Blaszczak, Olan, and Huber – and consultants and securities traders in the healthcare space more generally – knew that predecisional CMS information was nonpublic and confidential. Indeed, Fogel testified that the Deerfield defendants valued predecisional CMS information precisely *because* it was not available to other traders. Plaford testified similarly as to his own motivations.

That testimony was corroborated by evidence of Defendants' own communications and behavior. In one episode in 2012, for example, Olan, Huber, Fogel, and Blaszczak attempted to extract predecisional CMS information from CMS consultant Dr. Niles

Rosen, prompting an email discussion of the fact that Rosen was unlikely to disclose such information. Olan commented that he thought the odds of Blaszczak "getting shut down by [R]osen [were] 103%," but nevertheless Blaszczak and the Deerfield partners pushed ahead in the hopes that Blaszczak might get Rosen to "bite[ ]," since he was "the man with the keys to [the radiation-oncology device] companies' coffins." App'x at 1982, 2428. Ultimately, Rosen rebuffed Blaszczak's efforts, writing in an email, "As you clearly understand, I cannot share with you our recommendations to CMS." *Id.* at 2431.

Thus, construing the evidence in the light most favorable to the prosecution, we conclude that there was sufficient evidence to establish that Olan, Huber, and Blaszczak knew that the CMS information at issue was disclosed "without authority." Accordingly, their as-applied vagueness challenge fails.

4. Scienter

Olan and Huber next argue that there was insufficient evidence at trial to establish that they received confidential CMS information "knowing it to have been ... converted," as required by 18 U.S.C. § 641. Blaszczak similarly argues that the evidence was insufficient to prove his "intent to convert [such information] to his use or gain." *Id.* Again, we disagree, and find that the evidence at trial was sufficient to establish Olan's and Huber's knowledge that they received converted property.

Specifically, we reject, for the reasons just mentioned, Olan's argument (joined by Huber) that the evidence was insufficient to prove his knowledge of unauthorized disclosure. We also reject Olan's claim that the evidence was insufficient to prove his

knowledge of "serious interference" with CMS's ownership of its confidential information. Despite Olan's bald assertion that "[t]here was no way for [him] ... to know that disclosure of the information" could affect CMS's rulemaking process given that he had "never worked for CMS," Olan Br. at 45, fellow Deerfield partner Fogel – who had also never worked for CMS – testified that he understood that disclosure of CMS's confidential information "had the potential to disrupt CMS's process," App'x at 564. Indeed, Fogel specifically acknowledged that if CMS's confidential "information was out there, it would give industry lobbyists and others a chance to ... stop a proposed cut or increase from happening." *Id.* Most notably, Fogel testified that he "discuss[ed] th[e] impact on the CMS process" with Huber and Olan. *Id.* This detailed testimony alone was enough to establish Huber's and Olan's knowledge of serious interference. *See United States v. Hamilton*, 334 F.3d 170, 179 (2d Cir. 2003) ("The testimony of a single accomplice is sufficient to sustain a conviction so long as that testimony is not incredible on its face and is capable of establishing guilt beyond a reasonable doubt." (internal quotation marks omitted)).

As to Blaszczak's sufficiency challenge, there was ample evidence to support a finding that Blaszczak intended to convert the confidential CMS information that he received from CMS insiders to his use or gain. Although Blaszczak argues that there was insufficient evidence to establish that he specifically "intend[ed] [for] his predictions and analyses ... to interfere ... with CMS's work," Blaszczak Br. at 57, the requisite intent was established by evidence that Blaszczak, himself a former CMS employee, obviously knew that the disclosure of the predecisional CMS

information he received was unauthorized and could spawn interference with CMS's processes, but he nevertheless intentionally proceeded to appropriate such information to his own use by disclosing it to his hedge fund clients. *See Morissette*, 342 U.S. at 270–72, 72 S.Ct. 240.

5. Conscious Avoidance Instruction

Last, we reject Olan's and Huber's claim that the district court erred in giving a "conscious avoidance" instruction. As relevant here, a conscious avoidance instruction may only be given if "the appropriate factual predicate for the charge exists, i.e. the evidence is such that a rational juror may reach the conclusion beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." *United States v. Goffer*, 721 F.3d 113, 126–27 (2d Cir. 2013) (internal quotation marks omitted). This standard is easily satisfied here. To repeat, the evidence at trial established that Olan and Huber sought out Blaszczak's services precisely so they could trade on information that other analysts and consultants did not possess. And as Fogel testified, when Blaszczak gave the Deerfield partners the nonpublic information they sought, he either told them "explicitly" that it came from CMS insiders, or that fact was "implied or obvious" given the context in which the information was conveyed. App'x at 555. In addition, Fogel testified that he, Olan, and Huber specifically discussed the fact that disclosure of CMS's confidential predecisional information could harm the agency's regulatory process. In these circumstances, a rational juror could find that, even if Olan and Huber did not have actual knowledge that Blaszczak's predictions were based on confidential

CMS information that had been converted, Olan and Huber were at least aware of a high probability of that fact and yet consciously avoided confirming it.

D. Other Sufficiency Arguments

Blaszczak, joined by Olan and Huber, next argues that at most the evidence established that he passed along information that was already public, or that was disclosed by CMS insiders who had the authority to disclose it. This argument is meritless. The fact that Blaszczak had access to legitimate sources of information that *could have* supported his predictions hardly compels the conclusion that he in fact relied on those sources, rather than on CMS insiders who disclosed confidential information without authority, as Fogel and Plaford testified. And while Blaszczak makes much of the fact that his predictions were not always accurate, his lack of perfection does not compel an inference that his sources were legitimate and public. As the evidence reflected, there were various reasons why CMS might adjust its position between the time that confidential predecisional information leaked and the time that a rule was publicly announced. Moreover, despite Blaszczak's imperfect record, his predictions were still more accurate (and valuable) than those of other market consultants. Put simply, Blaszczak invites us to choose "between competing inferences," but this is a fact-finding function that lies "solely within the province of the jury." *United States v. Payne*, 591 F.3d 46, 60 (2d Cir. 2010).

For similar reasons, we reject Worrall's argument that the evidence was insufficient to establish that he was the source of leaked CMS information in 2012. Contrary to Worrall's suggestion, the government

was not required to prove the precise way in which he became aware of predecisional information concerning the proposed radiation oncology rule. Rather, the government was entitled to prove Worrall's knowledge of the information through circumstantial evidence, including evidence that Worrall had access to the information because he worked closely with Blum and his job responsibilities exposed him to various matters within the agency. As to whether Worrall disclosed this information to Blaszczak, the government introduced into evidence a May 8, 2012 CMS sign-in sheet establishing that Blaszczak met Worrall the day before relaying confidential information concerning the proposed radiation oncology rule to Fogel. This evidence was buttressed by testimony from Marc Samuels, Blaszczak's consulting partner between 2008 and 2012, who recalled that Blaszczak had specifically named Worrall as a source of confidential CMS information. The government also presented evidence that Blaszczak and Worrall remained close in 2013 and 2014; for example, Blaszczak's research analyst during that period, Timothy Epple, testified that Blaszczak "would reference his friend Chris most often" as his source of nonpublic CMS information. App'x at 872. Epple further testified that, after Blaszczak learned he was under investigation by the SEC, he pointedly asked Worrall whether investigators had been questioning people at CMS. While Worrall argues that Blaszczak could nevertheless have obtained information about the 2012 radiation oncology rule from other people at CMS, the above-referenced evidence was more than sufficient to support the jury's contrary finding on this point.

Thus, having carefully reviewed the record, we conclude that the evidence at trial was sufficient to support the jury's verdict on each count of conviction.[4]

E. Misjoinder

Olan and Huber next argue that the district court erred in denying their motion under Federal Rule of Criminal Procedure 8(b) to sever Counts Seventeen and Eighteen, which charged Blaszczak alone in the Visium scheme, from the remaining counts.

Rule 8(b) provides that an indictment "may charge [two] or more defendants if they are alleged to have participated in the same act or transaction, or in the same series of acts or transactions, constituting an offense or offenses." Fed. R. Crim. P. 8(b). Under this rule, "joinder of defendants is proper when the alleged acts are 'unified by some substantial identity of facts or participants, or arise out of a common plan or scheme.'" *United States v. Feyrer*, 333 F.3d 110, 114 (2d Cir. 2003) (quoting *United States v. Attanasio*, 870 F.2d 809, 815 (2d Cir. 1989)). In administering this standard, we "apply a 'commonsense rule' to decide whether, in light of the factual overlap among charges, joint proceedings would produce sufficient efficiencies such that joinder is proper notwithstanding the possibility of prejudice

[4] Because each of the conspiracy convictions was predicated on substantive counts for which there was sufficient evidence, we need not reach the issue of whether there was also sufficient evidence to support so-called "*Klein*" conspiracies to defraud the United States, in violation of 18 U.S.C. § 371, by "obstruct[ing] a lawful function of the Government ... by deceitful or dishonest means." *United States v. Coplan*, 703 F.3d 46, 61 (2d Cir. 2012) (internal quotation marks omitted); *see United States v. Desnoyers*, 637 F.3d 105, 109–10 (2d Cir. 2011); *United States v. Coriaty*, 300 F.3d 244, 250 (2d Cir. 2002).

to either or both of the defendants resulting from the joinder." *United States v. Rittweger*, 524 F.3d 171, 177 (2d Cir. 2008) (Sotomayor, *J.*) (quoting *Shellef*, 507 F.3d at 96). Even where joinder is erroneous, we will not reverse unless the "misjoinder results in actual prejudice because it had [a] substantial and injurious effect or influence in determining the jury's verdict." *Shellef*, 507 F.3d at 100 (internal quotation marks omitted).

Here, the district court did not err in concluding that the Visium-related charges against Blaszczak were properly joined with the Deerfield-related charges against Blaszczak, Olan, Huber, and Worrall. Although these two sets of charges involved distinct schemes, there was substantial temporal overlap between the Visium scheme (2011 to 2013) and Deerfield scheme (mainly 2012 to 2014); the schemes involved nearly identical conduct, i.e., misappropriation and insider trading of confidential government information concerning healthcare rules; and in both schemes, Blaszczak was the key player and CMS was the victim. These similarities alone were sufficient to render Rule 8(b) joinder both efficient and proper. *See Rittweger*, 524 F.3d at 177; *Feyrer*, 333 F.3d at 114; *Attanasio*, 870 F.2d at 815.

In any event, even if joinder were improper, any error would be harmless because much of the evidence relating to the Visium scheme would have been admissible against Olan and Huber on Counts One through Sixteen. *See Shellef*, 507 F.3d at 101–02. The district court correctly determined that Plaford's testimony, which both corroborated Fogel's testimony and provided useful background on Blaszczak's methods and sources during the same time period as the Deerfield conspiracy, was relevant evidence on

the charges against Olan and Huber. *See* Fed. R. Evid. 401; *see also id.* 404(b). While the court also recognized that the probative value of Plaford's testimony "may [have been] somewhat attenuated" in relation to the Deerfield scheme, the court permissibly concluded that such testimony would not result in any undue prejudice for purposes of Rule 403(b). App'x at 996; *see United States v. Awadallah*, 436 F.3d 125, 134 (2d Cir. 2006) ("Only rarely – and in extraordinarily compelling circumstances – will we, from the vista of a cold appellate record, reverse a district court's on-the-spot judgment concerning the relative weighing of probative value and unfair effect." (internal quotation marks omitted)).

F. Evidentiary Issues

Blaszczak, again joined by Olan and Huber, also argues that the district court committed several evidentiary errors warranting a new trial. Specifically, Blaszczak contends that the district court erred by (1) limiting as cumulative the defense's cross-examination of CMS employee Mark Hartstein concerning the fact that CMS's 2012 proposed radiation oncology rule was based on published recommendations of the American College for Radiology; (2) precluding cross-examination of Plaford as to a prior inconsistent statement; (3) admitting into evidence statements made by Amgen employee Ruth Hoffman under the coconspirator exclusion set forth in Rule 801(d)(2)(E); and (4) admitting into evidence minutes of a 2007 Deerfield meeting as a business record for the purpose of proving Olan's and Huber's states of mind.

Having considered these arguments in the context of the record as a whole, we discern no error

warranting a new trial. The district court acted within its discretion in limiting Hartstein's testimony as to the basis for CMS's proposed radiation oncology rule, since other evidence had indeed been introduced on this subject and Hartstein's testimony would have been cumulative. Regarding Plaford's prior inconsistent statement that the market's prediction for the home healthcare cuts was 2.5% rather than 3.5% as he recalled at trial, the district court did not err in concluding that Plaford's recollection as to the actual market consensus was a collateral issue. As for Hoffman's email statements, the evidence at trial was sufficient to establish Hoffman's status as an unindicted coconspirator for purposes of Rule 801(d)(2)(E) based on her implied agreement with Blaszczak to misappropriate confidential CMS information. *See, e.g.*, *United States v. Downing*, 297 F.3d 52, 57–58 (2d Cir. 2002). Finally, the district court properly admitted the minutes of the 2007 Deerfield meeting – reflecting that someone at the meeting had opined that "Blazacks [sic] comments pre-news suggest he had a read of draft documents," App'x at 2039 – as a business record probative of Olan's and Huber's states of mind during the years of the charged conspiracy, *see* Fed. R. Evid. 803(6), and subject to a clear limiting instruction that such evidence could not be considered against Blaszczak.

We therefore discern no error in the district court's evidentiary rulings. Moreover, even assuming that one or more of these rulings were erroneous, any errors would fall well short of prejudicial. Over the course of the month-long trial, the government presented various forms of evidence establishing that Blaszczak's predictions were based on confidential nonpublic CMS information obtained directly from

CMS insiders, and that Olan and Huber were aware of that fact when they sought out this information, received it, and directed Deerfield to trade on it.

IV. CONCLUSION

In upholding the jury's verdict, we pause to reject Defendants' thematic claim that the government's positions, if accepted, would herald an unprecedented expansion of federal criminal law. It is Defendants who ask us to break new ground by rejecting well-recognized theories of property rights and by adding, in effect, a "personal benefit" element to the Title 18 fraud statutes. We decline these requests, holding instead that (1) a government agency's confidential information relating to its contemplated rules may constitute "property" for purposes of the wire fraud and Title 18 securities fraud statutes, and (2) *Dirks*'s "personal-benefit" framework does not apply to these Title 18 fraud statutes. Our remaining holdings confirm that Defendants' misappropriation of CMS's predecisional information, as proven at trial, fall comfortably within the Title 18 securities fraud, wire fraud, conversion, and conspiracy statutes. To the extent that the government's decision to prosecute any or all of these crimes in this case raises broader enforcement policy concerns, that is a matter for Congress and the Executive, not the Judiciary. Our inquiry is a more limited one, and having now completed it, we AFFIRM the judgments of the district court.

KEARSE, Circuit Judge, dissenting:

I respectfully dissent from the majority's affirmance of the convictions of these four defendants for substantive crimes of conversion of government property in violation of 18 U.S.C. § 641 and wire fraud in violation of 18 U.S.C. § 1343, as well as the convictions of three of the defendants for substantive crimes of securities fraud in violation of 18 U.S.C. § 1348, for conspiracy in violation of 18 U.S.C. § 1349 to commit Title 18 crimes of wire fraud and securities fraud, and for conspiracy in violation of 18 U.S.C. § 371 to commit offenses under § 641 and other provisions, including Title 15 securities fraud in violation of 15 U.S.C. § 78j(b) and SEC Rule 10b-5 promulgated thereunder.

Section 641, one of the sections under which all four defendants were convicted, provides that it is unlawful to

> embezzle[ ], steal[ ], purloin[ ], or knowingly *convert*[ ] to his use or the use of another, or without authority, sell[ ], convey[ ] or dispose[ ] of *any* record, voucher, money, or *thing of value of the United States or of any department or agency thereof* ....

18 U.S.C. § 641 (emphases added). Section 1343, under which all four defendants were also convicted, provides in part that

> [w]hoever, having devised or intending to devise any scheme or artifice ... *for obtaining* money or *property* by means of false or fraudulent pretenses ... transmits or causes to be transmitted by

> means of wire ... any writings, signs, signals ... for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both.

18 U.S.C. § 1343 (emphases added). Section 1348, under which three defendants were convicted, is similar to § 1343. It provides in part that

> [w]hoever knowingly executes, or attempts to execute, a scheme or artifice--
>
> ....
>
> (2) *to obtain*, by means of false or fraudulent pretenses, representations, or promises, any money or *property* in connection with the purchase or sale of ... any security of an issuer with a class of securities registered under Section 12 of the Securities Exchange Act of 1934 ....
>
> shall be fined under this title or imprisoned not more than 25 years, or both.

18 U.S.C. § 1348(2) (emphases added).

With respect to the issue dividing us, the majority treats the relevant elements of §§ 1343 and 1348 as the same: the property that the defendant is charged with obtaining by false or fraudulent pretenses must be the property of the defrauded victim. While this has been held to be so with respect to the mail fraud statute, 18 U.S.C. § 1341, *see*, *e.g.*, *Cleveland v. United States*, 531 U.S. 12, 15, 121 S.Ct. 365, 148

L.Ed.2d 221 (2000) ("the thing obtained must be property in the hands of the [fraud] victim"), and §§ 1341 and 1343 "share the same language in relevant part" and are subject to the same analysis, *Carpenter v. United States*, 484 U.S. 19, 25 n.6, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987), it is not entirely clear to me that this is true of § 1348. However, for purposes of this opinion, I accept that both §§ 1343 and 1348 prohibit obtaining property belonging to the victim of the fraud.

My disagreement with the majority is focused on the charges of the operative superseding indictment ("Indictment") that defendants violated §§ 1343 and 1348 by obtaining something that was government "property" and violated § 641 by "converting" something that was a "thing of value" to the government.

The alleged conduct underlying virtually all of these charges was that defendants Blaszczak, Huber, and Olan obtained directly or indirectly from defendant Worrall, an employee of the federal agency Centers for Medicare & Medicaid Services ("CMS"), confidential information as to the substance and timing of upcoming changes to CMS rules governing reimbursement rates for certain medical treatments. CMS is not a business; it does not sell, or offer for sale, a service or a product; it is a regulatory agency. It adopts regulations that affect, *inter alia*, business organizations or health industry entities--whether the affected persons or entities favor the regulations or not. While CMS seeks to maintain confidentiality as to its planned regulations--and the regulations can plainly have either a favorable or an adverse effect on certain business entities' fortunes--I do not view a planned CMS regulation as a "thing of value" to CMS,

18 U.S.C. § 641, that is susceptible to conversion. Unlike the information that was planned for publication by the news publisher victim in *Carpenter*, information is not CMS's "stock in trade," 484 U.S. at 26, 108 S.Ct. 316 (internal quotation marks omitted). CMS does not seek buyers or subscribers; it is not in a competition; it is an agency of the government that regulates the conduct of others. It does so whether or not any information on which its regulation is premised is confidential. Further, regardless of whether information as to the substance or timing of a planned regulation remains confidential as CMS prefers or is disclosed to unauthorized listeners, CMS adopts its preferred planned regulation and--subject to legal requirements as to timing, *e.g.*, 42 U.S.C. § 1395w-4(b)(1) (requiring that reimbursement rates for a given year be announced prior to November 1 of the preceding year)--can do so in accordance with its own timetable. I cannot see that predecisional regulatory information is subject to conversion within the contemplation of § 641.

Although the majority views our decision upholding a § 641 conviction in *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979), as compelling the conclusion that CMS's desire for predecisional confidentiality is a thing of value, I disagree. *Girard* involved a drug dealer's attempt to purchase confidential records of the United States Drug Enforcement Administration ("DEA") as to what persons were DEA informants. Confidential information as to the identities of informants and cooperators is clearly "[some]thing of value" to a government agency whose mission is law enforcement. That confidential information has

inherent value because it enables the agency to, *inter alia*, collect evidence upon which the Department of Justice may obtain authorizations to conduct electronic surveillance, obtain warrants for arrests, and commence prosecutions. Confidentiality in that context enhances the value of the information because, *inter alia*, it reduces the chances that suspects will alter their observable behavior, hide their contraband, flee into hiding, or tamper with--or harm--witnesses before the law enforcement agency has an opportunity to fully act upon the information it possesses.

An agency such as CMS whose brief is to issue regulations is entirely different. It may either carry out or deviate from its planned adoption of regulations even if its plans, and/or the information that affects those plans, become public knowledge before CMS prefers that such disclosures occur. There has been no conversion.

For similar reasons, I do not view CMS's interest in issuing a regulation, or in doing so on a particular date, or in keeping the planned regulation a secret until its issuance, as constituting government "property" within the meaning of §§ 1343 and 1348. Given that CMS, notwithstanding any premature disclosure of its predecisional regulatory information, can issue a regulation that adheres to its preliminary inclination or can issue a different regulation, I cannot see that CMS has been deprived of anything that could be considered property.

Nor do I see merit in the government's contention that predecisional regulatory information should be considered government property because CMS is "responsible for allocating $1 trillion in federal funds

every year," and that "[b]ecause a large part of" CMS's "mission" to "develop[ ] and maintain[ ] effective health care policy .... is centered on cost-effective allocation of health care spending, interference with CMS's right to exclusive use of its confidential information necessarily creates the potential for significant economic consequences" (Government brief on appeal at 92). Whatever economic consequences actually occur will be based on what CMS actually decides as to the substance and the timing of the regulation it adopts. The *Cleveland* Court rejected the government's argument that a property right of the State of Louisiana had been interfered with because the defendant "frustrated the State's right to control the issuance" of gaming licenses. 531 U.S. at 23, 121 S.Ct. 365. The Court held that "these intangible rights of allocation, exclusion, and control amount to no more and no less than Louisiana's sovereign power to regulate." *Id*.

Like the gaming licenses in question in *Cleveland*, which the State had the right to control or withhold--but which had no property status or effect until they were issued (and even when issued were not the property of the State)--the predecisional CMS information has no economic impact on the government until after CMS has actually decided what regulation to issue and when the regulation will take effect. And at the point when the regulation has economic impact on the government fisc, its impact will be in accordance with whatever regulation CMS ultimately decided to adopt. Thus, I cannot agree that a premature disclosure of predecisional regulatory information has taken any property from CMS or the government.

As the majority notes, all four defendants were

acquitted on all of the counts charging them with substantive securities fraud violations of Title 15 and SEC Rule 10b-5 promulgated thereunder. The only substantive counts on which the jury found any defendant guilty were those charging violations of 18 U.S.C. §§ 641, 1343, and 1348. Since, in my view, the predecisional regulatory information at issue here did not constitute CMS property within the meaning of §§ 1343 and 1348, or a thing of value stolen from CMS in violation of § 641, none of defendants' convictions on substantive counts should stand.

The Indictment also contained three conspiracy counts: Counts 1 and 2 against all four defendants (on both of which Worrall was acquitted), and Count 17 against Blaszczak alone. Count 2 charged all defendants with violating 18 U.S.C. § 1349, which prohibits conspiracy "to commit any offense under this chapter," to wit, Chapter 63 of Title 18, *i.e.*, 18 U.S.C. §§ 1341-1351. Count 17 charged Blaszczak with violating 18 U.S.C. § 371 by conspiring with a cooperating coconspirator to violate § 641. Since in my view the Indictment's allegations of substantive violations of §§ 1343, 1348, and 641 charged defendants only with conduct that was not prohibited by those sections, defendants could not properly be convicted of conspiring to violate them. Thus, I would conclude that the convictions on Counts 2 and 17 should also be reversed.

The conspiracy charged in Count 1, however, was not limited to a conspiracy to violate §§ 641, 1343, and 1348. Count 1 (Indictment ¶¶ 1-76) charged defendants with agreeing to commit "conversion of United States property, in violation of Title 18, United States Code, Section 641; *securities fraud, in violation of*

78j(b) and 78ff, and Title 17, Code of Federal Regulations, Section 240.10b-5; and *to defraud the United States and an agency thereof*, to wit, CMS, *in violation of Title 18, United States Code, Section 371 and Title 5, Code of Federal Regulations, Section 2635.703(a)*." (Indictment ¶ 72 (emphases added)). The latter Code of Federal Regulations provision states in part that "[a]n employee shall *not* ... *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) (emphases added). Count 1 alleged that defendants agreed to, *inter alia*, defraud CMS by obtaining from its employee Worrall confidential information about CMS's predecisional regulatory information (*see* Indictment ¶ 75) and engage in purchases and sales of securities in violation of 15 U.S.C. § 78j(b) and 78ff (*see id*. ¶ 74), and that pursuant to their conspiracy certain overt acts, including short sales of the shares of specified companies, were committed, all in violation of 18 U.S.C. § 371 (*see id*. ¶ 76).

The defendants other than Worrall were found guilty on this count. The jury was not given questions to answer that would reveal, with respect to Count 1, whether it found that the three convicted defendants had conspired to violate the securities fraud provisions of Title 15 and SEC Rule 10b-5 promulgated under that Title or to violate a government employee's duty of confidentiality, or instead had only conspired to violate § 641. When, as here, the jury has been presented with several bases for conviction, one or more of which is invalid as a matter of law, and it is impossible to tell which ground the jury selected, the conviction should be

vacated. *See*, *e.g.*, *Yates v. United States*, 354 U.S. 298, 312, 77 S.Ct. 1064, 1 L.Ed.2d 1356 (1957) (prosecution for conduct beyond statute-of-limitations period invalid as a matter of law), *partially overruled on other grounds by Burks v. United States*, 437 U.S. 1, 7-10, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *see generally Griffin v. United States*, 502 U.S. 46, 52-56, 112 S.Ct. 466, 116 L.Ed.2d 371 (1991). While the mere insufficiency of the evidence to support one of the bases submitted to the jury does not fall within this principle, *see id*. at 56, 112 S.Ct. 466, a basis is invalid as a matter of law when the conduct in question "fails to come within the statutory definition of the crime," *id*. at 59, 112 S.Ct. 466.

As the jury could have found that the three defendants it convicted under Count 1 agreed to commit crimes prohibited by Title 15 and the regulations promulgated under that Title, but may instead have found only that they 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, the convictions of Blaszczak, Huber, and Olan on Count 1 should be vacated.

Accordingly, I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. 17 CR 357 (LAK)

UNITED STATES OF AMERICA,

v.

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

Defendants.

New York, N.Y.

September 13, 2018, 9:30 a.m.

Before: HON. LEWIS A. KAPLAN, District Judge

[SENTENCING TRANSCRIPT]

* * *

[3] THE COURT: Good morning.

We have one unfinished piece of business which is I have not yet ruled on the post-verdict motions. I'm prepared to do so. If anybody wants to add something brief to the large **[4]** volume of argument and briefing I've had, I'll be happy to hear you for a couple of minutes.

MR. NAFTALIS: No, your Honor.

THE COURT: All right. The motions are all the denied. I'm just going to make one or two more comments very briefly.

I considered writing at great length about the sufficiency of the evidence and the Bruton point. I concluded there is certainly not any need for it on the Bruton point. The record is abundantly clear. I'd only

be repeating myself. So far as the analysis of the evidence, I think the record really does speak for itself.

The additional point that I think worth making is one that, unless I have somehow overlooked it, none of the parties made. And although the result with respect to these motions would be the same independent of this point, I think it's worth making it.

The essence at least of Mr. Worrall's motion -- perhaps it is too strong to say "the essence," but a very important part of his motion is the assertion that because the jury acquitted him on a considerable number of counts, it must be concluded that the jury found that he was not culpable with respect to any of those counts. And from that, he effectively draws the conclusion that in considering the sufficiency of the evidence on the counts of conviction, evidence that went to the **[5]** counts on which he was acquitted is not to be considered.

I'm not sure that the defense ever stated it in those words, but that's really an important part of their argument. I'm not sure it is a part only of their argument, but certainly it is far and away most prominently a part of that argument.

To give one example, and only one, Mr. Worrall's motion argues that the fact that he was acquitted on some counts means that the jury, and now I quote from his brief, "rejected the idea that Worrall was part of a systematic attempt to illicitly extract information from CMS. Acquitting him of all the conspiracy counts and substantive counts relating to matters other than the 2012 radiology oncology rule, which," as detailed above in his brief, "related at most to a single interaction between Worrall and Blaszczak."

The law in fact is exactly the opposite. I had occasion to deal with this problem in a case that the lawyers I think will all remember, *United States v. Ghailani*, in which Mr. Ghailani was acquitted of something like 282 out of 283 counts, and argued that the verdicts were inconsistent as between the one count of conviction and the 200-plus acquittals.

Now, the law of inconsistent verdicts is not a precise fit to these or at least isn't necessarily a precise fit, but the fit is so good that it controls here.

The leading case on inconsistent verdicts for many, **[6]** many years was Justice Holmes' opinion in *Dunn v. United States* in which he wrote consistency in the verdict is not necessary. Each count in an indictment is recorded as if it was a separate indictment. He then went on to quote Learned Hand's Second Circuit opinion in a case called *Steckler v. United States* as follows: "The most that can be said in such cases, that is to say, cases of truly inconsistent verdicts, and I don't think this is one, is that the verdict shows that either in the acquittal or the conviction, the jury did not speak their real conclusions. But that does not show that they were not convinced of the defendant's guilt. We interpret the acquittal as no more than their assumption of a power which they had no right to exercise, but to which they were disposed through lenity."

If there were any doubt about the meaning of all that, particularly in the circumstances of this case, it was removed by the Supreme Court in *United States v. Powell*, where the Court said that in reviewing the sufficiency of the evidence on one count, which is precisely what I'm asked to do here by Mr. Worrall, "The review should be independent of the jury's

determination that evidence on another count was insufficient." The Supreme Court in that case went on to say that returning an inconsistent verdict, and now I quote again "is as the *Dunn* court" -- that was Justice Holmes' opinion -- "recognized, an assumption of a power which the jury has no right to exercise, **[7]** but the illegality alone does not mean that such a collective judgment should not be subject to review. The fact that the inconsistency may be the result of a lenity coupled with the government's inability to invoke review suggests that inconsistent verdicts should not be reviewable."

Now, here, I don't think we have inconsistent verdicts. There were so many elements on the other counts on which the jury could have found a reasonable doubt. They could have acquitted on all of them without necessarily deciding anything favorably to Mr. Worrall that would be preclusive of a conviction on counts of conviction.

But even if there were an inconsistency it wouldn't matter. I reviewed the sufficiency of the evidence on the convictions that were returned, completely independently of the verdict on all the other counts, and so I'm entitled to look at the entirety of the trial evidence in determining the sufficiency. Ergo, if the trial evidence would have permitted the jury to find that Mr. Worrall was part of a systematic attempt to illegally take information from CMS, and use it to tip Blaszczak, then the verdict on the counts of conviction stands. And I think considering the whole record, the jury was entitled so to find.

So I did think it significant to make that point, and that takes care of the motions.

* * *

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 18-2811, 18-2825, 18-2867, 18-2878

UNITED STATES OF AMERICA,
Appellee,

v.

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

[Filed: April 10, 2020]

ORDER

Appellants, Theodore Huber and Robert Olan, filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*. The panel that determined the appeal has considered the request for panel rehearing, and the active members of the Court have considered the request for rehearing *en banc*.

IT IS HEREBY ORDERED that the petition is denied.

FOR THE COURT:

/s/ Catherine O'Hagan Wolfe,
Clerk

APPENDIX D

1. 15 U.S.C. § 78j provides:

Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange--

(a)(1) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security other than a government security, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Paragraph (1) of this subsection shall not apply to security futures products.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement[1] any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(c)(1) To effect, accept, or facilitate a transaction involving the loan or borrowing of securities in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(2) Nothing in paragraph (1) may be construed

to limit the authority of the appropriate Federal banking agency (as defined in section 1813(q) of Title 12), the National Credit Union Administration, or any other Federal department or agency having a responsibility under Federal law to prescribe rules or regulations restricting transactions involving the loan or borrowing of securities in order to protect the safety and soundness of a financial institution or to protect the financial system from systemic risk.

Rules promulgated under subsection (b) that prohibit fraud, manipulation, or insider trading (but not rules imposing or specifying reporting or recordkeeping requirements, procedures, or standards as prophylactic measures against fraud, manipulation, or insider trading), and judicial precedents decided under subsection (b) and rules promulgated thereunder that prohibit fraud, manipulation, or insider trading, shall apply to security-based swap agreements to the same extent as they apply to securities. Judicial precedents decided under section 77q(a) of this title and sections 78i, 78*o*, 78p, 78t, and 78u-1 of this title, and judicial precedents decided under applicable rules promulgated under such sections, shall apply to security-based swap agreements to the same extent as they apply to securities.

2. 18 U.S.C. § 371 provides:

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any

manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

3. 18 U.S.C. § 641 provides:

Public money, property or records

Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, or without authority, sells, conveys or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or

Whoever receives, conceals, or retains the same with intent to convert it to his use or gain, knowing it to have been embezzled, stolen, purloined or converted--

Shall be fined under this title or imprisoned not more than ten years, or both; but if the value of such property in the aggregate, combining amounts from all the counts for which the defendant is convicted in a single case, does not exceed the sum of $1,000, he shall be fined under this title or imprisoned not more than one year, or both.

The word "value" means face, par, or market

value, or cost price, either wholesale or retail, whichever is greater.

4. 18 U.S.C. § 1343 provides:

Fraud by wire, radio, or television

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

5. 18 U.S.C. § 1348 provides:

Securities and commodities fraud

Whoever knowingly executes, or attempts to execute, a scheme or artifice--

(1) to defraud any person in connection with any commodity for future delivery, or any option on a commodity for future delivery, or any security of

an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78*l*) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d)); or

(2) to obtain, by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of any commodity for future delivery, or any option on a commodity for future delivery, or any security of an issuer with a class of securities registered under section 12 of the Securities Exchange Act of 1934 (15 U.S.C. 78l) or that is required to file reports under section 15(d) of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*(d));

shall be fined under this title, or imprisoned not more than 25 years, or both.

6. 18 U.S.C. § 1349 provides:

Attempt and conspiracy

Any person who attempts or conspires to commit any offense under this chapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

7. 17 C.F.R. § 240.10b–5 provides:

Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or

indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,

in connection with the purchase or sale of any security.

APPENDIX E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

No. S1 17-cr-357 (LAK)

UNITED STATES OF AMERICA,

v.

DAVID BLASZCZAK, et al.,

Defendants.

JURY INSTRUCTIONS

[* * *]

E. Counts 3, 11, 13 and 18: Conversion of Government Property (18 U.S.C. §§ 2, 641)

I am going to begin with Counts 3, 11, 13, and 18, each of which charges the substantive crime of conversion of government property. Specifically, each of these counts charges one or more defendants with knowingly converting money or property belonging to the United States government - here, confidential information from the Centers for Medicare and Medicaid Services, or "CMS." These counts differ in two respects. First, they differ with regard to the specific information that allegedly was stolen. Second, they do not all charge exactly the same defendants.

Count 3 charges each of the four defendants with knowingly converting to their own use confidential CMS information about CMS's proposed radiation oncology rule, or receiving and converting that confidential information knowing it to have been

converted, from approximately May 2012 through at least in or about July 2012.

Count 11 charges Mr. Blaszczak and Mr. Worrall with knowingly converting to their own use a confidential CMS report with CMS's internal data analysis relevant to NxStage, among other companies, or receiving and converting that confidential information knowing it to have been converted, in or about June 2012.

Count 13 charges Mr. Blaszczak and Mr. Worrall with knowingly converting to their own use confidential CMS reports with CMS's internal data analysis and other confidential information in advance of a proposed kidney dialysis rule, or receiving and converting that confidential information knowing it to have been converted, in or about July 2013.

Count 18 charges Mr. Blaszczak with knowingly converting to his own use confidential information about CMS decisions, from at least in or about 2011 through at least in or about 2013, including the June 2013 home health regulatory action, or receiving and converting that confidential information knowing it to have been converted.

As to each of these counts, the government, in order to convict a defendant on a particular count, must prove each of the following elements beyond a reasonable doubt:

First, that the money or property described in the Indictment – here, the allegedly confidential CMS information as set forth in each of these counts – belonged to the United States Government;

Second, that the defendant you are considering either (1) knowingly converted that property or caused

such property to be converted or (2) knowing such property to have been converted, received and converted the property, or caused such property to be received and converted;

Third, that the defendant you are considering acted knowingly and willfully with the intent to deprive the government of the use and benefit of its property; and

Fourth, that the value of the property was greater than $1,000.

Now, as I said, the government may prove the second element in either of two ways. It may do so by establishing that the defendant you are considering converted the property in question or caused someone else to convert the property. It may do so also by proving that the defendant you are considering received and converted what he knew to be converted property, or caused someone else to receive and convert what he knew to be converted property. In order to find that the government has established the second element beyond a reasonable doubt for the count you are considering, and for each defendant you are considering, you must agree unanimously on which of the two sets of facts described in the previous sentence (if either) has been established beyond a reasonable doubt – in other words, you must agree unanimously that the defendant (1) converted the property in question, or caused someone else to convert the property, or (2) received and converted what he knew to be converted property, or caused someone else to receive and convert what he knew to be converted property.

1. First Element: Property Belonged to the United States

On the first element, there is no dispute in this case that the property in question – specifically, any information from CMS, an agency of the U.S. government, that was confidential – was property belonging to the United States.

2. Second Element: Defendant Knowingly Converted Property or Received and Converted Property Knowing It to Be Converted

As I said a moment ago, the government can prove the second element of the crimes charged in Counts 3, 11, 13, and 18 by establishing that the defendant you are considering either (1) converted the property in question, or caused someone else to convert the property, or (2) received and converted what he knew to be converted property, or caused someone else to receive and convert what he knew to be converted property. Let me discuss each of the two alternatives separately.

First, this element is satisfied if you find beyond a reasonable doubt that the defendant you are considering knowingly converted the information at issue, or caused the information at issue to be converted by someone else, in the count you are considering. To convert property knowingly means to use the property in an unauthorized manner in a way that seriously interfered with the governments's right to use and control the property, knowing that the property belonged to the government, and knowing that the government did not authorize such a use.

Second, and alternatively, this element is satisfied if you find beyond a reasonable doubt that the defendant you are considering, knowing the property at issue to have been converted – that is, used in an unauthorized manner and in a way that seriously interfered with the owner's right to use and control it – received and converted the property, or caused someone else to receive and convert the property, in the relevant count. A person receives property when he or she takes possession of it.

The property at issue in this case is government information. The disclosure of government information may be unauthorized within the meaning of this statute only if the disclosure of the information at issue was affirmatively prohibited by a federal statute, administrative rule or regulation, or any longstanding government practices. You have before you GX-2206, which is a regulation of the Office of Government Ethics. That regulation has the force of law.

A defendant may be convicted of this offense charge only if he was aware of the unauthorized nature of the disclosure. In addition, as I will explain further later on in these instructions, in some circumstances, you may find that a defendant acted with the necessary knowledge because the defendant consciously avoided learning certain facts by deliberately closing his eyes to what otherwise would have been clear. I will explain the specific circumstances and defendants as to which you may consider this theory of knowledge later in my instructions.

3. Third Element: Intent

The third element the government must prove beyond a reasonable doubt under Counts 3, 11, 13, and

18 is that the defendant you are considering acted knowingly and willfully with the intent to deprive the government of the use and benefit of the property at issue in the count you are considering.

To act knowingly means to act intentionally and voluntarily, and not because of ignorance, mistake, accident or carelessness.

To act willfully means to act with knowledge that one's conduct is unlawful and with the intent to do something the law forbids, that is to say, with the bad purpose to disobey or disregard the law.

Because an essential element of the crime charged is intent to deprive, good faith on the part of a defendant you are considering is a complete defense to the charge of conversion of government property. In other words, the law is not violated if a defendant you are considering had an actual, good faith belief that the property was lawfully obtained.

A defendant has no burden to establish a defense of good faith; it remains the government's burden to prove, beyond a reasonable doubt, that each defendant acted knowingly, willfully, and with intent to deprive.

Whether the defendant acted knowingly and willfully may be proven by the defendant's conduct and by all of the circumstances surrounding the case.

4. Fourth Element: Value of the Property

The fourth and final element the government must prove beyond a reasonable doubt for Counts 3, 11, 13, and 18 is that the value of the property converted from the government here, the allegedly confidential CMS information was greater than $1,000.

In determining the value of the property, you may consider the aggregate or total value of the property referred to in the count you are considering. If you find that the aggregate value is $1,000 or less, then you must find the defendant you are considering not guilty on that count. On the other hand, if you find the aggregate value to be greater than $1,000, then this element is satisfied.

* * *

If you find that the government proved beyond a reasonable doubt each of the four elements I have described with respect to the defendant you are considering and on the count that you are considering, then you should find that defendant guilty on that count. If, however, you are not satisfied that the government has so proved each of the four elements, then you must find the defendant not guilty on that count.

F. Counts 4, 5, 6, 7, 8 and 14: Title 15 Securities Fraud (15 U.S.C. §§ 78j(b), 78ff; 17 C.F.R. § 240.10b-5; 18 U.S.C. § 2)

Next I will turn to the counts that charge the defendants with Title 15 securities fraud: Counts 4 through 8 and 14. As described below, Counts 4 through 8 allege that all of the defendants committed Title 15 securities fraud based on conduct related to CMS's consideration of cuts in radiation oncology reimbursements that ultimately were announced on or about July 1, 2012.

Count 4 relates to the short sale of approximately 105,000 shares of Varian on or about June 7, 2012;

Count 5 relates to the short sale of approximately 90,000 shares of Varian on or about June 14, 2012;

Count 6 relates to the short sale of approximately 90,000 shares of Varian on or about June 15, 2012;

Count 7 relates to the short sale of approximately 250,000 shares of Varian on or about June 18, 2012;

Count 8 relates to the short sale of approximately 265,000 shares of Varian on or about June 25 and June 29, 2012.

Count 14 alleges that Mr. Blaszczak and Mr. Worrall committed Title 15 securities fraud from at least in or about January 2013 through at least in or about July 2013 based on conduct related CMS's consideration of possible cuts in reimbursement for kidney dialysis that ultimately were announced on or about July 6, 2013. This count relates to the short sale of approximately 33,665 shares of Fresenius ADR on or about June 25, 2013.

As to each of these six counts, the government, in order to convict a defendant you are considering, must prove each of the following three elements beyond a reasonable doubt:

First, that in connection with the purchase or sale of securities of the identified company, the defendant you are considering employed a device, scheme, or artifice to defraud, or engaged in an act, practice, or course of business that operated, or would operate, as fraud or deceit upon a purchaser or seller of the specified security;

Second, that when he engaged in this scheme, the defendant you are considering acted knowingly, willfully, and with an intent to deceive; and

Third, that in furtherance of the scheme, there occurred at least one use of any means or instrument

of transportation or communication in interstate commerce, or the use of the mails, or the use of any facility of any national securities exchange.

1. First Element; Device, Scheme, or Artifice to Defraud

The first element that the government must prove beyond a reasonable doubt is that the defendant you are considering employed a device, scheme or artifice to defraud or engaged in an act, practice or course of business that operated, or would operate, as fraud or deceit in connection with the purchase or sale of securities.

A "device, scheme or artifice to defraud" is merely a plan for the accomplishment of any fraudulent objective.

"Fraud" is a general term that embraces all efforts and means that individuals devise to take unfair advantage of others.

The specific "device, scheme or artifice to defraud," or course of business that the government alleges the defendants employed in connection with Counts 4 through 8 and 14 is known as "insider trading."

An "insider" is a person who comes into possession of material, nonpublic information by virtue of a relationship that imposes on the person a duty to maintain that information in confidence. If a person has such inside information and has a duty to keep it confidential, the law forbids that person from (1) buying or selling securities on the basis of that information or (2) giving that information to another person whom the insider anticipates will trade in securities on the basis of that information. In addition, the law prohibits a person who is not an insider from

trading in securities based on material nonpublic information, or assisting others in trading on the basis of that information, if the person who trades securities knows that the material, nonpublic information was intended to be kept confidential and that it was disclosed in violation of a duty to keep it confidential and in exchange for a personal benefit to the insider. It is not, however, a willful deceptive device in contravention of the federal securities law for a person to use his or others' superior financial expertise or expert analysis, his or others' guesses or predictions, or his or others' past practice or experience to determine whether to buy or sell securities. Nor is it a deceptive device in contravention of the federal securities laws for a person to buy or sell securities based on public information, or on tips provided that he does not know that the information has been disclosed in violation of a duty or confidence and in exchange for a benefit to the tipper.

Because the defendants are alleged to have played different roles in the charged scheme, I will summarize for you, with respect to each defendant, the facts that the government must prove beyond a reasonable doubt in order for you to find that the government has established the first element of Title 15 securities fraud, that is, use of a device, scheme, or artifice to defraud in connection with the purchase or sale of securities, with respect to that defendant. I will do that by providing you with a list of questions that you must consider in order to find whether the government established the first of the three essential elements of the crime of insider trading with respect to the defendant that you are considering and on the count that you are considering.

The Indictment alleges that Mr. Worrall was an "insider" at CMS who disclosed or, to use another word, "tipped," inside information to Mr. Blaszczak, who in turn disclosed the inside information to Mr. Huber, Mr. Olan and others in anticipation that those persons would use it in securities trading. Messrs. Blaszczak, Huber and Olan are not charged with being "insiders," but rather are charged with having been "tippees."

In order to find that the government has established the first of the three essential elements of the crime of insider trading with respect to Mr. Worrall, you must be convinced that the government has proved, with respect to the count you are considering, that the answer to each of the following three questions is "yes":

Question A: Did Mr. Worrall owe a duty of trust and confidence to CMS?

Question B: Did Mr. Worrall violate his duty of trust and confidence by disclosing or causing someone else to disclose material, non-public information to Mr. Blaszczak?

Question C: Did any of the three defendants charged as "tippees" in fact trade or cause others to trade in securities based on the material, non-public information?

In order to find that the government has established the first of the three essential elements of the crime of insider trading under Title 15 as to any of Messrs. Blaszczak, Huber and Olan, the answers to Questions A and B must be "yes" and, in addition, you must be convinced that the government has proved that the answer to the following Question D is "yes"

with respect to the defendant you are considering for each count in which that defendant is charged:

Question D is this: Did the defendant that you are considering in fact trade or cause someone else to trade in securities based on the material, non-public information?

I will now discuss each of the questions separately.

Question A asks whether Mr. Worrall owed a duty of trust and confidence to CMS. To answer this question you must look to all of the facts and circumstances and ask whether both Mr. Worrall and CMS recognized their relationship as one that involved trust and confidence.

Question B asks whether Mr. Worrall disclosed or caused someone else to disclose material, non-public information.

Information is "material" if a reasonable investor would have considered it important in deciding whether to buy, sell, or hold securities, and at what price to buy or sell the securities. Put another way, there must be a substantial likelihood that the fact would have been viewed by a reasonable investor as having significantly altered the total mix of information then available.

Information is "non-public" if, at the time it was disclosed, it was not available to the public through such sources as press releases, trade publications, analyst reports, newspapers, magazines, word of mouth, public meetings, or other similar sources. In assessing whether information is non-public, the key word is "available." If information is available, for example, in the public media, analyst reports, or on publically accessible government websites, it is public.

In making this evaluation, you may consider also written CMS policies, contracts, measures CMS has taken to guard the information's secrecy, the extent (if any) to which the information already has been disclosed to outsiders, and any other relevant facts and circumstances.

I caution you that the fact that information has not appeared in the newspaper or other widely available public medium does not alone determine whether information is non-public. Sometimes the government authorizes the release of information, or is otherwise willing to make information available to certain members of the public even though it never may have appeared in any newspaper or other publication. Such information would be considered public. For example, if CMS policy was to give certain information to lobbyists or industry groups who ask for it, that information is public information. Accordingly, information is not necessarily non-public simply because there has been no formal announcement or because only a few people have been made aware of it.

On the other hand, confirmation by an insider of unconfirmed facts or rumors - even if those unconfirmed facts or rumors have been reported in a newspaper or research report or predicted by someone else without use of material non-public information - may itself be inside information. A tip from an insider that is more reliable or specific than unconfirmed facts, predictions, or public rumors is nonpublic information despite the existence of such rumors, predictions or unconfirmed facts in the media or investment community.

Questions C and D each require you to consider whether the government has proved that one or more

of the three defendants charged as tippees – Messrs. Blaszczak, Huber, and Olan – did in fact trade or cause others to trade on the basis of the inside information provided by Mr. Worrall. In this context, you may conclude that a trade was made on the basis of the inside information if the information was a factor in the trading decision. It need not have been the only factor.

As I indicated earlier, if the government has established beyond a reasonable doubt that the answer to each of Questions A through C is "yes" for a given count in which Mr. Worrall is charged you should find that the government has proved the first element of the crime of Title 15 securities fraud as to Mr. Worrall on that count. If, for any of Questions A through C with respect to the count you are considering, the government has failed to establish beyond a reasonable doubt that the answer is "yes," you must find Mr. Worrall not guilty as to that count.

Similarly, if the government has established beyond a reasonable doubt that the answer to each of Questions A, B, and D is "yes" with respect to the defendant you are considering (either Mr. Blaszczak, Mr. Huber, or Mr. Olan) for a given count in which that defendant is charged, you should find that the government has proved the first element of the crime of Title 15 securities fraud as to that defendant on that count. If the government has failed to establish beyond a reasonable doubt that the answer is "yes" to all of Questions A, B and D with respect to the defendant you are considering and the count you are considering, you must find that defendant not guilty as to that count.

2. Second Element: State of Mind

The second element of the crime of Title 15 securities fraud relates to state of mind. The government must prove beyond a reasonable doubt that the defendant you are considering engaged in an insider-trading scheme knowingly, willfully, and with an intent to deceive. To act knowingly means to act intentionally, deliberately, and voluntarily, rather than by mistake, accident, ignorance, or carelessness. To act willfully means to act deliberately and with a purpose to do something that the law forbids.

I am going to provide you with a list of questions that you must consider in order to find whether the government has established that the defendant you are considering acted with an intent to deceive with respect to any given count.

In order to find that the government has established that Mr. Worrall acted with an intent to deceive with respect to the count you are considering, you must be convinced beyond a reasonable doubt that the government has proved that the answer to each of the following questions is "yes" with respect to Mr. Worrall.

Question E: Did Mr. Worrall know that the information that he disclosed to Mr. Blaszczak was material and non-public?

Question F: Did Mr. Worrall know that, in disclosing the information, he was violating his duty of trust and confidence to CMS?

Question G: Did Mr. Worrall anticipate that Mr. Blaszczak would use the material, non-public information to trade in securities or to cause others to trade in securities?

Question H: Did Mr. Worrall, in providing this information to Mr. Blaszczak, anticipate receiving a personal benefit of some kind in return?

In order to find that the government has established that Mr. Blaszczak acted with an intent to deceive, you must conclude that it has proved beyond a reasonable doubt that the answers to Questions E through H are "yes" for the count you are considering and, in addition, that it has so proved that the answer to the following Question I is "yes" with respect to that count.

Question I is this: Did Mr. Blaszczak know that Mr. Worrall disclosed the information in breach of a duty of trust and confidence and in anticipation of personal benefit?

I now turn to Messrs. Huber and Olan. In order to find that either Mr. Huber or Mr. Olan acted with an intent to deceive, the answers to Questions E through I must be "yes" and, in addition, you must be convinced that the government has proved beyond a reasonable doubt that the answer to the following Question J is "yes" with respect to each of the counts in which the defendant you are considering is charged.

Question J is this: Did the defendant you are considering (either Mr. Huber or Mr. Olan) know that the material, non-public information that he received from Mr. Blaszczak was disclosed to Mr. Blaszczak by someone who owed a duty to keep that information confidential but breached that duty in anticipation of a personal benefit?

I now will discuss each question separately.

Question E asks whether Mr. Worrall knew that the information that he disclosed to Mr. Blaszczak was

material and non-public. I instructed you on the meaning of the terms "material" and "non-public" in the first element of Title 15 securities fraud. You should apply those definitions here.

Question F asks whether Mr. Worrall knew that, in disclosing the information, he was violating his duty of trust and confidence to CMS. It is not necessary for Mr. Worrall to have had knowledge of the legal nature of a breach of his duty of trust and confidence to CMS. However, he must have understood that he violated a confidence in disclosing the confidential information.

As to Question G, you must determine whether the government has proven beyond a reasonable doubt that Mr. Worrall anticipated that Mr. Blaszczak would use or cause others to use the information to trade securities. Direct proof that Mr. Worrall anticipated Mr. Blaszczak would use the information to trade or cause others to trade securities is not required. Mr. Worrall's knowledge may be established by circumstantial evidence. Further, it is not necessary for the government to prove that Mr. Worrall knew to a certainty that Mr. Blaszczak would use the information to trade or cause others to trade securities. It is sufficient for the government to prove that Mr. Worrall anticipated that Mr. Blaszczak would use the information for his or others' trading of securities.

With respect to Question H, you must determine whether Mr. Worrall anticipated receiving a personal benefit in return for providing material non-public information to Mr. Blaszczak. A "personal benefit," in the context of the securities laws, need not be financial or tangible in nature; it includes also the benefit one would obtain from simply making a gift of confidential

information to a relative or friend with the expectation that the recipient will trade on such confidential information. In other words, a gift of confidential information results in a personal benefit to the tipper if the disclosure of that information has the same anticipated effect as if the tipper had instead traded on that information him- or herself and given the proceeds of the trade to the recipient of the information. A pre-existing relationship may be taken into account as a factor in determining whether the information was disclosed with the expectation that the recipient would trade on it.

I must caution you that an insider's disclosure of material nonpublic information, standing alone, does not establish this personal benefit factor. Even where a person has a duty of trust and confidence, meaning that he was required to keep information confidential, his breach of the duty is not fraudulent unless he discloses the information with the intention that he receive a personal benefit in consequence of doing so. While you need not be unanimous as to any particular benefit Mr. Worrall may have received or expected to receive as a result of his disclosures to Mr. Blaszczak, you must all agree that Mr. Worrall received or expected to receive a benefit of some kind and that any such benefit was personal in order to answer Question H "yes."

Finally, as to Questions I and J, when you are considering whether the government has met its burden with respect to the alleged tippees – that is, Mr. Blaszczak, Mr. Huber, or Mr. Olan – you must determine whether the government has proved beyond a reasonable doubt that the defendant you are considering knew that the information disclosed to or obtained by him was disclosed in breach of a duty of

trust and confidence and for personal benefit. The mere receipt of material, non-public information, and even trading on that information is not sufficient; the tippee must have known that the tipper disclosed the information in violation of a duty of confidentiality and that it was disclosed in exchange for a personal benefit.

Whether a defendant acted knowingly, willfully, and with intent to deceive is a question of fact for you to determine, like any other fact question. Direct proof of knowledge and intent to deceive is not required. Knowledge and criminal intent may, like any other fact, be established by circumstantial evidence. Obviously, we cannot look into a person's mind and know what that person is thinking. However, you do have before you evidence of certain acts, including emails and conversations, alleged to have taken place with the respective defendants or in their presence. The government contends that these acts and conversations show beyond a reasonable doubt knowledge on the part of each defendant of the unlawful purposes of the defendant's actions. On the other hand, each defendant denies either that these acts and conversations took place or show that he had such knowledge and intent. It is for you to determine whether the government has established beyond a reasonable doubt that such knowledge and intent on the part of the defendant existed.

Because an essential element of the crime charged is intent to deceive, good faith on the part of a defendant you are considering is a complete defense to the charge of insider trading. In other words, the law is not violated if a defendant you are considering held an honest belief that his actions were not in furtherance of any unlawful scheme.

A defendant has no burden to establish a defense of good faith; it remains the government's burden to prove, beyond a reasonable doubt, that each defendant acted knowingly, willfully, and with intent to deceive.

If the government has established beyond a reasonable doubt that the answer to each of Questions E through H is "yes" and that Mr. Worrall acted knowingly and willfully with respect to the actions charged in a given count, you should find that the government has proved the second element of the crime of Title 15 securities fraud as to Mr. Worrall on that count. If the government has failed to establish beyond a reasonable doubt that the answer is "yes" to any of Questions E through H with respect to the count you are considering or that Mr. Worrall acted knowingly and willfully, you must find Mr. Worrall not guilty as to that count.

Similarly, if the government has established beyond a reasonable doubt that the answer to each of Questions E through I is "yes" and that Mr. Blaszczak acted knowingly and willfully for a given count in which Mr. Blaszczak is charged, you should find that the government has proved the second element of the crime of Title 15 securities fraud as to Mr. Blaszczak on that count. If the government has failed to establish beyond a reasonable doubt that the answer is "yes" for any of Questions E through I with respect to the count you are considering or that Mr. Blaszczak acted knowingly and willfully, you must find Mr. Blaszczak not guilty as to that count.

Finally, if the government has established beyond a reasonable doubt that the answer to each of Questions E through J is "yes" with respect to the defendant you are considering (either Mr. Huber, or

Mr. Olan) and that the defendant you are considering acted knowingly and willfully for a given count in which the defendant you are considering is charged, you should find that the government has proved the second element of the crime of Title 15 securities fraud as to that defendant on that count. If the government has failed to establish beyond a reasonable doubt that the answer is "yes" for any of Questions E through J with respect to the defendant and the count you are considering or that the defendant you are considering acted knowingly and willfully, you must find that defendant not guilty as to that count.

3. Third Element: Interstate Commerce

The third and final element that the government must prove beyond a reasonable doubt is that the disclosure of material, nonpublic information or trading based on that information involved the use of some instrumentality of interstate commerce, such as an interstate telephone call, use of the mails, email or use of a facility of a national securities exchange, such as a stock or options trade A made on the NASDAQ, the New York Stock Exchange or the International Stock Exchange.

* * *

As to each tip and trade alleged in Counts 4 through 8 and 14 of the Indictment, if you find that the government has failed to prove any element of any count beyond a reasonable doubt as to a particular defendant, then you must find that defendant not guilty of that count. On the other hand, if you find that the government has proven each element beyond a reasonable doubt as to a particular defendant, then you should find the defendant guilty of that count.

G. Counts 9, 12 and 15: Wire Fraud (18 U.S.C. §§ 2,1343)

Counts 9, 12 and 15 each charge certain defendants with a substantive count of the crime of wire fraud. Specifically:

Count 9 charges that, from at least in or about May 2012 through at least in or about July 2012, Messrs. Blaszczak, Huber, Olan, and Worrall each participated in a scheme to defraud CMS of confidential information related to CMS's proposed radiation oncology rule by obtaining that confidential information and then converting it to their own use using interstate wires (for example, through the use of cellular telephones and email communications) for the purpose of executing securities transactions in Varian, Elekta, and Accuray stock.

Count 12 charges that, in or about June 2012, Messrs. Blaszczak and Worrall each participated in a scheme to defraud CMS of confidential information related to CMS's internal data analysis relevant to NxStage, among other companies, by obtaining that information and then converting it to their own use using interstate wires (for example, through the use of cellular telephones and email communications) for the purpose of executing securities transactions in NxStage stock.

Count 15 charges that, from at least in or about January 2013 through in or about July 2013, Messrs. Blaszczak and Worrall each participated in a scheme to defraud CMS of confidential information related to CMS's proposed kidney dialysis rule by obtaining that information and then converting it to their own use using interstate wires (for example, through the use of cellular telephones and email communications) for the

purpose of executing securities transactions in Fresenius stock and ADRs.

For each of these counts, the government must prove the following three elements:

First, the defendant you are considering employed a device, scheme, or artifice to defraud or obtained money or property by false pretenses, representations or promises;

Second, the defendant you are considering acted knowingly and willfully, with knowledge of the fraudulent nature of the scheme and with specific intent to defraud; and

Third, in the execution of the scheme, the defendant you are considering used, or caused to be used, interstate wires.

1. First Element: Device or Artifice to Defraud

First, a device or artifice to defraud is merely a plan to accomplish a fraudulent objective. For purposes of the wire fraud statute, depriving another of money or property by means of false or fraudulent pretenses, representations, or promises includes the act of embezzlement, which is the fraudulent appropriation to one's own use of the money or property entrusted to one's care by another.

2. Second Element: Intent

I explained in the context of Title 15 securities fraud what it means to act knowingly and willfully, and that earlier explanation applies here. To prove that the defendant you are considering acted with specific intent to defraud, the government must prove that he acted with the intent to deprive CMS of

something of value – for example, confidential material, non-public information – by trading on the basis of that information or converting it to his own use by tipping it for use in trading. My prior instructions concerning good faith apply here in relation to whether there was a willful intent to defraud. In this context, "material" means simply that the information was important to CMS. "Non-public" has the same meaning as I previously stated with respect to Title 15 securities fraud.

3. Third Element: Use of Interstate Wires

Finally, in order to convict on each of these counts, the government must prove beyond a reasonable doubt that interstate or international wires (for example, phone calls, email communications, or electronic trades) were used in furtherance of the scheme to defraud.

* * *

As to each scheme alleged in Counts 9, 12 and 15 of the Indictment, if you find that the government has failed to prove any element of any count beyond a reasonable doubt as to a particular defendant, then you must find that defendant not guilty of that count. On the other hand, if you find that the government has proven each element beyond a reasonable doubt as to a particular defendant, then you should find the defendant guilty of that count.

H. Counts 10 and 16: Title 18 Securities Fraud (18 U.S.C. §§ 2, 1348)

Counts 10 and 16 charge each charge certain defendants with participating in a scheme to commit securities fraud under Title 18 of the United States Code, The defendants accused in these counts are

charged with participating in a scheme to defraud CMS of confidential information relating to its internal deliberations, data, and rule-making, and converting that information to their own use in connection with the purchase or sale of securities. Specifically:

Count 10 charges that, from at least in or about May 2012 through at least in or about July 2012, each of the four defendants schemed to defraud CMS of confidential information related to CMS's proposed radiation oncology rule by obtaining that information and converting it to their own use, using cellular telephone and email communications, for the purpose of executing securities transactions in Varian, Elekta, and Accuray stock.

Count 16 charges that, from at least in or about January 2013 through in or about July 2013, Messrs. Blaszczak and Worrall schemed to defraud CMS of confidential information relating to CMS's internal data and proposed kidney dialysis rule by obtaining that information and converting it to their own use, using cellular telephone and email communications, for the purpose of executing securities transactions in Fresenius stock and ADRs.

In order to convict on these charges, the government must prove each of the following elements beyond a reasonable doubt:

First, that the defendant you are considering executed a scheme to defraud a person or to obtain money or property by materially false and fraudulent pretenses, representations, or promises;

Second, that the defendant you are considering participated in the scheme knowingly, willfully, and with an intent to defraud; and

Third, that the scheme to defraud was connected to the purchase or sale of stock in a company whose securities were registered under Section 12 of the Securities Exchange Act of 1934 or was otherwise required to file reports under that Act.

With respect to the first element, the government alleges that the defendants engaged in an illegal scheme or artifice by taking the confidential information from CMS and transferring it to another person for the purpose of buying or selling securities on the basis of that information. As I explained earlier, a device, scheme or artifice to defraud is merely a plan to accomplish a fraudulent objective. In the same way, a device, scheme or artifice to obtain money or property by materially false and fraudulent pretenses, representations, or promises, is merely a plan to accomplish those ends. You might find that the defendant you are considering participated in a scheme to defraud if you find that he participated in a scheme to embezzle or convert confidential information from CMS by wrongfully taking that information and transferring it to his own use, or the use of another person. I instruct you that confidential government information can be considered to be "property" for purposes of Counts 10 and 16.

With respect to the second element, I explained in the context of Title 15 securities fraud and wire fraud what it means to act knowingly and willfully, and that earlier explanation applies here. I explained also in the context of wire fraud what it means to act with

specific intent to defraud, and that earlier explanation applies here.

With respect to the third element, I instruct you, as a matter of law that each of the transactions charged in Counts 10 and 16 are, if established beyond a reasonable doubt, purchases or sales of securities of a company with a class of securities registered under Section 12 of the Securities Exchange Act of 1934.

* * *

As to each scheme alleged in Counts 10 and 16 of the Indictment, if you find that the government has failed to prove any element of any count beyond a reasonable doubt as to a particular defendant, then you must find that defendant not guilty of that count. On the other hand, if you find that the government has proven each element beyond a reasonable doubt as to a particular defendant, then you should find the defendant guilty of that count.

I. Conscious Avoidance

I mentioned earlier that, in some circumstances, you may find that a defendant acted with the necessary knowledge as to particular facts on the theory that the defendant consciously avoided learning those facts by deliberately closing his eyes to what otherwise would have been clear. I mentioned also that you could consider this theory only with respect to specific circumstances and defendants. I now will explain this theory of knowledge and those circumstances and defendants to which it may be applied.

I told you before that acts done knowingly must be a product of a defendant's conscious intention, not the product of carelessness or negligence. A person,

however, cannot willfully blind himself to what is obvious and disregard what is plainly before him. A person may not intentionally remain ignorant of facts that are material and important to his conduct in order to escape the consequences of criminal law.

We refer to this notion of blinding yourself to what is staring you in the face as "conscious avoidance." When one consciously avoids learning a fact, the law often treats that person as knowing that fact. An argument of "conscious avoidance," however, is not a substitute for proof. It is simply another fact you may consider in deciding what the defendant knew.

So now I will explain the circumstances in this case in which conscious avoidance would be the legal equivalent of actual knowledge.

With respect to the substantive crime of conversion of government property (Counts 3, 11, 13 and 18), you may infer that Messrs. Blasczak, Huber, or Olan, as applicable, knew that the property at issue had been converted – that is, the information had been used in an unauthorized manner and in a way that seriously interfered with the owner's right to use and control it – if you find that the defendant you are considering deliberately and consciously avoided learning or confirming that the property had been so converted.

With respect to the substantive crime of Title 15 securities fraud (Counts 4-8, and 14), you may infer that Mr. Blasczak knew that Mr. Worrall disclosed the information at issue in breach of a duty of trust and confidence if you find that Mr. Blaszczak deliberately and consciously avoided learning or confirming that fact.

In addition, with respect to the substantive crime of Title 15 securities fraud (Counts 4-8), you may infer that Messrs. Huber or Olan, as the case may be, knew that material, non-public information that he received from Mr. Blaszczak, if any, was disclosed to Mr. Blaszczak by someone who owed a duty to keep that information confidential if you find that Messrs. Huber or Olan, as applicable, deliberately and consciously avoided learning or confirming that fact.

In other words, for the circumstances and defendants listed above, if you find that the defendant you are considering was aware of a high probability that a fact enumerated was so, and that the defendant you are considering deliberately avoided learning or confirming that fact, you may find that such defendant acted knowingly. However, if you find that the defendant actually believed the fact was not so, then he did not act knowingly with respect to whatever charge you are considering.

I note that you may consider this theory of conscious avoidance only with respect to whether a defendant is guilty as a principal, not as an aider or abettor. Finally, please keep in mind that the conscious avoidance theory does not apply to Mr. Worrall.

J. Aiding and Abetting (18 U.S.C. § 2)

That concludes my instructions on the government's burden of proof with respect to the first of the two theories of liability in respect of each substantive count charged in the Indictment. If you all agree that the government has proved a defendant guilty as a principal beyond a reasonable doubt on any substantive count in which that defendant is charged, you need not consider the second theory of liability as

to that count. But if you do not convict a defendant as a principal on any of these counts, you then will consider whether the government has proved that defendant guilty on each such count on the second theory, which is called aiding and abetting.

As I explained earlier, in addition to charging the defendants as principals with the substantive crimes of conversion of government property, securities fraud under Title 15 and Title 18, and wire fraud – in other words, all of the substantive crimes I have instructed you on today – the Indictment charges that each defendant is guilty on the ground that he aided and abetted another person in committing the crime. I will explain this second theory in greater detail now.

It is unlawful for a person to aid, abet, counsel, command, induce, or procure another to commit an offense. A person who does so is just as guilty of the offense as someone who actually commits it. Accordingly, you may find a defendant guilty of any of the substantive counts in the Indictment if you find that the government has proved beyond a reasonable doubt that another person actually committed the crime and that the defendant you are considering aided, abetted, counseled, commanded, induced, or procured the commission of that crime.

In order to convict the defendant as an aider and abettor, the government must prove beyond a reasonable doubt two elements.

First, it must prove that a person other than the defendant you are considering, and other than a person he caused to do so, committed the crime charged. Obviously, no one can be convicted of aiding or abetting the criminal acts of another person if no crime was committed by the other person in the first

place. Accordingly, if the government has not proved beyond a reasonable doubt that a person other than the defendant committed the substantive crimes charged in the Indictment, then you need not consider the second element under this theory. But if you do find that a crime was committed by someone other than the defendant you are considering, or someone he caused to commit the crime, then you must consider whether the defendant you are considering aided or abetted the commission of that crime.

Second, in order to convict on an aiding and abetting theory, the government must prove that the defendant you are considering willfully and knowingly associated himself in some way with the crime, and that he willfully and knowingly engaged in some affirmative conduct or some overt act for the specific purpose of bringing about that crime. Participation in a crime is willful if done voluntarily and intentionally, and with the specific intent to do something which the law forbids.

The mere presence of the defendant you are considering in a place where a crime is being committed, even coupled with knowledge that a crime is being committed, is not enough to make him an aider and abettor. A defendant's acquiescence in the criminal conduct of others, even with guilty knowledge, is not enough to establish aiding and abetting. An aider and abettor must know that the crime is being committed and act in a way which is intended to bring about the success of the criminal venture.

To determine whether the defendant you are considering aided and abetted the commission of the crime, ask yourself these questions:

Did the defendant you are considering participate in the crime charged as something that he wished to bring about?

Did he knowingly associate himself with the criminal venture?

Did he seek by his actions to make the criminal venture succeed?

If he did, then the defendant is an aider and abettor. If, on the other hand, your answer to any one of these questions is "no," then the defendant is not an aider and abettor.

Now, I understand that, depending on your view of the evidence, there may be a subtle distinction with respect to whether the defendant is guilty, if at all, as a principal or an aider and abettor. The question is what is the difference between a defendant causing someone else to commit a crime as opposed to aiding and abetting someone else to do so.

If this question comes up in your deliberations, you should think of it in terms of the difference between causing someone to do something versus facilitating or helping someone to do it. If you are persuaded beyond a reasonable doubt that the defendant you are considering caused someone else to commit one or more of the substantive crimes charged in the Indictment, you should convict him as a principal. If, on the other hand, you are persuaded beyond a reasonable doubt that the defendant you are considering, with the knowledge and intent that I described, sought by his actions to facilitate or assist that other person in committing the crime, then he is guilty as an aider and abettor.

If you find beyond a reasonable doubt that the government has proven that another person actually committed one or more of the substantive crimes charged in the Indictment and that the defendant you are considering aided or abetted that person in the commission of the offense, you should find the defendant guilty of that substantive crime on an aiding and abetting theory. If, however, you do not so find, you should find the defendant you are considering not guilty on that substantive crime.

K. Count 1: Conspiracy to Convert Government Property, Commit Title 15 Securities Fraud, and Defraud the United States (18 U.S.C. § 371)

Earlier in these instructions, I explained to you that a conspiracy to commit a crime is a separate and different offense from the substantive crime which may have been the object of the conspiracy. Now that I have discussed the substantive counts charged in the Indictment, I will discuss the elements of the conspiracy counts.

Count 1 charges all four defendants with conspiracy to convert government property and Title 15 securities fraud – two crimes I have just described to you – as well as conspiracy to defraud the United States, which I will address momentarily.

In order to sustain its burden of proof with respect to the conspiracy charged in Count 1, the government must prove beyond a reasonable doubt each of the following three elements:

First, an agreement or understanding to accomplish at least one of the unlawful objectives alleged in the Indictment to have existed;

Second, that the defendant you are considering knowingly and willfully became a member of, and joined in, the conspiracy; and

Third, that at least one of the co-conspirators committed an overt act in furtherance of the conspiracy.

1. First Element: Agreement or Understanding

a. *Existence of an Agreement*

Starting with the first element, a conspiracy is a combination, an agreement or an understanding of two or more people to accomplish by concerted action a criminal or unlawful purpose. In this instance, Count 1 charges that there was an agreement or understanding to accomplish three unlawful objectives. I will describe these objectives in more detail in a moment. To establish a conspiracy, the government is not required to show that two or more persons sat around a table and entered into a solemn compact stating that they have formed a conspiracy to violate the law and setting forth details of the plans and the means by which the unlawful project is to be carried out or the part to be played by each conspirator. It is sufficient if two or more persons come to a common understanding to violate the law.

In determining whether there has been an unlawful agreement, you may judge acts and conduct of the alleged co-conspirators that are done to carry out an apparent criminal purpose.

In short, the government must prove beyond a reasonable doubt that at least two alleged conspirators came to a mutual understanding, either spoken or

unspoken, to violate the law in the manner charged in the Indictment.

b. *Objects of the Conspiracy*

The objects of a conspiracy are the illegal goals the co-conspirators agree or hope to achieve. In this case, the unlawful objects of the conspiracy charged in Count 1 are alleged to have been (1) the conversion of confidential information from CMS; (2) Title 15 securities fraud, specifically insider trading on the basis of material, non-public information relating to CMS's internal deliberations regarding coverage and reimbursement decisions; and (3) the defrauding of the United States or an agency thereof by obtaining confidential information about CMS's internal deliberations in advance of the agency's rulemaking decisions, thereby impairing, impeding, and obstructing the governmental functions and operations of CMS.

I previously instructed you on the elements of the conversion of government property and Title 15 securities fraud. You should apply those definitions here in considering whether the government has proved beyond a reasonable doubt that the conspiracy charged in this Count 1 existed.

I have not yet instructed you on the crime of defrauding the United States. A conspiracy to defraud the United States need not involve cheating the government out of money or property. The statute reaches also conspiracies to interfere with or obstruct any lawful governmental function by fraud, deceit or any dishonest means.

I instruct you that CMS is an agency of the United States government. The term "conspiracy to defraud

the United States" in this Indictment therefore means that the defendants and their alleged co-conspirators are accused of conspiring to impede, impair, obstruct or defeat, by fraudulent or dishonest means, the lawful functions of CMS to design and promulgate rules pertaining to Medicare reimbursement rates.

It is not necessary that the government or CMS actually suffer a financial loss from a scheme. Nor is it necessary that you find that the conspirators' conduct in any particular instance actually was scrutinized by CMS. A conspiracy to defraud exists when there is an agreement to impede, impair, obstruct or defeat in any fraudulent or dishonest manner the lawful functions of CMS. Where, however, there is an agreement to impede, impair, obstruct or defeat the lawful functions of CMS by fraudulent or dishonest means, the first element is satisfied regardless of whether the particular means of doing so are or are not unlawful in and of themselves.

In considering the objects of the alleged conspiracy, you should keep in mind that you need not find that the conspirators agreed to accomplish all three of these alleged goals. An agreement to accomplish any of the three objects is sufficient. If the government fails to prove that the defendant you are considering was party to a conspiracy that had at least one of the three objects as an objective, then you must find the defendant you are considering not guilty on this Count 1. However, if you unanimously find beyond a reasonable doubt that the conspirators agreed to accomplish any of the three objects charged in Count 1 of the Indictment, the illegal purpose element will be satisfied. You must be unanimous as to at least one of the three alleged objectives of the conspiracy to find that this element is satisfied.

It is not necessary for you to find that the agreement was ever expressed orally or in writing, but the government does have to prove that there was a mutual understanding between at least two people. The adage "actions speak louder than words" is applicable here. Usually, the only evidence available with respect to the existence of a conspiracy is that of disconnected acts on the part of the alleged individual coconspirators. When taken together and considered as a whole, however, such acts may show a conspiracy or agreement as conclusively as would direct proof.

The Indictment charges that the conspiracy charged in Count 1 lasted from at least in or about 2009 through at least in or about 2014. It is not necessary for the government to prove that the conspiracy lasted throughout the entire period alleged, but only that it existed for some period within that time frame.

2. Second Element: Membership in a Conspiracy

If you conclude that the government has proven beyond a reasonable doubt that the conspiracy charged in Count 1 existed and that the conspiracy had as an object at least one of the objects charged in the Indictment, you next must determine whether the defendant you are considering willfully joined and participated in the conspiracy, knowing at least one of its unlawful purposes and to further at least one of its unlawful objectives. The government must prove by evidence of each defendant's own actions and conduct beyond a reasonable doubt that he unlawfully, willfully, and knowingly entered into the conspiracy.

The term "knowingly" means that you must be satisfied beyond a reasonable doubt that in joining the

conspiracy (if you find that a defendant did join the conspiracy), the defendant knew what he was doing. An act is done "knowingly" if it is done deliberately and purposefully; that is, the defendant's act must have been the product of the defendant's conscious decision rather than the product of mistake or accident or some other innocent reason.

"Unlawful" simply means contrary to law. In order to know of an unlawful purpose, a defendant need not have known that he was breaking any particular law or any particular rule. He needs to have been aware only of the generally unlawful nature of his acts.

"Wilfully" means to act with the specific level of intent that I already have explained to you in the discussion of the substantive counts. In other words, an act is done "willfully" if it is done voluntarily and in intentional violation of a known legal duty.

To have guilty knowledge, a defendant need not have known the full extent of the conspiracy or all of its activities or all of its participants. In fact, a defendant may know only one other member of the conspiracy and still be a co-conspirator. The defendant need not have joined the conspiracy at the outset. Each member of a conspiracy may perform separate and distinct acts and may perform them at different times.

I want to caution you, however, that the mere association by one person with another does not make that person a member of the conspiracy. A person may know, or be friendly with, a criminal, without being a criminal himself. Mere presence at the scene of a crime, even with knowledge that a crime is taking place, is not sufficient to support a conviction. Moreover, the fact that the acts of a defendant, without

knowledge, merely happen to further the purposes or objectives of the conspiracy, does not make the defendant a member.

A conspiracy, once formed, is presumed to continue until either its objectives are accomplished or there is some affirmative act of termination by its members. So, too, once a person is found to be a member of a conspiracy, that person is presumed to continue being a member in the venture until the venture is terminated, unless it is shown by some affirmative proof that the person withdrew and disassociated himself from it.

In addition, if you find beyond a reasonable doubt that a defendant intentionally participated in the alleged conspiracy, but deliberately and consciously avoided learning or confirming the specific objectives of the conspiracy, then you may infer from the defendant's willful and deliberate avoidance of knowledge that the defendant understood the objectives or goals of the conspiracy.

I caution you that there is a difference between knowingly participating in a conspiracy, on the one hand, and knowing the object or objects of the conspiracy on the other. Conscious avoidance cannot be used as a substitute for finding that the defendant knowingly joined a conspiracy, that is, that a defendant knew that he was becoming a party to an agreement to accomplish an alleged illegal purpose. It is, in fact, logically impossible for a defendant to join a conspiracy unless he knows the conspiracy exists. The defendant must know that the conspiracy is there.

However, in deciding whether a defendant knew the objectives of a conspiracy, you may consider whether the defendant was aware of a high probability

that an objective of the conspiracy was to commit the crime or crimes charged as an object of the conspiracy and nevertheless participated in the conspiracy. You must judge from all the circumstances and all the proof whether the government did or did not satisfy its burden of proof beyond a reasonable doubt.

3. Third Element: Overt Act

The third element that the government must prove beyond a reasonable doubt to establish the offense of conspiracy is that at least one of the conspirators, not necessarily one of the defendants, committed at least one overt act in furtherance of the conspiracy. In other words, there must have been something more than an agreement – some overt step or action must have been taken by at least one of the conspirators in furtherance of the conspiracy. The overt act element, to put it another way, is a requirement that the agreement w/ respect to count I went beyond the mere talking stage, the mere agreement stage.

The government may satisfy the overt act element by proving one of the overt acts alleged in the Indictment, but it is not required to prove any of those particular overt acts. It is enough if the government proves that at least one overt act was committed in furtherance of the conspiracy. However, you all must agree on at least one overt act that a conspirator committed in order to satisfy this element. In other words, it is not sufficient for you to agree that some overt act was committed without agreeing on which overt act was committed.

Similarly, it is not necessary for the government to prove that each member of the conspiracy committed or participated in an overt act. It is sufficient if you find that at least one overt act was in fact performed

by at least one conspirator, whether by the defendant you are considering or by another co-conspirator, to further the conspiracy within the time frame of the conspiracy. Remember, the act of any one of the members of a conspiracy, done in furtherance of the conspiracy, becomes the act of all the other members. To be a member of the conspiracy, it is not necessary for a defendant to commit an overt act.

In addition, an overt act alleged in the Indictment need not have been committed at precisely the time alleged in the Indictment. It is sufficient if you are convinced beyond a reasonable doubt that it occurred at or about the time and place stated.

The overt act must have been knowingly done by at least one conspirator in furtherance of one of the objects of the conspiracy, as charged in the Indictment. In this regard, you should bear in mind that the overt act, standing alone, may be an innocent, lawful act. Frequently, however, an apparently innocent act sheds its harmless character if it is a step in carrying out, promoting, aiding, or assisting the conspiratorial scheme. You therefore are instructed that the overt act does not have to have been an act which in and of itself is criminal or constitutes an objective of the conspiracy.

* * *

In sum, for each defendant, if you find that the government has met its burden on all three elements, then you should find that defendant guilty on Count 1. If you find that the government has not met its burden with respect to any of the three elements as to the defendant you are considering, then you should find that defendant not guilty on Count 1.

L. Count 17: Conspiracy to Convert Government Property and Defraud the United States (18 U.S.C. § 371)

Count 17 charges Mr. Blaszczak with conspiring with Christopher Plaford, among others, to defraud the United States and convert government property. This count relates toMr. Blaszczak's relationship with Visium Asset Management. The Indictment charges that the conspiracy alleged in Count 17 lasted from in or about 2011 through in or about 2013. Again, it is not necessary for the government to prove that the conspiracy lasted throughout the entire period alleged, but only that it existed for some period within that time frame.

I have already instructed you on the elements of a conspiracy charge in respect of Count 1. The elements of the conspiracy charged in this Count 17 are the same as those charged in Count 1 except that the objects of the conspiracy charged in this Count 17 are different.

The unlawful objects of the conspiracy with which Mr. Blaszczak is charged in Count 17 are alleged to have been (1) the defrauding of the United States or an agency thereof by obtaining confidential information about CMS's internal deliberations in advance of the agency's rulemaking decisions, thereby impairing, impeding, and obstructing the lawful and legitimate governmental functions and operations of CMS; and (2) the conversion of confidential information from CMS.

I previously instructed you on the crimes of defrauding the United States and converting government property. You should apply those definitions here in considering whether the

government has proved beyond a reasonable doubt that the conspiracy charged in this Count 17 existed.

* * *

If you find that the government has met its burden on all three elements, then you should find Mr. Blaszczak guilty on Count 17. If you find that the government has not met its burden with respect to any of the three elements, then you should find Mr. Blaszczak not guilty on Count 17.

M. Count 2: Conspiracy to Commit Wire Fraud and Title 18 Securities Fraud (18 U.S.C. § 1349)

I now turn to Count 2, which charges all four defendants with conspiracy to commit wire fraud and Title 18 securities fraud. The Indictment charges that the conspiracy alleged in Count 2 lasted from at least in or about 2009 through at least in or about 2014. Again, is not necessary for the government to prove that the conspiracy lasted throughout the entire period alleged, but only that it existed for some period within that time frame. For this count, the government must prove the following two elements beyond a reasonable doubt:

First, that the charged conspiracy existed; and

Second, that the defendant intentionally joined and participated in this conspiracy during the applicable time period.

In considering Count 2, you should apply my previous instructions with respect to the first two elements of the conspiracies charged in each of Counts 1 and 17 in every respect but one. The government does not need to prove beyond a reasonable doubt the

occurrence of any overt act with respect to the alleged conspiracy in this Count 2 – that is, a conspiracy to commit wire fraud and Title 18 securities fraud.

In addition, the objects of the conspiracy alleged in this Count 2 are different from the objects in the conspiracies charged in Counts 1 and 17.

The unlawful objects of the conspiracy with which the four defendants are charged in Count 2 are wire fraud and Title 18 securities fraud. Specifically, the wire fraud scheme that is alleged to be an object of the conspiracy charged in Count 2 is the use of the interstate or international wires (for example, through phone calls, e-mail communications, or electronic trades) in furtherance of a scheme to defraud CMS of confidential information. The Title 18 securities fraud scheme that is alleged to be an object of the conspiracy charged in Count 2 is the defrauding of CMS of confidential information relating to its internal deliberations, data, and rule-making, and converting that information to their own use in connection with the purchase or sale of securities.

I previously explained the elements of each of these objects. You should apply those definitions here in considering whether the government has proved beyond a reasonable doubt each of the elements of this offense as to each defendant.

* * *

For each defendant, if you find that the government has met its burden on both elements, then you should find that defendant guilty on Count 2. If you find that the government has not met its burden with respect to either of the two elements as to the defendant you are

considering, then you should find that defendant not guilty on Count 2.

[* * *]