

Nos. 20-306 and 20-5649

In the Supreme Court of the United States

ROBERT OLAN AND THEODORE HUBER, PETITIONERS

v.

UNITED STATES OF AMERICA

DAVID BLASZCZAK, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITIONS FOR WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT*

MEMORANDUM FOR THE UNITED STATES

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Petitioners contend (Olan & Huber Pet. 13-24; Blaszczak Pet. 19-23; see also Worrall Br. 10-13) that their convictions for wire fraud, in violation of 18 U.S.C. 1343 and 2; securities fraud, in violation of 18 U.S.C. 1348 and 2; conversion of government property, in violation of 18 U.S.C. 641 and 2; and conspiracy to commit those offenses, in violation of 18 U.S.C. 371 and 1349, are infirm because a federal agency's predecisional, confidential information about a regulation does not constitute "property" under the federal fraud statutes

or a “thing of value” under the federal conversion statute. After the court of appeals issued its decision in this case and denied rehearing, this Court decided *Kelly v. United States*, 140 S. Ct. 1565 (2020), which held that “a scheme to alter * * * a regulatory choice is not one to appropriate the government’s property.” *Id.* at 1572 (citing *Cleveland v. United States*, 531 U.S. 12, 23 (2000)); see *Olan & Huber Pet. App.* 1a, 57a. The issue of the potential effect, if any, of the Court’s decision in *Kelly* on the court of appeals’ disposition of this case was therefore discussed only in supplemental letters addressing petitioners’ motions to stay the court of appeals’ mandate. The court granted those motions without a written opinion. A remand is appropriate under the circumstances, because it would allow the court of appeals to consider the issue in a different posture and to provide a written decision that addresses it. Accordingly, the appropriate course is to grant the petitions for writs of certiorari, vacate the decision below, and remand the case for further consideration in light of *Kelly*.*

Respectfully submitted.

JEFFREY B. WALL
Acting Solicitor General

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* The government waives any further response to the petitions for writs of certiorari unless this Court requests otherwise.