18-2811(L),

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

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

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

On Appeal from the United States District Court
for the Southern District of New York, No. 17-cr-357 (Kaplan, J.)

BRIEF FOR AMICUS CURIAE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITION FOR REHEARING OR REHEARING EN BANC

LINDSAY A. LEWIS
VICE CHAIR, AMICUS CURIAE COMMITTEE OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
29 Broadway, Suite 1412
New York, NY 10006

PETER G. NEIMAN
NICHOLAS R. WERLE
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800

Counsel for Amicus Curiae NACDL

February 10, 2020

CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES, RULES, AND REGULATIONS

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

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

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

[1] The parties to this appeal have consented to the filing of this brief. Pursuant to Fed. R. App. P. 29(a)(4)(E), amicus states that no party's counsel authored this brief in whole or in part, and that no party or person other than amicus or its counsel contributed money toward the preparation or filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

This prosecution's theory in this case was that if a government agency designates information as "confidential," the information becomes the government's property, and under general theft and fraud statutes, it is a *felony*, punishable by as much as 25 years in prison, to share or receive that information without permission.

Unfortunately, the Panel majority (over the dissent of Judge Kearse) fully embraced the prosecution's theory, squarely holding that designating information as "confidential" is enough to give the government a "property interest" in that information. The Panel made perfectly clear that sharing or disclosing confidential information in which the government has such a property interest is a crime, *even if nobody trades on the confidential information.* In the Panel's view, "the relevant 'interference' with [the government's] ownership of confidential information [i]s complete upon the unauthorized disclosure." Panel Op. at 35.

That theory of government property has broad and profound implications well beyond the alleged insider trading at issue here. It would turn the general fraud and theft statues into an official-secrets act, and it would make sharing information with the press a serious crime, notwithstanding the media's centrality to democratic government.

Consider: a government employee learns, from documents labeled "confidential" by agency leaders, that they plan to enact a regulation, which agency experts have concluded will disserve the public but that will enrich a political appointee's powerful patron. So, she calls a journalist and relays this information in the hope that publication will lead to public pressure and cause the agency to change course. The journalist uses the information to write an article, which proves to be profitable for his newspaper. Under the Panel's opinion, both the whistleblower's and the journalist's conduct would satisfy each element of the charged offenses.[2]

The government may protest that it would never use the authority granted by the Panel decision to criminalize reporting or punish whistleblowers. But there is no reason to have confidence in such protests, and in any event, they are legally insufficient. The Court "cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *McDonnell v. United States*, 136 S. Ct. 2355, 2372-73 (2016).

[2] Indeed, a journalist could be convicted under Section 641 for using any information that she knows is derived from "confidential" government documents, even if she didn't participate in the leak. *See* Eugene Volokh, *Journalists Might Be Felons for Publishing Leaked Governmental "Predecisional Information,"* The Volokh Conspiracy (Jan. 27, 2020), https://reason.com/2020/01/27/journalists-might-be-felons-for-publishing-leaked-governmental-predecisional-information.

Rather, core principles of statutory construction require courts to reject interpretations that would wildly expand the reach of ordinary criminal statutes, particularly interpretations that cast a "pall of prosecution" around First Amendment activity. *McDonnell*, 136 S. Ct. at 2372. And the Supreme Court has directed courts to "resist reading [a statute] expansively" when the broad construction would permit prosecutors to charge conduct fundamentally unlike the conduct that Congress intended to prohibit. *Yates v. United States*, 135 S. Ct. 1074, 1088-1089 (2015) (plurality).

This Court should grant rehearing *en banc*.

ARGUMENT

I. DESIGNATING INFORMATION AS CONFIDENTIAL IS NOT ENOUGH TO MAKE IT "PROPERTY" IN THE GOVERNMENT'S HANDS

To sustain charges under the fraud statutes, the government must establish that "the thing obtained [was] property in the hands of the victim." *Cleveland v. United States*, 531 U.S. 12, 15 (2000). Schemes to impair a public entity's regulatory interests fall outside the ambit of the fraud statutes. *See id.* at 20-23. If the government's "core concern is *regulatory*," *id.* at 20, the rights at issue are not property rights protected under the fraud statutes.

In finding that the government had a property interest in the rumors about potential regulatory changes at issue in this case, the Panel majority relied heavily on the Supreme Court's decision in *Carpenter v. United States*, 484 U.S. 19, 25

(1987). *Carpenter* held that a scheme to fraudulently obtain a newspaper's planned articles—its "stock in trade"—and transact securities using that information violated the federal fraud statutes. *Id.* at 26. But *Carpenter*'s recognition that one kind of confidential information is a form of property—information that a commercial enterprise can sell precisely because it is unknown to others—hardly implies that *all* confidential information is property for the purposes of the fraud statutes.

There are good reasons to treat differently the information at issue here. The premise of the First Amendment is that there is a very strong public interest in government transparency. Disclosure of information about the government's policy plans that the government would prefer to keep secret ought not be made criminal absent *very* clear evidence of Congressional intent, of which there is *none* here.

The Panel decision reckoned neither with the special kind of information at issue in *Carpenter* nor with the important First Amendment implications of criminalizing disclosures about a government agency's regulatory planning. Instead, the Panel viewed as sufficient the fact that the government had a "right to exclude the public from accessing its . . . information." Panel Op. at 22. But the Supreme Court rejected precisely that reasoning in *Cleveland*, holding that "[a]

right to exclude in [a] governing capacity is not one appropriately labeled 'property.'" 531 U.S. at 24.

Nor does the government's purported "economic interest" in its confidentiality rules justify making it a felony to disclose rumors about contemplated regulatory changes. The government invests some resources in everything it does; that banal fact cannot criminalize every act that makes the government's bureaucratic procedures less efficient (such as a healthy dose of public scrutiny). And again, *Cleveland* already rejected this argument, finding that an agency's "substantial economic stake" in the allocation of video poker licenses did not convert that license into property in the government's hands. 531 U.S. at 22. Indeed, the government's economic interest in its confidentiality rule is far vaguer than Louisiana's concrete economic stake in the video poker licenses misallocated in *Cleveland*, since the State collected a portion of the gambling revenue generated by each licensed device. *Id.*

The Panel's construction of "property" threatens to criminalize a wide range of lawful conduct in contravention of binding Supreme Court precedent. These errors justify rehearing by the *en banc* Court.

II. THIS COURT SHOULD NOT EXPAND SECTION 641 AND PROVIDE THE GOVERNMENT WITH AN ALL-PURPOSE TOOL FOR PROSECUTING LEAKS

The Panel read *United States v. Girard*, 601 F.2d 69 (2d Cir. 1979), to require the conclusion that confidential, predecisional information about a

contemplated regulation is a "thing of value" under 18 U.S.C. § 641, noting that "we are not at liberty to reconsider *Girard* here." Panel Op. at 39. But *Girard* is distinguishable. In *Girard*, a DEA agent was convicted of accessing a law enforcement database, obtaining specific records containing the identities of confidential informants, and selling that information to drug traffickers. *See* 601 F.2d at 70. *Girard* thus finds support in Section 641's plain text, which lists "records" as among the species of government property protected. But that reasoning does not cover the information at issue here—predictions about the likely outcome of a regulatory decision-making process—which is not alleged to have been located in any specific government record. It is also clear in *Girard* how the "[c]onfidentiality … enhance[d] the value of the information," since the informants had value to the DEA only insofar as their identities remained secret. J. Kearse Dissent at 5. In this case, however, (unlike in both *Girard* and *Carpenter*) disclosure did not destroy the value (to the owner) of the information in question: the government in fact adhered to its decision, notwithstanding its premature disclosure. J. Kearse Dissent at 6-7. The defendants thus did not take anything of value from the government. Since *Girard's* logic does not apply to these facts, the Panel erred by holding, without additional reasoning, that *Girard* controlled.

But even if *Girard* dictated this result, the *en banc* Court should rehear this appeal so it can overrule *Girard* to the extent that decision converts Section 641

into a boundless tool for prosecuting any unauthorized disclosure of government information. The vibrant public discourse guaranteed by the First Amendment requires greater protection than a prosecutor's indulgence. *See McDonnell*, 136 S. Ct. at 2372-2373. When, as here, "the most sweeping reading of [a] statute would fundamentally upset" constitutional constraints on federal prosecution, it "gives . . . serious reason to doubt the Government's expansive reading . . . and calls for [courts] to interpret the statute more narrowly." *Bond v. United States*, 572 U.S. 844, 866 (2014).

The government deems many things confidential. Some leaks threaten national security, others imperil confidential informants, and some risk only officials' embarrassment or administrative inconvenience. Accordingly, Congress enacted separate, measured, and differentiated regimes of disciplinary, civil, and criminal sanctions to reconcile control over various types of government information with the needs of democratic governance. Where the criminal law protects sensitive government information, targeted offenses deal only with specific information types. *See, e.g.*, 18 U.S.C. § 1906 (protecting information from a bank examination). Congress also included *mens rea* elements in statutes criminalizing information disclosure to ensure, for example, that the defendant acted in knowing derogation of duty. *See, e.g.*, 18 U.S.C. § 1902 (no prosecution for disclosure of information affecting the value of agricultural products unless

defendant had actual knowledge of applicable rules). Offenses with less restrictive *mens rea* requirements cover only national security information or classified information. *See, e.g.*, 18 U.S.C. §§ 793, 798. More general constraints on disclosure have lesser penalties. For instance, there is a civil service regulation providing that: "[a]n employee shall not engage in a financial transaction using nonpublic information, nor allow the improper use of nonpublic information to further his own private interest or that of another, whether through advice or recommendation, or by knowing unauthorized disclosure." 5 C.F.R. § 2635.703(a). Violation of this regulation renders a federal employee subject to discipline, including possible termination, but is not itself a crime. *See id.* §§ 2635.102(g), 2635.106.

The Panel's expansive interpretation of Section 641 replaces the existing, nuanced system for regulating disclosure of confidential government information with a single, one-size-fits-all rule: All unauthorized disclosures of information the government views as confidential, on any topic at all, are felonies, punishable by up to ten years in prison. The Panel did not so much as acknowledge this displacement of Congress's specific and varied information control regimes, let alone justify why it rejected the traditional presumption that Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary

provisions—it does not, one might say, hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001).

The Supreme Court rejected a similar misinterpretation of a general theft statute in *Dowling v. United States*, 473 U.S. 207 (1985). *Dowling* addressed a conviction under the National Stolen Property Act, 18 U.S.C. § 2314, for interstate transport of bootleg records that were "'stolen, converted[,] or taken by fraud' only in the sense that they were manufactured and distributed without the consent of the copyright owners of the music[]." 473 U.S. at 208. Surveying the history of copyright-enforcement provisions, the Court emphasized that "[n]ot only has Congress chiefly relied on an array of civil remedies to provide copyright holders protection against infringement, but in exercising its power to render criminal certain forms of copyright infringement, it has acted with exceeding caution." *Dowling*, 473 U.S. at 221 (citation omitted). The Court criticized that by treating an unauthorized reproduction of intangible information as no different from a stolen thing, "[t]he Government thereby presumes congressional adoption of an indirect but blunderbuss solution to a problem treated with precision when considered directly. To the contrary, the discrepancy between the two approaches convinces us that Congress had no intention to reach copyright infringement when it enacted § 2314." *Id.* at 226.

Section 641 is just as much a "blunderbuss" solution to confidentiality breaches as Section 2314 was to copyright infringement. If anything, "precision" is even more important here, given the enormous tensions between secrecy and democratic governance. *Dowling* thus justifies rejecting the government's attempt to expand Section 641, a general anti-theft offense, into an all-purpose tool for prosecuting leaks.

CONCLUSION

Amicus therefore respectfully requests that the *en banc* Court rehear the defendants' appeal.

Respectfully submitted,

/s/ *Peter Neiman*

PETER G. NEIMAN
NICHOLAS R. WERLE
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007
(212) 230-8800

Counsel for Amicus Curiae NACDL

LINDSAY A. LEWIS
VICE CHAIR, AMICUS CURIAE
COMMITTEE OF THE NATIONAL
ASSOCIATION OF CRIMINAL DEFENSE
LAWYERS
29 Broadway, Suite 1412
New York, NY 10006

February 10, 2020

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 29(b)(4) and 32(a)(7)(B).

1. Exclusive of the exempted portions of the brief, as provided in Fed. R. App. P. 32(f), the brief contains 2,210 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied on the word count feature of this word processing system in preparing this certificate.

/s/ *Peter G. Neiman*
PETER G. NEIMAN