Nos. 20-306 & 20-5649

IN THE

Supreme Court of the United States

ROBERT OLAN AND THEODORE HUBER,
Petitioners,

v.

UNITED STATES,
Respondent.

DAVID BLASZCZAK,
Petitioner,

v.

UNITED STATES,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICUS CURIAE[1]

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

NACDL has an interest in this case because the government has asserted novel and overly broad theories of what constitutes "property" and "thing of value" for purposes of wire fraud, Title 18 securities fraud, and conversion of government property. The Second Circuit's opinion extends these statutes to the point where they criminalize all unauthorized disclosures and receipts of confidential government information. If not reexamined, this would expose individuals to unbounded and unpredictable liability for their disclosure or receipt of government information.

SUMMARY OF ARGUMENT

The prosecution's theory in this case was that if a government agency designates information about its regulatory plans as "confidential," the information becomes the government's property, and under general theft and fraud statutes, it is a felony – punishable by a decade or more in prison – simply to share or receive that information without permission.

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than NACDL and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record for all parties received notice of NACDL's intention to file this brief at least ten days prior to the due date. All parties have consented to the filing of the brief.

A divided panel of the Second Circuit embraced this unprecedented theory, over the dissent of Judge Kearse.

The decision below conflicts with this Court's holdings in *Cleveland* v. *United States*, 531 U.S. 12 (2000) and *Kelly* v. *United States*, 140 S. Ct. 1565 (2020). *Cleveland* and *Kelly* hold that disrupting the government's regulatory interests does *not* amount to obtaining property. Thus, it was not a violation of the federal theft or fraud statutes to deceive a state government into issuing a poker license (*Cleveland*) or into reallocating lanes of a public bridge (*Kelly*). But under the decision below, *information* about regulatory plans *is* government property, so long as an agency labels it "confidential," and a defendant would violate the federal theft and fraud statutes by obtaining (or leaking) confidential information about how the government will allocate poker licenses or bridge lanes. In other words, the prosecution here succeeds, in the view of the court below, because defendants did *less* than the defendants in *Cleveland* and *Kelly* – merely obtaining information about the government's regulatory plans (a crime) rather than managing fraudulently to alter those plans to defendants' financial or political benefit (no crime at all under *Kelly* and *Cleveland*). But that is backwards. If, as *Kelly* and *Cleveland* establish, a scheme to obtain a license or a lane from the government is not fraud, then a scheme to obtain information about the government's plans for allocation of a license or a lane (or, as here, about Medicaid reimbursement rates) cannot be.

The decision below is thus plainly wrong. Worse, it is dangerous. It turns the general fraud and theft statutes into something that Congress has never provided the executive: an all-purpose, official-secrets act.

Consider: a government employee learns, from documents labeled "confidential" by agency leaders, that they plan to enact a regulation that agency experts conclude will disserve the public but enrich a political appointee's powerful patron. So, the employee calls a journalist and relays this information in the hope that publication will create public pressure and cause the agency to change course. The journalist – recognizing that an article on this topic will generate clicks (and profits) for her newspaper – posts a story featuring the information. Under the decision below, the government has a "property interest" in the information leaked because the government considers it confidential, and the "relevant 'interference' with [the government's] ownership" needed to establish a crime "[i]s complete upon the unauthorized disclosure" of the information to the journalist. Pet. App. 27a-28a. Under the decision below, therefore, both the whistleblower and the journalist have committed felonies – they have taken (or obtained) the government's property without authorization – and so they could face years in prison.

This Court has repeatedly rejected interpretations of federal criminal law that would wildly expand the reach of ordinary criminal statutes, particularly interpretations that cast a "pall of potential prosecution" around First Amendment activity. *McDonnell* v. *United States*, 136 S. Ct. 2355, 2372 (2016). And this Court has "resist[ed] reading [a statute] expansively" when a broad construction would permit prosecutors to charge conduct fundamentally unlike the conduct that Congress decided to prohibit. *Yates* v. *United States*, 574 U.S. 528, 549 (2015) (plurality opinion). The Second Circuit's opinion contravenes both these rules. It gives prosecutors a tool to criminalize the exchanges of information essential to accountable government and will

chill those engaged in core First Amendment conduct. This Court's review is warranted.

ARGUMENT

I. THE SECOND CIRCUIT'S INTERPRETATIONS OF "PROPERTY" AND "THING OF VALUE" VIOLATE THIS COURT'S PRECEDENTS

A. Deeming Regulatory Information "Confidential" Does Not Give The Government A Property Interest In That Information

To prove a scheme to defraud, the prosecution must show that "the thing obtained" is "property in the hands of the victim." *Cleveland* v. *United States*, 531 U.S. 12, 15 (2000). Simply put, the prosecution "need[s] to prove *property* fraud." *Kelly* v. *United States*, 140 S. Ct. 1565, 1571 (2020). It "ha[s] to show not only [that defendants] engaged in deception, but that an object of their fraud was property." *Id.* (internal quotation marks and alterations omitted). The property may be either tangible or intangible, but the fraud statutes are "limited in scope to the protection of property rights" and do not criminalize interference with non-property interests a victim may have. *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987). This Court has emphasized that where the government is the alleged victim of the fraud, the scheme must disrupt the government's "role as … property holder." *Kelly*, 140 S. Ct. at 1572 (internal quotation marks omitted). If the government's "core concern" regarding the object of a fraud "is *regulatory*," then the fraud does not implicate the government's role as a property holder and the conduct falls outside the ambit of the fraud statutes. *Id.* at 1572 (quoting *Cleveland*, 531 U.S. at 20).

"[A] scheme to alter … a regulatory choice is not one to appropriate the government's property." *Kelly*, 140 S. Ct. at 1572. Regulatory interests encompass, for instance, "exercises of the States' traditional police powers." *Cleveland*, 531 U.S. at 23. Targeting "governance involv[ing] … regulatory choice" cannot be property fraud because it does not implicate the government's role as property holder, but rather seeks to "alter a regulatory decision." *Kelly*, 140 S. Ct. at 1573, 1574. The government's "sovereign power to regulate" also includes "rights of allocation, exclusion, and control," such as "its prerogatives over who should get a benefit and who should not." *Id.* at 1572. And while nearly all schemes to alter regulatory choices involve "incidental costs," such as "employees' time and labor," those costs cannot "undergird a property fraud prosecution" unless obtaining their economic value is an "*object* of the fraud." *Id.* at 1573-1574 (emphasis added).

This Court's decision in *Kelly* – handed down after the Second Circuit denied *en banc* review of the decision below – illustrates the difference between the government's regulatory and property interests. There, two officials sought to punish Fort Lee's mayor for refusing to back Governor Chris Christie's reelection. 140 S. Ct. at 1568-1570. They reduced the lanes reserved at the George Washington Bridge for Fort Lee, N.J., snarling the town in gridlock. *Id.* They claimed, falsely, that the realignment was for a phony traffic study and asked government employees to collect useless traffic data. *Id.* A jury convicted the officials for wire fraud, among other offenses. *Id.* at 1571. This Court reversed, holding that the lane realignment was an "exercise of regulatory power" because the officials "*regulated* use of the lanes, as officials responsible for roadways so often do – allocating lanes as between

different groups of drivers," or, in "*Cleveland*'s words, [they] exercised the regulatory rights of 'allocation, exclusion, and control' – deciding that drivers from Fort Lee [would get] fewer lanes." *Id.* at 1573 (emphasis added). This Court also held that the labor costs incurred for the data collection concocted as a cover story failed to give rise to property fraud because, while the "government's right to its employees' time and labor … can undergird a property fraud prosecution," "the labor costs were an incidental (even if foreseen) byproduct of [the officials'] regulatory object." *Id.* at 1573-1574.

It follows from *Cleveland* and *Kelly* that where information about the government's regulatory plans is the object of the alleged fraud, the mere application of the label "confidential" to the information – a regulatory choice – cannot resolve the question of whether the information is property. Rather, the prosecution must show that disclosure of the information disrupts its "role as property holder."

In affirming the conviction, the court below erased the careful distinctions this Court has drawn between property and regulatory interests.

First, the Second Circuit thought it "most significant" that "CMS possesses a 'right to exclude' … the public from accessing its confidential predecisional information." Pet. App. 16a. The decision below held that this "right to exclude" gives CMS a "'property right in keeping confidential and making exclusive use' of its nonpublic predecisional information." *Id.* (quoting *Carpenter*, 484 U.S. at 26). But this Court has twice rejected precisely the argument that a government agency has a property interest merely because it exercises exclusive control over something. *Cleveland* held that the "right to exclude" in a "governing capacity"

fails to give rise to a property interest. 531 U.S. at 24. And *Kelly* reaffirmed that interfering with an agency's "exercise[of] the regulatory rights of 'allocation, exclusion, and control'" amounts to "alter[ing] a regulatory decision," not "the taking of property." 140 S. Ct. at 1573.

Second, the decision below relied on "evidence that CMS [had] an economic interest in its confidential predecisional information" because it "invests time and resources" in maintaining confidentiality. Pet. App. 17a. But *Kelly* rejects this rationale. There, this Court held that a "property fraud conviction cannot stand when the loss to the victim is only an incidental byproduct of the scheme." 140 S.Ct. at 1573. Rather, a government agency's expenditure of resources must have been the "object of the fraud" to support a property fraud conviction. *Id.* The defendants here plainly did not scheme to obtain the value of the resources CMS expended in creating its confidential filing system or to benefit from the administrative inefficiencies purportedly produced by leaks.

The court below purported to find support for its decision in this Court's holding in *Carpenter*, but that case dealt with very different information and a very different kind of putative victim. There, defendants were charged with scheming to fraudulently obtain a newspaper's planned articles and to trade in advance of their publication. This Court affirmed the fraud conviction, holding that the newspaper had a property interest in its forthcoming columns. 484 U.S. at 26. But *Carpenter*'s recognition that one kind of confidential information is a form of property – information that a *commercial* enterprise generates and sells precisely because it is unknown to others – hardly implies that all *governmental* confidential information is property. In

Carpenter, it was critical that the scheme involved a particular business – the Wall Street Journal – and a particular kind of information – the content of future columns. The columns were, in this Court's words, the Journal's "stock in trade." *Id.* A newspaper unsurprisingly has a property interest in the thing it sells – the stories it prints. *Carpenter* does not address whether the rumors about future regulatory action at issue here – which is not something the government sells, let alone its entire stock in trade – constitutes the government's property merely because the government designates it as confidential.

Disclosing information about regulatory plans the government would prefer to keep confidential can no doubt be disruptive. It perhaps can, as the government theorized below, make its deliberations over planned regulations less efficient. Pet. App. 29a. However, our constitutional system supports valuing, not punishing, this kind of disruption. The First Amendment reflects the premise that "[s]unlight is … the best … disinfectants," *Buckley* v. *Valeo*, 424 U.S. 1, 67, n.2 (1976) (per curiam) (citing Brandeis, *Other People's Money* 62 (1933)), and that it is "secrecy," not disclosure, that "perpetuat[es] bureaucratic errors." *New York Times Co.* v. *United States*, 403 U.S. 713, 724 (1971) (Douglas, J., concurring).

The federal fraud statutes do not criminalize this sort of disruption. The harms allegedly following from disclosure of the government's regulatory plans are harms to the government's *regulatory* interests, not its *property* interests.

B. Confidential Information About Regulatory Plans Is Not "A Thing Of Value" Under Section 641

Section 641 punishes "[s]tealing, larceny, and its variants and equivalents," when aimed at the federal government's property. *Morissette* v. *United States*, 342 U.S. 246, 260 (1952). Section 641 defines the property to which it applies to include any "record, voucher, money or thing of value of the United States or of any department … thereof," 18 U.S.C. § 641, and criminalizes both the unauthorized taking of government property and the receipt of that property, knowing it was taken without permission.

The prosecution's theory was that all information the government has designated as confidential, whether by statute, rule, regulation, or even longstanding practice, is a "thing of value" and thus government property under Section 641. The decision below accepted this theory.

But if this were true, then Section 641 criminalizes a broad range of conduct that is not just innocent, but actually desirable, including whistleblowing and journalism. Both, after all, commonly involve unauthorized disclosure or receipt of information the government would prefer to keep from public view.

The Court should not lightly assume that Congress hid a sweeping government-secrecy law in Section 641, a routine recodification of existing offenses prohibiting theft of government property. *See Morissette*, 342 U.S. at 266 n.28 (Section 641 "was not intended to create new crimes but to recodify those then in existence"). Congress, after all, "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions – it does not, one might say, hide elephants

in mouseholes." *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

When Congress has addressed confidential government information directly, it has incorporated careful limits on the information covered, the conduct proscribed, and the penalties imposed.

There is an enormous variety of information that the government deems confidential. Some of that information affects national security, some may be relevant to the safety of informants, and some may risk nothing more than embarrassment of senior officials or administrative inconvenience. In keeping with both the broad spectrum of information the government labels as confidential, and the important First Amendment values at stake, there are separate, measured, and differentiated regimes of disciplinary, civil, and criminal sanctions in place that aim to reconcile control over various types of government information with the needs of democratic governance.

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

Congress has singled out misuse of certain kinds of government information for more serious punishment. For example, 18 U.S.C. § 1905 makes it a misdemeanor, punishable by no more than one year in prison, for a

government employee to disclose private financial and business information (e.g., tax returns) learned during the course of government employment. Congress has also enacted statutes making it a misdemeanor to disclose information from a bank examination report, *id.* § 1906, or information related to an examination by a farm credit examiner, *id.* § 1907. Congress made it a felony for federal employees to disclose, in violation of agency rules, information (such as crop reports) that might affect the value of agricultural products. But in doing so, it placed an important caveat, specifying that "[n]o person shall be deemed guilty of a violation of any such rules, unless prior to such alleged violation he shall have had *actual knowledge* thereof." *Id.* § 1902 (emphasis added).

There are also specific provisions regarding law-enforcement and national-security information. For example, Rule 6(e) of the Federal Rules of Criminal Procedure establishes a comprehensive system of secrecy and authorized disclosures of matters occurring before grand juries, Fed. R. Crim. P. 6(e)(2)-(3), authorizes courts to enforce this regime through the contempt power, *id.* 6(e)(7), and prohibits the imposition of an obligation of secrecy on any person not named in the rule, *id.* 6(e)(2)(A). With respect to classified information, Congress and the executive have enacted numerous federal statutes and regulations to ensure the secrecy of sensitive national-security information – and these laws balance the need for government secrecy and First Amendment protections. *See, e.g.*, 32 C.F.R. Part 2001 (regulations safeguarding classified national-security information); *id.* Part 2002 (regulations safeguarding controlled unclassified information). The federal offense of disclosure of classified information, 18 U.S.C. § 798, covers only specified types of classified

information, and it requires for some categories of classified information that the defendant have known the information's provenance. *Id.* § 798(a). Similarly, the anti-leaking provisions of 18 U.S.C. § 793 criminalize unauthorized disclosure of wholly intangible national-defense information only when "the possessor has reason to believe [the information] could be used to the injury of the United States or to the advantage of any foreign nation." *Id.* § 793(d)-(e).

The decision below undoes the careful balancing reflected in these statutes by reading Section 641 to make any unauthorized disclosure of information the government deems confidential a felony punishable by up to ten years in prison.

This Court rejected a similar misinterpretation of a general theft statute in *Dowling* v. *United States*, 473 U.S. 207 (1985). There, this Court addressed a conviction under the National Stolen Property Act, 18 U.S.C. § 2314, for interstate transport of bootleg records that were "'stolen, converted or taken by fraud' only in the sense that they were manufactured and distributed without the consent of the copyright owners of the music[]." 473 U.S. at 208. Section 2314, like Section 641, is a general theft statute, and the plain language of the statute, which covers "any goods, wares, merchandise, securities or money," might seem broad enough to encompass bootleg records, which are, after all, both merchandise and goods. Nonetheless, this Court reversed the conviction.

Surveying the history of copyright-enforcement provisions, this Court emphasized that "[n]ot only has Congress chiefly relied on an array of civil remedies to provide copyright holders protection against infringement, but in exercising its power to render criminal

certain forms of copyright infringement, it has acted with exceeding caution." *Dowling*, 473 U.S. at 221 (citation omitted). This Court criticized the government's effort to apply the general stolen-property law to this unique species of intellectual property, explaining that by treating an unauthorized reproduction of intangible information as no different from a stolen thing, "[t]he Government thereby presumes congressional adoption of an indirect but blunderbuss solution to a problem treated with precision when considered directly. To the contrary, the discrepancy between the two approaches convinces us that Congress had no intention to reach copyright infringement when it enacted § 2314." *Id.* at 226.

The Second Circuit's decision creates just as much a "blunderbuss" solution to the issue of confidentiality as Section 2314 was to the issue of copyright infringement. And "precision" is even more important here than in the copyright context, given the enormous tensions between secrecy and democratic governance. *Dowling* provides a clear basis to reject the Second Circuit's expansion of Section 641 into an all-purpose tool for prosecuting leaks.

II. THE SECOND CIRCUIT'S INTERPRETATIONS OF "PROPERTY" AND "THING OF VALUE" CRIMINALIZE CORE FIRST AMENDMENT ACTIVITY

The vibrant public discourse guaranteed by the First Amendment requires greater protection than a prosecutor's indulgence. *See McDonnell* v. *United States*, 136 S. Ct. 2355, 2372-2373 (2016). When, as here, "the most sweeping reading of [a] statute would fundamentally upset" constitutional constraints on federal prosecution, it "gives … serious reason to doubt the Government's expansive reading … and calls for

[courts] to interpret the statute more narrowly." *Bond* v. *United States*, 572 U.S. 844, 866 (2014).

There are important reasons to be wary about criminalizing the free flow of information about the government's plans. The Supreme Court has long recognized that the "public interest in having free and unhindered debate on matters of public importance [is] the core value of the Free Speech Clause of the First Amendment." *Pickering* v. *Board of Educ. Twp. High Sch. Dist. 205, Will Cty.*, 391 U.S. 563, 573 (1968). "The dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information." *New York Times*, 403 U.S. at 723-724 (Douglas, J., concurring). The Constitution's Framers recognized that robust institutions and a free society require "the power of reason as applied through public discussion," and so by including the First Amendment "they eschewed silence coerced by law – the argument of force in its worst form." *Whitney* v. *California*, 274 U.S. 357, 375-376 (1927) (Brandeis, J., concurring).

Discussion of proposed regulatory changes – even changes the government would prefer to keep "confidential" – is at the heart of ordinary, necessary activity in a functioning democracy. Elected officials may wish to discuss possible regulatory changes with constituents who will be affected to learn of likely impacts and assess whether the benefits of contemplated changes outweigh their costs. Constituents may want to learn what their government is doing, so that they may plan or advocate for a different course. And the press appropriately and routinely seeks to learn of regulatory changes in advance, so that it can fulfil its role of informing the public about government policymaking.

But who would dare engage in such beneficial activities if any unauthorized disclosure of information about the government's regulatory plans risks felony prosecution? The prosecution may protest that this case involves trading on governmental information, and it would never bring a case over the simple leak of unclassified information. But the Constitution requires more. This Court has repeatedly refused to "construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *See McDonnell*, 136 S. Ct. at 2372-2373 (quoting *United States* v. *Stevens*, 559 U.S. 460, 480 (2010)).

For instance, in construing the federal bribery statute, this Court recently rejected the government's "expansive interpretation" of "official act" in order to avoid converting routine interactions into felonies. *McDonnell*, 136 S. Ct. at 2372. It explained that public officials routinely "arrange meetings for constituents, contact other officials on their behalf, and include them in events." *Id.* Indeed, "[t]he basic compact underlying representative government assumes that public officials will hear from their constituents and act appropriately on their concerns." *Id.* Treating these routine and desirable actions as "official act[s]" within the meaning of the bribery statutes would "cast a pall of potential prosecution over these relationships." *Id.*

These concerns apply equally here: Discussing planned regulatory changes is a basic part of democratic governance. The theory that all confidential government information is property would lead officials to "wonder whether they could respond to even the most commonplace requests for" information. *McDonnell*, 136 S. Ct. at 2372. Prudent officials, anxious to avoid getting close to prosecutable conduct, would say less and withhold more. Government employees "with

legitimate concerns" about their employer's actions and constituents eager to learn of the government's plans would both "shrink from participating in democratic discourse" for fear of prosecution. *Id.* Important First Amendment activity would be chilled.

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

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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