18-2811(L)

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

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

—against—

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

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AND SPECIAL APPENDIX FOR DEFENDANT-APPELLANT THEODORE HUBER

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INTRODUCTION

This is an insider trading case in which the government failed to prove insider trading. The jury acquitted Theodore Huber on all charges under §10(b) of the Securities Exchange Act, the principal statute the government has invoked for decades in virtually every insider trading prosecution. But Huber was convicted under other statutes using novel theories that vitiate black letter law, including the Supreme Court's repeated admonition that not all trading on material nonpublic information is illegal. The Court has instead adhered to the longstanding rule, articulated in *Dirks v. SEC*, 463 U.S. 646 (1983), that trading on a "tip" from an insider is not fraudulent unless the "tipper" disclosed the information for a personal benefit. And in order to convict a trader who receives information indirectly—a "remote tippee"—the government must prove that he knew the original tipper disclosed the information for such a benefit.

The government tried to evade this element in the 2010s by prosecuting remote tippees who were unaware of any personal benefit. Then this Court squarely held that knowledge of personal benefit is necessary to convict a downstream tippee, *United States v. Newman*, 773 F.3d 438, 450 (2d Cir. 2014), and reemphasized that "important teaching" just months ago, *United States v. Martoma*, 894 F.3d 64, 76 (2d Cir. 2018).

There was no proof of such knowledge here. Huber and co-defendant Robert Olan were analysts at Deerfield Management, an investment firm focused on the healthcare industry. In 2012, they made a handful of trades allegedly based in part on predictions they received from defendant David Blaszczak, a Deerfield consultant, about possible cuts in Medicare reimbursement rates. The government claimed that Blaszczak got these predictions from Christopher Worrall, an employee at the Centers for Medicare and Medicaid Services, the federal agency that sets those rates. But the Deerfield defendants never met Worrall, had no idea who he was, and had no clue that he was a supposed Blaszczak source. That is why the jury acquitted them of §10(b) fraud.

The result should have been the same for the fraud counts brought under 18 U.S.C. §§1343, 1348 and 1349. The Supreme Court has made it abundantly clear that the Title 18 fraud requirements are the same as under §10(b): the government must prove a personal benefit to the tipper and the tippee's knowledge of it. The government itself agreed with this view for decades. Yet the district court inexplicably refused to instruct the jury that these requirements also applied to the Title 18 fraud charges, leading to Huber's conviction on those counts. Binding precedents also exclude information about internal policy deliberations from the definition of "property," providing an independent basis for reversal of these convictions.

Huber was also convicted under a radically expansive interpretation of 18 U.S.C. §641, the conversion of government property statute, which had never been used to prosecute a downstream tippee for purported insider trading. But there was not a shred of evidence that Huber had any idea the information Blaszczak provided to Deerfield was stolen. And under numerous Supreme Court precedents, mere chatter or innocent leaks by government employees cannot be covered by this statute. The government's attempt to criminalize otherwise lawful leaks from government sources also has vast and disturbing implications—particularly for the press—that would create grave First and Fifth Amendment problems. Huber's conviction of the conspiracy "to defraud the United States" offense in 18 U.S.C. §371 fails for similar reasons and because there was no fraud.

For decades the Supreme Court has rejected the government's persistent efforts to circumvent the personal benefit requirement and to label virtually all trading on material nonpublic information "fraudulent." This prosecution is the government's latest attack on *Dirks* and its teaching that the "personal benefit" requirement is "essential" as "a guiding principle for those whose daily activities must be limited and instructed by" insider trading rules. 463 U.S. at 664. To uphold that essential principle and the Supreme Court authority insisting upon it, the conviction must be reversed.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 18 U.S.C. §3231. The judgment of conviction was entered on September 21, 2018. (SPA-2). Huber filed a notice of appeal on September 26, 2018. (A-3253). This Court has jurisdiction pursuant to 28 U.S.C. §1291.

ISSUES PRESENTED

1. Whether Huber's convictions under 18 U.S.C. §§1343, 1348 and 1349 must be reversed because the government failed to prove Huber's knowledge of any breach of fiduciary duty for personal benefit as required to establish fraudulent insider trading, or because recommended policy changes are not "property" under these provisions.

2. Whether Huber's conviction under 18 U.S.C. §641 must be reversed because the government failed to prove that Huber knew Blasczcak's disclosures were unauthorized, that they were a "thing of value" or government property, or that they interfered with any government function.

3. Whether Huber's conviction under 18 U.S.C. §371 must be reversed because Huber lacked the requisite intent to commit any offense against the United States and because there was no agreement no engage in deceitful conduct or to interfere with a government function and, thus, no conspiracy "to defraud the United States."

4. Whether Huber's convictions under §§371 and 641 must be reversed because the government's expansive interpretation of these statutes would criminalize the publication of information lawfully received from government sources, and issue-advocacy and debate before government agencies, in violation of the First and Fifth Amendments.

STATEMENT OF THE CASE

Huber appeals from a judgment of conviction entered on September 21, 2018, by the United States District Court for the Southern District of New York (Kaplan, J.) following a four-week jury trial. The relevant rulings are unreported.

A. Background

1. *Deerfield's Policies And Practices Were Designed To Ensure Compliance*

Deerfield is an investment management firm focused on healthcare. It has four sector teams—Devices, Services, Pharmaceuticals, and Biotechnology—each of which has three investment analysts. (A-957/2963-64). In 2012, Huber, Olan and Jordan Fogel were the analysts on the Devices team. (A-551/666). Fogel cooperated with the government after being pushed out of Deerfield for poor performance, which was exacerbated by illegal drug abuse and other felonies that continued after he began cooperating. (A-630/1018-19, A-632-33/1029-31).

Deerfield prided itself on transparency. Its compensation and compliance policies discouraged unlawful trading. Compensation was based upon seniority

and the firm's overall profits, not the performance of any given trade, because "how the funds do is a product of everybody['s performance] at Deerfield." (A-959-60/2971-75). Analysts like Huber therefore had much to lose but little to gain from recommending trades based on illegal tips. Moreover, each Deerfield trade was vetted at the firm's daily morning meetings, which all professionals at the firm, including general counsel David Clark and managing partner James Flynn, attended. (A-553/672-74, A-811-12/2225-26, A-821/2267-68, A-960-61/2975-78). The firm's analysts communicated openly about their trading theses and inputs, which further deterred illegal trading. The Devices group communicated using an internal email list that included Flynn, Clark, Deerfield's chief compliance officer, the trading desk, and analysts from other investment teams. (A-560/711, A-814/2236-37, A-823/2275-76).

Blaszczak was one of many consultants Deerfield engaged to provide industry-related information for its investments. (A-638/1075-77). Huber and the Devices team vetted the firm's relationship with Blaszczak with Deerfield's legal and compliance officers, who knew Blaszczak spoke to his former CMS colleagues. After consulting with outside counsel, Deerfield's compliance department repeatedly cleared the firm's use of Blaszczak as a consultant. (A-2035-37, A-810-11/2220-25, A-817/2246-47, A-821/2269, A-824-25/2291-94, 2296, A-983-84/3260-62, A-985/3268-69, A-986/3272). At the morning meetings,

the Devices group also openly discussed Blaszczak and advised attendees that he "spoke to officials at CMS." (A-821/2268-69). Furthermore, it was Huber's practice to email substantive trading information and analysis—including Blaszczak's predictions—to the entire Devices group. (*See, e.g.*, A-1985, A-2003-04). Huber saved that information to a shared database called the "matrix" that Deerfield employees, including its compliance officers, could search. (A-554/676, A-815/2239-41, A-982/3256-57). For example, Huber sent a summary of a call with Blaszczak, stating that Blaszczak "met with senior CMS people recently," to the Devices group email list and the matrix, copying the legal and compliance officers. (A-2003-04). And when Deerfield learned that the SEC was investigating Blaszczak in 2014, Huber, again on his own initiative, directed Deerfield's compliance chief to search the database where the "conversation[s] [he] had with [Blaszczak] would be documented." (A-2937).

2. CMS

CMS is the agency within the Department of Health and Human Services that administers Medicare and Medicaid. CMS sets reimbursement rates that health care providers receive for services and procedures covered by these programs. (A-465). CMS assigns payment codes to eligible services and procedures, and then applies formulas that set reimbursement rates for each code. (A-475/240-41). These rates are reevaluated on an annual basis. (A-474/236-37).

Changes to reimbursement rates may be prompted by the agency's own research or by suggestions from Congress or the public. (A-468/214, A-520/444, A-840/2379-80).

Changes to reimbursement rates can impact health care companies. (A-469/219, A-750/1788). For example, kidney dialysis reimbursement rates can affect profits (and thus the stock price) of companies that manufacture dialysis machines. CMS rate decisions can also affect the availability of medical therapies. (A-770/1946). Accordingly, meetings between CMS and outside stakeholders, including patient and industry groups, healthcare companies and investment analysts, are routine and entirely appropriate. (A-857/2454-55). Investors like Deerfield conduct research in an effort to predict changes to reimbursement rates when making investment decisions. (A-962/2982-84, A-968/3006-07).

CMS had an internal policy purportedly requiring its employees to keep CMS information confidential until release of the information was authorized. (A-2043-45; *see also* A-1646-54). But Deerfield was unaware of this policy, and senior CMS officials testified that there was no way for third parties like Deerfield to know if information provided to them had been authorized or not. (A-538-39/523-27, A-477-78/251-52). Moreover, there was no policy delineating who at the agency was authorized to make information public or the procedures required to authorize public release of confidential information. (A-493/313-14). One

high-level CMS executive testified that he had complete discretion to share nonpublic information with outsiders, and acknowledged that they would not know whether the disclosure was unauthorized. (A-539/527, A-542/552).

Huber knew that it was "common" for CMS personnel to provide agency information to third parties. (A-641/1096, A-2992; A-2950; A-642-44/1100-06, A-2997). That is because CMS's policies affected numerous stakeholders—including patients, hospitals, doctors, healthcare companies, and Congress—that required the agency to gather as many public inputs as possible to optimize the policymaking process. (A-516/408-09, A-527-28/474-75, A-2602). The trial was replete with evidence of these stakeholders seeking nonpublic information from CMS, without a shred of evidence that CMS considered this to be improper. (*See, e.g.*, A-523-26/458-67, A-527-28/474-77, A-530-532/489-95, A-538-39/526-27, A-641/1096, A-642-44/1100-06, A-848/2411-13, A-852-53/2437-38, 2441). Interaction between political intelligence consultants like Blaszczak and CMS personnel was routine: "they can share information about CMS'[s] policies and try to inform us about what they think [are] the policies that CMS should adopt." (A-849/2415-16). For these reasons, political intelligence consultants and Wall Street representatives were welcome to and routinely did attend public meetings at CMS, including meetings held in advance of proposed rules, and there were no formal

CMS policies prohibiting staffers from meeting privately with such individuals. (A-515-16/405-09).

3. Worrall and Blaszczak

Blaszczak previously worked at CMS, and maintained contact with a number of CMS employees after he left the agency to become a consultant. (A-700/1536). Blaszczak obtained information about CMS's policymaking process from his connections there, including Worrall. (A-881/2556-57). Blaszczak also spoke to other CMS contacts. (*See, e.g.*, A-700/1536-37).

4. The Alleged Radiation Oncology Tips

The government alleged that Worrall "tipped" Blaszczak, who subsequently "tipped" Deerfield, concerning potential changes in reimbursement rates for radiation oncology.

These reimbursement rates significantly depend upon two assumptions: "utilization rate" and treatment time. First, the higher the utilization rate for a machine, the more frequently the machine is assumed to be in use, which decreases the cost per minute of the machine's operation and therefore lowers reimbursement per treatment. (A-865/2491-93). Second, lowering the assumption for how long it takes to administer treatment also reduces reimbursement rates. (A-865/2491-93, A-866/2495-96, A-2568-70).

The charges against Huber related to two sets of trades involving CMS's proposed rules for radiation oncology reimbursement. The first in 2009 was alleged to be part of the conspiracies; the second in 2012 formed the basis for the substantive counts. (A-274 ¶20, A-279-82 ¶¶28-33, A-306-09 ¶¶82-86).

The 2009 allegations bordered on frivolous. The government claimed that on June 15, 2009, Blaszczak gave Deerfield material nonpublic information about an upcoming proposed rule increasing the utilization rate assumption for imaging equipment. (A-635/1038-39, A-2034). But two days earlier, the White House had publicly announced that very same "increase" in "the equipment utilization factor for advanced imaging." (A-3066, A-987/3296; *see also* A-2980 (rule change "done deal" based on "[a]dministration…announcement" of "UR increase assumption")). Thus, there was nothing "material" or "nonpublic" for Blaszczak to convey to Deerfield on June 15. The government didn't even mention the 2009 allegations in its opening summation and touched on it only briefly in rebuttal. (A-1008-22/3514-69, A-1030-31/3911-12).

The government instead focused on 2012. That spring, CMS again contemplated cutting radiation oncology reimbursement rates, but this was no secret. As early as 2011, Deerfield discussed the likelihood of these cuts internally based upon its own research. (A-3012). Outside analysts agreed. (*Id.*).

In May and June 2012, Blaszczak also told Deerfield he thought that CMS would cut radiation therapy reimbursement by reducing the estimated treatment times. (A-1985, A-2006). That prediction was so similar to Blaszczak's 2009 prediction—which came after the White House's rate-cut announcement—that Huber referred to it as "[d]eja [v]u all over again." (A-3021). The government conceded that Huber did not know the source or sources informing Blaszczak's prediction, let alone their motivation for whatever they shared with Blaszczak. (A-1010). In fact, it was undisputed that Huber, Olan and Fogel were unaware of Worrall's existence. (A-556/686, A-1010/3519). Even government star witness Fogel could not say how Blaszczak obtained any particular piece of information from CMS. (A-556/686, A-662/1253-54). He instead admitted that Blaszczak obtained information from numerous sources, including lobbyists, company management, Capitol Hill staffers, commercial insurers, and professional organizations. (A-664-65/1266-70).

The government alleged that Deerfield made several trades in June 2012 based upon Blaszczak's prediction, netting approximately $2.7 million. (A-2924). Because of Deerfield's compensation system, Huber's share of these profits was a mere 0.3% of his 2012 compensation. (A-979/3190, A-2924). In Fogel's view, these trades were "not very profitable" because Blaszczak's predictions about the CMS proposal turned out to be wrong in critical respects. (A-659/1237-38). For

example, Blaszczak predicted that CMS would propose radiation therapy rate cuts for hospitals. (A-658/1234-35). But when CMS released the proposed rule in July 2012, it proposed *increasing* reimbursement to hospitals. (A-659/1237-38). In an email to colleagues about the proposed rule, Huber noted "[t]he increase in hospital pay rates isn't what Dave was calling for and really mutes the impact here in my view." (A-2928). Fogel himself conceded that Deerfield "had a history of losing money" on trades that were based upon Blaszczak's predictions. (A-659).

At trial, the government unsuccessfully sought to elicit testimony from CMS witnesses that unauthorized disclosures of confidential information frustrated CMS's rule-making process. (A-467/209-10, A-504/360-61). There was no testimony that any alleged Worrall disclosure affected the timing or substance of the radiation oncology rules, or otherwise impeded or harmed CMS.

5. Niles Rosen

The government tacked on allegations that Huber conspired with Blaszczak to obtain information from and to influence Niles Rosen, a CMS contractor who made recommendations on coding issues unrelated to the charged tipping-and-trading scheme.

In May 2012, Blaszczak emailed Rosen his personal views on the coding, arguably to influence Rosen's recommendations. (A-2431). But Blaszczak fully disclosed his "background," the nature of his "interest in th[e] issue" and his ties to

"the investment community." (A-2432). Rosen saw nothing wrong with this, and instead "sincerely thank[ed]" Blaszczak, indicating that he "very much appreciate[d]" his "opinions." (A-2431). Indeed, Rosen testified that he found Blaszczak's "perspective…interesting" and "agreed" with Blaszczak's "points," which prompted Rosen to forward Blaszczak's email to CMS. (A-760-61/1906-10). CMS personnel likewise considered Blaszczak's position sufficiently "interesting" that they ultimately discussed the issues directly with Blaszczak and "factor[ed]" his views "into [their] analysis." (A-848/2411-13, A-852-53/2437-39, 2441, A-860-61/2474-75). Blaszczak's email therefore was an ordinary, commonplace, and constructive part of the policymaking process, which typified his legitimate role as a Deerfield consultant. (A-761/1909-10, A-848/2413, A-849/2415-17).

Neither Rosen nor anyone at CMS testified that there was anything improper about Blaszczak's interaction with Rosen.

B. The Jury Instructions And Verdict

The indictment charged Huber with ten counts: conversion of government property, 18 U.S.C. §641 (Count Three); securities fraud under Securities Exchange Act §10(b), 15 U.S.C. §§78j(b) (Counts Four to Eight) ("Title 15 securities fraud"); wire fraud, 18 U.S.C. §1343 (Count Nine); Title 18 securities fraud, 18 U.S.C. §1348 (Count Ten); conspiracy to commit conversion and Title 15

securities fraud and to defraud the United States, 18 U.S.C. §371 (Count One); and conspiracy to commit wire fraud and Title 18 securities fraud, 18 U.S.C. §1349 (Count Two).

On October 27, 2017, Huber moved to dismiss the indictment. (A-141). On March 29, 2018, the district court denied the motion. (A-435).

The district court correctly instructed the jury that, for purposes of the §10(b) counts, the government had to prove that Worrall provided inside information for a personal benefit, and that the Deerfield defendants were aware of that personal benefit:

- Information "was disclosed in violation of a duty to keep it confidential and in exchange for a personal benefit to the insider" (A-1040/3952);
- "Mr. Worrall, in providing…information to Mr. Blaszczak, anticipate[d] receiving a personal benefit" (A-1042/3960);
- "Mr. Huber…kn[ew] 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" (A-1042/3961);
- There was more than just an "insider's disclosure of material, nonpublic information," because such a disclosure, "standing alone, all by itself, does not establish this personal benefit fact" (A-1043/3963); and
- "The tippee…kn[ew] that the tipper disclosed the information in violation of a duty of confidentiality and that it was disclosed in exchange for a personal benefit." (A-1043/3964).

Defendants repeatedly requested a corresponding instruction for the Title 18 fraud counts. (*See* A-343, A-407-09, A-437, A-1001-03/3466-74). The district court appeared to acknowledge—or at least did not dispute—that the fiduciary breach for personal benefit (and tippee knowledge thereof) also applied to Title 18 fraud. (A-1002/3469-70). Yet the court nevertheless refused to provide any corresponding instruction for the Title 18 counts (A-1002-03/3969-74), thereby leading the jury to conclude that it was required to find a personal benefit to convict the defendants of §10(b) but not Title 18 fraud.

On May 3, 2018, after four days of deliberations, the jury acquitted the Deerfield defendants on all five §10(b) counts, but convicted them on the remaining counts. (A-1060-62/4071-80).

C. The Sentence

On September 13, 2018, the district court sentenced Huber principally to 36 months' imprisonment, a $1.25 million fine, and $1,644.26 in restitution. (SPA-4, SPA-7). Finding that the "question[s]…on appeal" are "novel" and "substantial" (SPA-4, A-3250-51), the district court granted bail pending appeal.

SUMMARY OF ARGUMENT

1. No federal statute prohibits trading on "inside" information. For decades, the government has prosecuted insider trading under a general anti-fraud provision prohibiting "manipulative" or "deceptive" conduct in connection with the purchase

or sale of securities, §10(b) of the Securities Exchange Act. And the government has repeatedly tried to convert §10(b) into a "parity of information" rule banning all trading on material nonpublic information. But its position is contrary to law, because mere informational disparities are not fraud and "insider trading does not necessarily involve deception." *United States v. Kaiser*, 609 F.3d 556, 569 (2d Cir. 2010). Insider trading rarely involves false statements, and silence is not fraudulent absent a duty to speak. Accordingly, invoking basic common-law fraud principles, the Supreme Court has held that trading on material nonpublic information is not fraudulent unless it involves a breach of fiduciary duty for personal benefit. In the tipping context, this requires proof that the "tipper" disclosed material nonpublic information to obtain a personal benefit, and the tippees' knowledge of that benefit. *Martoma*, 894 F.3d at 76.

The Supreme Court's reasoning in the §10(b) cases applies equally to the Title 18 anti-fraud statutes, as the Court's decisions applying the wire fraud statute to insider trading illustrate. The government cannot somehow duck its burden to prove that insider trading is fraud by prosecuting under a different set of fraud statutes. Indeed, the government has itself repeatedly acknowledged—in Supreme Court briefs and requests to charge at trials—that to prove insider trading under the Title 18 fraud statutes, it must prove a fiduciary breach for personal benefit. Nothing in the text or judicial interpretations of the Title 18 fraud statutes provides

any legitimate basis for a different result here. There was no evidence that Huber knew who Blaszczak's sources were, much less whether they were breaching any duty by providing information or doing so for some personal benefit. The Title 18 fraud counts also fail because they require a scheme to deprive the government of its "property," and the information at issue is not "property." Accordingly, Huber's fraud convictions must be reversed.

2. The §641 count fails for numerous independent reasons. The government failed to prove that Huber knew the disclosures were improper, as required to establish scienter. It instead pointed to an inapposite regulation and a purported nondisclosure policy that CMS employees ignored, which was never shared with Huber. Nor did the government show that leaks about possible policy changes qualified as a "thing of value" that belongs to the government, as required to establish a §641 violation. The government also failed to establish the requisite interference with a property interest, and instead speculated about hypothetical forms of interference that never happened. Finally, the government's radically expansive interpretation of §641 leads to absurd conclusions—criminalizing the use of *any* confidential information originating with a government source, even if the disclosure is otherwise legal and has no adverse impact on the government—that raise serious First Amendment and due process concerns.

3. The §371 conspiracy conviction does not withstand the slightest scrutiny. This conspiracy supposedly had two objects—to commit offenses against the United States (§641 conversion and §10(b) fraud) and to defraud the United States. As explained, the government failed to prove that Huber agreed to commit the elements of either conversion or §10(b). Nor did Huber conspire to defraud the United States. To prove such a conspiracy, the government must show that the defendant agreed to engage in deceitful conduct, and the record contains not a shred of evidence showing such an agreement.

4. Huber joins the briefs of his co-appellants to the extent applicable to him. Fed. R. App. P. 28(i). Specifically, Huber joins all of Olan's arguments, and Points I, II.A.1, B.1-2, C.1-2, D and III of Blaczszak's brief.

STANDARDS OF REVIEW

This court reviews statutory interpretation questions, sufficiency of the evidence challenges, jury instructions challenges, and due process violations *de novo*. *United States v. Gayle*, 342 F.3d 89, 91 (2d Cir. 2003); *United States v. Novak*, 443 F.3d 150, 157 (2d Cir. 2006); *United States v. Silver*, 864 F.3d 102, 117 (2d Cir. 2017); *United States v. Abuhamra*, 389 F.3d 309, 317 (2d Cir. 2004).

ARGUMENT

I. THE TITLE 18 FRAUD CHARGES MUST BE REVERSED

A. Tippee Insider Trading Is "Fraud" Only Where The Tipper Has Breached A Duty For Personal Benefit, And The Tippee Knows Of The Duty, Breach, And Benefit

For nearly four decades, the Supreme Court has held that "fraud" means something more than simply trading on material, nonpublic information, even where that information has been taken without permission.

As relevant here, §10(b) prohibits "deceptive" conduct "in connection with the purchase or sale of any security," 15 U.S.C. §78j(b); and Rule 10b-5 prohibits "employ[ing] any device, scheme, or artifice to defraud," or "engag[ing] 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," 17 C.F.R. §240.10b-5(a), (c).

The Supreme Court first addressed whether insider trading can violate these provisions in *Chiarella v. United States*, 445 U.S. 222 (1980), holding that there is no "general duty…to forgo actions based on material, nonpublic information." *Id.* at 233. Rather, what can make insider trading fraudulent is the insider's failure to disclose the information before trading. "When an allegation of fraud is based upon nondisclosure, there can be no fraud absent a duty to speak." *Id.* at 235. This is no "novel twist of the law," but reflects the "common law" principle that "one

who fails to disclose material information…commits fraud only when he is under a duty to do so." *Id*. at 227-28 (citing Restatement (Second) of Torts §551(2)(a)). To hold otherwise in the insider trading context would "depart radically from [this] established doctrine." *Id*. at 233; *see also id*. at 230 ("silence" is "fraud" only if there is "duty to disclose arising from a relationship of trust and confidence").

1. The Tipper Must Breach A Fiduciary Duty For Personal Benefit

In *Dirks*, the Supreme Court confirmed that in the tipping context, "[n]ot all breaches of fiduciary duty in connection with a securities transaction…come within the ambit of [§10(b) and] Rule 10b-5"; "[t]here must also be 'manipulation or deception.'" 463 U.S. at 654. To prove a fraudulent breach, the government must show that the tipper received a "personal benefit from the disclosure." *Id*. at 663. Moreover, in *Dirks*, the Court recognized that the tippee—who owed no duty to the company in question—could be liable only where the tipper had breached a duty and received a personal benefit in return for the tip. The Court held that "the test is whether the insider personally will benefit…Absent some personal gain, there has been no breach of duty to stockholders. And absent a breach by the insider, there is no derivative breach" by the tippee. *Id*. at 662.

The Supreme Court reaffirmed these principles in *United States v. O'Hagan*, 521 U.S. 642 (1997), and *Salman v. United States*, 137 S. Ct. 420 (2016). *O'Hagan* emphasized that there is no "general duty" to refrain from trading on

material nonpublic information, and held that criminal liability under §10(b) may be predicated upon the "misappropriation" theory of insider trading. 521 U.S. at 658-59, 661. That theory "outlaws trading based on nonpublic information by a corporate 'outsider' in a breach of a duty owed…to the source of the information" other than the corporation. *Id*. at 652-53. The misappropriation theory, like the "classical" theory addressed in the prior cases, requires the government to prove that the insider "convert[ed] the principal's information for personal gain." *Id*. at 653.

Moreover, the Court observed that "misappropriators…deal in deception," and that "a fiduciary who pretends loyalty to the principal while secretly converting the principal's information for personal gain, dupes or defrauds the principal." *Id*. at 653-54. In so doing, the Court relied on *Carpenter v. United States*, 484 U.S. 19 (1987), where the Court had upheld an insider trading conviction under the mail and wire fraud statutes.

Finally, *Salman* "adhere[d] to *Dirks*" and rejected the government's view that a fraud occurs "whenever the tipper discloses confidential trading information for a noncorporate purpose," reaffirming that "[a] tipper breaches [its] fiduciary duty" only "when the tipper discloses the inside information for a personal benefit." 137 S. Ct. at 423, 426-27.

2. The Tippee Must Know Of The Tipper's Personal Benefit Motive

The tipper's breach of duty alone is insufficient to convict the tippee. A tippee is exposed to liability for trading on inside information only if (1) "the tipper breached a fiduciary duty by disclosing the information" *and* (2) the tippee "acquire[d] the tipper's duty." *Id*. at 423. The tippee only "acquire[s]" a duty of trust and confidence and "breache[s] [it] himself…by trading on the information with full knowledge that it [was] improperly disclosed." *Id*. at 423, 428; *accord Dirks*, 463 U.S. at 660. This means the government must "prove that the [tippee] knew that the insider[]…received a personal benefit in order" for the tippee "to be found guilty of insider trading." *Newman*, 773 F.3d at 447-50.[1] As this Court recently reaffirmed, the "important teaching of *Newman*" is that the "tippee must be aware…that the tipper received a personal benefit." *Martoma*, 894 F.3d at 76.

This knowledge requirement "comports with well-settled principles of substantive criminal law." *Newman*, 773 F.3d at 450. "[U]nder the common law, *mens rea*, which requires that the defendant know the facts that make his conduct illegal, is a necessary element in every crime." *Id*. This "requirement is particularly appropriate in insider trading cases where [this Court] ha[s] acknowledged 'it is easy to imagine a...trader who receives a tip and is unaware

[1] *Salman* abrogated *Newman*'s holding that the personal benefit must be pecuniary or similar but left undisturbed the requirement of tippee knowledge of personal benefit. 137 S. Ct. at 425 n.1.

that his conduct was illegal and therefore wrongful.'" *Id*. (quoting *Kaiser*, 609 F.3d at 569).

3. The Same Principles Apply To §§1343 and 1348

The government cannot circumvent decades of Supreme Court and Circuit precedent defining what insider trading is "fraud" when it cannot establish the elements of §10(b) fraud by charging the same conduct under alternative fraud statutes, as it has done here. As explained, nondisclosure of insider trading is not "dece[ptive]" absent breach of a duty, which is why only "trading for personal gain" is "fraudulent." *Dirks*, 463 U.S. 663, 666 n.27. And "[i]t is a well-established rule of construction that '[w]here Congress uses terms that have accumulated settled meaning under...the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.'" *Neder v. United States*, 527 U.S. 1, 21 (1999); *accord Universal Health Servs., Inc. v. United States*, 136 S. Ct. 1989, 1999 (2016) ("the term 'fraudulent' is a paradigmatic example of a statutory term that incorporates the common-law meaning of fraud"); *Sekhar v. United States*, 570 U.S. 729, 732-33 (2013) ("if a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it").

These principles therefore apply equally to the other fraud statutes charged here, as confirmed by the statutes' texts, controlling precedent, and the government's own prior concessions.

a. Wire Fraud

The wire fraud statute prohibits "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" transmitted by wire. 18 U.S.C. §1343. As with §10(b), Congress incorporated the "common-law meaning" of the term "fraud" into "the wire fraud…statute[]." *Neder*, 527 U.S. at 22; *see also McNally v. United States*, 483 U.S. 350, 356-57 (1987). Thus, when "the government's theory of wire fraud" is "based on material omissions, it is settled that a duty to disclose arises only when one party has information that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them." *United States v. Szur*, 289 F.3d 200, 211 (2d Cir. 2002) (internal quotations omitted). And it has long been settled, in "civil cases" and under the mail/wire fraud statutes, that "[u]sing a fiduciary position" "to obtain secret profits based upon inside information is…a breach of trust" and "an active fraud." *United States v. Buckner*, 108 F.2d 921, 926-27 (2d Cir. 1940).

That is why the Supreme Court and this Court have confirmed that "[t]he fortunes of" mail/wire "fraud convictions are tied closely to securities fraud

convictions" where, as here, both are predicated upon "[t]he same" "alleged insider trading." *United States v. Chestman*, 947 F.2d 551, 554, 571 (2d Cir. 1991). In *Carpenter*, the government charged a tipping and trading scheme as "mail and wire fraud." *Id*. at 22-24. The tipper, a Wall Street Journal reporter, disclosed the contents of articles to traders before they were published, and benefitted personally by "shar[ing] profits from [the] trading." *Id*. at 27. The Court affirmed the convictions based on common law principles governing "employee[s'] fiduciary obligation to protect confidential information obtained during the course of employment." *Id*. at 27; *see also id.* at 27-28 (citing common-law principle that "a person who acquires…information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge for his own personal benefit"). Under these "well established" principles, the Court held, the tipper "knowingly breached a duty" by tipping "for his own personal benefit" and misappropriating information "for his own use." *Id*. at 23-24, 27-28.[2]

In its *Carpenter* Supreme Court brief, the government agreed that these common-law fraud principles apply to all insider-trading fraud prosecutions—whether under mail/wire fraud or §10(b). It argued that the "benefit" requirement

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[2] The Court was equally divided on whether misappropriation satisfies §10(b)'s additional requirement that fraudulent conduct be "in connection with" the purchase or sale of a security. *Id*. at 24. It resolved that issue in *O'Hagan*. 521 U.S. at 653-59.

not only applies to "the federal mail and wire fraud statutes," but also "draws its content…from a century of case law" interpreting them. Brief for the United States at 9, *Carpenter v. United States*, 484 U.S. 19 (1987) (No. 86-422). The government conceded that it is an "essential characteristic of a fraudulent breach of trust" that the tipper "*benefit himself*" and use fraudulent "misimpression[s] *to his benefit*" (*id*.) (emphasis added); and that the tipper "engage[s] in trick, deceit, chicane or overreaching" by "us[ing] his position of trust *to benefit himself*" (*id.* at 9-10) (emphasis added). *See also id.* at 18-19 (a person "violates Section 10(b)" by misappropriating information "to his own benefit").

In *O'Hagan*, the Supreme Court reconfirmed that the insider-trading Title 18 fraud inquiry parallels the §10(b) analysis. In concluding that the government must prove that the insider was motivated by "personal gain," *O'Hagan* held that insider trading under §10(b) is "fraud of the same species" as the wire and mail fraud at issue in *Carpenter*, and that "*Carpenter*'s discussion of fraudulent misuse of confidential information…is a particularly apt source of guidance here, because the mail fraud statute" and "Section 10(b)" impose the same requirements. *Id*. at 653-54.

As in *Carpenter*, the government agreed. Its Supreme Court brief said that "[t]he task of identifying those relationships in which the improper use of confidential information for personal gain constitutes a deceptive practice under

Section 10(b)…parallels the similar inquiry under the mail fraud statute." Brief for the United States at 24, *United States v. O'Hagan*, 521 U.S. 642 (No. 96-842). It further acknowledged that: "[i]n *Carpenter*…[the Supreme] Court held that an employee's deceptive misuse of confidential business information *for personal gain* in securities trading violated the mail fraud statute"; "*Carpenter* makes clear that the mail fraud statute prohibits *that form of fraud*," *i.e.*, the "misuse of confidential business information for personal gain"; and "[t]he same conclusion applies" to the "conversion of information…for the purpose of [the defendant's] *personal profit* in" a Title 15 case. *Id*. at 12 (emphasis added).

Indeed, the government has generally agreed that, in insider trading cases, the "scheme or artifice to defraud" element of wire fraud required it to show breach of duty by an insider, including a personal benefit. It has previously proposed or acceded to numerous jury instructions stating precisely that, including in several recent trials. *See, e.g.*, *United States v. Walters*, No. 16 Cr. 338 (PKC) (S.D.N.Y.), Dkt.91 at 17, 19, 32; Dkt.95 at 6 (to establish "wire fraud," government must prove insider "anticipated receiving a personal benefit"); *United States v. Stewart*, No. 15 Cr. 287 (LTS) (S.D.N.Y.), Dkt.109 at 20, 33 (to establish "wire fraud," government must show insider "intended to receive a personal benefit"); *cf. United States v. Bogucki*, No. 18 Cr. 21 (CRB) (N.D. Cal.), Dkt.162 at 42 (to prove "defendant committed [wire] fraud…by

misappropriating…confidential information," government must show that he "use[d] that information for his own benefit").

b. Title 18 Securities Fraud

Under the same common-law principles, the personal benefit requirement likewise applies to §1348, which prohibits a "scheme or artifice (1) to defraud any person in connection with" covered securities 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" covered securities. The statute was enacted as part of the Sarbanes-Oxley Act to address "a series of celebrated accounting debacles," and not to change the well-settled rules that govern an insider trading prosecution. *Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 561 U.S. 477, 484 (2010); *accord Yates v. United States*, 135 S. Ct. 1074, 1081 (2015) (statute "prompted by the exposure of Enron's massive accounting fraud").

Section 1348 employs "scheme or artifice to defraud" language that echoes Rule 10b-5(a) and is virtually identical to the mail/wire fraud statutes. Indeed, "courts have recognized that 'because the text and legislative history of 18 U.S.C. §1348 clearly establish that it was modeled on the mail and wire fraud statutes,' an analysis of Section 1348 'should be guided by the caselaw construing those statutes.'" *United States v. Wey*, 2017 WL 237651, at *9 n.6 (S.D.N.Y. Jan. 18,

2017); *accord United States v. Coscia*, 866 F.3d 782, 799 (7th Cir. 2017) ("section 1348 was modeled on the federal mail and wire fraud statutes"); *United States v. Mahaffy*, 2006 WL 2224518, at *11 (E.D.N.Y. Aug. 2, 2006) ("the text and legislative history of…§1348 clearly establish that it was modeled on…mail and wire fraud" so §1348 is also "guided by the numerous and well-established precedents on those statutes").

Because the statutes use "the same language in relevant part," courts must "apply the same analysis to [these] offenses." *Carpenter*, 484 U.S. at 25 n.6; *accord Sekhar*, 570 U.S. at 733 ("'Where Congress borrows terms of art in which are accumulated…legal tradition and meaning…it presumably knows and adopts the cluster of ideas that were attached to'" them). Accordingly, just as "[t]he fortunes of" mail/wire "fraud convictions are tied closely to…securities fraud convictions" in insider trading cases, the same is true for §1348. *Chestman*, 947 F.2d at 571; *accord O'Hagan*, 521 U.S. at 653-54; *Carpenter*, 484 U.S. at 27-28.

Nor would a different result under §1348 make sense. What makes insider trading fraudulent is "deception through nondisclosure," and under the "common law," the "mail fraud statute" and "Section 10(b)," nondisclosure is not fraudulent absent "breach of fiduciary duty." *O'Hagan*, 521 U.S. at 654-55. To hold otherwise under §1348 would "depart[] radically from…established doctrine" without *any* justification, let alone "explicit evidence of congressional intent."

Chiarella, 445 U.S. at 233. Under "§1348," as elsewhere, the government must prove "a fiduciary relationship exist[s] before it c[an] convict…on…[a] failure-to-disclose theory." *United States v. Harris*, 881 F.3d 945, 952 (6th Cir. 2018) (no abuse of discretion for jury instruction imposing this requirement); *accord United States v. Mahaffy*, 693 F.3d 113, 125 (2d Cir. 2012) (where government proceeds on theory of nondisclosure, it must prove "violation[] of…duty to disclose").

Furthermore, §1348's text is *narrower* in scope than §10(b) and Rule 10b-5, and thus cannot somehow justify *broadening* insider trading liability by doing away with the personal benefit requirement. The former covers a "scheme or artifice to defraud," or a "scheme or artifice to obtain" property "by means of false" pretenses, in connection with covered securities. Rule 10b-5(a) alone covers more ground than that—it applies to any "*device*, scheme, or artifice to defraud." 17 C.F.R. §240.10b-5(a) (emphasis added). Rule 10b-5(c) goes even further, prohibiting "*any act, practice, or course of business* which *operates or would operate as a fraud or deceit* upon any person." 17 C.F.R. §240.10b-5(c) (emphasis added). And §10(b) makes it unlawful "[t]o use or employ, in connection with [certain securities], any *manipulative or deceptive device or contrivance* in contravention" of SEC rules. 15 U.S.C. §78j(b).[3]

[3] At most, §1348 extends beyond §10(b) in prohibiting fraud "in connection" with a security, rather than in connection with the "*purchase or sale* of a security." That distinction is irrelevant here.

Nothing about §1348 suggests that it was intended to upend basic tort law and controlling precedent establishing the elements of insider trading fraud. Rather, §1348 "incorporates the [same] common-law meaning of fraud" as the other statutes. *Universal Health Servs.*, 136 S. Ct. at 1999; *accord Sekhar*, 570 U.S. at 732; *Neder*, 527 U.S. at 21.

B. There Was No Proof That Huber Knew Of Any Fraudulent Breach

The erroneous instructions on Title 18 fraud were particularly harmful here, because there was no proof that Huber—allegedly a remote tippee—knew who the source of Blaszczak's information was, let alone why he/she disclosed the information. The government did not identify the source of Blaszczak's 2012 radiation oncology tips, or demonstrate any benefit that person anticipated. The government suggested it was Worrall, but the evidence did not actually establish that he was the source of those particular tips. (*See, e.g.*, *supra* at 12; Worrall Br. Point I).

Even if the government had proven that Worrall was the source, there was no evidence that Huber was aware of his identity, let alone any personal benefit he might have received. (A-556/686). It was undisputed that Huber, Olan, and Fogel didn't even know of Worrall's existence. (A-1010/3519). Fogel admitted that he had no idea how Blaszczak obtained the information. (A-662/1253-54).

The government argued that Huber might have inferred from the nature of Blaszczak's information that it had been improperly obtained. (A-1017/3547). It elicited testimony that Huber should have drawn this inference because he knew that Blaszczak had "had relationships…with CMS employees," even though Huber didn't know who they were or whether they were even the source. (A-556/684). But this argument ignores that CMS routinely disclosed information to third parties. The argument is also legally foreclosed by *Newman*. There, as here, the remote tippee defendants were aware that their source "was talking to someone" on the inside. 773 F.3d at 453-54. But they were "not aware of the insider's name, or position, or the circumstances of how [their source] obtained the information," let alone whether the tipper "received a personal benefit for disclosing" the information to their source. *Id*. There, as here, the government simply assumed that "a tipper who discloses confidential information *necessarily* does so to receive a personal benefit"— an assumption the Supreme Court has "affirmatively rejected." *Id*. at 454 (emphasis added). Thus, "no rational jury [c]ould find" that Huber "knew" that Worrall "received any personal benefit." *Id*. at 455.

Huber lacked "full knowledge"—indeed, any knowledge—of how the tips were "disclosed," and never "acquired" a "duty of trust and confidence" or "breached [it] himself." *Salman*, 137 S. Ct. at 428. That is why the jury acquitted Huber of the §10(b) counts but convicted on the Title 18 counts. As explained, for

the §10(b) counts, the jury was instructed as to the personal benefit requirement. (A-1040/3952, A-1042-43/3960-64). But there were no corresponding instructions for the Title 18 counts (A-1044-45/3969-73), thereby leading the jury to conclude that it was required to find a personal benefit to convict under §10(b) but not Title 18.

That was the only material difference between the two sets of instructions. The jury was told a "scheme, or an artifice to defraud" is otherwise the same in all contexts; for each statute, it "is merely a plan for the accomplishment of any fraudulent objective." (A-1040/3951 (Title 15)); *compare with* (A-1044/3969 (same for wire fraud)); A-1045/3971-73 (same for Title 18 securities fraud). The critical difference between the Title 15 and 18 instructions is clear: the jury believed that the government needed to prove a personal benefit (and Huber's knowledge of that benefit) for the former but not the latter.

Because the tippees knew "nothing about what, if any, personal benefit had been provided to" the insiders, this Court must "reverse [the] convictions and remand with instructions to dismiss the indictment" for the Title 18 fraud counts. *Newman*, 773 F.3d at 453, 455; *accord Dirks*, 463 U.S. at 665-67 (reversing where "tippers received no…benefit" and tippee "therefore could not have [participated] in an insider's breach of a fiduciary duty") (internal quotations omitted).

At a minimum, a new trial is required. Huber repeatedly asked the district court to give the personal benefit instructions for the Title 18 fraud counts, but the court refused. (*See supra* at 15-16). "Because the jury was not correctly instructed" on the personal benefit requirements for Title 18 fraud, "it may have convicted [Huber] for conduct that is not unlawful," requiring vacatur. *McDonnell v. United States*, 136 S. Ct. 2355, 2375 (2016); *accord United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 414 (1999).

C. The Leaked CMS Information Is Not Government "Property"

As explained more fully in Olan's brief (Point I.A), the fraud convictions must also be reversed because the information Worrall purportedly disclosed was not "property" within the meaning of the relevant statutes, which are "limited in scope to the protection of property rights." *McNally*, 483 U.S. at 360.[4] "It does not suffice…that the object of the fraud may become property in the recipient's hands," because "the thing obtained must be property in the hands of the victim." *Cleveland v. United States*, 531 U.S. 12, 15 (2000). Moreover, only "interest[s] that 'ha[ve] long been recognized as property'" or "traditional concepts of property" will qualify. *Id*. at 23-24.

[4] As explained above, because §1348 was modeled on the mail/wire fraud statutes, its interpretation is guided by caselaw construing those statutes.

In *Cleveland*, the Supreme Court rejected the government's theory that a state-issued license is "property" under §1341, reasoning that a licensing regime's "core concern is *regulatory*." *Id*. at 20-24. The defendant did not "defraud[] the State of any money to which the State was entitled by law"; all the defendant took was a license, through which the State confers rights. *Id*. at 22. "[T]h[ose] intangible rights…amount to no more and no less than [the State's] sovereign power to regulate," which is not a traditional property right. *Id*. at 23. For example, the right to alienate property is a traditional property right, but the State obviously cannot "sell its licensing authority." *Id*. at 23.

Thus, "in the context of government regulation, monetary loss presents a critical, perhaps threshold consideration" in determining whether "property" has been taken. *Fountain v. United States*, 357 F.3d 250, 257 (2d Cir. 2004). "[T]he relevant inquiry is…whether the scheme…is designed to defraud the government of its revenues or of its licenses…" *Id*. Only schemes to defraud the government of revenues it is owed, as in *Fountain*, which involved a liquor tax fraud scheme, are actionable under §1341. *Id.*

The alleged scheme here obviously had no such aim. The government alleged a scheme to deprive it of predictions about policy changes, not revenues. CMS's interests in these policy decisions are purely regulatory, and prognostications about whether they will occur "stray" even further "from

traditional concepts of property." *Cleveland*, 531 U.S. at 24. Like the licensing scheme in *Cleveland*, the government could not "sell" these predictions, and suffered no "monetary loss" when they were allegedly disclosed. *Fountain*, 357 F.3d 257. They are more analogous to an "employee's yet-to-be-issued recommendation" that the Supreme Court, applying *Cleveland*, held was *not* "property" within the meaning of the Hobbs Act. *Sekhar*, 570 U.S. at 737; *see also id.* at 740-41 (Alito, J., concurring) ("Our decision in *Cleveland*…supports the conclusion that internal recommendations regarding government decisions are not property."). Because "the government nowhere alleges that [Huber] defrauded [CMS] of any money to which [CMS] was entitled by law," there was no "property" as a matter of law. *Cleveland*, 531 U.S. at 22; *accord United States v. Griffin*, 324 F.3d 330, 354 (5th Cir. 2003) (unissued tax credits with "zero intrinsic value" to government have regulatory purpose and are not property).

Carpenter does not hold otherwise. It held that "confidential business information" was "property" in the hands of the for-profit business from which the information was stolen. 484 U.S. at 28. But "business information has long been recognized as property," *id.* at 26, because it clearly has "commercial value" in the hands of the victim, *United States v. Grossman*, 843 F.2d 78, 86 (2d Cir. 1988). A business can sell or otherwise use information to its financial advantage, whereas CMS cannot. *See United States v. Bruchhausen*, 977 F.2d 464, 468 (9th Cir. 1992)

(no "property" taken absent "monetary loss"). Because CMS's objectives were strictly regulatory, and its internal deliberations lacked any business purpose, they were not "property" in the government's hands. *Fountain*, 357 F.3d at 257; *accord Bruchhausen*, 977 F.2d at 468.

II. THERE WAS NO CONVERSION OF GOVERNMENT PROPERTY

The prosecution of insider trading under §641 is unprecedented, because the statute does not prohibit it. To convict under §641, the government needed to show that: Huber knew his conduct was unlawful; Worrall's leaks were a "thing of value" in which the government had a cognizable property interest; and Huber's use of the information somehow interfered with CMS's business. The government proved none of these elements. *See also* Olan Br. Points II.1-4. The §641 charges are a transparent attempt by the government to circumvent the federal securities laws and "shoehorn[] [alleged insider trading] into statutory sections where it does not fit." *Leocal v. Ashcroft*, 543 U.S. 1, 13 (2004).

A. The Government Failed To Prove Scienter

There was no evidence that Huber had any idea the information he received from Blaszczak about potential policy changes had been stolen. As relevant here, 18 U.S.C. §641 criminalizes "*knowingly* convert[ing]…any record, voucher, money, or thing of value of" the federal government, or "receiv[ing]" such "property" "with intent to convert it to [one's] use or gain, *knowing* it to have

been…converted." (Emphasis added). The defendant therefore must "know[]" that he was "wrongfully…depriv[ing] another of possession of property." *Morissette v. United States*, 342 U.S. 246, 276 (1952). It is not enough if the defendant "believed [the property] w[as] stolen," because "knowledge implies a much higher degree of certainty." *United States v. Golomb*, 811 F.2d 787, 792 (2d Cir. 1987). And in this context the government must prove that the defendant "kn[ew] that the [disclosure] was *prohibited*" to prevail under §641. *United States v. Girard*, 601 F.2d 69, 71 (2d Cir. 1979) (emphasis added).

There was no such evidence. The government failed to show that Huber knew these disclosures were unauthorized. It pointed to a single regulation (A-1038-39/3945-46), 5 C.F.R. §2635.703, prohibiting a government employee from "allow[ing] the improper use of nonpublic information to further his own private interest or that of another…by knowing unauthorized disclosure." But there was no evidence that Huber (a non-lawyer) was aware of this regulation or anything like it, and the evidence instead showed that Deerfield's in-house and outside counsel repeatedly blessed the firm's relationship with Blaszczak. Nor was there any evidence that Huber knew who Blaszczak's source was or why he disclosed the information. Moreover, §2635.703 is not a blanket prohibition on the use of nonpublic information; the regulation covers only "improper" use, which begs the question: were the disclosures here "improper"? Absent a law explicitly

prohibiting them, or explaining what "improper" otherwise means, §2635.703 offers no guidance as to whether and when it is permissible for third parties to use nonpublic information from a government source or the source's predictions of how government policy might change in the future. Finally, There was no evidence that what Blasczak conveyed was even *property* of the government. (*Infra* at 53). Certainly Huber had no way of *knowing* that it was.

The government also pointed to a CMS policy against disclosure of information (A-477/251, A-493/313-14, A-515/404-07), without attempting to establish that Huber was even aware of it or explain why it was unlawful for a CMS employee to violate a mere policy. And the record is replete with examples of other CMS employees who repeatedly disclosed confidential information to third parties in the exact same manner as allegedly occurred here. (*See, e.g.*, A-532/498, Tr.499, A-862/2479-80, A-864/2488-89). This is analogous to *Newman*, where the evidence showed that the companies at issue "routinely 'leaked' earnings data in advance of quarterly" announcements. 773 F.3d at 454. In that scenario, there was insufficient proof that the remote-tippee defendants could have known that the disclosures were unlawful. *Id.* at 454-55. The same is true here.

Finally, as Olan explains (at Point II.4), there was no evidence supporting a conscious avoidance theory, and charging the jury on that theory was also reversible error.

B. There Was No "Thing Of Value"

Section 641 applies only to conversion of a "record, voucher, money, or *thing of value* of" the federal government. 18 U.S.C. §641 (emphasis added). Because no "records, vouchers, or money" were conveyed to Blaszczak, the disclosures fall within §641, if at all, if they qualify as a "thing of value." (*See, e.g.*, A-229-30). But that would contravene basic statutory construction principles, raise serious constitutional concerns and conflict with recent Supreme Court precedent narrowly interpreting analogous statutes. *See, e.g.*, *McDonnell*, 136 S. Ct. at 2367-73; *Yates*, 135 S. Ct. at 1081-89.

1. When interpreting statutory text, courts must consider "its placement and purpose in the statutory scheme." *Bailey v. United States*, 516 U.S. 137, 145 (1995). "Particularly when interpreting a statute that features as elastic a word as ['thing'], [this Court must] construe language in its context and in light of the terms surrounding it." *Leocal*, 543 U.S. at 9; *accord Marinello v. United States*, 138 S. Ct. 1101, 1106-07 (2018). Here, "established interpretive canons" dictate that §641 "uses the term ['thing of value'] far more restrictively" than the government claimed. *Wash. State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 384 (2003).

First, the government's broad interpretation of "thing of value" would render portions of §641 superfluous. It prohibits conversion of "any record, voucher,

money, or thing of value" belonging to the government. If "thing of value" were as broad as the government says, the terms preceding it—record, voucher, and money—"would serve no role in the statute." *McDonnell*, 136 S. Ct. at 2369. That is because such a broad interpretation of "thing of value" already encompasses records, vouchers, and money. "The Government's unbounded reading of ['thing of value'] would render those [preceding] words…surplusage," *Yates*, 135 S. Ct. at 1087, and violate the "cardinal principle of statutory construction that…if it can be prevented, no clause, sentence, or word [of a statute] shall be superfluous, void, or insignificant," *Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 489 n.13 (2004) (internal quotations omitted); *accord McDonnell*, 136 S. Ct. at 2369.

Indeed, Congress would not have gone to the trouble of listing narrow terms like "records," "vouchers" and "money" as examples of what §641 covers had it intended "thing of value" to include anything and everything that might conceivably belong to the government. *See Begay v. United States*, 553 U.S. 137, 142 (2008) ("If Congress meant…the statute to be all encompassing, it is hard to see why it would have needed to include the examples at all."); *Yates*, 135 S. Ct. at 1086-87. To give effect to every word of the statute, a thing of value "must be similar in nature," *McDonnell*, 136 S. Ct. at 2372, or in "kind as well as in degree," *Begay*, 553 U.S. at 143, to the preceeding examples.

Noscitur a sociis, a related canon of construction, holds that "where general words follow specific words, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." *Wash. State Dep't*, 537 U.S. at 384 (internal quotations omitted); *accord McDonnell*, 136 S. Ct. at 2368-69. Thus, if a criminal statute "list[s] examples" that "illustrate the kinds of crimes that fall within the statute's scope…[t]heir presence indicates that the statute covers only *similar* crimes, rather than *every* crime that" might conceivably fall within a broader catch-all. *Begay*, 553 U.S. at 142; *accord Yates*, 135 S. Ct. at 1085; *Marinello*, 138 S. Ct. at 1107.

Predictions about policy changes are not similar in "nature," or in "kind" and "degree," to records, vouchers, or money. *McDonnell*, 136 S. Ct. at 2372; *Begay*, 553 U.S. at 143. Consequently, they are not a "thing of value" either, and so are not covered by §641.

2. Recent Supreme Court precedents hewing closely to statutory text under analogous circumstances compel a narrow construction of "thing of value." *See, e.g.*, *Marinello*, 138 S. Ct. at 1106-09; *McDonnell*, 136 S. Ct. at 2367-74; *Lagos v. United States*, 138 S. Ct. 1684, 1688-89 (2018); *Yates*, 135 S. Ct. at 1081-89; *Begay*, 128 S. Ct. at 141-43; *Leocal*, 543 U.S. at 9-13; *Jones v. United States*, 529 U.S. 848, 855-58 (2000); *Bailey*, 516 U.S. at 143-46. These cases reject the

expansive use of a word or phrase in a criminal statute where, as here, the statutory context limits its reach.

McDonnell and *Yates* are particularly instructive. In *McDonnell*, the government charged a governor with public corruption for hosting events and arranging meetings with a constituent seeking favorable treatment from his administration. To prevail, the government had to prove an "official act," defined as "any question, matter, cause, suit, proceeding or controversy" before a public official. 18 U.S.C. §201(a)(3). Because there was no "cause, suit, proceeding or controversy" at issue, the government obtained a conviction based upon a broad interpretation of the terms "question" and "matter." But the Supreme Court reversed, requiring that these terms "be interpreted more narrowly…[based upon] the context in which [they] appear." *McDonnell*, 136 S. Ct. at 2368. Using the same interpretative canons described above—"*noscitur a sociis*" and the "presumption that statutory language is not superfluous"—the Court "conclude[d] that a 'question' or 'matter' must be similar in nature to a 'cause, suit, proceeding or controversy,'" and that the meetings and events hosted by the defendant did not qualify. *Id*. at 2368-69 (internal quotations omitted).

In *Yates*, the defendant fisherman disposed of an undersized fish he had illegally caught in the Gulf of Mexico. He was charged under 18 U.S.C. §1519, which prohibits destruction of "any record, document, or tangible object with the

intent to impede, obstruct or influence" a federal investigation. The Supreme Court held that a fish does not qualify as a "tangible object" under §1519. 135 S. Ct. at 1079, 1088-89. Relying upon "[t]he *noscitur a sociis* canon," the presumption against "surplusage," and other language in the statute and in Title 18, the Supreme Court rejected "[t]he Government's unbounded reading of 'tangible object,'" and concluded that this term refers only "to the subset of tangible objects involving records and documents." *Id*. at 1083-88; *see also Lagos*, 138 S. Ct. at 1688 (limiting "investigation" and "proceedings" to those by government because terms listed with "prosecution" in the same clause must be "of the same general type").

The issue here is a virtual carbon copy of the ones in *McDonnell* and *Yates*, compelling a narrow interpretation of §641.

3. *Girard* does not hold otherwise. That case involved a prosecution under §641 related to the theft of "DEA…records." *Girard*, 601 F.2d at 70. Thus, *Girard* held that the defendants there, unlike the defendants here, fell comfortably within the statutory language, which expressly covers "records." *Id*.

The government here relied upon dicta in *Girard* suggesting that "thing of value" may be construed to cover "intangibles" in addition to "tangible property and documents." *Id*. at 70-71. This dicta reasoned that (1) a handful of unrelated statutes governing conduct like "gambling" and "intercourse" permit "thing of

value" to cover "intangibles"; (2) in the abstract, regardless of §641's specific language, information such as "the content of a writing" may be considered a "thing of value"; and (3) theft of the "DEA's computerized records" could give rise to a "common law…conversion" claim. *Id*. at 71. What is missing is a discussion of §641's *text*, or any suggestion that it would apply to the information at issue here. Since *Girard* was decided, the Supreme Court has narrowly construed closely analogous criminal statutes using textual analysis that confirms §641 does not apply to this case. *See also Chappell v. United States*, 270 F.2d 274, 278 (9th Cir. 1959) ("thing of value" doesn't include intangibles).

Girard is irrelevant where, as here, no defendant is alleged to have stolen a government record. Nor is this Court bound to follow *Girard*'s dicta. *See, e.g.*, *United States v. Acosta*, 502 F.3d 54, 60-61 (2d Cir. 2007) (rejecting contrary "dicta" in "a number of our previous decisions" because none "explicitly ruled" on issue); *Newman*, 773 F.3d at 447-48 (rejecting "Government's overreliance on…prior dicta" suggesting government need not prove remote tippee's knowledge of personal benefit). And, were the Court otherwise inclined to follow it, "a three-judge panel" must "reconsider" such precedent where, as here, intervening Supreme Court decisions "cast[] doubt" upon its continuing validity. *Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 378 (2d Cir. 2016); *accord Union of Needletrades, Indus. & Textile Emp., AFL-CIO, CLC v. INS*, 336 F.3d 200, 210 (2d

Cir. 2003) (Supreme Court's rejection of a "theory and its reasoning…are sufficiently broad to" implicitly overrule Circuit precedent); *Finkel v. Stratton Corp.*, 962 F.2d 169, 174-75 (2d Cir. 1992) (overturning decision whose "reasoning…ha[d] been fatally undercut by the Supreme Court's decision").

C. §641 Should Be Construed Narrowly To Avoid Absurd Results And Serious Constitutional Problems And In Favor Of Lenity

1. Section 641 should also be narrowly interpreted to avoid the absurd results that would follow from the government's broad interpretation. *See, e.g.*, *United States v. Granderson*, 511 U.S. 39, 56 (1994) (courts must give statutes "a sensible construction that avoids attributing to the legislature either an unjust or an absurd conclusion") (internal quotations omitted).

The government's newly minted theory "provides almost no limitation on the kind of [unofficial government disclosure] that would be criminalized," *Bailey*, 516 U.S. at 143-44, and leads to absurd conclusions that Congress plainly did not intend. For example, under the government's theory, a parent who learns from an FDA colleague of early nonpublic positive results of a treatment for a pediatric illness and uses that information to change her child's treatment has converted government property and risks 10 years' imprisonment under §641. The same would be true of a former law clerk who publishes a memoir about his or her behind-the-scene experiences working for a judge, or a soldier with PTSD who obtains comfort by revealing a disturbing detail of a secret mission to a spouse.

Furthermore, 18 U.S.C. §798 imposes liability for "disclosure of *classified* information" only if the disclosure operates "to the detriment of the United States," the defendant acts "willfully," *and* if the information falls within one of four clearly defined substantive categories. 18 U.S.C. §798(a) (emphasis added). If the government's theory were correct, §641 would impose broader liability for disclosure of *nonclassified* information, like the alleged disclosures here, than for the most sensitive state secrets governed by §798. Had Congress intended such a peculiar outcome, "it would have spoken with more clarity than it did in §[641]." *Marinello*, 138 S. Ct. at 1108; *accord Granderson*, 511 U.S. at 56.

Indeed, there are numerous criminal statutes that proscribe disclosure of specific categories of confidential government information, all of which would be subsumed by §641 under the government's unbounded theory. *See, e.g.*, 50 U.S.C. §3121 (identity of covert U.S. agents); 18 U.S.C. §952 (diplomatic codes and correspondence); 18 U.S.C. §1902 (crop reports); 18 U.S.C. §§1906-07 (bank examination reports). "Congress' careful action in this…area[]" simply cannot be reconciled with "the broad rule of [§641] liability" that the government advocates. *Chiarella*, 445 U.S. at 233-34. Because "this is an area where precisely targeted prohibitions are commonplace…a statute that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *Sun-Diamond*, 526 U.S. at 412; *accord McDonnell*, 136 S. Ct. at 2373; *cf. United States*

v. Truong Dinh Hung, 629 F.2d 908, 926-27 (4th Cir. 1980) (if §641 covered "classified information, it would greatly alter th[e] meticulously woven fabric of criminal sanctions" and "sweep aside many of the limitations Congress had placed upon the imposition of criminal sanctions for the disclosure of classified information").

2. Construing §641 to cover the leak of a policy recommendation would raise serious problems under the Due Process Clause and the First Amendment. A narrow construction is imperative to "avoid passing unnecessarily upon [these] important constitutional questions." *Rust v. Sullivan*, 500 U.S. 173, 207 (1991); *see also McDonnell*, 136 S. Ct. at 2372-73 (construing criminal corruption statute narrowly to avoid due process, First Amendment, and federalism concerns); *Skilling v. United States*, 561 U.S. 358, 403-04 (2010) (courts must endeavor to "construe" statutes narrowly to avoid due process problems; "par[ing]" honest services fraud to its "core").

First, the Due Process Clause prohibits a "criminal law so vague that it [1] fails to give ordinary people fair notice of the conduct it punishes, or [2] so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S. Ct. 2551, 2556 (2015); *accord Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). Both concerns are present here. Huber lacked fair notice that he could be imprisoned under §641 for what was, at worst, lawful "insider trading" that was

not fraudulent under *Chiarella* and its progeny. In the seven decades before this case, §641 was understood to cover run-of-the mill conversion. *See, e.g.*, *United States v. Lee*, 833 F.3d 56 (2d Cir. 2016) (affirming conviction for conversion of items from post office); *United States v. Jackson*, 805 F.2d 457 (2d Cir. 1986) (affirming conviction for conversion of treasury checks); *United States v. Weisman*, 366 F.2d 767 (2d Cir. 1966) (affirming conviction for conversion of ammunition from army post). Mostly in the 1970s and 1980s, the government also charged theft of state secrets or information that, if disclosed, would impair law enforcement investigations or the administration of justice under §641. *See, e.g.*, *Truong*, 629 F.2d 908 (classified information whose exposure could undermine national security); *United States v. Tobias*, 836 F.2d 449 (9th Cir. 1988) (theft of cryptographic devices); *United States v. Girard*, 601 F.2d 69 (2d Cir. 1979) (reports about DEA's confidential informants). Huber had no reason to think the statute would be used to prosecute an alleged insider trading scheme. The absence of any "fair warning" requires "this Court…to exercise interpretive restraint." *Marinello*, 138 S. Ct. at 1108 (internal quotations omitted).

The government's expansive interpretation of §641 here would criminalize not just lawful trading, but the use of *any* confidential information originating with a government source, despite the absence of a law prohibiting its disclosure and any cognizable harm to the government, and the lack of any fraud by the trader. In

short, it epitomizes the "exercise of arbitrary power" that "leav[es] the people in the dark about what the law demands" and "allow[s] prosecutors and courts to make it up" as they go along. *Dimaya*, 138 S. Ct. at 1223-24 (Gorsuch, J. concurring in part and in judgment); *accord Marinello*, 138 S. Ct. at 1108-09 (construing criminal tax statute narrowly to avoid construction "wide-ranging [in] scope" that would allow "prosecutors…to pursue their personal predilections" and "result in the nonuniform execution of power" and "arbitrary prosecution") (internal quotations omitted).

Second, the government's boundless interpretation raises grave First Amendment concerns. If these defendants are criminally liable for using information leaked by a government official—even though that source was unpaid and there was no law prohibiting the disclosure—what is to stop the government from attempting to prosecute reporters or their sources for doing the same thing? This case has the potential to chill essential speech concerning matters of the utmost importance—the inner workings of government. That cannot be squared with the First Amendment's protection of "uninhibited, robust, and wide open" "debate on public issues." *Boos v. Barry*, 485 U.S. 312, 318 (1988) (internal quotations omitted); *accord NAACP v. Button*, 371 U.S. 415, 433 (1963) (public debate requires "breathing space" necessary "to survive"). Rather, "[t]he Government's position [would] cast a pall of potential prosecution" on

commonplace newsgathering, causing the press to "shrink from participating in democratic discourse." *McDonnell*, 136 S. Ct. at 2372; *see Truong*, 629 F.2d at 925 (an interpretation of §641 that has a "chilling effect on the exercise of first amendment rights" would "bring [its] constitutional validity…into question"); *cf. United States v. Alvarez*, 567 U.S. 709, 733 (2012) (Breyer, J., concurring) ("[T]he threat of criminal prosecution for making a false statement can inhibit the speaker from making true statements, thereby 'chilling' a kind of speech that lies at the First Amendment's heart."). The "impinge[ment] [of] rights protected by the first amendment" is particularly acute where, as here, "no precise standard controls the exercise of discretion by upper level government employees when they decide whether to forbid or permit the disclosure of government information."[5] *Truong*, 629 F.2d at 925.

Finally, even if the statutory text were ambiguous, and the canons discussed above dismissed, the rule of lenity would dictate a narrow construction. *See, e.g.*, *United States v. Santos*, 553 U.S. 507, 514 (2008) ("The rule of lenity…vindicates the fundamental principle that no citizen should be held accountable for a violation

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[5] In *Girard*, this Court rejected defendant's vagueness challenge because defendants knew that DEA regulations clearly "forb[ade] disclosure" of the records at issue, which served "as both a delimitation and a clarification of the conduct proscribed by the statute." 601 F.2d at 71. Here CMS employees routinely ignored the supposed nondisclosure policy and Huber was unaware of it. (*See supra* at 8-10).

of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed."); *Cleveland*, 531 U.S. at 24 (rejecting "a sweeping expansion" of §1341 "absen[t] a clear statement by Congress").

D. The Leaks Were Not Government Property

Even if information about potential CMS policy recommendations qualified as a "thing of value," the government must separately establish that they "belong[] to the government." *Lee*, 833 F.3d at 65. As explained above (at 35-38), the government did not establish any property interest in the information disclosed.

E. There Was No Interference With The Government's Purported Ownership Interest

The §641 charges fail for the independent reason that the government never proved the requisite interference with any property interest.

It has long been hornbook law that an "exercise of dominion or control" over a chattel qualifies as a conversion only if it "so seriously interferes with the right of another to control it that the actor may justly be required to pay the other the full value of the chattel." Restatement (Second) of Torts §222A(1); *accord Evergreen Marine Corp. v. Six Consignments of Frozen Scallops*, 4 F.3d 90, 94 (1st Cir. 1993) ("[C]onversion is simply an intentional and wrongful exercise of dominion or control over a chattel, which seriously interferes with the owner's rights…").

Consequently, to be guilty under §641, a defendant's "unauthorized exercise of control over [the] property" must "*seriously interfere*[] with [the government's]

ownership rights." *United States v. Collins*, 56 F.3d 1416, 1420 (D.C. Cir. 1995); *see also United States v. Kammer*, 1 F.3d 1161, 1165-66 (11th Cir. 1993) (vacating conviction because defendant's actions must "seriously interfere[] with the [government's] rights"); *United States v. Wilson*, 636 F.2d 225, 228 (8th Cir. 1980) (same where defendant used subordinate for personal matters but she otherwise had "little or no assigned work"). Thus, the government requested, and the district court charged, that the jury had to find that the property was used "in an unauthorized manner and in a way that seriously interfered with the government's right to use and control [that] property." (A-389, A-1038).

There was no serious interference here. CMS went about its business as if the alleged leaks never occurred, and there is no evidence that its deliberative process or decision-making was the least bit affected by those disclosures.[6] The government did not suggest otherwise below, and instead hypothesized ways in which leaks *theoretically* might impact a government agency like CMS. Specifically, the government pointed to testimony speculating that leaks might (1) prompt an agency to restrict internal access to the information, thus depriving it of potentially helpful input from those outside the loop; and (2) "trigger lobbying" that is intended to influence the agency's decision-making. (A-467/210, A-766-

[6] By contrast, in *Girard* disclosure of the identities of confidential informants obviously risked compromising the ongoing criminal investigations.

67/1932-33). But there was no testimony that any of this happened here, and a conviction premised on mere "speculation" about a serious interference that might occur in some future case "cannot stand." *United States v. D'Amato*, 39 F.3d 1249, 1256 (2d Cir. 1994); *accord*, *e.g.*, *United States v. Coplan*, 703 F.3d 46, 76 (2d Cir. 2012) (reversing conviction based upon "speculation and surmise"). The government was required to show that *Huber* interfered with *CMS's* property rights; its failure to do so requires reversal. *See Collins*, 56 F.3d at 1420-21; *Wilson*, 636 F.2d at 228.[7]

III. THE CONSPIRACY CHARGES FAIL

A. There Was No §1349 Conspiracy

The §1349 conspiracy falls because of the defects in the substantive Title 18 fraud counts. As explained above (at 20-38), the conduct at issue was not prohibited by the substantive Title 18 statutes, and there was no specific intent to violate them. That compels reversal of the conspiracy count as well. *See*, *e.g.*, *Newman*, 773 F.3d at 455 (conspiracy count fails due to lack of evidence remote-tippee defendants knew of tippers' purported personal benefits); *Mahaffy*, 693 F.3d

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[7] The government's complaint about "lobbying," if accepted, would also raise serious constitutional concerns. The public has a First Amendment right to "advocate" and "petition [the] government" for or against reimbursement rates changes. *E.g.*, *Smith v. Ark. State Highway Emp., Local 1315*, 441 U.S. 463, 464 (1979); *see also McDonnell*, 136 S. Ct. at 2372 (narrowly construing corruption statute to avoid "chill[ing] federal officials' interactions with the people they serve").

at 123 (government must show agreement "to commit the offense"); *United States v. Torres*, 604 F.3d 58, 65 (2d Cir. 2010) (knowledge requirement is relevant "to a conspiracy charge to the same extent as it may be for conviction of the substantive offenses") (internal quotations omitted).

B. There Was No §371 Conspiracy

The government also failed to meet its burden under 18 U.S.C. §371, which prohibits a conspiracy "to commit any offense against the United States" or "to defraud the United States." There was no proof of either conspiracy here.

1. Huber was charged with conspiring to commit two offenses: §641 conversion, and §10(b) fraud. (A-265). The substantive §641 count fails for numerous reasons (*see supra* at 38-55), including the insufficiency of evidence as to the requisite scienter. The §641 conspiracy object therefore must also fail, both because the alleged object of the conspiracy was not a crime, *see, e.g.*, *Coplan*, 703 F.3d at 66, and because conspiracy liability requires proof that "the defendant had the specific intent to violate the substantive statute," *United States v. Lorenzo*, 534 F.3d 153, 159 (2d Cir. 2008) (internal quotations omitted).

The §10(b) object was insufficient for similar reasons. As the jury apparently found, Huber "knew next to nothing" about any personal benefit the alleged tipper might have received for disclosing information to Blaszczak. *Newman*, 773 F.3d at 453. Because the government failed to prove that the object

of the conspiracy was a crime, or that Huber "had the intent" to violate §10(b), the court "cannot sustain" that object either. *Id*. at 455.

2. Nor did the government establish a conspiracy to "defraud the United States." That offense requires proof "(1) that the defendant entered into an agreement (2) to obstruct a lawful function of the Government (3) by deceitful or dishonest means and (4) at least one overt act." *Coplan*, 703 F.3d at 61 (internal quotations omitted). There was no proof of the second or third elements here.

For the second, the government was required to prove that Huber agreed to interfere with or obstruct one of the government's lawful functions with "specific intent." *United States v. Ogando*, 547 F.3d 102, 107-08 (2d Cir. 2008); *see United States v. Gurary*, 860 F.2d 521, 525 (2d Cir. 1988); *see also* A-414 (government request to charge conceding that government must prove "defendant conspired to impair, impede or obstruct a legitimate governmental function" and "inten[ded] to defraud" the government). The government made no such showing. Huber at most sought information from his consultant, and though he lacked specific knowledge about the consultant's sources, he had no reason to suspect they would impact CMS rate setting or other functions. Indeed, Huber did not even know whether the information he received *originated* with a CMS employee, let alone interfered with CMS functions. (*See, e.g.*, A-556/686, A-662/1253-54, A-664-65/1266-70).

The government instead relied on evidence relating to Niles Rosen, which was wholly unrelated to the alleged tipping-and-trading scheme, and is akin to protected lobbying. Although Blaszczak merely contacted Rosen to share his views on coding for genetic testing, the government claimed this violated §371 because a private citizen supposedly obstructs the government by "seek[ing] to alter [governmental] policy." (A-3176). This contravenes both the First and Fifth Amendments. "The First Amendment protects the right of an individual to…petition his government" and "engage in advocacy." *Smith*, 441 U.S. at 464; *accord E. R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961) (courts cannot "lightly impute to Congress an intent to invade" the "right to petition"). Even the most routine political activities—such as lobbying elected officials or organizing a protest—would "seek to alter" policy and thus risk prosecution under the government's interpretation of §371. This breathtaking expansion of the statute, if accepted, would countenance a blatant violation of the First Amendment right of advocacy and free expression. *See id*; *McDonnell*, 136 S. Ct. at 2372 (interpreting criminal law narrowly to avoid "chill[ing]" interaction between government and constituents).

It would also violate due process. We are aware of no case in which §371's "defraud" provision has been used to punish mere advocacy for changes in government policy. Huber had no reason to suspect that petitioning for policy

change—which caused the government no conceivable harm and would potentially help the government by reducing CMS overpayment—would constitute a "conspiracy to defraud the United States." Because "neither the statute nor any prior judicial decision" would have "fairly disclosed" the government's "novel construction" of §371, due process bars that construction. *United States v. Lanier*, 520 U.S. 259, 266 (1997).

The conviction is also unconstitutionally standardless because the government cannot explain when petitioning the government crosses the line from legitimate self-interested advocacy to a crime. *Johnson*, 135 S. Ct. at 2556. This leaves the public entirely in the dark as to how to "conform [its] conduct to the law." *City of Chicago v. Morales*, 527 U.S. 41, 58 (1999). It likewise presents a grave risk of "arbitrary prosecution," because the public would have to rely "upon prosecutorial discretion to narrow the otherwise wide-ranging scope of a criminal statute's highly abstract general statutory language." *Marinello*, 138 S. Ct. at 1109.

There was similarly no proof of the third element, because the government failed to show that Huber agreed to engage in deceitful conduct. Controlling precedent limits the scope of §371's "defraud" clause to "plainly and unmistakably" prohibited conduct. *United States v. Gradwell*, 243 U.S. 476, 485 (1917) (internal quotations omitted); *see, e.g.*, *Skilling*, 561 U.S. at 407-08;

McNally, 483 U.S. at 359-60. And courts of appeals have repeatedly reversed convictions for conduct that was not plainly fraudulent. *E.g.*, *Coplan*, 703 F.3d at 62-76 (reversing where record was "equivocal" that defendant had lied and defendant was under no duty to disclose); *United States v. Caldwell*, 989 F.2d 1056, 1058-61 (9th Cir. 1993) (reversing conviction for merely making it difficult for the IRS to discover taxpayer information); *United States v. Mastronardo*, 849 F.2d 799, 804-05 (3d Cir. 1988) (reversing where governing regulations "d[id] not even intimate" that conduct was illegal); *United States v. Varbel*, 780 F.2d 758, 760-62 (9th Cir. 1986) (same); *United States v. Porter*, 591 F.2d 1048, 1055-57 (5th Cir. 1979) (alleged "fraud" was not "plainly and unmistakably" within §371).

As discussed *supra* (at 32-35), there was no fraudulent or deceitful conduct here. *See In re Grand Jury Subpoena Duces Tecum Dated Sept. 15, 1983*, 731 F.2d 1032, 1040 (2d Cir. 1984) ("a common denominator in the cases in which a §371 conviction has been upheld is the defendant's agreement to make a false representation"); *accord Dennis v. United States*, 86 S. Ct. 1840, 1844 (1966) (filing false affidavits); *Gurary*, 860 F.2d at 524 (aiding the filing of false returns); *United States v. Turkish*, 623 F.2d 769, 771 (2d Cir. 1980) (false income tax deductions).

Nor did Huber bribe, or cause the bribery of, any CMS officials. *Haas v. Henkel*, 216 U.S. 462, 472 (1910) (bribing government official to falsify reports);

United States v. Peltz, 433 F.2d 48, 50 (2d Cir. 1970) (gifting prostitutes to government official in exchange for information). All Huber did was receive information from his consultant and allegedly use it to trade, and the government cannot impose liability for otherwise lawful trading on nonpublic information by resorting to §371. The §371 conviction must be reversed for these additional reasons. *See Coplan*, 703 F.3d at 62-76; *Porter*, 591 F.2d at 1055-57.

3. A finding that the government failed to prove both a conspiracy "to commit any offense against the United States" and a conspiracy "to defraud the United States" would require a reversal with instructions to enter a judgment of acquittal. *See, e.g., Coplan*, 703 F.3d 46. But even if this Court finds just one of the theories to be legally invalid, a new trial would be required. The objects of the the conspiracy to commit an offense were §641 conversion and §10(b) fraud. The conversion charge was not only factually, but also legally invalid because predictions about recommended policy changes are not a "thing of value" under §641, it violated due process, and the jury was improperly instructed as to conscious avoidance. The jury returned a general verdict (A-1048/3984-85), and was not asked to identify which object of the §371 conspiracy was proven (A-3082). This makes it impossible to tell which theory (or theories) the jury relied upon when convicting Huber under §371. Accordingly, the conviction may have been predicated upon the legally invalid §641 object.

Where, as here, "a jury is presented with multiple theories of conviction, one of which is invalid, the jury's verdict must be overturned if it is impossible to tell which theory formed the basis for conviction." *Szur*, 289 F.3d at 208; *accord* *McDonnell*, 136 S. Ct. at 2375 (requiring new trial because it was "possible" that the jury convicted on invalid theory); *United States v. Garcia*, 992 F.2d 409, 416 (2d Cir. 1993) ("if any of the theories was legally insufficient, then the verdict must be reversed").

CONCLUSION

The judgment should be reversed and the case remanded with instructions to enter a judgment of acquittal. Alternatively, the judgment should be vacated and the case remanded for a new trial.

Dated: New York, New York
March 5, 2019

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENT, AND TYPE STYLE REQUIREMENT

1. The undersigned counsel of record for Defendant-Appellant Theodore Huber certifies pursuant to Federal Rules of Appellate Procedure 32(g) and Local Rule 32.1 that the foregoing brief contains 13,817 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the Word Count feature of Microsoft Word 2016.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point font of Times New Roman.

Dated: March 5, 2019

___/s/ Barry H. Berke_____
Barry H. Berke

SPECIAL APPENDIX

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SPA-1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------x

UNITED STATES OF AMERICA,

-against-

17-cr-357 (LAK)

DAVID BLASZCZAK, et al.,

Defendants.

----------x

ORDER

LEWIS A. KAPLAN, *District Judge.*

Defendant Theodore Huber's motion for dismissal of the indictment [DI 77] is denied for the reasons indicated in open court on December 20, 2017.

SO ORDERED.

Dated: March 29, 2018

Lewis A. Kaplan
United States District Judge

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1

UNITED STATES DISTRICT COURT

Southern District of New York

UNITED STATES OF AMERICA
v.
THEODORE HUBER

JUDGMENT IN A CRIMINAL CASE

Case Number: 1:(S1)17-CR-357-002(LAK)

USM Number: 79124-054

Mr. Barry H. Berke, Esq., 212-715-9500
Defendant's Attorney

THE DEFENDANT:

☐ pleaded guilty to count(s) _____

☐ pleaded nolo contendere to count(s) _____
which was accepted by the court.

☑ was found guilty on count(s) (S1)1, (S1)2, (S1)3, (S1)9, and (S1)10.
after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 371	Conspiracy to Convert Property of the United States, to Commit Securities Fraud and Defraud the United States	12/31/2014	(S1)1
18 U.S. § 1349	Conspiracy to Commit Wire and Securities Fraud	12/31/2014	(S1)2

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☑ The defendant has been found not guilty on count(s) (S1)4, (S1)5, (S1)6, (S1)7, and (S1)8.

☑ Count(s) underlying indictment ☑ is ☐ are dismissed on the motion of the United States.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of material changes in economic circumstances.

USDS SDNY
DOCUMENT
ELECTRONICALLY FILED
DOC #: _____
DATE FILED: SEP 21 2018

9/13/2018
Date of Imposition of Judgment

Signature of Judge

Hon. Lewis A. Kaplan, U.S.D.J.
Name and Title of Judge

9/20/18
Date

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 1A

DEFENDANT: THEODORE HUBER
CASE NUMBER: 1:(S1)17-CR-357-002(LAK)

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. § 641, & § 2	Conversion of Property of United States	7/31/2012	(S1)3
18 U.S.C. § 1343 & § 2	Wire Fraud	7/31/2012	(S1)9
18 U.S.C. § 1348 & § 2	Securities Fraud	7/31/2012	(S1)10

AO 245B (Rev. 02/18) Judgment in Criminal Case
Sheet 2 — Imprisonment

DEFENDANT: THEODORE HUBER
CASE NUMBER: 1:(S1)17-CR-357-002(LAK)

IMPRISONMENT

The defendant is hereby committed to the custody of the Federal Bureau of Prisons to be imprisoned for a total term of:

36 months on each count, the terms to run concurrently. Defendant granted bail pending appeal.

☑ The court makes the following recommendations to the Bureau of Prisons:

That consistent with the policies of the BOP, defendant Huber be designated to a minimum security camp, specifically to FCI Morgantown.

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at _____ ☐ a.m. ☐ p.m. on _____ .

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before 2 p.m. on _____ .

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____

at _____ , with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
DEPUTY UNITED STATES MARSHAL

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 3 — Supervised Release

DEFENDANT: THEODORE HUBER
CASE NUMBER: 1:(S1)17-CR-357-002(LAK)

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of :

2 Years subject to the standard and following special conditions of supervision:

The defendant shall submit his person, residence, place of business, vehicle, and other premises under his control to a search at a reasonable time and in a reasonable manner, on the basis that the probation officer has reasonable belief that contraband or evidence of a violation of the conditions of his release may be found. The search must be conducted at a reasonable time and in a reasonable manner. Failure to submit to a search may be ground for revocation of his supervised release. The defendant shall inform any other residents that the premises may be subject to search pursuant to this condition.

The defendant shall provide the probation officer with any financial information he or she may request.

The defendant shall not incur new credit charges or open additional lines of credit without the approval of the probation officer unless he is in compliance with financial terms imposed by the judgment.

MANDATORY CONDITIONS

1. You must not commit another federal, state or local crime.
2. You must not unlawfully possess a controlled substance.
3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.
   - ☑ The above drug testing condition is suspended, based on the court's determination that you pose a low risk of future substance abuse. *(check if applicable)*
4. ☑ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(check if applicable)*
5. ☑ You must cooperate in the collection of DNA as directed by the probation officer. *(check if applicable)*
6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq.*) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(check if applicable)*
7. ☐ You must participate in an approved program for domestic violence. *(check if applicable)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 3A — Supervised Release

DEFENDANT: THEODORE HUBER
CASE NUMBER: 1:(S1)17-CR-357-002(LAK)

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. For further information regarding these conditions, see *Overview of Probation and Supervised Release Conditions*, available at: www.uscourts.gov.

Defendant's Signature _____ Date _____

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 5 — Criminal Monetary Penalties

DEFENDANT: THEODORE HUBER
CASE NUMBER: 1:(S1)17-CR-357-002(LAK)

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the schedule of payments on Sheet 6.

	Assessment	JVTA Assessment*	Fine	Restitution
TOTALS	$ 500.00	$	$ 1,250,000.00	$ 1,644.26

☐ The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☑ The defendant must make restitution (including community restitution) to the following payees in the amount listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
See schedule of victims filed under seal	$1,644.26	$1,644.26	

TOTALS	$ 1,644.26	$ 1,644.26

☐ Restitution amount ordered pursuant to plea agreement $ _____

☐ The defendant must pay interest on restitution and a fine of more than $2,500, unless the restitution or fine is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 6 may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ the interest requirement is waived for the ☐ fine ☐ restitution.

☐ the interest requirement for the ☐ fine ☐ restitution is modified as follows:

* Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
** Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

AO 245B (Rev. 02/18) Judgment in a Criminal Case
Sheet 6 — Schedule of Payments

DEFENDANT: THEODORE HUBER
CASE NUMBER: 1:(S1)17-CR-357-002(LAK)

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties is due as follows:

A ☑ Lump sum payment of $ 2,144.26 due immediately, balance due

☐ not later than _____, or
☑ in accordance with ☐ C, ☐ D, ☐ E, or ☑ F below; or

B ☐ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☐ F below); or

C ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after the date of this judgment; or

D ☐ Payment in equal _____ *(e.g., weekly, monthly, quarterly)* installments of $ _____ over a period of _____ *(e.g., months or years)*, to commence _____ *(e.g., 30 or 60 days)* after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within _____ *(e.g., 30 or 60 days)* after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☑ Special instructions regarding the payment of criminal monetary penalties:

The $1,250,000 fine shall be paid by 10/11/2018.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during the period of imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers *(including defendant number)*, Total Amount, Joint and Several Amount, and corresponding payee, if appropriate.

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

United States Code Annotated
Title 15. Commerce and Trade
Chapter 2B. Securities Exchanges (Refs & Annos)

15 U.S.C.A. § 78j

§ 78j. Manipulative and deceptive devices

Currentness

<Notes of Decisions for 15 USCA § 78j are displayed in two separate documents. Notes of Decisions for subdivisions I to XVI are contained in this document. For Notes of Decisions for subdivisions XVII to end, see second document for 15 USCA § 78j.>

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.

CREDIT(S)

(June 6, 1934, c. 404, Title I, § 10, 48 Stat. 891; Pub.L. 106-554, § 1(a)(5) [Title II, § 206(g), Title III, § 303(d)], Dec. 21, 2000, 114 Stat. 2763, 2763A-432, 2763A-454; Pub.L. 111-203, Title VII, § 762(d)(3), Title IX, §§ 929L(2), 984(a), July 21, 2010, 124 Stat. 1761, 1861, 1932.)

Footnotes

1 So in original. Probably should be followed by a comma.

15 U.S.C.A. § 78j, 15 USCA § 78j

Current through P.L. 116-5.

Code of Federal Regulations
Title 17. Commodity and Securities Exchanges
Chapter II. Securities and Exchange Commission
Part 240. General Rules and Regulations, Securities Exchange Act of 1934 (Refs & Annos)
Subpart A. Rules and Regulations Under the Securities Exchange Act of 1934
Manipulative and Deceptive Devices and Contrivances (Refs & Annos)

17 C.F.R. § 240.10b–5

§ 240.10b–5 Employment of manipulative and deceptive devices.

Currentness

<Notes of Decisions for 17 CFR § 240.10b–5 are displayed in separate documents. Notes of Decisions for subdivisions I to IX are contained in this document. For text of section, and references, see first document for 17 CFR § 240.10b–5. For Notes of Decisions for subdivisions X to end, see documents for 17 CFR § 240.10b–5, post.>

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.

(Authority: Sec. 10; 48 Stat. 891; 15 U.S.C. 78j)

Credits
[13 FR 8183, Dec. 22, 1948, as amended at 16 FR 7928, Aug. 11, 1951]

AUTHORITY: 15 U.S.C. 77c, 77d, 77g, 77j, 77s, 77z–2, 77z–3, 77eee, 77ggg, 77nnn, 77sss, 77ttt, 78c, 78c–3, 78c–5, 78d, 78e, 78f, 78g, 78i, 78j, 78j–1, 78k, 78k–1, 78*l*, 78m, 78n, 78n–1, 78*o*, 78*o*–4, 78*o*–10, 78p, 78q, 78q–1, 78s, 78u–5, 78w, 78x, 78*ll*, 78mm, 80a–20, 80a–23, 80a–29, 80a–37, 80b–3, 80b–4, 80b–11, 7201 et seq.; and 8302; 7 U.S.C. 2(c)(2)(E); 12 U.S.C. 5221(e)(3); 18 U.S.C. 1350; and Pub.L. 111–203, 939A, 124 Stat. 1887 (2010); and secs. 503 and 602, Pub.L. 112–106, 126 Stat. 326 (2012), unless otherwise noted.; Section 240.3a4–1 also issued under secs. 3 and 15, 89 Stat. 97, as amended, 89 Stat. 121 as amended;; Section 240.3a12–8 also issued under 15 U.S.C. 78a et seq., particularly secs. 3(a)(12), 15 U.S.C. 78c(a)(12), and 23(a), 15 U.S.C. 78w(a);; Section 240.3a12–10 also issued under 15 U.S.C. 78b and c;; Section 240.3a12–9 also issued under secs. 3(a)(12), 7(c), 11(d)(1), 15 U.S.C. 78c(a)(12), 78g(c), 78k(d)(1);; Sections

240.3a43–1 and 240.3a44–1 also issued under sec. 3; 15 U.S.C. 78c;; Sections 3a67–1 through 3a67–9 and 3a71–1 and 3a71–2 are also issued under Pub.L. 111–203, §§ 712, 761(b), 124 Stat. 1841 (2010).; Section 240.3a67–10, 240.3a71–3, 240.3a71–4, 240.3a71–5, and 240.3a71–6 are also issued under Pub.L. 111–203, secs. 712, 761(b), 124 Stat. 1754 (2010), and 15 U.S.C. 78dd(c).; Sections 240.3a71–3 and 240.3a71–5 are also issued under Pub.L. 111–203, sec. 761(b), 124 Stat. 1754 (2010), and 15 U.S.C. 78dd(c).; Section 240.3b–6 is also issued under 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a).; Section 240.3b–9 also issued under secs. 2, 3 and 15, 89 Stat. 97, as amended, 89 Stat. 121, as amended (15 U.S.C. 78b, 78c, 78***o***);; Section 240.9b–1 is also issued under sec. 2, 7, 10, 19(a), 48 Stat. 74, 78, 81, 85; secs. 201, 205, 209, 120, 48 Stat. 905, 906, 908; secs. 1–4, 8, 68 Stat. 683, 685; sec. 12(a), 73 Stat. 143; sec. 7(a), 74 Stat. 412; sec. 27(a), 84 Stat. 1433; sec. 308(a)(2), 90 Stat. 57; sec. 505, 94 Stat. 2292; secs. 9, 15, 23(a), 48 Stat. 889, 895, 901; sec. 230(a), 49 Stat. 704; secs. 3, 8, 49 Stat. 1377, 1379; sec. 2, 52 Stat. 1075; secs. 6, 10, 78 Stat. 570–574, 580; sec. 11(d), 84 Stat. 121; sec. 18, 89 Stat. 155; sec. 204, 91 Stat. 1500; 15 U.S.C. 77b, 77g, 77j, 77s(a), 78i, 78***o***, 78w(a);; Section 240.10b–10 is also issued under secs. 2, 3, 9, 10, 11, 11A, 15, 17, 23, 48 Stat. 891, 89 Stat. 97, 121, 137, 156, (15 U.S.C. 78b, 78c, 78i, 78j, 78k, 78k–1, 78***o***, 78q);; Section 240.12a–7 also issued under 15 U.S.C. 78a et seq., particularly secs. 3(a)(12), 15 U.S.C. 78c(a)(12), 6, 15 U.S.C. 78(f), 11A, 15 U.S.C. 78k, 12, 15 U.S.C. 78(l), and 23(a)(1), 15 U.S.C. 78(w)(a)(1).; Sections 240.12b–1 to 240.12b–36 also issued under secs. 3, 12, 13, 15, 48 Stat. 892, as amended 894, 895, as amended; 15 U.S.C. 78c, 78***l***, 78m, 78***o***;; Section 240.12b–15 is also issued under secs. 3(a) and 302, Pub.L. No. 107–204, 116 Stat. 745.; Section 240.12b–25 is also issued under 15 U.S.C. 80a–8, 80a–24(a), 80a–29, and 80a–37.; Section 240.12g–3 is also issued under 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a).; Section 240.12g3–2 is also issued under 15 U.S.C. 77f, 77g, 77h, 77j, 77s(a).; Section 240.13a–10 is also issued under secs. 3(a) and 302, Pub.L. No. 107–204, 116 Stat. 745.; Section 240.13a–11 is also issued under secs. 3(a) and 306(a), Pub.L. 107–204, 116 Stat. 745.; Section 240.13a–14 is also issued under secs. 3(a) and 302, Pub.L. No. 107–204, 116 Stat. 745.; Section 240.13a–15 is also issued under secs. 3(a) and 302, Pub.L. No. 107–204, 116 Stat. 745.; Section 240.13d–3 is also issued under Public Law 111–203 § 766, 124 Stat. 1799 (2010).; Sections 240.13e–4, 240.14d–7, 240.14d–10 and 240.14e–1 also issued under secs. 3(b), 9(a)(6), 10(b), 13(e), 14(d) and 14(e), 15 U.S.C. 78c(b), 78i(a)(6), 78j(b), 78m(e), 78n(d) and 78n(e) and sec. 23(c) of the Investment Company Act of 1940, 15 U.S.C. 80a–23(c);; Sections 240.13e–4 to 240.13e–101 also issued under secs. 3(b), 9(a)(6), 10(b), 13(e), 14(e), 15(c)(1), 48 Stat. 882, 889, 891, 894, 895, 901, sec. 8, 49 Stat. 1379, sec. 5, 78 Stat. 569, 570, secs. 2, 3, 82 Stat. 454, 455, secs. 1, 2, 3–5, 84 Stat. 1497, secs. 3, 18, 89 Stat. 97, 155

15 U.S.C. 78c(b), 78i(a)(6), 78j(b), 78m(e), 78n(e), 78***o***(c); sec. 23(c) of the Investment Company Act of 1940; 54 Stat. 825; 15 U.S.C. 80a–23(c);; Section 240.13f–2(T) also issued under sec. 13(f)(1) (15 U.S.C. 78m(f)(1));; Section 240.13p–1 is also issued under sec. 1502, Pub.L. 111–203, 124 Stat. 1376.; Section 240.13q–1 is also issued under sec. 1504, Pub.L. 111–203, 124 Stat. 2220.; Sections 240.14a–1, 240.14a–3, 240.14a–13, 240.14b–1, 240.14b–2, 240.14c–1, and 240.14c–7 also issued under secs. 12, 15 U.S.C. 781, and 14, Pub.L. 99–222, 99 Stat. 1737,15 U.S.C. 78n;; Sections 240.14a–3, 240.14a–13, 240.14b–1 and 240.14c–7 also issued under secs. 12, 14 and 17, 15 U.S.C. 781, 78n and 78g;; Sections 240.14c–1 to 240.14c–101 also issued under sec. 14, 48 Stat. 895; 15 U.S.C. 78n;; Section 240.14d–1 is also issued under 15 U.S.C. 77g, 77j, 77s(a), 77ttt(a), 80a–37.; Section 240.14e–2 is also issued under 15 U.S.C. 77g, 77h, 77s(a), 77sss, 80a–37(a).; Section 240.14e–4 also issued under the Exchange Act, 15 U.S.C. 78a et seq., and particularly sections 3(b), 10(a), 10(b), 14(e), 15(c), and 23(a) of the Exchange Act (15 U.S.C. 78c(b), 78j(a), 78j(b), 78n(e), 78***o***(c), and 78w(a)).; Section 240.15a–6, also issued under secs. 3, 10, 15, and 17, 15 U.S.C. 78c, 78j, 78***o***, and 78q;; Section 240.15b1–3 also issued under sec. 15, 17; 15 U.S.C. 78***o***78q;; Sections 240.15b1–3 and 240.15b2–1 also issued under 15 U.S.C. 78***o***, 78q;; Section 240.15b2–2 also issued under secs. 3, 15; 15 U.S.C. 78c, 78***o***;; Sections 240.15b10–1 to 240.15b10–9 also issued under secs. 15, 17, 48 Stat. 895, 897, sec. 203, 49 Stat. 704, secs. 4, 8, 49 Stat. 1379, sec. 5, 52 Stat. 1076, sec. 6, 78 Stat. 570; 15 U.S.C. 78***o***, 78q, 12 U.S.C. 241 nt.;; Section 240.15c2–6, also issued under secs. 3, 10, and 15, 15 U.S.C. 78c, 78j, and 78***o***.; Section 240.15c2–11 also issued under 15 U.S.C. 78j(b), 78***o***(c), 78q(a), and 78w(a).; Section 240.15c2–12 also issued under 15 U.S.C. 78b, 78c, 78j, 78***o***, 78***o***–4 and 78q.; Section 240.15c3–1 is also issued under secs. 15(c)(3), 15 U.S.C. 78***o***(c)(3).; Sections 240.15c3–1a, 240.15c3–1e, 240.15c3–1f, 240.15c3–1g are also issued under Pub.L. 111–203, secs. 939, 939A, 124. Stat. 1376 (2010) (15 U.S.C. 78c, 15 U.S.C. 78***o***–7 note).; Section 240.15c3–3 is also issued under 15 U.S.C. 78***o***(c)(2), 78(c)(3), 78q(a), 78w(a); sec. 6(c), 84 Stat. 1652; 15 U.S.C. 78fff.; Section 240.15c3–3a is also issued under Pub.L. 111–203, §§ 939, 939A, 124. Stat. 1376 (2010) (15 U.S.C. 78c, 15 U.S.C. 78***o***–7 note).; Section 240.15c3–3(o) is also issued under Pub.L. 106–554, 114 Stat. 2763, section 203.; Section 240.15d–5 is also issued under 15 U.S.C.

77f, 77g, 77h, 77j, 77s(a).; Section 240.15d–10 is also issued under 15 U.S.C. 80a–20(a) and 80a–37(a), and secs. 3(a) and 302, Pub.L. No. 107–204, 116 Stat. 745.; Section 240.15d–11 is also issued under secs. 3(a) and 306(a), Pub.L. 107–204, 116 Stat. 745.; Section 240.15d–14 is also issued under secs. 3(a) and 302, Pub.L. No. 107–204, 116 Stat. 745.; Section 240.15d–15 is also issued under secs. 3(a) and 302, Pub.L. No. 107–204, 116 Stat. 745.; Sections 240.15Ba1–1 through 240.15Ba1–8 are also issued under sec. 975, Public Law 111–203, 124 Stat. 1376 (2010). ; Section 240.15Bc4–1 is also issued under sec. 975, Public Law 111–203, 124 Stat. 1376 (2010). ; Sections 240.15Ca1–1, 240.15Ca2–1, 240.15Ca2–2, 240.15Ca2–3, 240.15Ca2–4, 240.15Ca2–5, 240.15Cc1–1 also issued under secs. 3, 15C; 15 U.S.C. 78c, 78*o*–5;; Sections 240.15Fh–1 through 240.15Fh–6 and 240.15Fk–1 are also issued under sec. 943, Pub.L. 111–203, 124 Stat. 1376.; Section 240.15Ga–1 is also issued under sec. 943, Pub.L. 111–203, 124 Stat. 1376.; Section 240.15Ga–2 is also issued under sec. 943, Pub.L. 111–203, 124 Stat. 1376.; Section 240.16a–1(a) is also issued under Public Law 111–203 § 766, 124 Stat. 1799 (2010).; Section 240.17a–3 also issued under secs. 2, 17, 23a, 48 Stat. 897, as amended; 15 U.S.C. 78d–1, 78d–2, 78q; secs. 12, 14, 17, 23(a), 48 Stat. 892, 895, 897, 901; secs. 1, 4, 8, 49 Stat. 1375, 1379; sec. 203(a), 49 Stat. 704

sec. 5, 52 Stat. 1076; sec. 202, 68 Stat. 686; secs. 3, 5, 10, 78 Stat. 565-568, 569, 570, 580; secs. 1, 3, 82 Stat. 454, 455; secs. 28(c), 3–5, 84 Stat. 1435, 1497; sec. 105(b), 88 Stat. 1503; secs. 8, 9, 14, 18, 89 Stat. 117, 118, 137, 155; 15 U.S.C. 78*l*, 78n, 78q, 78w(a); ; Section 240.17a–4 also issued under secs. 2, 17, 23(a), 48 Stat. 897, as amended; 15 U.S.C. 78a, 78d–1, 78d–2; sec. 14, Pub.L. 94–29, 89 Stat. 137 (15 U.S.C. 78a); sec. 18, Pub.L. 94–29, 89 Stat. 155 (15 U.S.C. 78w);; Section 240.17a–23 also issued under 15 U.S.C. 78b, 78c, 78*o*, 78q, and 78w(a);; Section 240.17f–1 is also authorized under sections 2, 17 and 17A, 48 Stat. 891, 89 Stat. 137, 141 (15 U.S.C. 78b, 78q, 78q–1);; Section 240.17g–7 is also issued under sec. 943, Pub.L. 111–203, 124 Stat. 1376.; Section 240.17g–8 is also issued under sec. 938, Pub.L. 111–203, 124 Stat. 1376.; Section 240.17g–9 is also issued under sec. 936, Pub.L. 111–203, 124 Stat. 1376.; Section 240.17h–1T also issued under 15 U.S.C. 78q.; Sections 240.17Ac2–1(c) and 240.17Ac2–2 also issued under secs. 17, 17A and 23(a); 48 Stat. 897, as amended, 89 Stat. 137, 141 and 48 Stat. 901 (15 U.S.C. 78q, 78q–1, 78w(a));; Section 240.17Ad–1 is also issued under secs. 2, 17, 17A and 23(a); 48 Stat. 841 as amended, 48 Stat. 897, as amended, 89 Stat. 137, 141, and 48 Stat. 901 (15 U.S.C. 78b, 78q, 78q–1, 78w);; Sections 240.17Ad–5 and 240.17Ad–10 are also issued under secs. 3 and 17A; 48 Stat. 882, as amended, and 89 Stat. (15 U.S.C. 78c and 78q–1);; Section 240.17Ad–7 also issued under 15 U.S.C. 78b, 78q, and 78q–1.; Section 240.17Ad–17 is also issued under Pub.L. 111–203, section 929W, 124 Stat. 1869 (2010).; Section 240.17Ad–22 is also issued under 12 U.S.C. 5461 et seq.; Section 240.19b–4 is also issued under 12 U.S.C. 5465(e).; Sections 240.19c–4 also issued under secs. 6, 11A, 14, 15A, 19 and 23 of the Securities Exchange Act of 1934 (15 U.S.C. 78*o*–3, and 78s);; Section 240.19c–5 also issued under Sections 6, 11A, and 19 of the Securities Exchange Act of 1934, 48 Stat. 885, as amended, 89 Stat. 111, as amended, and 48 Stat. 898, as amended, 15 U.S.C. 78f, 78k–1, and 78s.; Section 240.21F is also issued under Pub.L. 111–203, § 922(a), 124 Stat. 1841 (2010).; Section 240.31–1 is also issued under sec. 31, 48 Stat. 904, as amended (15 U.S.C. 78ee).

Notes of Decisions (1520)

Current through March 1, 2019; 84 FR 6978.

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 19. Conspiracy

18 U.S.C.A. § 371

§ 371. Conspiracy to commit offense or to defraud United States

Currentness

<Notes of Decisions for 18 USCA § 371 are displayed in two separate documents.>

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.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 701; Pub.L. 103-322, Title XXXIII, § 330016(1)(L), Sept. 13, 1994, 108 Stat. 2147.)

18 U.S.C.A. § 371, 18 USCA § 371
Current through P.L. 116-5.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 31. Embezzlement and Theft (Refs & Annos)

18 U.S.C.A. § 641

§ 641. Public money, property or records

Effective: July 15, 2004
Currentness

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.

CREDIT(S)

(June 25, 1948, c. 645, 62 Stat. 725; Pub.L. 103-322, Title XXXIII, § 330016(1)(H), (L), Sept. 13, 1994, 108 Stat. 2147; Pub.L. 104-294, Title VI, § 606(a), Oct. 11, 1996, 110 Stat. 3511; Pub.L. 108-275, § 4, July 15, 2004, 118 Stat. 833.)

18 U.S.C.A. § 641, 18 USCA § 641
Current through P.L. 116-5.

End of Document

United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 63. Mail Fraud and Other Fraud Offenses (Refs & Annos)

18 U.S.C.A. § 1343

§ 1343. Fraud by wire, radio, or television

Effective: January 7, 2008
Currentness

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.

CREDIT(S)

(Added July 16, 1952, c. 879, § 18(a), 66 Stat. 722; amended July 11, 1956, c. 561, 70 Stat. 523; Pub.L. 101-73, Title IX, § 961(j), Aug. 9, 1989, 103 Stat. 500; Pub.L. 101-647, Title XXV, § 2504(i), Nov. 29, 1990, 104 Stat. 4861; Pub.L. 103-322, Title XXXIII, § 330016(1)(H), Sept. 13, 1994, 108 Stat. 2147; Pub.L. 107-204, Title IX, § 903(b), July 30, 2002, 116 Stat. 805; Pub.L. 110-179, § 3, Jan. 7, 2008, 121 Stat. 2557.)

18 U.S.C.A. § 1343, 18 USCA § 1343
Current through P.L. 116-5.

End of Document

18 U.S.C.A. § 1348

§ 1348. Securities and commodities fraud

Effective: May 20, 2009
Currentness

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. 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));

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

CREDIT(S)

(Added Pub.L. 107-204, Title VIII, § 807(a), July 30, 2002, 116 Stat. 804; amended Pub.L. 111-21, § 2(e)(1), May 20, 2009, 123 Stat. 1618.)

18 U.S.C.A. § 1348, 18 USCA § 1348
Current through P.L. 116-5.

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United States Code Annotated
Title 18. Crimes and Criminal Procedure (Refs & Annos)
Part I. Crimes (Refs & Annos)
Chapter 63. Mail Fraud and Other Fraud Offenses (Refs & Annos)

18 U.S.C.A. § 1349

§ 1349. Attempt and conspiracy

Effective: July 30, 2002
Currentness

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.

CREDIT(S)

(Added Pub.L. 107-204, Title IX, § 902(a), July 30, 2002, 116 Stat. 805.)

18 U.S.C.A. § 1349, 18 USCA § 1349
Current through P.L. 116-5.

End of Document