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Catherine O'Hagan Wolfe, Clerk of Court
United States Court of Appeals for the Second Circuit
Thurgood Marshall Courthouse, 40 Foley Square
New York, NY 10007

June 4, 2021

Re: *United States v. Blaszczak*, Nos. 18-2811, 18-2825, 18-2867, 18-2878

Dear Ms. Wolfe:

Defendants respectfully submit this response to the brief filed by Court-appointed amicus:

A. 1. Kelly *cannot be limited to its facts.* Amicus's entire argument rests on the premise that *Kelly*, the unanimous decision that led the Supreme Court to vacate the prior panel decision, "does not move the needle" and is limited to its "facts." Am.Br.8. That premise is misconceived.

Kelly obliterates the linchpin of the now-vacated decision: that *Cleveland* was a one-off ruling that does not apply to new factual scenarios and offers only "permissible considerations." Op.21. *Kelly* reaffirmed that *Cleveland* sets forth a definitive interpretation of the statutory term "property" that controls *all* property-fraud prosecutions. Both decisions draw a categorical distinction between actions that interfere with the government's "exercise of regulatory power," which cannot be prosecuted as a property crime, and actions that aim to appropriate something of economic value to the government, which can. *Kelly*, 140 S. Ct. at 1572 (citing *Cleveland*, 531 U.S. at 23); *see also, e.g.*, *McNally v. United States*, 483 U.S. 350, 359-61 (1987). That the Supreme Court would draw that distinction should not be surprising. The term "property" has a well-understood meaning: it is something with economic value in the hands of its possessor. It is not a term that can be molded like clay to cover any conduct a prosecutor finds objectionable.[1]

[1] Amicus argues (at 13) that the government can hold a property interest even if it suffers no "economic loss." That is true (and ensures that the fraud statutes cover schemes that are ultimately unsuccessful). But it is irrelevant here. The question is whether the government has an "economic" *interest* in the object of a scheme, not whether the government actually suffered some out-of-pocket *loss*. *Cleveland*, 531 U.S. at 20, 22, 24; *see also, e.g.*, *Kelly*, 140 S. Ct. at 1573.

Kelly also controls the analysis here in other ways. It makes clear that an incidental expenditure of government "time and resources" does not qualify as an economic interest. *See* pp. 5-6, *infra*. And it confirms that when the government is making what is in effect a licensing decision about who should have access to something in the government's hands—whether it be a bridge lane or a piece of information—then the government is acting as sovereign, not as property holder. *See* 140 S. Ct. at 1568-69, 1573 ("right[] to 'allocation, exclusion, and control'" is regulatory).

Amicus asserts that because certain references *Kelly* and *Cleveland* make to the "rights of allocation, exclusion, and control" are preceded by the words "that" and "these," those decisions cover only the "*specific* exercises of regulatory rights" at issue in those particular cases. Am.Br.11. That is just another variation on the mistaken theme that *Kelly* and *Cleveland* are limited to their facts. Again, those decisions set forth a definitive interpretation of the term "property," broadly holding that "[t]he State's 'intangible rights of allocation, exclusion, and control'—its prerogatives over who should get a benefit and who should not—do 'not create a property interest.'" *Kelly*, 140 S. Ct. at 1572; *see, e.g.*, *id.* ("scheme to alter" a "regulatory choice is not one to appropriate the government's property"). Application of that principle here leaves no doubt that the relevant government interest is regulatory, not economic—and that no government property right exists.

Amicus also erroneously suggests that reversal here would result in "every property interest" being "abstracted and recast as an act of [government] licensure." Am.Br.3. That is a red herring. A traditional economic interest in a piece of property like a "car," *id.* at 11, is a protected property interest. The government could sell a car and would have to pay money to replace it, and if someone takes the car (denying the government its use), then the government has lost something of economic value. *See Morissette v. United States*, 342 U.S. 246, 271 (1952). The situation in *Kelly*, and in this case, is very different. The government possesses no economic interest in doling out

the right to use a lane on the George Washington Bridge, or the right to know a piece of regulatory information. And when someone else obtains access, the government does not lose the use of the bridge lane, or the ability to itself know and use the relevant information. The government is thus acting as a sovereign gatekeeper, and not as a property owner.

In addition, amicus asserts (at 8, 12) that nothing in *Kelly* limits the scope of *Carpenter*. But *Kelly* reinforces the primacy of *Cleveland*, and *Cleveland* makes clear that *Carpenter* is limited to confidential *business* information. *See* 531 U.S. at 19, 23; *see* Op.21-22 (relying "most significant[ly]" on *Carpenter* given erroneous conclusion that *Cleveland* has limited applicability). That is not surprising, because *Carpenter*'s conclusion that "confidential business information" is property, 484 U.S. at 26, says nothing about whether the government, which is decidedly not a business, has the requisite economic interest in its own confidential information. Plainly no such interest exists in the information at issue here. Private businesses use confidential information to make a profit, including (as in *Carpenter*) by selling it to others. That is why the Court referred to such information as a business's "stock in trade" (*i.e.*, the merchandise it sells). *Id.* The government, by contrast, uses confidential information like that at issue here to *govern*, which is why its interest is a sovereign regulatory one, not an economic one.

2. Kelly *is not otherwise distinguishable*. Amicus tries to distinguish *Kelly* in multiple other ways, all unpersuasive.[2]

Amicus insists (at 10) that the object of the alleged fraud here was not regulatory action because defendants did not seek to "change CMS's ultimate healthcare reimbursement rates" and

[2] Amicus assumes that the prior panel decision remains binding unless *Kelly* displaced it in the most direct fashion possible. That is incorrect. The Supreme Court has vacated that prior decision. This newly constituted panel must therefore look at this case afresh, with *Kelly* in mind—and reversal is equally warranted whether *Kelly* compels that result or simply indicates that it is correct.

there was "no established regulatory process" for public release of confidential CMS information. That makes no sense. Undoubtedly the government's interest would be regulatory in those situations. But that hardly suggests that the government's interest in controlling who may possess certain information about a proposed regulation at a certain time is not *also* a regulatory one. Amicus herself argues that here the government's exercise of control was intended to smooth CMS's processes and create better "policy." Am.Br.13-14. Nothing could be more regulatory than that.

Amicus also contends (at 10) that the object of the alleged scheme here was not regulatory action because defendants sought private gain, whereas "the *Kelly* defendants changed *public* use of the roadways." But because the inquiry is about whether the object of a supposed scheme is "'property' in the government regulator's hands,'" *Cleveland*, 531 U.S. at 20, a defendant's pecuniary motive is irrelevant. And in the passage amicus cites, *Kelly* explains that the government interest at stake there was purely regulatory because changing who had access to the bridge lanes did not "take" the lanes away "from the Government." 140 S. Ct. at 1573. Here, too, defendants did not deprive the government of anything that belonged to it; regardless of disclosure, the government still had all of the same information in its hands and kept on using it just as before. As in *Kelly*, then, the only thing at stake here was access, which is what confidentiality is all about—and the question of who gets such access is a "quintessential[ly]" regulatory one. *Id*. at 1572.[3]

Finally, amicus argues (at 15) that *Kelly* is distinguishable because confidential government information has traditionally been considered government property. But the decisions to which amicus points do not come close to supporting that proposition. Two of those decisions concern

[3] Amicus asserts in passing that although "denial of the creation of a new property interest" is a "regulatory right," denial of "access" to something in the government's hands is not. Am.Br.11-12. That distinction is invented out of whole cloth. And it contradicts *Kelly*, which deemed denial of access to a government road to involve only a regulatory interest. 140 S. Ct. at 1572-73.

bidding information on government contracts, where the government stands to lose *money*—which the text of the fraud statutes covers separately from "property"—as a direct consequence of disclosure. All of the decisions predate *Cleveland*—although not by so long as to root amicus's argument in any history or tradition. None involves regulatory information. And most fail to meaningfully analyze whether information can constitute government property or a thing of value.

3. Kelly*'s "object of the fraud" analysis governs*. Amicus's effort to distinguish *Kelly*'s "object of the fraud" analysis likewise lacks merit. The prior panel rested its ruling on a notion *Kelly* has emphatically rejected: that a government property interest can exist based on merely incidental interference with employee "time and resources." Op.23; *see* 140 S. Ct. at 1573.[4]

Amicus contends that "the original panel analyzed the economic impact on CMS . . . because economic loss to CMS tended to show CMS's property interests in the information." Am.Br.16. That is an unabashed attempt to duck *Kelly*'s unequivocal holding. A "government's right to its employees' time and labor" is relevant to the existence of property fraud only if that right "play[s] more than some bit part in a scheme: It must be an 'object of the fraud,'" such as when a parks commissioner directs her employees to perform gardening services for political contributors. *Kelly*, 140 S. Ct. at 1573. But the "time and labor" of CMS employees or the "CMS Director[]" were not objects of the alleged scheme in this case. Am.Br.13-14. Under *Kelly*, that is the end of the matter. If amicus were right that investment of government "time and resources" could nevertheless somehow "tend[] to show" the requisite government economic interest, Am.Br.16-17, then *Kelly* would have come out the other way. *See Kelly*, 140 S. Ct. at 1573-74 (discussing

[4] Contrary to amicus's suggestion (at 16), *Kelly* never suggests that government data is property; it simply explains that the employee effort expended in connection with the wrongdoing in that case was not the object of the scheme because defendants were not trying to obtain the employees' "time and labor," which involved in part generation of new traffic data. 140 S. Ct. at 1573-74.

"implementation costs of the defendants' scheme to reallocate the Bridge's access lanes"). So too would *Cleveland*, where employees plainly devoted time and effort to licensing issues (and where issuance of a license also created a stream of revenue for the state). *See id.* at 1574. Indeed, such a reading would revive the discredited "honest services" interpretation of the property-fraud statutes. *See McNally*, 483 U.S. at 352, 359-60; *Skilling v. United States*, 561 U.S. 358, 409 (2010).

Amicus's other efforts to show that the government had an economic interest here also fail. Amicus says that the government identified an economic interest by showing that disclosure "impeded" the agency's "effectiveness." Am.Br.13-14. That is a self-evidently *regulatory* interest relating to the agency functioning—not an economic one. The government is not a for-profit enterprise whose bottom line improves when its employees are more efficient. Amicus also says the information derived from government employees' "specialized knowledge and expertise." Am.Br.17. But that does not change the fact that the government's interest in the information was solely regulatory—and it does not distinguish *Cleveland* or *Kelly*, where government employees undoubtedly brought considerable knowledge and expertise to bear on whether to issue a license and whether and how to redirect traffic. *See, e.g.*, 140 S. Ct. at 1569. Finally, amicus asserts that the government has an interest as an employer in its employees' work. Am.Br.15-16. But amicus does not even try to explain why the government's status as an employer has any relevance, and *Kelly* is crystal clear that mere expenditure of time and effort by government employees does not suffice unless that expenditure is itself the object of the allegedly fraudulent scheme.

4. Girard *is not binding*. Finally, as to the meaning of "thing of value" in the conversion statute (Section 641), amicus incorrectly insists that *Girard* binds this panel. Am.Br.8-9. *Girard* depends on a broad understanding of "property," 601 F.2d at 71, and interprets a term that necessarily means the same thing as "property," *see* 18 U.S.C. § 641 (encompassing "thing of value" in

referring to "the value of such property" and defining "value" as "par, or market value, or cost price, either wholesale or retail"); Def.Remand.Br.23-24; Olan.Opening.Br.39-40. *Girard* thus is no longer good law in light of *Kelly* and *Cleveland*, which explain that the government lacks a property interest where it lacks an economic interest in the purported property. *See, e.g.*, *Kelly*, 140 S. Ct. at 1573. This panel is entitled to so hold—regardless of whether the Supreme Court has specifically discussed *Girard* or Section 641. *See, e.g.*, *Doscher v. Sea Port Grp. Sec., LLC*, 832 F.3d 372, 378 (2d Cir. 2016) ("three-judge panel" may "overrule[] Circuit precedent" if "intervening Supreme Court decision casts doubt," even if that decision's "effect" is "'subtle'").

In any event, *Girard* is readily distinguishable for the reason Judge Kearse gave in her dissent: unlike this case, it involved information that the government could no longer use, and that therefore lost all value to the government, after disclosure. Dissent.4-5. The relevant question is not, as amicus suggests, whether disclosure may affect the smoothness of the government's internal process, Am.Br.14.n.2; that is just another form of amicus's erroneous argument that expenditure of government employee time is somehow relevant here. Rather, the question is whether the information *itself* loses value to the government if disclosed. In this case, the value of the information to the government was unaffected, and the government continued to use it just as before. Dissent.5.

B. 1. ***Constitutional avoidance and other canons dictate reversal***. Amicus's answer to the grave First Amendment and federalism problems raised by her argument is to say that those problems do not arise on the specific facts presented here. Am.Br.19. As the Supreme Court has explained, however, courts may not follow an "interpretive approach" that "render[s] every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case." *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005). Rather, a court must adopt a unitary statutory interpretation that would avoid constitutional problems in *any*

case, *see id.* (constitutional avoidance canon "vindicate[s]" a litigant's "own *statutory* rights")—especially if an overbroad interpretation could chill the exercise of First Amendment rights, *see, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 327 (2010).

If this Court were to adopt amicus's position, then the First Amendment rights of journalists, whistleblowers, and others who shed light on government functioning would be eviscerated, and federalism would be seriously threatened. Amicus mystifyingly suggests that the relevant First Amendment question is whether "a whistleblower who reveals government malfeasance" should be "found guilty of insider trading," Am.Br.19-20—but federal conversion and wire-fraud liability does not depend on the existence of stock trading. On amicus's reading of the statute, for instance, the conversion crime is completed the instant that the government employee makes an unauthorized disclosure of confidential information, irrespective of what anyone does with it. In addition, there is no basis for treating state- and local-government information any differently from federal-government information for purposes of the federal fraud statutes, and amicus offers no such distinction. Amicus's interpretation thus would insert federal prosecutors into state and local affairs in exactly the way that *Kelly*, *Cleveland*, and *McNally* disapproved. *See Kelly*, 140 S. Ct. at 1574.

Amicus also cannot avoid her interpretation's other fatal problems. As to circumvention of the careful limitations the Supreme Court has placed on honest-services fraud, amicus says only that she believes that criminal liability is warranted because "this was a case about insider trading—an act already understood to be wrongful under 15 U.S.C. §§ 78j(b) and 78ff." Am.Br.19. That is a non sequitur. The jury *acquitted* defendants of Title 15 insider trading; the question is whether *other* criminal statutes should be interpreted in a "sweeping[ly] expans[ive]" way, *Kelly*, 140 S. Ct. at 1574, thus allowing prosecutors to punish (for instance) trading not involving personal benefit to a tipper or deprivation of honest services without any bribe or kickback. *Kelly* and

numerous other Supreme Court decisions warn against just such a "ballooning of federal power." *Id.* at 1568; *see, e.g.*, *id.* (wire-fraud statute does not "criminalize all" forms of "wrongdoing").

As to wiping off the books Congress's careful choices about how and when to punish disclosure of confidential government information, amicus says only that federal statutes sometimes overlap. That, too, misses the point. Under amicus's interpretation of the provisions at issue here, the statutes specifically criminalizing disclosure of certain confidential government information (which postdate the earliest enacted fraud statute) would become largely superfluous—displaced by a regime covering much more ground and, in many cases, inflicting much harsher punishment. Def.Remand.Br.21-22. That cannot be what Congress intended. It is for Congress, not this Court, to decide whether federal criminal law should penalize disclosure of categories of government information not already covered by Congress's detailed statutory scheme.[5]

2. ***Amicus's policy arguments fail.*** Having failed to refute those dispositive arguments, amicus asserts that in confessing error the government has perversely chosen to adopt an interpretation of the criminal law that would harm the United States. That is incorrect. First, amicus asserts that adopting the approach taken in Judge Kearse's dissent would mean that "the most sensitive and proprietary government information" would be "categorically entitled to lesser protection than confidential information belonging to private businesses." Am.Br.17; *see id.* at 12. That assertion disregards the many federal statutes that criminalize disclosure of classified or confidential gov-

[5] In addition, a distinct separation-of-powers concern has recently arisen: the Executive Branch, which has "broad discretion to enforce the Nation's criminal laws," *United States v. Armstrong*, 517 U.S. 456, 464 (1996), has conceded that the relevant convictions are invalid. For this Court to rebuff that concession would be highly unusual. Indeed, this Court recently granted the government's motion to dismiss a criminal appeal based on the government's confession of error *in this case*. *See United States v. Aytes*, No. 19-3981, Dkt. Nos. 65, 70 (2d Cir. Apr. 12-13, 2021).

ernment information under specific circumstances—which Congress is, of course, free to supplement. *See* p. 9, *supra*. It also disregards Title 15 insider-trading statutes and the honest-services fraud statute, which can capture wrongdoing involving government information. More broadly, there is nothing surprising about the fact that some things that are property in private hands are not property in the hands of the government. Indeed, that is the premise behind both *Cleveland* and *Kelly*; if something has economic value in the hands of a private business but not in the hands of the government, then the property analysis comes out differently in those different contexts.[6]

Second, amicus claims that if the regulatory information here is not government property then the government risks never having any property interests—not even in "car[s]" or "furniture." Am.Br.11, 18. That is nonsensical. As discussed, the government has a self-evident economic interest in cars, furniture, and other traditional forms of property in its hands. *See* Dissent.5-6.

Amicus's understanding of federal criminal law is untenable. It cannot be reconciled with *Kelly*, which reflects the Supreme Court's long-time insistence on narrow interpretation of the fraud statutes. And it distorts the statutory language at issue so as to give prosecutors essentially unlimited power over those who disclose any confidential government information, thus creating extremely serious constitutional problems. This Court should not transform each of the billions of pieces of confidential federal, state, and local government information into government property, thereby giving public officials—who can label as confidential any information they choose—virtually complete control over citizens' access to knowledge about how they are being governed. Instead, the Court should accept the government's concession of error and reverse the convictions.

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[6] That premise does not, as amicus asserts, impose a "major limitation" on *Carpenter* (Am.Br.12), because *Carpenter* says nothing about how to analyze whether confidential information is "property in the hands of" a *government* "victim." *Cleveland*, 531 U.S. at 15. *Pasquantino* (cited at Am.Br.12) does not help amicus either, since that case involved the government's "right to be paid money"—a "straightforward 'economic' interest." *Pasquantino*, 544 U.S. at 356-57.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on June 4, 2021, I electronically filed the foregoing Response with the United States Court of Appeals for the Second Circuit using the CM/ECF system and that parties or their counsel of record are registered ECF filers and will be served by the CM/ECF system.

Dated: June 4, 2021

/s/ *Donald B. Verrilli, Jr.*
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