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No. 08-1196

In the Supreme Court of the United States

BRUCE WEYHRAUCH,
Petitioner,
v.
UNITED STATES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING PETITIONER

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QUESTION PRESENTED

Whether, to convict a state official for depriving the public of its right to the defendant's honest services through nondisclosure of material information, in violation of the mail-fraud statute (18 U.S.C. §§ 1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law.

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INTEREST OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE*[1]

Amicus is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

The National Association of Criminal Defense Lawyers (NACDL) was founded in 1958. It has a nationwide membership of 11,000 and an affiliate membership of almost 40,000. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates. NACDL files numerous *amicus* briefs each year in this Court and other courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. Recent cases in which NACDL has participated as *amicus curiae* include *Black v. United States*, No. 08-876 (pending); *Montejo v. Louisiana,*

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[1] Pursuant to Rule 37.6, *amicus curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Letters from the parties consenting to the filing of this brief have either been previously filed with the Clerk of this Court or accompany this brief.

129 S. Ct. 2079 (2009); *Giles v. California*, 128 S. Ct. 2678 (2008); *Rothgery v. Gillespie County*, 128 S. Ct. 2578 (2008); and *Indiana v. Edwards*, 128 S. Ct. 2379 (2008).

NACDL has an interest in ensuring that federal criminal statutes provide fair notice of what conduct is prohibited and that criminal defendants are not penalized for making legitimate strategic decisions.

SUMMARY OF ARGUMENT

Beginning in the 1970s, enterprising federal prosecutors embarked upon an aggressive campaign to use a dubious interpretation of the federal mail and wire fraud statutes to impose free-ranging ethical obligations upon state and local governmental officials. Originally, the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, were narrowly targeted, vindicating only the government's interest in preventing the use of the federal mail and wire systems "to carry instruments of fraud such as false advertisements of get-rich-quick schemes." *See* George D. Brown, *Should Federalism Shield Corruption? Mail Fraud, State Law and Post-Lopez Analysis*, 82 Cornell L. Rev. 225, 246 (1997) (citing Peter J. Henning, *Maybe It Should Just Be Called Federal Fraud: The Changing Nature of the Mail Fraud Statute*, 36 B. C. L. Rev. 435, 442 (1995)). Under the government's ever-expansive "honest services" theory, however, the statutes were expanded to cover a wide variety of fiduciary duties as well, including the public servant's ill-defined obligation to respect the "intangible right of the citizenry to good government." *McNally v. United States*, 483 U.S. 350, 356 (1987); *see also United States v. Margiotta*, 688 F.2d

108, 123–126 (2d Cir. 1982). In the face of this extreme misinterpretation, some judges remained cautious, decrying federal prosecution of honest services fraud as "a catch-all political crime which has no use but misuse," invoked only "when a particular corruption, such as extortion, cannot be shown or Congress has not specifically regulated certain conduct." *Margiotta*, 688 F.2d at 144 (Winter, J., concurring in part and dissenting in part).

In 1987, this Court vindicated such skepticism. In *McNally v. United States*, the Court identified two critical constitutional concerns raised by the federal government's attempt to use general fraud statutes to regulate local governmental affairs: the fundamental vagueness of the "ambiguous" honest-services-fraud theory, and the threat to state sovereignty inherent in "involv[ing] the Federal Government in setting standards of disclosure and good government for local and state officials." *McNally*, 483 U.S. at 360. Rather than rely upon these concerns alone, however, the Court invoked the rule of lenity to prevent the federal government from prosecuting state and local officials for depriving their constituents of the so-called "intangible right" to their "honest services." *Id.* "If Congress desires to [make such conduct a crime]," the Court warned, "it must speak more clearly than it has." *Id.*

Congress's response was swift, but no more precise. Within a year, it enacted 18 U.S.C. § 1346, a statute that "was never included in any bill as filed in either the House of Representatives or the Senate . . . was never the subject of any committee report from either the House or the Senate, and was never

the subject of any floor debate reported in the Congressional Record." *United States v. Brumley*, 116 F.3d 728, 742 (5th Cir. 1997) (Jolly, J., dissenting). That Section 1346 purports to criminalize "honest services fraud" is undisputable. But in the decades since its adoption, the courts have continually struggled to understand what that statute actually *means*. *See Sorich v. United States*, 129 S. Ct. 1308, 1311 (2009) (Scalia, J., dissenting from denial of certiorari) (noting "the conflicts among the Circuits; the longstanding confusion of the scope of [18 U.S.C. § 1346]; and the serious due process and federalism interests affected by the expansion of criminal liability" under the statute). The issue is far from academic, as federal prosecutors continue to exploit the ill-defined nature of honest services fraud in order to charge state government officials with federal felonies based on conduct not criminal under relevant state and local laws.

Petitioner, in his opening brief, accurately critiques Section 1346's checkered past and urges that the government must predicate any honest-services-fraud prosecution upon the violation of a duty imposed by some outside source—either state or federal law. Although adoption of such a limiting principle would represent a substantial step in addressing Section 1346's constitutional infirmities, NACDL submits that such a decision would not cure them entirely. As a result, it submits this *amicus* brief to elaborate upon and amplify two critical constitutional concerns raised by Petitioner's Brief: (1) that Section 1346 fails to provide the degree of fair warning required by the Due Process Clause, and (2) that Section 1346 invades a regulatory area constitution-

ally committed to the states under the doctrine of federalism.

When, prior to 1987, prosecutors used the same rudderless concept of "honest services fraud" to impose criminal liability on an unlimited range of conduct, this Court put an end to the practice. For the reasons set forth below, it should do the same today.

ARGUMENT

I. 18 U.S.C. § 1346 Is Unconstitutionally Vague, As It Fails To Provide Fair Notice Of Its Scope Or Meaning.

1. "It is established that a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits[.]" *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion); *see also United States v. Diaz*, 712 F.2d 36, 40 (2d Cir. 1983) ("[F]undamental principles of due process . . . mandate that no individual be forced to speculate, at peril of indictment, whether his conduct is prohibited."). As a result, a prosecution cannot stand if "the statute under which it is [maintained] fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008).

In response to these Due Process concerns, this Court has consistently adopted a rule of lenity, holding that courts must resolve questions concerning the scope or meaning of criminal statutes against the

government, "to ensure both that there is fair warning of the boundaries of criminal conduct and that legislatures, not courts, define criminal liability." *Crandon v. United States*, 494 U.S. 152, 158 (1990). In *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008), this Court recently stressed the central role the rule of lenity plays in our constitutional structure:

> Under a long line of our decisions, the tie must go to the defendant. The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them. This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed. It also places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress's stead.

This rule of lenity is particularly important in cases such as this. The Court already relied upon lenity concerns once to strike down the doctrine of honest services fraud in *McNally*, 483 U.S. at 359–360, and lenity concerns are "particularly weighty in the context of prosecutions of political officials, since such prosecutions may chill constitutionally protected political activity," *United States v. Panarella*, 277 F.3d 678, 698 (3d Cir. 2002). Therefore, as long as Section 1346 is vague, ambiguous, or otherwise suscep-

tible to multiple interpretations, prosecutions under it cannot stand.

2. The plain text of Section 1346 "simply provides no clue to the public or the courts as to what conduct is prohibited under the statute." *United States v. Rybicki,* 354 F.3d 124, 158 (2d Cir. 2003) (en banc) (Jacobs, J., dissenting) (quoting *United States v. Handakas,* 286 F.3d 92, 104 (2d Cir. 2002)). Section 1346 states only that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. The section does not define "intangible right of honest services," and it leaves unanswered numerous questions about that concept:

> The term "intangible right" is not defined in the United States Code, is not defined in *Black's Law Dictionary,* and, prior to its use in § 1346, had never been used in any other statute of the United States. The term "honest services" is not defined anywhere in the United States Code, is not defined in *Black's Law Dictionary,* and had never been used in the United States Code prior to its use in § 1346. The phrase "the intangible right of honest services" is, therefore, inherently undefined and ambiguous.

Brumley, 116 F.3d at 742 (Jolly, J., dissenting).

Indeed, when taken on its face, the concept of "honest services" is virtually limitless, embracing conduct far removed from the bribery-type offenses that purportedly form the doctrine's "core." *See United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir.

2005) (identifying bribery as core example of honest services fraud). Almost any act by a public or private officer involving a trace of dishonesty, a remote element of self-interest, or a mistake made in the course of an officer's duties can be recharacterized as a failure to live up to the fiduciary obligation to provide "honest services":

> If the "honest services" theory—broadly stated, that officeholders and employees owe a duty to act only in the best interests of their constituents and employers—is taken seriously and carried to its logical conclusion, presumably the statute also renders criminal a state legislator's decision to vote for a bill because he expects it will curry favor with a small minority essential to his reelection; a mayor's attempt to use the prestige of his office to obtain a restaurant table without a reservation; a public employee's recommendation of his incompetent friend for a public contract; and any self-dealing by a corporate officer. Indeed, it would seemingly cover a salaried employee's phoning in sick to go to a ball game. . . . Quite a potent federal prosecutorial tool.

Sorich, 129 S. Ct. at 1309 (Scalia, J., dissenting from denial of certiorari); *see also United States v. Thompson*, 484 F.3d 877, 882 (7th Cir. 2007) (Easterbrook, J.) ("When the Supreme Court reverses a court of appeals, it is apt to say . . . that public officials have failed to implement the law correctly. Does it follow that judges who are reversed have deprived the

United States of their honest services and thus committed mail fraud?").

This very breadth has led courts to insist that the statute cannot possibly mean what it says: that it "does not encompass every instance of official misconduct that results in the official's personal gain." *United States v. Sawyer*, 85 F.3d 713, 725 (1st Cir. 1996); *see also Thompson*, 484 F.3d at 882 ("[N]o one *really* thinks that § 1346 treats all legal errors by public employees as criminal[.]"); *United States v. Welch*, 327 F.3d 1081, 1107 (10th Cir. 2003) (Section 1346 is "not violated by every breach of contract, breach of duty, conflict of interest, or misstatement made in the course of dealing"). "But why that is so, and what principle it is that separates the criminal breaches, conflicts and misstatements from the obnoxious but lawful ones, remains entirely unspecified." *Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari). Such ambiguity is inevitable in light of Congress's decision to criminalize the doctrine of honest services fraud—using the exact same language that this Court found so troublesome in *McNally*—without making any effort to first define its contours.

Some courts have attempted to cure the statute's vagueness in any given case through reference to pre-*McNally* case law, on the theory that Congress passed Section 1346 simply to reverse this Court's decision and restore the same definition that existed previously. *See, e.g., United States v. Frost*, 125 F.3d 346, 364 (6th Cir. 1997). Yet such an approach merely replaces textual ambiguity with historical uncertainty. After all, "before *McNally* the doctrine

of honest services *was not a unified set of rules*." *Brumley*, 116 F.3d at 733 (emphasis added); *see also id.* (collecting cases; "Before *McNally*, the meaning of 'honest services' was uneven."); *cf. Rybicki*, 354 F.3d at 158 (Jacobs, J., dissenting) (observing that claim that Section 1346 reinstates pre-*McNally* decisions "gets us nowhere in terms of limits on prosecutorial power and notice to the public"). Indeed, as Judge Winter noted in his influential separate opinion in *United States v. Margiotta*, pre-*McNally* honest-services jurisprudence was riddled with the same confusion that now plagues Section 1346:

> One searches in vain for even the vaguest contours of the legal obligations created beyond the obligation to conduct governmental affairs "honestly" or "impartially," to ensure one's "honest and faithful participation" in government and to obey "accepted standards of moral uprightness, fundamental honesty, fair play and right dealing." . . . While there is talk of a line between legitimate patronage and mail fraud, there is no description of its location. With all due respect to the majority, the quest for legal standards is not furthered by reference to "the right to good government" and the duty "to act in a disinterested manner."

688 F.2d at 142–143 (Winter, J., concurring in part and dissenting in part). Given the well-documented ambiguities and contradictions within the area, courts cannot simply brush aside a challenge to Section 1346 on the basis that it was a legislative codification of some clear, extant judicial standard. *See*

also Brumley, 116 F.3d at 733 ("Congress could not have intended to bless each and every pre-*McNally* lower court 'honest services' opinion.") At the time of *McNally*, the honest services fraud doctrine was anything but clear.

Nor has the doctrine grown any clearer in the decades since the adoption of Section 1346. Given the "amorphous and open-ended nature" of Section 1346, the courts have consistently felt the need to graft *some* limitations upon its vague language. *United States v. Sorich*, 523 F.3d 702, 707 (7th Cir. 2008); *see also Rybicki*, 354 F.2d at 162 (Jacobs, J., dissenting) ("Even the circuits that have reinstated pre-*McNally* law recognize that ad hoc parameters are needed to give the statute shape."). Yet while all seem to agree that a limiting principle is needed to save this statute from certain demise, none can agree on which principle to apply:

- The Seventh Circuit has limited application of the statute to cases involving misuse of a position for private gain, *see United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998)—a construction found nowhere in the text and one that both the Third and Tenth Circuits have criticized, *see Panarella*, 277 F.3d at 691–692; *Welch*, 327 F.3d at 1107.

- The Third and Fifth Circuits, in turn, hold that an underlying violation of state law is necessary to support a federal honest-services conviction, *see Panarella*, 277 F.3d at 692–693; *Brumley*, 116 F.3d at 735—an approach that has met similarly strong opposition in other circuits. *See United*

States v. Martin, 195 F.3d 961, 966 (7th Cir. 1999).

- Even those circuits purporting to apply the pre-*McNally* definition of honest services fraud remain divided over the content of that definition—for example, whether "materiality" or "forseeability" properly defines the scope of the crime. *Compare Frost*, 125 F.3d at 364 (forseeability), *with United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996) (materiality), *and United States v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997) (same).

The result is chaos. Despite decades of opportunities to clarify the statute, the concept of honest services remains "vague and undefined," "frustrating" judicial efforts "to reduce the 'honest services' concept to a simple formula specific enough to give clear cut answers[.]" *Urciuoli*, 513 F.3d at 294, 300. Neither Congress's words nor judicial gloss has provided the public with a clear definition of what is criminal under Section 1346 and what is not.

3. Based in part upon the vagueness concerns detailed above, Petitioner argues that nondisclosures should be actionable under Section 1346 "only where they violate an established duty to disclose, under state or federal law, apart from § 1346 itself." Pet'r Br. 28. Yet although adoption of such a limitation would could constitute a step towards a clearer regime of honest services fraud, it would not wholly cure Section 1346's vagueness. Rather, several ambiguities would remain in the wake of such a decision.

First, requiring Section 1346 prosecutions to be predicated upon the violation of some extrinsic ethical duty would not necessarily address whether *only* state law can establish such obligations. Petitioner correctly notes that, given the circumstances of his prosecution and the record below, the instance case does not squarely present the question of whether federal law other than Section 1346 can define the scope of the duty to provide "honest services." Pet'r Br. 28–29. But as a result, a narrow judgment in this case will provide little clarity to those subjected to other pending or future prosecutions, who will still be uncertain even as to such a basic question as from where the duty of "honest services" arises.

Second, even if the Court reaches further and rules that only state law violations can serve as the basis of Section 1346 prosecutions, it would remain unclear whether Section 1346 is limited to violations of state *criminal* law, or if violation of *any* state law duty can trigger federal liability. *See, e.g.*, *Brumley*, 116 F.3d at 733–734 (requiring state law violation, but leaving open "the question of whether a breach of a duty to perform must violate the criminal law of the state"). Given that, in many states, ethical obligations are codified as a collection of civil *and* criminal statutes, *see, e.g.*, N.Y. Pub. Off. Law §§ 73–75, even general reference to state law it not enough to provide potential defendants with clear notice of what duties fall within or without the scope of Section 1346's purview.

Third, as Petitioner observes, limiting Section 1346's reach to cases in which a defendant violates some extrinsic legal duty fails to address confusion

over *which types* of violations rise to the level of failing to provide "honest services." Although the Alaska disclosure requirements evaluated by the district court in this case only require disclosure of actual conflicts of interest, *see* Pet'r Br. 32–33, many state ethical codes are prophylactic in nature—targeting not only actual corruption but also the potential appearance thereof. *See, e.g.*, *Sawyer*, 85 F.3d at 728 (recognizing that, because of appearance-of-corruption focus, not every violation of Massachusetts gift statute could be punished as honest services fraud). As a result, even invocation of state law will not fully address the problem that the term "honest services," standing alone, fails to provide meaningful guidance as to what it permits and what it forbids. Reference to state law, standing alone, simply does not provide clear enough guidance regarding where the alleged duty of "honest services" arises, how it is defined, and how such an obligation can be violated.

In the end, the only consensus regarding Section 1346 is that it cannot possibly mean what it says. Despite years of attempted judicial gap-filling, Section 1346 remains "vague and amorphous . . . and depends for its constitutionality on the clarity divined from a jumble of disparate cases." *United States v. Brown*, 459 F.3d 509, 523 (5th Cir. 2007). Rather than adopt yet another incremental refinement, Court should call an end to the experiment entirely, and strike down the statute as being unconstitutionally vague. To do otherwise would be to open a dangerous door: as currently drafted, Section 1346 "is nothing more than an invitation for federal courts to develop a common-law crime of unethical con-

duct," a notion that is "utterly anathema today." *Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari); *see also Brown*, 459 F.3d at 523 n.13 (noting that the government's aggressive application of Section 1346 "crystallizes the danger we face of defining an ever-expanding and ever-evolving federal common-law crime"). It is not for the courts to have to write the law, define the offense, set its parameters and establish its elements. Unless and until Congress speaks to the issue with clearer language, this Court should once again inter the doctrine of honest services fraud.

II. 18 U.S.C. § 1346 Unconstitutionally Intrudes Upon State Sovereignty.

Although vagueness alone is enough to invalidate Section 1346, its constitutionality is further undermined by its subject matter. When applied to prosecute violations of alleged ethical obligations, the doctrine of honest services fraud "involves the Federal Government in setting standards of disclosure and good government for local and state officials"—an area raising grave federalism concerns. *McNally*, 483 U.S. at 360. Whether viewed as falling outside the scope of Congress's enumerated powers, *see United States v. Lopez*, 514 U.S. 549 (1995), or impermissibly violating the sovereignty of the individual states, *see New York v. United States*, 505 U.S. 144 (1992), the Constitution does not countenance federal efforts to define the duties that State officials owe to *their own* constituents or to micromanage the ethical responsibilities of elected state officials. *See* George D. Brown, *New Federalism's Unanswered Question: Who Should Prosecute State*

and Local Officials for Political Corruption?, 60 Wash. & Lee. L. Rev. 417, 428–430 (2003). At minimum, legislative inroads into such areas traditionally regulated by the states themselves require clearer authorization and justification than Section 1346 provides.

1. Although the federalism problems raised by Section 1346 can be cast in a variety of ways, each reduces to the same objection—by purporting to define a federal standard of "good government" with which state and local officials must comply, the federal government is impermissibly attempting to regulate an area constitutionally committed to the state. The *McNally* Court was well aware of this fundamental defect in the theory of honest services fraud, citing it as a reason to avoid any interpretation of the mail fraud statute that would "involve[] the Federal Government in setting standards of disclosure and good government for local and state officials[.]" 483 U.S. at 360. Section 1346's cursory text does nothing to minimize this constitutional flaw.

Over the past two decades, this Court has reminded Congress of a central truth of our constitutional structure: "The Constitution creates a Federal Government of enumerated powers," delegating to the federal government powers "few and defined" while reserving "numerous and indefinite" authority to the individual states. *Lopez*, 514 U.S. at 552 (quoting The Federalist No. 45, at 292–293 (James Madison) (C. Rossiter ed. 1961)). Respect for that allocation of power serves a critical purpose: "Just as the separation and independence of the coordinate branches of the Federal Government serve to prevent

the accumulation of excessive power in any one branch, a healthy balance of power between the States and the Federal Government will reduce the risk of tyranny and abuse from either front." *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

This Court has implicitly reiterated this concern in cases involving federal restraints on the conduct of state government employees, including in the specific contexts of the mail and wire fraud statutes. Although not phrased in terms of the *Lopez* rule, both *McNally* and this Court's subsequent decision in *Cleveland v. United States* rejected efforts to expand the scope of the mail fraud act beyond the deprivations of property rights long considered actionable under the act. *See Cleveland v. United States*, 531 U.S. 12, 26 (2000) ("[T]he mail fraud statute . . . had its origin in the desire to protect individual property rights, and any benefit which the Government derives from the statute must be limited to *the Government's interests as property holder*." (quoting *McNally*, 483 U.S. at 359 n.8; emphasis by the *Cleveland* Court)). Such an effort reflects an appropriate enumerated-powers driven focus on the limits of the mail and wire fraud statutes. *Cf. Schmuck v. United States*, 489 U.S. 705, 722–723 (1989) (Scalia, J., dissenting) ("The law does not establish a general remedy against fraudulent conduct, with the use of the mails as a jurisdictional hook, but reaches only those limited instances in which the use of the mails is *a part of the execution of the fraud*, leaving all other cases to be dealt with by appropriate state law. In other words, it is mail fraud, not mail and fraud, that incurs liability." (citations omitted; emphasis in original)). Any effort to justify an aggressive reading

of Section 1346 based on either the Commerce Clause or Postal Power, then, is suspect. Brown, 82 Cornell L. Rev. at 253–254 (noting that the *McNally* Court rejected dissenters' argument that Postal Power justified interpreting Section 1341 to embrace honest services fraud).

The natural result of a constitutional system of limited federal powers is that the definition of the duties owed by state officials to their own constituents is one constitutionally reserved to the several states. *See Panarella*, 277 F.3d at 693 (prosecuting state public officials for honest services fraud creates "federalism concerns about the appropriateness of the federal government's interference with the operation of state and local governments"). Within our federal system, there exist certain areas of State control upon which the federal government cannot tread. Each government has "its own direct relationship, its own privity, its own set of mutual rights and obligations to the people who sustain it and are governed by it." *U.S. Terms Limits, Inc. v. Thornton*, 514 U.S. 779, 838 (1995) (Kennedy, J., concurring). Under this federal system, "a State's government will represent and remain accountable to its own citizens." *Printz v. United States*, 521 U.S. 898, 920 (1997). Thus, our state governments and their elected officials form, as James Madison explained, "distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the [national] authority than the [national] authority is subject to them, within its own sphere." The Federalist No. 39, at 245 (James Madison) (C. Rossiter ed., 1961).

At its root, our constitutional system simply does not grant the federal government the authority to dictate a universal code of ethics governing every state and local public official, especially "a freestanding, open-ended duty to provide 'honest services'—with the details to be worked out case-by-case." *Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari). This Court should therefore heed the warning of *McNally*, strike down this statute, and refuse to endorse the notion that the federal government is authorized to enforce ill-defined "standards of disclosure and good government." *See* 483 U.S. at 360.

2. Once again, adoption of a state-law limiting principle would mitigate against, but not wholly cure, this constitutional defect. While interpreting Section 1346 to incorporate state law would lessen concerns about federal law imposing additional substantive requirements on individuals, it would still deprive states of their ability to make independent policy decisions in areas of traditional state concern on numerous secondary questions, including enforcement mechanisms, appropriate penalties, and the relative priorities of various laws. "It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country," *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)—and this is as true for remedies as for underlying substantive requirements. This Court has recognized the "fundamental interest in federalism that allows individual States to define crimes, punishments, rules of evidence, and

rules of criminal and civil procedure in a variety of different ways." *Danforth v. Minnesota,* 128 S. Ct. 1029, 1041 (2008) (holding that states may give broader effect than federal courts to new constitutional holdings). It substantially undermines that "fundamental interest" to borrow a state rule, potentially not even criminally enforceable, and turn it into a federal felony with a sentence of up to twenty years in prison. 18 U.S.C. § 1341. *Cf.* Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness,* 154 U. Pa. L. Rev. 257, 259 & nn.10–16 (2005) (citing numerous examples of States' "diverse views on criminal law matters").

This case provides a perfect example. The prosecution has attempted to convict Petitioner based on alleged violated of Alaska's state ethical laws, but Alaska, like many states, does *not* impose any criminal penalties for violations of such conflict-of-interest or disclosure requirements. *See, e.g.*, Alaska Stat. § 24.60.240 (establishing only civil penalties for nondisclosure). Even in those states that do impose criminal punishment for conflicts of interest, nondisclosure, or improper gifts, such punishments are rarely felonies and are often narrowly circumscribed. *See, e.g.*, N.Y. Pub. Off. Law § 73-a(4) (allowing, in limited circumstances, punishment for nondisclosure as criminal misdemeanor, but also requiring that "[n]otwithstanding any other provision of law to the contrary, no other penalty, civil or criminal may be imposed for a failure to file, or for a false filing, of such statement[.]"). Using such civil statutes as the predicate for honest-services-fraud prosecutions would therefore invalidate these state decisions to

enforce their ethical codes through non-criminal means.

As a result, limiting Section 1346's applications to instances in which defendants violated duties created by underlying state ethical codes would continue to unconstitutionally interfere with state autonomy. Application of Section 1346 in the public-corruption context seeks to apply federal force to state officers for failing to live up to duties they allegedly owe to citizens of their states, acting in their official capacities. It is wholly unclear, however, what constitutional basis can support such charges. It cannot be based on a public official's obligation as a *private* citizen to comply with the federal mail and wire fraud statutes, as the duty alleged in most honest services fraud cases "is directed [at state officials] in their *official* capacities as state officers; it controls their actions, not as private citizens, but as the agents of the State." *See Printz*, 521 U.S. at 930 (emphasis added). Neither can the application of Section 1346 be grounded on some broad federal authority to regulate the ethical standards of state officers—as this Court has repeatedly held "that state legislatures are *not* subject to federal direction." *Id.* at 912 (citing *New York*, 505 U.S. 144 emphasis in original). Given the Constitution's emphasis on dual sovereignty, there is no room for Congress to declare "without any obvious limiting principles, [that] federal prosecutors [will] police honesty in the corridors of state government by invoking section 1346 against state employees for their acts of 'honest services' fraud." *Rybicki*, 354 F.3d at 164–165 (Jacobs, J., dissenting).

3. Even if the federalism concerns set forth above do not independently establish Section 1346's unconstitutionality, they trigger an additional clarity requirement upon Congress—one which the honest-services-fraud statute cannot satisfy.

In deference to the delicate balance between the federal and state governments, this Court requires Congress to speak clearly before regulating an area traditionally committed to state control. *United States v. Bass*, 404 U.S. 336, 349 (1971); *see also Rybicki*, 354 F.3d at 137 n.10 ("Congress must speak clearly when it legislates in areas of criminal law that are traditionally regulated by the states."). Indeed, this Court has *expressly* emphasized this rule as a critical limitation on the scope and application of the mail fraud statute:

> Absent clear statement by Congress, we will not read the mail fraud statute to place under federal superintendence a vast array of conduct traditionally policed by the States.

Cleveland, 531 U.S. at 27; *see also United States v. Turner*, 465 F.3d 667, 683 (6th Cir. 2006) (reading Section 1346 narrowly in light of federalism-based clear-statement rule).

This clear-statement rule vindicates different interests from the due process concerns already discussed. While the rule of lenity focuses on giving citizens clear notice of their potential criminal liability, the federalism clarity standard ensures that the states receive indisputable notice of any federal efforts to usurp their authority. Yet, notwithstanding their divergent purposes, both concerns are triggered

by the same statutory ambiguities and confusions. It is certainly true that Congress intended to achieve *something* by adopting Section 1346, but the statute provides almost no guidance as to *what* that something is.

Indeed, the statute does not even clearly state that it has any application to state and local government officials. Had Congress wished to clearly evidence such an intention, it had the necessary tools—Senate-approved language would have explicitly regulated the ethical conduct of state and local government officials, but was never enacted into law. *See Brumley*, 116 F.3d at 745–746 (Jolly, J., dissenting); *see also* Pet'r Br. 3–6 (detailing evolution of Section 1346's text). With Congress having not done so explicitly, the Constitution does not permit federal prosecutors to exploit vague language in order to supersede states' rights to determine the codes of conduct governing their local public officials.

Thus, regardless of whether Congress *could* pass a statute purporting to regulate state-level ethical issues in such detail, it cannot be conclusively said that it *did* so by adoption Section 1346. In 1987, such concerns of vagueness, federalism, and lenity were enough to lead this Court to jettison the doctrine of honest services fraud entirely. *McNally*, 483 U.S. at 359–360. The twenty-eight words adopted by Congress in response to *McNally* hardly provide the clear instruction needed to grant the doctrine constitutional legitimacy.

CONCLUSION

For the reasons set forth above, this Court should rule in favor of the petitioner, reverse the Ninth Circuit's decision below, and invalidate 18 U.S.C. § 1346 on constitutional grounds.

Respectfully submitted,

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