23-7038

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA,

Appellee,

– v. –

NATHANIEL CHASTAIN, AKA Sealed Defendant 1,

Defendant-Appellant.

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

BRIEF FOR *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF DEFENDANT-APPELLANT NATHANIEL CHASTAIN

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STATEMENT OF INTEREST OF AMICUS CURIAE[1]

New York Council of Defense Lawyers ("NYCDL") is a non-profit organization of approximately 350 criminal defense lawyers, including many former prosecutors, whose principal area of practice is the defense of criminal cases, particularly in the federal courts in New York. Its purposes are, among other things, to support the criminal defense function by enhancing the quality of defense representation and to take positions on important defense issues. NYCDL offers the Court the perspective of experienced practitioners who defend some of the most significant and complex criminal cases in the federal courts and who routinely defend against wire and mail fraud charges.

NYCDL files this amicus brief in support of Defendant-Appellant Nathaniel Chastain's argument that the government's interpretation of the wire fraud statute—which the District Court adopted—improperly expands the meaning of "property." Confidential business information that lacks commercial value, no matter how closely held, is not property as traditionally defined and, thus, not "property" under 18 U.S.C. §§ 1341 or 1343. Holding otherwise makes a federal crime of a broad swath of workplace misconduct typically regulated by state tort and contract law. NYCDL submits this amicus brief because it is deeply concerned

[1] No party or counsel for a party in this case authored this brief in whole or in part or made any monetary contribution to its preparation or submission. Both parties have given their consent to the filing of this amicus brief.

about prosecutions and court decisions that expand the scope of wire and mail fraud beyond the boundaries that Congress has set and that the Supreme Court has repeatedly cautioned courts not to transgress.

NYCDL participated as amicus curiae in the District Court proceedings, supporting Chastain's motion to dismiss. Other recent Supreme Court and Second Circuit appeals in which NYCDL has filed amicus briefs addressing the interpretation of the wire and mail fraud statutes include *Ciminelli v. United States*, 598 U.S. 306 (2023) (invalidating right-to-control theory of wire and mail fraud, following government confession of error); *Percoco v. United States*, 598 U.S. 319 (2023) (reversing conviction that impermissibly permitted jury to convict non-government official of honest services fraud); and *United States v. Connolly*, 24 F.4th 821 (2d Cir. 2022) (reversing convictions based on insufficiency of government's proof of the making of a false statement in bank and wire fraud prosecution).

PRELIMINARY STATEMENT

Appellant identifies several errors below, but the foundational error—one with broad and troubling implications—concerns the wire fraud theory on which Chastain was indicted, tried, and convicted. The government's theory was *not* that those who purchased non-fungible tokens ("NFTs") from Chastain were deprived of property, as they got precisely what they paid for. Instead, the government alleged the victim was OpenSea itself, Chastain's employer, from which Chastain allegedly "misappropriated . . . confidential business information about what NFTs were going to be featured on its homepage." (A-22 ¶ 3). The defense argued that such "misappropriation" could form the basis of a wire fraud conviction only if the information had commercial value to OpenSea, but the District Court disagreed. In a pre-trial evidentiary ruling and in its instructions to the jury, the District Court held that the government need show only that the information was "acquired or created" by OpenSea and kept confidential, rejecting any requirement that the information had commercial or inherent value to the purported victim. (SPA-15; A-412). Freed of the "commercial value" requirement, the government provided

no proof that the confidential information at issue had any commercial value to Chastain's employer.[2]

The District Court's rulings contravene a well-established and growing body of Supreme Court precedent. For almost forty years, the Supreme Court has insisted that courts limit the wire (and mail) fraud statutes to actual property fraud and defined "property" as it was traditionally understood when the statutes were adopted. This means that information, to count as property, must have commercial value to the victim. Indeed, just last term the Supreme Court reiterated that the wire fraud statute only protects traditional property, unanimously rejecting this Court's "right to control" theory of wire fraud, which the Solicitor General's Office declined even to defend. *Ciminelli v. United States*, 598 U.S. 306 (2023). The District Court's failure to heed the Supreme Court's admonitions allowed Chastain's prosecution—one that never should have gone to trial—to result in a conviction for conduct that Congress has not made a crime.

The implications of the District Court's interpretation of property are breathtaking. Companies take steps to keep all sorts of information quiet, whether that be upcoming changes in business plans, communications with employees, or

[2] To be clear, NYCDL does not concede or agree that the government proved that the information was confidential. NYCDL's argument is that, *even if* the information were confidential, that fact would not suffice to treat the information as property for purposes of the wire fraud statute.

internal malfeasance. If all such information is "property," then use and misuse of workplace information that has never before been thought criminal would suddenly be fair game for federal prosecution. Federalizing and criminalizing regulation of employee conduct in this way is exactly what the Supreme Court has warned against for years. This Court should reject the District Court's overbroad interpretation of the wire fraud statute.

ARGUMENT

I. The Wire And Mail Fraud Statutes Require That Purported Property Have Commercial Value In The Hands Of The Victim

Neither the Supreme Court nor this Court has held that information a business creates or uses becomes property under the wire fraud statute, 18 U.S.C. § 1343, as long as it is confidential. Instead, a long line of Supreme Court precedents—recently recognized and applied by this Court—makes clear that the term "property" under the wire and mail fraud statutes (which define property identically) is limited to "traditional concepts of property." *Cleveland v. United States*, 531 U.S. 12, 23–24 (2000). In particular, when it comes to intangibles like information, the Supreme Court has made clear the intangible must have commercial value in the hands of the owner. *That*—not confidential treatment or some amorphous right to exclude—is the *sine qua non* of "property" under these statutes. Otherwise, as this case shows, garden-variety employment misconduct

will become grist for the federal prosecution mill in place of state law remedies—without any clear Congressional mandate.

A. The Supreme Court's Jurisprudence Limits The Wire And Mail Fraud Statutes To Schemes To Deprive The Victim Of Something Of Commercial Value

The wire and mail fraud statutes make it a crime to use the mails or wires in furtherance of "any scheme or artifice to defraud" or to "obtai[n] money or property by means of false or fraudulent pretenses." 18 U.S.C. §§ 1341, 1343. In a firmly-established line of cases, the Supreme Court has limited these statutes to property frauds and carefully cabined the scope of property fraud to include "only schemes to deprive people of traditional property interests." *Ciminelli*, 598 U.S. at 309. That jurisprudence governs this case.

First, relying on the common-law understanding of the phrase "to defraud," the Supreme Court held in 1987 that the statutory prohibition of any "scheme or artifice to defraud" is "limited in scope to the protection of property rights." *McNally v. United States*, 483 U.S. 350, 360 (1987); *id.* at 358–59 (adopting common-law understanding). The Court reasoned that, at common law when the statute was enacted, defrauding another required "the deprivation of something *of value*." *Id.* at 358 (emphasis added) (quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188 (1924)). *McNally* thus rebuffed the government's attempts to use the mail fraud statute to target "various forms of corruption" that were "unrelated to

money or property." *Cleveland*, 531 U.S. at 18 (discussing *McNally*, 483 U.S. at 356). In so doing, the Supreme Court emphasized that it would not "construe the statute in a manner that leaves its outer boundaries ambiguous" and thereby allow federal prosecutors to wield lawmaking power. *McNally*, 483 U.S. at 360.

Second, the Supreme Court has construed—and strictly cabined—what counts as "property" for purposes of the wire and mail fraud statutes. The bottom line of those decisions is that, while the Supreme Court has long recognized that confidential business information *can* be property under those statutes, such information must be a "traditional property interest[]," *Ciminelli*, 598 U.S. at 309, which requires that the information have commercial value in the hands of the victim.

More than two decades ago, the Supreme Court decided *Cleveland*, which held that Louisiana's regulatory interest in issuing licenses for video poker games was not "property" under the mail fraud statute. 531 U.S. at 15, 22–24. In that case, putative licensees provided false information in their licensing applications, and the government brought mail fraud charges on the ground that the licensees took the licenses from the state under false pretenses. *Id*. at 18–19. The Supreme Court recognized that the state "ha[d] a substantial economic stake in the video poker industry," but insisted that, to fit within the statute's terms, "the thing obtained [by the fraud] must be property in the hands of the victim." *Id*. at 15, 22.

Cleveland's reasoning was not limited to situations involving governmental regulatory schemes. Rather, the Supreme Court rejected the government's theories on the broader ground that "they stray[ed] from traditional concepts of property" and "invite[d] [the Supreme Court] to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Id*. at 24. In other words, the Court was concerned about "subject[ing] to federal . . . fraud prosecution a wide range of conduct traditionally regulated" through other means. *Id*. "[T]o the extent that the word 'property' is ambiguous," the Court added, this ambiguity "should be resolved in favor of lenity," a cautionary principle "especially appropriate" here because the wire and mail fraud statutes serve as predicate offenses for other criminal laws. *Id*. at 25 (quotation marks omitted).

Similarly, in *Kelly v. United States*, which reversed convictions resulting from the infamous "Bridgegate" scandal, the Supreme Court again emphasized that abuses of regulatory power (like the power to direct traffic on a busy bridge) are not deprivations of property. 140 S. Ct. 1565, 1572–73 (2020). The Court added that, even though the scheme arguably diverted the governmental entity's "right to its employees' time and labor," and even though that time and labor had value in the governmental entity's hands, the scheme would only be a "property fraud" if the "*object* of the fraud" was the taking of that time and labor from the governmental entity. *Id*. at 1573 (quotation marks omitted and emphasis added).

In *Kelly*, the "object of the fraud" was to take control of traffic lanes leading to the George Washington bridge, not to steal the time and labor of the employees. *Id.* at 1574. When "the [property] loss to the victim is only an incidental byproduct of the scheme," the Supreme Court concluded, "a property fraud conviction cannot stand." *Id.* at 1573.

Kelly, like *McNally* and *Cleveland*, enforced the requirement to construe the fraud statutes narrowly. The Supreme Court opined that courts must avoid permitting federal prosecutors to "use property fraud statutes to 'set[] standards of disclosure and good government for local and state officials,'" *id*. at 1574 (quoting *McNally*, 483 U.S. at 360), which would result in "a sweeping expansion of federal criminal jurisdiction," *id*. (quoting *Cleveland*, 531 U.S. at 24). That same concern, of course, was part of what motivated the Supreme Court in limiting statutes to property frauds in the first place. *See supra* at 8.

Finally, just days after the verdict in this case *Ciminelli* was decided. *Ciminelli* overturned wire fraud convictions charged under the right-to-control theory, which had permitted wire or mail fraud charges to be founded on the deprivation of "potentially valuable economic information necessary to make discretionary economic decisions." 598 U.S. at 309 (quotation marks and citations omitted).

The decision is notable for several reasons. The Supreme Court unanimously rejected a theory of wire fraud that had held sway in this Circuit for more than thirty years. *See id.* at 313 (discussing *United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991)). The Supreme Court explained that the "right to control" theory "cannot be squared with the text of the federal fraud statutes" because "potentially valuable economic information" "is not a traditional property interest," a proposition the Solicitor General's Office conceded after certiorari was granted. *Id.* at 314–15. *Ciminelli* further reasoned that the "right to control" theory effectively revived fraud charges based on "intangible interests unconnected to property," which *McNally* had ruled out of bounds. *Id*. at 313. Moreover, "[b]ecause the theory treats *mere information* as the protected interest, almost any deceptive act could be criminal," including "an almost limitless variety of deceptive actions traditionally left to state contract and tort law." *Id.* at 315 (emphasis added). As discussed further below, in Part III, each of these concerns is present in this case.

The Supreme Court described its holding in *Ciminelli* as a direct application of prior precedents, which "consistently reject[] federal fraud theories that 'stray from traditional concepts of property.'" *Id*. at 314–15 (quoting *Cleveland*, 531 U.S. at 24). *Ciminelli* merely sharpened the point of a well-established instruction that courts must limit the definition of "property" in the wire and mail fraud

statutes to "traditional property interests," such that the boundaries of criminality are administrable and clear. *Id.* at 316.

B. *Carpenter v. United States* Allows Confidential Information To Count As Property Only If It Has Commercial Value To The Owner

Despite this long line of cases limiting property to traditional property interests, the District Court believed its rulings could rest, ultimately, on *Carpenter v. United States*, 484 U.S. 19 (1987). (SPA-9-10). It was incorrect. Not only did the District Court focus on *Carpenter* to the exclusion of the other Supreme Court cases discussed above, it also misread *Carpenter* itself in exactly the way this Court has warned against—and that the Solicitor General's Office elsewhere conceded would be erroneous. *See infra* at 15. Although *Carpenter* recognizes that, consistent with traditional property law, information can count as property, that information must have economic value in the hands of the victim. Mere confidentiality is not enough.

In *Carpenter*, a reporter for The Wall Street Journal wrote a column called "Heard on the Street," which synthesized information gathered from the business community, analyzed market trends, and provided an assessment of certain securities. 484 U.S. at 22. The column, sold to readers as part of the newspaper, regularly moved markets. *Id.* After the journalist conspired with two securities brokers to trade ahead of what the column would say, to the tune of approximately $700,000 in profits, the government brought prosecutions under the wire and mail

fraud statutes. *Id*. at 23. The Supreme Court upheld the convictions, reasoning that the Journal had "a property right in keeping confidential and making exclusive use, prior to publication, of the schedule and contents of the 'Heard' column." *Id*. at 27. The Court explained that, by secretly exploiting that information for their own use, the journalist and the brokers stole the Journal's property and defrauded it. *Id.*

Critical to the Court's finding that fraud had been committed, however, was that "[n]ews matter"—the contents of the yet-to-be-published Heard on the Street column—"is [the] *stock in trade*" of the newspaper, and that it was "gathered at the cost of enterprise, organization, skill, labor, and money . . . *to be distributed and sold to those who will pay money for it, as for any other merchandise*." *Id.* at 27 (emphasis added) (quoting *International News Service v. Associated Press,* 248 U.S. 215, 236 (1918)). The confidential business information in *Carpenter* indisputably had commercial value in the hands of the owner—the information *was* the Journal's product—and thus the Supreme Court concluded that the information could be considered property. *See id*. at 26 (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001–04 (1984) (trade secrets); *Bd. of Trade of City of Chicago v. Christie Grain & Stock Co.*, 198 U.S. 236, 250–51 (1905) (trade secrets); *International News Service*, 248 U.S. at 234 ("literary property at the common law")).

The cases on which the *Carpenter* Court relied are telling. *International News Service* called "news articles" "literary property at the common law," which of course has commercial value to its owner or author prepublication. *See* 248 U.S. at 234, 239. The trade secrets at issue in *Ruckelshaus*, the Court noted, were a form of property that "ha[s] many of the characteristics of more tangible forms of property," in that they were "assignable" and "[could] form the res of a trust." *Ruckelshaus*, 467 U.S. at 1002. And *Board of Trade of City of Chicago* involved a suit to prevent the disclosure of the Board of Trade's collection of "quotations of prices on sales of grain and provisions for future delivery," a collection which the Court held "stands like a trade secret." 198 U.S. at 245, 250. The Board of Trade's "collection of [price] quotations" allowed it, as a clearinghouse, to facilitate the transactions that were its *raison d'etre*. *See id.* at 245–46. Only once the Board of Trade "ha[d] gained its reward" by completing the transactions to which a given price quotation related would the information "become public property." *Id.* at 251.

The reasoning and analysis of *Carpenter* make clear that the Supreme Court announced no sweeping rule that all confidential business information, merely by virtue of its confidentiality, is property. Further, such a rule would be irreconcilable with the body of subsequent case law reviewed above, in which the

Court has repeatedly and firmly defined "property" under the wire and mail fraud statutes by reference to traditional property rights.

This Court, after two opinions and an intervening Supreme Court remand, has read *Carpenter* the same way. In *United States v. Blaszczak*, the Court addressed a prosecution for supposed insider trading where the alleged material non-public information was predecisional information held by a federal agency. According to the government, an employee for the Centers for Medicare & Medicaid Services ("CMS") passed information to a consultant about upcoming changes in Medicare reimbursement rates, which the consultant then provided to hedge fund employees, who profitably shorted shares of companies disadvantaged by those rate changes. 56 F.4th 230, 234 (2d Cir. 2022) ("*Blaszczak II*"). When the Court first reviewed the defendants' convictions under the wire fraud statute, it held that "CMS possesses a 'right to exclude' that is comparable to the proprietary right recognized in *Carpenter*" because it "has a 'property right in keeping confidential and making exclusive use of its nonpublic predecisional information.'" *United States v. Blaszczak*, 947 F.3d 19, 33 (2d Cir. 2019) ("*Blaszczak I*") (quoting *Carpenter*, 484 U.S. at 26), *vacated and remanded*, 141 S. Ct. 1040 (2021). In dissent, Judge Kearse concluded that the information at issue was not property because this right to exclude consisted of nothing more than "the

intangible rights of allocation, exclusion, and control" found insufficient in *Cleveland*. *Id*. at 48 (Kearse, J. dissenting).

The Supreme Court granted certiorari, vacated *Blaszczak I*, and remanded for further proceedings in light of *Kelly*, discussed above. The Solicitor General's Office, having supported a remand in light of *Kelly*, agreed that the wire fraud convictions should be vacated. It filed a letter confessing error and ***conceding*** that "information typically *must have economic value* in the hands of the relevant government entity to constitute 'property' for the purposes of" the wire fraud statute. *Blaszczak II*, 56 F. 4th at 236 (discussing U.S. Suppl. Br. at 7, *Blaszczak II*, No. 18-2811 (2d Cir. June 4, 2021), ECF No. 497) (emphasis added). Interpreting *Carpenter* in light of *Kelly* and *Cleveland*, the Solicitor General's Office distinguished the regulatory information at issue in *Blaszczak II* from the Heard on the Street column in *Carpenter* because the latter "ha[d] inherent market value to [its] owners." U.S. Suppl. Br. at 7. In other words, the Solicitor General's Office ***agreed*** with the interpretation of *Carpenter* that Appellant advances here.

On remand, this Court vacated the convictions. *Blaszczak II*, 56 F.4th at 232, 246. With Judge Kearse now writing for the Court, *Blaszczak II* held that "confidential information may constitute property of a commercial entity" only when it has "inherent value," such as when it is the "stock in trade [of the entity], to be gathered at the cost of enterprise, organization, skill, labor, and money, and *to*

be distributed and sold to those who [would] pay money for it." *Id.* at 243 (emphasis in original) (quoting *Carpenter*, 484 U.S. at 26). Because CMS "does not sell, or offer for sale, a service or a product," the predecisional information at issue cannot have been its product. *Id.* Nor did the secrecy of that information have any other kind of inherent value to the government that might be comparable to commercial value. *See id.* at 243–44.

Blaszczak II is this Court's most recent relevant decision on the treatment of confidential information for purposes of the wire and mail fraud statutes. It directly addressed the meaning of "property" under those statutes and followed the Supreme Court's guidance by insisting that information have commercial value—or the government equivalent—in the hands of the victim to ground a property fraud conviction. In so holding, this Court recognized that *Carpenter* stands for the proposition that "confidential information may constitute property of a commercial entity" only when it has "inherent value." *Id.*

Even before *Blaszczak II*, this Court rebuffed attempts to expand the meaning of "property." For example, in *United States v. Miller*, the Court rejected the "sweeping assertion" that a fraud prosecution could be brought "when a fiduciary has realized an economic benefit for which it may be made to account to its principal by means of a constructive trust." 997 F.2d 1010, 1018 (2d Cir. 1993). Noting that "[c]onduct which is wrongful in the civil context" is not necessarily

criminal, *id*. at 1019 (quotation omitted), the Court found that fiduciary delinquencies that do not "deprive[] [the principal] of 'money or property'" are not property fraud, *id*. at 1020. This Court also emphasized that the focus is not on whether the defendant profited, as "the mere fact [that] a fiduciary profits from a breach of duty is not a sufficient property deprivation to satisfy the requirements" of fraud. *Id*. (quotation omitted).

Decisions like *Miller* and *Blaszczak II* correctly hew to *McNally*'s holding, almost forty years ago, that the wire and mail fraud statutes require the "deprivation of something of value" to the victim. *McNally*, 483 U.S. at 358. Absent an allegation of that deprivation, or proof thereof, a wire or mail fraud charge should be dismissed.

C. The Second Circuit Cases On Which The District Court Relied Do Not Justify Its Holding

The District Court relied heavily on *United States v. Grossman*, 843 F.2d 78 (2d Cir. 1988), and *United States v. Mahaffy*, 693 F.3d 113 (2d Cir. 2012). *See* (SPA-10-13). In light of the Supreme Court and Second Circuit jurisprudence reviewed above, however, these cases cannot bear the weight the District Court put on them.

In *Grossman*, a law firm associate traded based on material nonpublic information that he learned about a pending transaction that his firm was handling. 843 F.2d at 80–81. This Court deemed that information "property," although the

firm was unable to directly "commercially exploit" the information, citing trial evidence that the information had "commercial value to the firm" and "maintaining the confidentiality of the information was of commercial value." *Id*. at 86. In other words, the Court reasoned that the information was "property" because confidentiality of client information is part and parcel of what a law firm sells; confidentiality is integral to the transaction between law firm and client.

Whatever one thinks of that analysis—and in light of the Supreme Court's subsequent case law it must be considered the outer bounds of "property" fraud—this case is very different. Here, the government did not even argue that the identity of NFTs to be featured on OpenSea's website had commercial value to the company, and OpenSea did not earn revenue from featuring NFTs on its website. *See* Appellant's Br. at 7–8, 30. And, of course, *Grossman* could not and did not address the post-1988 Supreme Court cases that made explicit what *Carpenter*'s reasoning implied—that "property" refers to those interests traditionally recognized as property at common law. *See Ciminelli*, 598 U.S. at 309.

The District Court also relied on dicta from *Mahaffy*, a case decided before the Supreme Court's decisions in *Kelly* and *Ciminelli*. In *Mahaffy*, this Court *vacated* a conviction—premised on frontrunning brokerage firm orders—for

conspiracy to commit securities fraud under 18 U.S.C. § 1348.[3] 693 F.3d at 121, 138. The government alleged two types of § 1348 securities fraud, one of which was the misappropriation of confidential information. This Court *vacated* the conviction because the government withheld exculpatory information in violation of *Brady v. United States*, 373 U.S. 83, 84 (1963), that tended to show the information at issue was not confidential. *Mahaffy*, 693 F.3d at 119.

At the end of the opinion, and merely as "guidance in the event the government commits itself to further proceedings," the Court held that the district court had not erred in rejecting defendants' proposed jury instructions, which would have required the government to show "the value of the information to the business," reasoning that "[i]nformation may qualify as confidential under *Carpenter* even if it does not constitute a trade secret." *Id.* at 134–35. But this language from *Mahaffy* was focused on explaining what makes information confidential—not what makes it property—and it was intended to illustrate that the reach of the property fraud statutes is not limited to trade secrets, a proposition with which no party here disagrees.

[3] Section 1348 prohibits: (1) "defraud[ing] any person in connection with" certain commodities or securities; and (2) "obtain[ing], by means of false or fraudulent pretenses, representations, or promises, any money or property in connection with the purchase or sale of" certain commodities or securities. 18 U.S.C. § 1348.

Thus, the District Court erred by reading *Grossman* and the *Mahaffy* dicta shorn of their factual contexts and as if the Supreme Court had not spoken since those decisions. The modern jurisprudence makes clear that confidential information must have commercial value in the hands of the victim to be considered "property." Notably, *Blaszczak II* did not cite *Grossman* or *Mahaffy*. *See generally Blaszczak II*, 56 F.4th 230. *Grossman* and the dicta in *Mahaffy* should be confined to the circumstances each addressed and read to be consistent with the Supreme Court's decisions in *Cleveland*, *Kelly*, and *Ciminelli*.

II. The Record Precludes Finding That The Featured NFT Information Is "Property" Under The Governing Jurisprudence

Applying the relevant Supreme Court precedents, recognized in *Blaszczak II*, the information at issue here cannot be considered property under the wire fraud statute. No evidence exists in the record suggesting that advance knowledge of which NFTs would be featured on OpenSea's website had any economic value to OpenSea. *See* Appellant's Br. at 8 (OpenSea did not seek to profit from the publication of the information and its revelation made no financial difference to OpenSea). OpenSea's business model was to earn commissions by brokering transactions. *Id*. at 30. It was not paid to promote NFTs. In fact, it regarded monetizing the featuring of NFTs to be "not aligned with [OpenSea's] main goals as a company" and not "substantial for the business." *See id*. at 8, 30. The information in question, while used or created by OpenSea as it conducted its

business, was therefore not of "inherent value" to OpenSea, nor did OpenSea acquire or compile the information for sale. *See id*. (describing how Chastain worked with employees and third parties to select featured NFTs). For that matter, and as Chastain argues, it is far from clear that the information in question was even confidential. *See id*. at 32–37 (Section I.B).

Had the District Court applied the definition of "property" set forth in *Carpenter*, *Cleveland*, *Kelly*, *Ciminelli*, and other Supreme Court cases, as well as this Court's decision in *Blaszczak II*, the indictment should have been dismissed and the jury could only have reasonably found the evidence insufficient to return a guilty verdict.

III. The Definition Of Property Adopted Below Yields Absurd Results And Allows Prosecutors To Bring Cases The Supreme Court Has Disallowed Under Other Fraud Statutes

Aside from contradicting the Supreme Court's now well-established line of property fraud decisions, the government's conception of property in this case is deeply troubling. As shown below, it would lead to absurd over-criminalization and eviscerate the limits on prosecutorial discretion on other fraud-related statutes. This Court should reject it.

A. The Government's Conception Of Property Leads To Absurd Results

Employees are often expected by their employers to keep information confidential. That expectation does not convert everything that an employee learns

about a business into corporate property, however, because not all "confidential" workplace information—even information that the owner takes steps to protect—has commercial value to the business. It is worth emphasizing: To hold that any confidential business information is "property" allows the government to bring fraud charges against any employee for any use of confidential workplace information for non-work purposes. Such a theory would run afoul of the Supreme Court's admonition against criminalizing "an almost limitless variety of deceptive actions." *Ciminelli*, 598 U.S. at 315.

In a host of different contexts, the Supreme Court has avoided statutory interpretations that "would attach criminal penalties to a breathtaking amount of commonplace . . . activity." *Van Buren v. United States*, 141 S. Ct. 1648, 1661 (2021) (noting that an interpretation of the Computer Fraud and Abuse Act that would "criminalize[] every violation [by an employee] of a computer-use policy" means "millions of otherwise law-abiding citizens are criminals"); *Kelly*, 140 S. Ct. at 1568 (explaining that the property fraud statutes "do not criminalize" all "wrongdoing," including acts of profound "deception" and "corruption"); *see also Bond v. United States*, 572 U.S. 844, 860 (2014) (rejecting a "boundless reading" of a penal statute, which would give rise to "deeply serious consequences" and "intrude[] on the police power of the States"). This Court should do the same here.

The implications are sweeping. Under the rulings made by the District Court, the below examples (and countless more) would constitute fraud:

1. A corporate whistleblower surreptitiously gathers information about corporate malfeasance and provides it via email to a journalist in violation of a company policy prohibiting the use of company information for non-company purposes. Under the government's theory, the whistleblower has committed wire fraud by "misappropriating" the employer's property for unauthorized uses.

2. A CEO's personal aide keeps secret notes about the CEO's behavior in meetings and treatment of her employees. These interactions are confidential—the aide even signed a nondisclosure agreement as a condition of accepting a job—but the aide nonetheless records wide-ranging specifics about how the CEO acts. Then, after the aide leaves her job, she writes a tell-all book (which becomes a movie), casting the CEO as a well-dressed-but-tyrannical figure. Fraud. After all, the CEO's aide has "misappropriated" confidential workplace information and redeployed it for private use.

3. An executive at a large corporation learns that his company is secretly planning to move its headquarters to a specific neighborhood in a new city. The executive has agreed that this information is confidential company information, but nonetheless proceeds to purchase a home for his son near the new headquarters, knowing that the announcement will cause home prices there to skyrocket. Fraud again. Just like Chastain, the employee "misappropriated" confidential business information for personal use.

4. An executive at a major automobile manufacturer learns that the company will soon discontinue production of its signature sportscar. Realizing that the car will quickly become a collector's item, the executive leaves work and immediately buys the last model from his local dealer. Also fraud. This executive—like the others—has used inside knowledge for personal purposes.

In each of these circumstances, the hypothetical defendant undertook to use information learned on the job and not widely known outside of the workplace for his or her own purposes, in violation of a corporate confidentiality policy. The person's employer may also have taken steps to prevent the information from being used, other than for work purposes. But an employer's displeasure at an employee's breach of trust cannot convert the garden-variety misconduct into a violation of federal law. *See United States v. Carpenter,* 791 F.2d 1024, 1035 (2d Cir. 1986) (emphasizing that "not every breach of an employee's fiduciary duty to his employer constitutes mail or wire fraud"), *aff'd*, 484 U.S. 19 (1987).

Nor can a court "construe a criminal statute on the assumption that the Government will use it responsibly." *McDonnell v. United States*, 579 U.S. 550, 576 (2016). To consider just the first example above, what counts as virtuous whistleblowing or traitorous leaking would depend on an evaluation of context and circumstances for which the government's definition of "property" provides no guide. *See Van Buren*, 141 S. Ct. at 1662 (rejecting the government's approach where it "would inject arbitrariness into the assessment of criminal liability").

None of this is to say employees would or should have free rein to misuse confidential information they learn in the course of their employment. But prosecution is not the only sanction. The corporate owner of the information could fire the employee, as happened in this case. A business can also seek recourse

through civil remedies, including lawsuits for breach of contract and breach of fiduciary duty. *See*, *e.g.*, *Poller v. BioScrip, Inc.*, 974 F. Supp. 2d 204, 227 (S.D.N.Y. 2013) (under New York law, "[a] breach of fiduciary duty . . . occurs when a fiduciary commits an unfair, fraudulent, or wrongful act, including . . . misuse of confidential information" (quotation marks omitted)); *ExpertConnect, L.L.C. v. Fowler*, No. 18 Civ. 4828 (LGS), 2019 WL 3004161, at *8 (S.D.N.Y. July 10, 2019) (recognizing a state law breach of contract action based on a failure to adhere to a non-disclosure agreement). *Ciminelli* cautioned that recourse for similarly "deceptive actions" has been "traditionally left to state contract and tort law." 598 U.S. at 315. There it should remain.

B. The Government's Conception Of Property Eviscerates Limits Set By The Supreme Court

The definition of "property" adopted by the District Court would also permit prosecutors to use the wire and mail fraud statutes to bring cases the Supreme Court has taken pains to disallow. After all, the Supreme Court has placed limits on statutes Congress has enacted to hold accountable employees who abuse their positions in ways that do not deprive a victim of its property. *See*, *e.g.*, 18 U.S.C. § 1346 (honest services fraud); 18 U.S.C. § 1348 (securities and commodities fraud); 18 U.S.C. § 1831 (trade secrets). To read the wire and mail fraud statutes to permit treating confidential business information as "property" would allow prosecutors to breach those limits.

For honest services fraud in particular, the Supreme Court has rejected the argument that the honest services fraud statute can be used to prosecute "undisclosed self-dealing by a public official or private employee" who takes an employment action "that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." *Skilling v. United States*, 561 U.S. 358, 409–12 (2010). But a definition that equates information that a business keeps confidential with "property" re-imports into the wire fraud statute the definition of honest services fraud rejected in *Skilling*. After all, the government's theory throughout Chastain's prosecution was that Chastain's crime was furthering his own financial interests while purporting to observe his duty of confidence to OpenSea. (A-21 ¶ 1). That theory effectively back-doored a prosecution barred by *Skilling*.

Moreover, the government in this case appears to have conceived of the wire fraud charge as back-up for an unavailable securities fraud charge. When first announcing Chastain's case to the public, the government's press release touted the charging of the "first ever digital asset insider trading scheme."[4] Similarly, a press release announcing Chastain's sentencing declared the sentence "should serve as a

[4] U.S. Dep't of Justice, *Former Employee of NFT Marketplace Charged in First Ever Digital Asset Insider Trading Scheme* (June 1, 2022), https://www.justice.gov/usao-sdny/pr/former-employee-nft-marketplace-charged-first-ever-digital-asset-insider-trading-scheme.

warning to other corporate insiders that insider trading—in any marketplace—will not be tolerated."[5] But the government brought no insider trading charge, presumably because it feared it would not be able to establish that NFTs are "securities" under the securities laws, *see* 18 U.S.C. § 1348(a), (b). The government's wire fraud charge thus criminalized purported "trading" conduct that Congress left outside the boundaries of securities laws, based on reasoning that there was no "special need [for] regulation for the protection of investors." *Matter of Cady, Roberts & Co.*, 40 S.E.C. 907, 910 (Nov. 8, 1961).

An overbroad definition of "property" permits the government to use the federal wire and mail fraud statutes to prosecute conduct Congress elected not to criminalize. Even the District Court recognized that the prosecution of Chastain, which it called "an odd case, where the victim doesn't feel victimized," (A-629-30), was likely filed only because it involved the "sexy, new arena" of NFTs. (A-627-28, A-634-35). That oddity was a red flag that something was amiss. And what was amiss was the government's latest improper attempt to expand the definition of "property." This Court should reject that attempt here.

[5] U.S. Dep't of Justice, *Former Employee Of NFT Marketplace Sentenced To Prison In First-Ever Digital Asset Insider Trading Scheme* (Aug. 22, 2023), https://www.justice.gov/usao-sdny/pr/former-employee-nft-marketplace-sentenced-prison-first-ever-digital-asset-insider.

CONCLUSION

The Court of Appeals should vacate the judgment of conviction and order the District Court to enter a judgment of acquittal on the ground that the government failed to prove a scheme to take "property."

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