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No. 08-876

In the Supreme Court of the United States

CONRAD M. BLACK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether the district court erred in failing to instruct the jury that, to find petitioners guilty of mail fraud on the theory that they deprived their employer of their honest services, the jury had to find that their fraudulent scheme contemplated economic harm to the employer.

2. Whether, by opposing the government's request for special verdicts that would have required the jury to make separate findings on property-rights mail fraud and honest-services mail fraud, petitioners forfeited the claim that their mail fraud convictions must be reversed because of the impossibility of determining whether the jury's general verdicts rested on the honest-services theory.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 530 F.3d 596.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2008. A petition for rehearing was denied on August 13, 2008 (Pet. App. 18a-19a). On October 29, 2008, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including January 10, 2009. The petition was filed on January 9, 2009, and was granted on May 18, 2009. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in an appendix to this brief. App., *infra*, 1a-2a.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341 and 1346, and petitioner Black was convicted of obstruction of justice, in violation of 18 U.S.C. 1512(c)(1). The court of appeals affirmed their convictions, and petitioners sought this Court's review of their mail fraud convictions to the extent they rested on Section 1346's prohibition of schemes to "deprive another of the intangible right of honest services." Pet. App. 1a-17a.

1. Petitioner Conrad M. Black was Chief Executive Officer and Chairman of the Board of Hollinger International, Inc. (Hollinger), a publicly held company that owns newspapers. Petitioners John A. Boultbee and Mark S. Kipnis were also senior executives of Hollinger. Pet. App. 2a; Gov't C.A. Separate App. 531-533 (Gov't C.A. App.).

Hollinger was controlled by a Canadian company called Ravelston in which Black held a majority stake. Boultbee, as well as Peter Y. Atkinson and F. David Radler, two other Hollinger executives, also owned stock in Ravelston. Black, Boultbee, Atkinson, and Radler were not paid directly by Hollinger but instead by Ravelston, which received management fees from Hollinger in exchange for their services. Pet. App. 2a; Gov't C.A. App. 53-56, 60-67, 212, 553, 557.

In 1998, Hollinger began selling many of its small community newspapers. In connection with those sales, Hollinger frequently executed non-competition agreements in which it promised the purchaser that it would not operate a newspaper near the newspapers it sold for a certain period of time after the sale. Petitioners used

purported non-competition agreements to pay themselves millions in fees that Hollinger did not authorize for that purpose, from funds that would otherwise have gone to Hollinger. Pet. App. 2a-4a, 32a; No. 05-CR-727, 2007 WL 3254452, at *4-*9 (N.D. Ill. Nov. 5, 2007); Gov't Exh.-Board-1B; 4/24/07 Tr. 5435-5439; 5/2/07 Tr. 7112.

The APC Scheme. One of petitioners' schemes involved a Hollinger subsidiary called APC, which was in the process of selling the newspapers it owned. When APC had only one newspaper left—a weekly community paper in Mammoth Lake, California—Kipnis prepared and signed on behalf of APC an agreement that paid $5.5 million to Black, Boultbee, Atkinson, and Radler, purportedly in exchange for their promises not to compete with APC or its affiliates for three years after they stopped working for Hollinger. Unlike the non-competition agreements executed by Hollinger, however, the APC agreement was not linked to the sale of any newspapers. Instead, it involved freestanding promises by Black and the others not to compete with a company that they themselves owned. Additionally, when the agreement was executed, no reasonable possibility existed that they would start a newspaper in Mammoth Lake (population approximately 7000). The checks for the $5.5 million were backdated to the year in which APC had sold most of its newspapers in order to make the purported non-competition payments seem more plausible. Petitioners did not disclose the transaction to either Hollinger's board of directors or its audit committee, which was required to approve transactions between Hollinger's executives and the company (or its subsidiaries) because of conflict-of-interest concerns. Pet. App. 2a-3a; J.A. 106a-107a, 123a-124a, 153a-158a; Gov't

C.A. App. 127-128, 182, 196-201, 205-206, 208-209, 214, 398, 403, 408, 413, 420, 539, 568, 599.[1]

At trial, some defendants at times suggested that the $5.5 million represented management fees owed to Ravelston and that they had characterized the fees as compensation for non-competition agreements to gain a tax benefit in Canada. But the evidence showed that (1) Hollinger's board of directors never approved the payments; (2) the payments were not made to Ravelston but to Black, Boultbee, Atkinson, and Radler personally (even though they never received management fees directly from Hollinger or its subsidiaries); and (3) the payments came from the proceeds of a newspaper sale rather than from a management-fee account. Although Radler, who pleaded guilty and testified for the government, stated that, when the payments were made, he mistakenly believed that Hollinger's audit committee had approved them as management fees, other Hollinger employees and officers, including members of the audit committee, testified that the payments had not been approved. Pet. App. 3a-4a; J.A. 52a-55a, 106a-107a, 116a-117a, 123a-129a, 159a-160a, 353a-356a; Gov't C.A. App. 113, 182, 196-201, 445-451; 5/2/07 Tr. 7112.[2]

[1] Although petitioners argue (Br. 9 & n.4) that the non-competition agreement also barred them from competing with Hollinger and its other subsidiaries, no evidence suggests that petitioners had construed the agreement that way before trial. Radler testified that he understood the agreement to bar competition only with the Mammoth paper. J.A. 153a-154a. And board members testified that they had no concerns about competition from petitioners and had not, as they would have done in standard business practice, discussed negotiating non-competes with them. J.A. 106a-107a, 123a-124a; Gov't C.A. App. 182, 199-201.

[2] Petitioners repeatedly mischaracterize (Br. 3, 9, 47) Radler's testimony, asserting that he stated that the $5.5 million was in fact pre-approved management fees. In fact, Radler testified that, when the

Petitioners did not disclose the APC payments until Hollinger filed its 10-K statement with the Securities and Exchange Commission (SEC) in April 2002. That filing described them as "non-competition" payments, made "[i]n connection with the sales of * * * newspaper properties," "to satisfy a closing condition," with the "approv[al]" of Hollinger's "independent directors." J.A. 396a. Every part of that description was false. Pet. App. 4a; J.A. 56a-60a, 116a-117a, 123a-125a, 128a-129a.

The Forum/Paxton Scheme. Another scheme involved the payment of $600,000 in proceeds from the sale of newspapers to Forum Communications Co. and Paxton. Neither Forum nor Paxton requested non-competition agreements with individual executives in connection with those sales, and none was executed.[3] Instead, after a phone conversation with Black, Radler inquired whether any funds from the sales had been set aside for individual non-competition agreements. Rad-

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payments were made, he *believed* they were approved management fees and "was not aware that [he] was *actually issuing money that belonged to Hollinger*." J.A. 159a (emphasis added). Petitioners also incorrectly assert (Br. 10 n.5) that the government argued on appeal that Radler committed perjury. The government argued that Radler was incorrect, not that he committed perjury. As the government's sentencing filings state, "[w]hile there are instances—such as the APC payments—where other evidence proved Radler's initial understanding of events to have been mistaken, the government does not believe that this undermines Radler's overall credibility or the truthfulness of his testimony." Gov't Sentencing Position Concerning David Radler 17 (Nov. 9, 2007) (unsealed Sept. 24, 2009).

[3] Based on a memorandum Radler sent petitioners as a joke, J.A. 374a-375a; 5/8/07 Tr. 7799-7800; 5/14/07 Tr. 8566-8567, petitioners assert (Br. 10) that Forum and Paxton demanded individual non-competition agreements. But the officers of the companies testified precisely the opposite. J.A. 35a-39a, 42-47a.

ler learned that no money had been set aside for that purpose, because no non-competition agreements had been executed, but that $600,000 remained from the sale.[4] Black and Radler then agreed that Radler would divide the money among Black, Radler, Atkinson, and Boultbee, according to the same formula used to divide past non-competition payments. Even though these payments were related-party transactions, petitioners did not seek approval from the audit committee. J.A. 35a-39a, 42a-47a, 104a-107a, 111a-115a, 123a-125a,140a-153a; Gov't C.A. App. 604, 609; 4/25/07 Tr. 5510, 5531-5532, 5541-5542; 4/27/07 Tr. 6059; 5/1/07 Tr. 6624.[5]

The payments were not disclosed in SEC filings until the April 2002 10-K. That filing stated that the payments were made pursuant to non-competition agreements, to satisfy a closing condition in connection with the sale of newspapers, and with the approval of Hollinger's independent directors. J.A. 396a. Again, each aspect of that statement was false.

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[4] Petitioners inaccurately contend that Radler testified that, when he made the payments, he "thought the money had been set aside" for non-competes. Br. 11 (quoting J.A. 142a). Radler testified that, although he initially believed money had been set aside for that purpose, he and Black ordered the payments only *after* he learned that no money had actually been set aside. J.A. 146a-149a, 152a.

[5] Petitioners incorrectly assert (Br. 10) that Hollinger's board approved the supplemental payments using executive committee consents. Only the audit committee could have approved the payments, because the executive committee was not composed of independent directors and therefore could not approve related-party transactions. J.A. 111a-112a. Audit committee members testified that they did not know about, much less approve, the payments. J.A. 104a-107a, 113a-115a, 123a-125a. In any event, no individual non-competition agreements were ever executed, so any board authorization of "noncompete agreement[s]" (J.A. 382a) could not have authorized the payments.

Black's Obstruction of Justice. As the fraud scheme came to light, the SEC, as well as law enforcement authorities and a federal grand jury, opened investigations into petitioners' conduct. Black was aware of those proceedings. Although many documents had already been subpoenaed, on approximately May 19, 2005, the SEC sought additional documents from Black. On May 20, Black, along with his personal assistant, removed 13 boxes of documents from his office at 10 Toronto Street containing files that included documents relevant to the pending proceedings. After his assistant contacted Black to inform him that she had been prevented from removing the boxes, Black drove to the building with his chauffeur and parked in a location where he did not typically park. Black, his assistant, and the chauffeur then removed the boxes from a back stairway. A security video showed Black pointing out cameras in certain parts of the building. Unbeknownst to Black and his assistant, another video camera had just been installed the day before and captured Black removing the boxes. Pet. App. 12a; 2007 WL 3254452, at *13; Gov't C.A. App. 273-276, 284, 312-316, 318, 639, 646, 654; 5/31/07 Tr. 11,413, 11,500, 11,506.

2. *The Charges*. Petitioners were charged with, among other crimes, multiple counts of mail fraud, in violation of 18 U.S.C. 1341 and 1346. Pet. App. 24a-121a. Section 1341 criminalizes the use of the mail to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. Section 1346 defines the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346. The indictment alleged, and the govern-

ment proceeded, on two overlapping theories of mail fraud: (1) that petitioners stole money from Hollinger by fraudulently paying themselves bogus and unapproved non-competition payments; and (2) that, in making the payments to themselves and failing to disclose them, petitioners deprived Hollinger of their honest services as managers of the company. Pet. App. 26a-30a, 35a-36a, 45a-47a, 52a-53a.

The Jury Instructions. The district court instructed the jury that it could find petitioners guilty of mail fraud if it concluded that they participated in a scheme either "to obtain money or property by means of materially false pretenses, representations, or promises," or "to deprive Hollinger International and its shareholders of their intangible right to the honest services of the corporation's officers, directors and/or controlling shareholders." J.A. 335a. On the honest-services theory, the court instructed on three central elements: (1) breach of a duty of loyalty; (2) intent to defraud, and (3) materiality. The court explained that, to establish petitioners' guilt under the honest-services theory, the government had to prove that they misused their positions "for private gain for [themselves] and/or a co-schemer" by knowingly and intentionally breaching their fiduciary "duty of loyalty" to Hollinger. J.A. 335a-336a. The government also had to prove, the instructions stated, that petitioners acted with "intent to defraud," J.A. 334a, which meant "the intent to deceive or cheat," J.A. 338a. "Good faith," the court stated, was "inconsistent" with such an intent, and the government had to negate good faith. J.A. 339a. The court further instructed that, as an element of mail fraud, petitioners' misrepresentations or omission had to be "material," J.A. 338a, which required that they had a natural tendency to influence, or the

capacity to influence, "the decision of the decision-making body to which [they were] addressed." *Ibid.*

The Verdict Forms. The government asked the district court to require special verdicts by which the jury would indicate, if it found petitioners guilty, on which theory (money-or-property fraud, honest-services fraud, or both) the jury had relied. Petitioners opposed special verdicts. Instead, they proposed that the court adopt a bifurcated procedure under which the jury, if it returned a guilty verdict on any fraud count, would be sent back to the jury room to answer special interrogatories about the basis for the verdict. The district court rejected petitioners' proposal for post-verdict special interrogatories. Given petitioners' opposition to a special verdict form, the government withdrew its request for one. The district court used only a general verdict form. Pet. App. 11a, 222a-228a; J.A. 429a-435a.

The Verdict. The jury found petitioners guilty on three mail fraud counts—Counts 1 and 6, which involved the APC payments, and Count 7, which involved the Forum/Paxton payments. See 2007 WL 3254452, at *3; Pet. App. 53a-54a, 57a-59a. The jury also found Black guilty of obstruction of justice, in violation of 18 U.S.C. 1512(c)(1). 2007 WL 3254452, at *3. The district court subsequently granted Kipnis's motion for judgment of acquittal on Count 7. *Id.* at *11.

3. The court of appeals affirmed petitioners' convictions. Pet. App. 1a-17a. As relevant here, the court rejected petitioners' contention that the jury instructions on honest-services fraud were deficient because they did not require a finding that the bogus non-competition agreements contemplated a private gain at the expense of Hollinger, as opposed to a private gain at the expense of the Canadian government. *Id.* at 6a. The court ex-

plained that harm to the person or organization to whom honest services are owed inheres in the deprivation of honest services, whether or not financial harm ensues. *Ibid.* To illustrate, the court described a paradigm honest-services fraud, in which a judge takes bribes from litigants, thereby depriving the public of "honest adjudication service[s]." *Id.* at 6a-7a (citation omitted). Similarly here, the court explained, petitioners deprived Hollinger of their honest services, even if "the inducement was the anticipation of money from a third party (the anticipated tax benefit)." *Id.* at 7a.

The court of appeals also noted that petitioners' "honest services fraud bleeds into money or property fraud." Pet. App. 8a. The court explained that, if petitioners had "disclosed to Hollinger's audit committee and board of directors that the recharacterization of management fees would net [them] a higher after-tax income, the committee or the board might have decided that this increase in the value of the fees to them warranted a reduction in the size of the fees." *Ibid.* The court added that petitioners' conduct, which included causing Hollinger to make false SEC filings to cover up their scheme, was "bound to get [the] corporation into trouble with * * * the SEC." *Id.* at 9a.

The court further held that, even if the honest-services instruction was incorrect, the error was harmless. Pet. App. 9a. The court explained that the government "did not ask the jury to convict" petitioners of honest-services fraud based on "private gain * * * at Canada's expense." *Id.* at 10a. Rather, the government's theory was "that [petitioners] had abused their positions with Hollinger to line their pockets with phony management fees disguised as compensation for covenants not to compete." *Ibid.* Accordingly, the court concluded, if

the jury had believed that the payments were actually management fees owed to petitioners, it would have acquitted them. *Ibid.*

The court of appeals also held, in the alternative, that petitioners "forfeited" their challenge by objecting to the government's request for special verdicts that would have required the jury to state whether, if it found petitioners guilty, it had done so based on property fraud, honest-services fraud, or both. Had the jury been so instructed, the court reasoned, petitioners' challenge to the honest-services instructions may have been "moot." Petitioners' opposition to a verdict form that could have avoided error, the court concluded, constituted a forfeiture of their right to claim that type of error on appeal. Pet. App. 10a-11a.

SUMMARY OF ARGUMENT

I. Honest-services fraud does not require proof, in the private or public sectors, that the defendant contemplated economic harm to the person to whom honest services were owed.

The statute defines a fraud offense in the deprivation of "the intangible right of honest services." 18 U.S.C. 1346. That language directly responded to *McNally* v. *United States*, 483 U.S. 350 (1987), in which the Court invalidated an honest-services conviction and held that the mail fraud statute is limited to the protection of property rights. The statute takes meaning from the decision it was designed to reverse: Section 1346 defines an offense whose essential elements correspond to the scheme involved in *McNally* itself. Thus, honest-services fraud requires a breach of the fiduciary duty of loyalty, carried out with an intent to deceive, on a material matter. As before *McNally,* that form of miscon-

duct may be prosecuted in both the private and the public spheres; the statutory text makes no distinction.

Under a correct interpretation of the statute, petitioners' convictions must stand. The jury instructions contained all of the critical elements of honest-services fraud: breach of the duty of loyalty; intent to deceive; and materiality. And petitioners' self-dealing scheme to pay themselves millions of dollars in the guise of non-competition agreements satisfied those elements. That is true regardless whether the scheme involved theft from Hollinger, as the government argues and the evidence established, or only the reclassification of management fees as non-competition payments—with all the risks to Hollinger that deceit entailed—in order to obtain a personal tax benefit, as petitioners contend.

Petitioners' purported "contemplated economic harm" requirement finds no support in the statutory text. Congress's omission of such an element makes sense because Section 1346 adds a distinct, non-property basis for fraud liability. Imposing petitioners' requirement would render Section 1346 largely insignificant. When a private-sector defendant contemplates economic harm, he can usually be prosecuted under a money-or-property theory. And if petitioners' contemplated-economic-harm requirement were applied to public-sector defendants, it would defeat the statute's essential purpose—to prosecute corrupt or deceptively self-dealing public officials. Even the facts involved in *McNally* would fall outside Section 1346's reach. Petitioners do not acknowledge that implication, but their textual arguments compel it. Their new element of "contemplated economic harm" emerges from the word "defraud" in Section 1341—which applies in all mail fraud cases.

Petitioners' position also directly contradicts the drafting history of Section 1346. An earlier version of the legislation would have limited the honest-services fraud prohibition to cases in which defendant either contemplated some kind of harm (although not necessarily economic) or sought a personal gain. But Congress stripped the bill of that limiting language, instead enacting the unqualified language in Section 1346. This Court should not read into the statute a limitation that Congress rejected.

Pre-*McNally* honest-services cases also support the conclusion that contemplated economic harm is not an element of Section 1346. Although one court of appeals had adopted that requirement for private sector cases, that decision stood on its own. It created an element to address an issue that other circuits considered under the rubric of "materiality," and it limited cognizable harms to economic ones, when no other circuit had done so.

Contrary to petitioners' claim, principles of constitutional avoidance and the rule of lenity do not support their extratextual limitation. Properly construed, the elements of Section 1346 (breach of duty of loyalty, intent to deceive, and materiality) limit its application and provide intelligible bounds. "[T]he intangible right of honest services" to which Congress referred is a term of art: it invokes the doctrine that this Court had rejected in *McNally* and reinstates it in both public and private contexts. *McNally* itself provides the paradigm for such divided-loyalty cases. And courts have defined the two major categories (bribes/kickbacks and undisclosed self-dealing/conflicts-of-interest) that fall within that paradigm. Congress did not criminalize all manner of dishonesty. And disloyal agents or fiduciaries who intend to deceive on a material matter have ample notice of

their criminal conduct. No justification exists for importing a judge-made "harm" requirement that Congress did not adopt.

Even if this Court were to find fault with the jury instructions, petitioners are not entitled to a new trial. This Court should remand for the court of appeals to revisit whether any error on the mail-fraud counts is harmless beyond a reasonable doubt under *Neder* v. *United States*, 527 U.S. 1 (1999). In light of the complexity of the proceedings, that court is best situated to determine the issues. Petitioners seem to assume that, if the jury relied on the honest-services theory, the absence of a jury finding that petitioners' scheme contemplated economic harm to Hollinger compels reversal. But any rational jury would have found that petitioners' undisclosed recharacterization of management fees as non-competition payments exposed Hollinger to foreseeable economic harm, in at least two respects. First, the fraudulent scheme by senior management harmed Hollinger's reputation, thus impairing vital business relationships. Second, the false filings with the SEC threatened further economic harm by inviting shareholder or government litigation.

Finally, Black errs in arguing that, if an instructional error were harmful on the mail fraud counts, it would require reversal of his obstruction of justice conviction. That claim was never made or addressed below, and it should not be considered here in the first instance. In any event, Black cannot carry his burden to show "spillover" prejudice: any instructional error on mail fraud did not affect the evidence admitted at trial and would not have affected the jury's determination that Black endeavored to render evidence unavailable in an official proceeding.

II. Petitioners forfeited their argument based on *Yates* v. *United States*, 354 U.S. 298 (1967), by opposing special verdicts that would have revealed the basis for any conviction by the jury. Such a procedure would have raised none of the concerns that petitioners find in special verdicts; it only would have identified whether a jury that found guilt relied on a legally unchallenged money-or-property fraud theory or on the honest-services fraud theory that petitioners challenge. The Federal Rules permit district courts discretion to apply such a non-prejudicial procedure to eliminate claims of error, yet petitioners objected to this one. Forfeiture of their *Yates* claim should be the consequence, consistent with general principles of forfeiture. No defendant should win reversal of his convictions based on the impossibility of determining the ground on which the jury relied, when the defendant himself objected to a procedure that would have identified the grounds and thus eliminated the *Yates* claim.

ARGUMENT

I. A JURY FINDING THAT PETITIONERS CONTEMPLATED ECONOMIC HARM TO THEIR EMPLOYER WAS NOT NECESSARY TO SUPPORT THEIR CONVICTIONS FOR HONEST-SERVICES FRAUD

In *McNally* v. *United States*, 483 U.S. 350 (1987), this Court rejected the unanimous view of the courts of appeals that the mail fraud statute, 18 U.S.C. 1341, protected against not only schemes for obtaining money or property, but also schemes to deprive others of intangible rights, such as the intangible right of honest services. 483 U.S. at 358; *id.* at 364 (Stevens, J., dissenting). The Court observed that, if Congress wished to expand federal fraud statutes beyond the deprivation of

property rights, "it must speak more clearly than it has." *Id.* at 360. The following year, Congress responded by restoring one such right (the very right at issue in *McNally*) through Section 1346, which states that, for purposes of the mail and wire fraud statutes, "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; see *Cleveland* v. *United States*, 531 U.S. 12, 19-20 (2000) ("Congress amended the law specifically to cover one of the 'intangible rights' that lower courts had protected under § 1341 prior to *McNally*."). Petitioners' contention (Br. 23) that honest-services fraud requires a showing of contemplated (*i.e.*, "reasonably foreseeable") economic harm to the victim lacks merit, and the claim in any event provides no basis for a retrial in this case.

A. Petitioners' Convictions Rest On Findings On All Of The Elements Of Honest-Services Fraud

Before *McNally*, the deprivation of the right of honest services was recognized as a species of fraud in both the public and the private spheres. *McNally,* 483 U.S. at 363-364 (Stevens, J., dissenting). The crime was exemplified by the conduct prosecuted in *McNally* itself. That case involved a "self-dealing" scheme in which state officials (both actual and de facto) deprived the government and citizens of the right to have government affairs "conducted honestly," by arranging to pay themselves, without disclosure to relevant state officials, a share of the commissions on sales of insurance to the State. *Id.* at 352. *McNally* thus sets forth the paradigm case of honest services fraud that Congress intended to prohibit in Section 1346: schemes involving a deceitful breach of the fiduciary duty of loyalty, in which an indi-

vidual faces a conflict between his own interests and those of the entity to whom services are owed and makes material misrepresentations or omissions to that entity. Congress intended to restore prosecutions of that form, whether the misconduct occurred in the public or private sector. The text itself makes that clear: it refers to the deprivation of "the intangible right of honest services," without differentiation of private and public contexts.

The jury instructions in this case embodied those requirements: they required an intentional breach of the fiduciary duty of loyalty; committed with intent to defraud (*i.e.*, to deceive or cheat); and involving material omissions or misrepresentations. J.A. 336a-339a. Petitioners' scheme to secretly extract money from Hollinger, disguising the payments as non-competition agreements, falls squarely within the self-dealing category of breaches of the duty of loyalty—whether the scheme involved the theft of Hollinger's money (as the government contends and the evidence established) or only the undisclosed reclassification of management fees as non-competition payments to obtain a personal tax benefit (as petitioners contend). The district court also correctly instructed the jury that it could find petitioners guilty of mail fraud only if the government proved that they had acted with "the intent to defraud," J.A. 334a, which the court defined as "the intent to deceive or cheat Hollinger," J.A. 338a. Petitioners do not challenge that instruction or contend that the evidence was insufficient to support the jury's finding that they acted with the requisite intent to deceive. Finally, the district court also gave the jury a correct instruction on materiality, which required it to find that petitioners' misrepresentations or omissions were capable of influencing Hollinger. *Ibid*. Petitioners did not take issue with the

district court's materiality instruction in either court below, and the evidence overwhelmingly supports the materiality of the omissions, even under the unwarranted assumption that petitioners believed that the payments they made to themselves were simply reclassified management fees. See pp. 42-43, *infra*.

B. The Statutory Text Does Not Require Proof Of Contemplated Economic Harm

Petitioners would add to the *McNally*-based elements described above an extra-textual requirement that, to establish honest-services fraud in the private sector, the government must prove that the defendant's scheme "contemplated some identifiable economic harm to the victim." Pet. Br. 22. That requirement confuses money-or-property fraud with honest-services fraud, and its importation into the statute cannot be justified.

1. Section 1341 prohibits any person from "devis[ing] or intend[ing] to devise" a "scheme or artifice to defraud," 18 U.S.C. 1341, and Section 1346 provides that a "'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.[6] The text makes no mention of foreseeable or contemplated economic harm. Even courts that have adopted a contemplated-economic-harm requirement have acknowledged that the "the *literal terms*" of the statutes "do not indicate that the prosecution must prove that a fiduciary breach has

[6] Congress enacted these provisions to protect against misuses of the mail (and, under current law, commercial carriers). Thus, the government must prove that the defendant used the United States "Postal Service," or "any private or commercial interstate carrier," "for the purpose of executing such scheme or artifice or attempting so to do." 18 U.S.C. 1341.

created a risk of economic harm to the employer." *United States* v. *Frost*, 125 F.3d 346, 368 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998); accord *United States* v. *Vinyard*, 266 F.3d 320, 326-327 (4th Cir. 2001), cert. denied, 536 U.S. 922 (2002).

The omission of a contemplated-economic-harm requirement is logical. *McNally* held that the mail fraud statute was "limited in scope to the protection of property rights," 483 U.S. at 360, and Congress responded by expanding it to the protection of "the intangible right of honest services." An economic-harm requirement would reintroduce into the mail fraud statute a variant of the very restriction that Section 1346 was designed to eliminate. Fraudulent schemes that contemplate economic harm will typically, if not invariably, involve "deprivation of money or property." *Id.* at 358. Section 1346 adds a distinct right—beyond the property right—to be protected. To construe that additional right as essentially replicating the property right that was already protected violates at least two sound principles of statutory construction: the canon against construing statutory language to be "insignificant, if not wholly superfluous," *TRW Inc.* v. *Andrews*, 534 U.S. 19, 31 (2001) (citation omitted), and the presumption that Congress's substantive changes to a statute are intended to have "real and substantial effect," *Stone* v. *INS*, 514 U.S. 386, 397 (1995).

To the extent that petitioners would limit the "contemplated economic harm" requirement to private sector cases, Pet. Br. 22, that limitation may give Section 1346 more practical effect, but at the cost of another textual anomaly. The text of Section 1346 draws no distinction between public-sector and private-sector honest-services cases. Although the duties and the misrep-

resentations or omissions that are material may differ in those two categories, see p. 38, *infra*, recognizing those different applications does not support creating a non-textual *element* for private-sector cases alone. The text affords no basis for that approach.[7]

2. Petitioners argue (Br. 24-28) that, because Section 1346 defines a deprivation-of-honest-services scheme as a subset of "a scheme or artifice to defraud," Congress must have wanted to limit Section 1346 to a "conventional concept of fraud," Br. 26, which, petitioners contend, requires intended or contemplated economic harm, Br. 27-28. That argument gets Congress's intent precisely backwards.

Congress did not intend prosecutions under Section 1346 to satisfy all of the conventional elements of fraud under Section 1341, plus the new elements of Section 1346. Rather, Congress enacted Section 1346 to supply what the Court found missing in *McNally*. There, the Court held that fraudulent schemes under the mail fraud statute were limited to "wronging one in *his property rights* by dishonest methods or schemes." *McNally*, 483 U.S. at 358 (emphasis added) (citation omitted). Following that decision, Congress expanded the statute to reach deceptive schemes that wronged victims in another way: by depriving them of the right to a person's

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[7] Indeed, the statutory language in which petitioners (Br. 24-28) purport to ground the contemplated-economic-harm requirement—the requirement of "a scheme or artifice to defraud"—applies to public-sector and private-sector cases alike. Although several courts have distinguished public-official from private-sector cases, see, *e.g.*, *United States* v. *deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) (requiring no harm beyond the breach in public-official cases, but requiring contemplated economic harm in private cases), cert. denied, 530 U.S. 1264 (2000), they have not grounded that rule in the text.

honest services. Under that expansion, mail fraud prosecutors must still prove an intent to deceive; materiality; and use of the mails or other jurisdictional means—but the object of the fraud can now be the deprivation of honest services *or* money or property.[8] To read into Section 1346 the requirement that the defendant contemplated injury to the "property rights of the victim," Pet. Br. 23 (citation omitted), strips Section 1346 of much of its function.

That is particularly evident with respect to public-official honest-services frauds of the type at issue in *McNally*. If petitioners were correct that Congress intended Section 1346 to require proof of all the traditional elements of "fraud," Pet. Br. 27, then the statute would not even reach the scheme to defraud prosecuted in *McNally* itself. The defendants there were not shown to contemplate economic harm to the State; rather, the charged conduct involved the simple deprivation of honest services without any accompanying loss of money or property. Yet, even petitioners do not go so far as to say that the conduct of the *McNally* defendants falls outside Section 1346.

The conclusion that Section 1346 does not require proof of intended or contemplated harm does not mean that the statute lacks a specific intent requirement. On the contrary, as in all mail fraud prosecutions, in honest-

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[8] As petitioners acknowledge, because Section 1341 prohibits the scheme to defraud, not the completed crime, proof of actual pecuniary loss is not an element of money-or-property mail fraud. *Neder* v. *United States*, 527 U.S. 1, 25 (1999); see Pet. Br. 27; J.A. 339a. Under Section 1341, a defendant need only scheme to deprive another of money or property. Likewise, under Section 1346, a defendant need only scheme to deprive another of honest services; he need not actually do so.

services cases, the government must prove that the defendant acted with the intent to defraud. See *United States* v. *Weyhrauch*, 548 F.3d 1237, 1247 n.8 (9th Cir. 2008), cert. granted, No. 08-1196 (June 29, 2009); *United States* v. *Cochran*, 109 F.3d 660, 667 (10th Cir. 1997). In the context of honest-services fraud, the required intent to defraud is the intent to "deceive or cheat" the victim in order "to deprive" her of the "right to the [defendant's] honest services." J.A. 338a; see *United States* v. *Welch*, 327 F.3d 1081, 1105 (10th Cir. 2003). But the requirement that the defendant acted with intent to deceive is not tantamount to a requirement that he intended or contemplated economic harm. *Ibid.*

C. A Contemplated-Economic-Harm Requirement Would Frustrate The Purposes Of The Honest-Services Fraud Prohibition

Reading a contemplated-economic-harm requirement into Section 1346 would undermine the purposes behind the statute in two significant ways. First, a contemplated-economic-harm requirement would deprive Section 1346 of almost all practical effect, because most honest-services frauds that threaten the victims with foreseeable economic harm could be prosecuted as money-or-property frauds. Second, a contemplated-economic-harm requirement would exclude from the ambit of Section 1346 several types of honest-services fraud that Congress clearly intended to cover.

1. The degree to which petitioners' interpretation would deprive Section 1346 of practical effect is vividly illustrated by decisions of the courts of appeals that reviewed honest-services convictions following this Court's decision in *McNally.* Those courts upheld many pre-*McNally* mail fraud convictions that had been obtained

under instructions that included an honest-services theory "where the 'bottom line' of the scheme or artifice had the inevitable result of effecting monetary or property losses to the employer or to the state." *United States* v. *Asher*, 854 F.2d 1483, 1494 (3d Cir. 1988), cert. denied, 488 U.S. 1029 (1989); see, *e.g.*, *United States* v. *Perholtz*, 836 F.2d 554, 558-559 (D.C. Cir. 1987); *United States* v. *Fagan*, 821 F.2d 1002, 1008-1011 & n.6 (5th Cir. 1987), cert. denied, 484 U.S. 1005 (1988). Those decisions make clear that honest-services frauds that expose the victims to foreseeable economic harm often could be prosecuted as money-or-property frauds. The court of appeals here made the same essential point in noting that "honest services fraud bleeds into money or property fraud" when disclosure of a breach of duty of loyalty would lead the principal to seek a more advantageous financial deal. Pet. App. 8a ("In this case, had the defendants disclosed to Hollinger's audit committee and board of directors that the recharacterization of management fees would net the defendants a higher after-tax income, the committee or the board might have decided that this increase in the value of the fees to them warranted a reduction in the size of the fees."). Surely Congress did not enact Section 1346 merely to provide an additional ground on which to prosecute cases that already could have been prosecuted as money-or-property frauds.

Some courts have suggested that Section 1346 would still expand the mail fraud statute beyond frauds that could have been prosecuted under *McNally* even if honest-services fraud included a contemplated-economic-harm requirement. They reason that money-or-property fraud would remain narrower than honest-services fraud because money-or-property fraud requires proof

that the defendant "intend[ed] to inflict an economic harm upon the victim," while honest services fraud requires no such intent (even with a contemplated-economic-harm requirement). *Frost*, 125 F.3d at 369. That reasoning is incorrect. Even if money-or-property fraud requires proof of intent to cause economic harm, that intent would be established in an honest-services fraud case in which the government proved contemplated economic harm. A jury can ordinarily infer that a person intends the natural and probable results of his actions. *Agnew* v. *United States*, 165 U.S. 36, 49 (1897). When a defendant intended to deceive his employer or principal (as required to establish honest-services fraud) and he did foresee or should have foreseen that his deception could result in pecuniary harm (as required by the contemplated-economic-harm element), the jury could draw the inference that the harm was intended. Thus, if proof of contemplated-economic-harm were an element of honest-services mail fraud, Section 1346 "would have effect," if ever, "only in the rarest of circumstances," a result Congress could not have intended. *Stone*, 514 U.S. at 397.

2. At the same time, a contemplated-economic-harm requirement would exclude from coverage under Section 1346 several categories of honest-services fraud that Congress certainly intended to include. In the public sector, it would exclude what courts have universally characterized as the "core misconduct" covered by the statute—cases involving legislative votes or bureaucratic decisions paid for by bribes or based on a public official's undisclosed conflict of interest. See *United States* v. *Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008). The need for the mail fraud prohibition to cover that category of misconduct was the primary concern leading to Section

1346's enactment.[9] As members of Congress who supported Section 1346 recognized, bribe-taking and similar corrupt conduct by public officials often causes no discernible economic harm to the public. See note 9, *supra*. Public corruption therefore generally would not be criminalized under petitioners' understanding of Section 1346, even though the principal motivation for the statute was to ensure that public corruption was covered. See Citizens for Responsibility and Ethics in Washington (CREW) Amicus Br. 2.

A contemplated-economic-harm requirement would also curtail the coverage of Section 1346 in the private sector in ways that Congress likely did not intend. In commercial settings, honest-services frauds will generally threaten economic harm. That is because the consequences of fraud committed in a business setting are ordinarily business-related—*i.e.*, economic. See *United States* v. *Pennington*, 168 F.3d 1060, 1065 (8th Cir. 1999). But fiduciary or employer-employee relationships also exist outside of the business setting, for example, in medical, educational, charitable, or public-interest contexts. And, in those contexts, honest-services schemes may work significant harm to the mission of an institution, or the purpose of the relationship, even if they pose little or no direct risk of pecuniary loss.

For example, in *United States* v. *Jain*, 93 F.3d 436 (8th Cir. 1996), cert. denied, 520 U.S. 1273 (1997), a psychologist received a financial kickback from a psychiatric hospital for referring patients, but the psychologist did not disclose that conflict to patients. The court of

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[9] See, *e.g.*, 134 Cong. Rec. 24,579 (1988) (Sen. Metzenbaum); *id.* at 23,955 (Sen. Thurmond); *ibid.* (Sen. Simon); *id.* at 23,953 (Sen. Biden); 133 Cong. Rec. 33,254 (1987) (Sen. Specter); *id.* at 21,466 (Rep. Synar); *ibid.* (Rep. Mfume).

appeals held that, although the psychologist had breached a fiduciary duty, he had not committed honest-services fraud because the scheme caused no "actual harm to the victims' tangible interests." *Id.* at 442; see *ibid.* (No patient would have considered the psychologist's conflict "material if it did not affect the quality or cost of his services to that patient.").[10] But a reasonable patient would plainly want to know that his psychologist had a financial conflict of interest before acting on his recommendation. A requirement of "harm to * * * *tangible* interests" in order to prosecute a violation of "the *intangible* right of honest services" makes no sense. The contemplated-economic-harm test should be rejected as a type of "no harm-no foul argument" that "usually fare[s] badly in criminal cases." Pet. App. 6a.

D. The Drafting History Establishes That The Honest-Services Fraud Statute Does Not Require Proof Of Contemplated Economic Harm

The drafting history of Section 1346 confirms that the statute does not require the government to prove contemplated economic harm in order to establish honest-services fraud.

Although several legislative proposals were introduced in the wake of *McNally*, Section 1346 ultimately grew out of the Anti-Corruption Act of 1988, S. 2793, 100th Cong., 2d Cong. That bill redefined a "scheme or artifice to defraud" under the mail and wire fraud statutes to include "depriv[ing] an organization of the intan-

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[10] The court added that, absent actual harm, the government had to introduce independent evidence of intent to defraud. *Jain*, 93 F.3d at 442; see also *United States* v. *Lamoreaux*, 422 F.3d 750, 754 (8th Cir. 2005). But *Jain*'s holding on materiality would seemingly foreclose a prosecution regardless of intent to defraud.

gible right of honest services in which the defendant received or attempted to receive, for the defendant or another person, anything of value *or* in which the defendant intended or contemplated loss *or* harm to the organization." *Id.* § 3 (emphasis added).

S. 2793 was passed by the Senate on October 14, 1988. 134 Cong. Rec. 31,073 (1988). That same day, the bill was also incorporated into the pending Omnibus Anti-Substance Abuse Act of 1988, H.R. 5210, 100th Cong., 2d Sess. See 134 Cong. Rec. at 30,310, 30,748, 30,766-30,768, 30,781. The Senate then passed H.R. 5210 as amended, and transmitted it to the House. *Id.* at 30,826. The House amended the honest-services provision by removing limitations in the Senate version, including the reference to "contemplated loss or harm," and adopting instead the more expansive language that now constitutes Section 1346. See *id.* at 33,150, 33,250, 33,318; Anti-Drug Abuse Act of 1988, H.R. 5210 § 7603(a) (as passed by the House, Oct. 21, 1988). The broader language passed both the House and the Senate as part of the Anti-Drug Abuse Act on October 21, 1988, 134 Cong. Rec. at 32,678, 33,318, and it was signed into law by the President on November 18, 1988. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508.

Even on its own terms, the Senate version of the honest-services provision does not support petitioner's proposed limitation on honest-services fraud. By referring broadly to "loss *or* harm," the Senate bill indicated that *any* kind of contemplated harm, not just pecuniary loss, would bring a defendant's fraudulent scheme within the coverage of the statute. S. 2793 § 3 (emphasis added). The Senate language also did not require proof of contemplated harm if the defendant "received or at-

tempted to receive * * * anything of value." *Ibid.* Instead, under the Senate version, a defendant would violate the law if he *either* sought a thing of value through his fraudulent conduct *or* contemplated that his conduct would cause his employer harm, which did not have to be economic in nature.

But quite apart from the Senate bill's failure to embody petitioners' requirement, the Senate bill did not pass. To the contrary, Congress stripped the bill completely of the limiting language and enacted a statute without any requirement that the government prove either attempted gain or contemplated harm. Congress thus plainly did not intend to adopt the more stringent contemplated-*economic*-harm requirement advocated by petitioners. Their suggestion (Br. 36-37) that Congress's deletion of the limiting language in the Senate bill should be read as an implicit adoption of the deleted limitation is contrary to both common sense and this Court's cases. The Court has repeatedly refused to conclude that Congress "intend[ed] *sub silentio* to enact statutory language that it ha[d] earlier discarded in favor of other language." *INS* v. *Cardozo-Fonseca*, 480 U.S. 421, 442-443 (1987); *e.g.*, *Doe* v. *Chao*, 540 U.S. 614, 622-623 (2004); *Gulf Oil Corp*. v. *Copp Paving Co.*, 419 U.S. 186, 200 (1974).

E. Pre-*McNally* Case Law Does Not Support Requiring A Jury Finding That The Defendant Contemplated Economic Harm

Petitioners contend (Br. 28-32) that a contemplated-economic-harm requirement is required by the pre-*McNally* cases concerning honest-services fraud. Although Section 1346 does draw meaning from the doctrine this Court rejected in *McNally*, petitioners mis-

construe that doctrine. With one exception, the pre-*McNally* cases rejected the suggestion that honest-services fraud requires proof of contemplated *economic* harm (as opposed to other forms of harm). And the cases (again with a lone exception) do not indicate that foreseeable harm is an independent element but instead find it in the traditional element of materiality.

1. The language of Section 1346 must be understood in light of the *McNally* decision itself. "[T]he intangible right of honest services" to which Congress referred is a term of art: it invokes the doctrine that this Court had rejected in *McNally* and reinstates it in both public and private contexts. As the Second Circuit has explained, "[t]he definite article 'the' suggests that 'intangible right of honest services' had a specific meaning to Congress when it enacted the statute—Congress was recriminalizing [mail fraud] * * * schemes to deprive others of *that* 'intangible right of honest services[]' which had been protected before *McNally*, not *all* intangible rights of honest services whatever they might be thought to be." *United States* v. *Rybicki*, 354 F.3d 124, 137-138 (2d Cir. 2003) (en banc), cert. denied, 543 U.S. 809 (2004).[11]

[11] Statements of legislators who played significant roles in the enactment process confirm that view. See, *e.g.*, 134 Cong. Rec. at 31,072 (Sen. Biden) ("[T]he committee intends, in general, that the bill be read in the context of pre-*McNally* case law."); *id.* at 33,297 (Rep. Conyers) ("This amendment is intended merely to overturn the *McNally* decision. No other change in the law is intended."). Some statements sweep more broadly and suggest that Section 1346 restored all pre-*McNally* law. *Id.* at 32,708 (Senate Judiciary Committee Section-by-Section Analysis) ("The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change."). But Congress could not have intended to restore *all* pre-*McNally* case law; lower court cases had announced conflicting rules and in some contexts had failed to clarify the scope of the doctrine. Indeed, petitioners assert

2. Petitioners attempt to extract from pre-*McNally* lower court cases a contemplated-economic-harm requirement in the private sector. Pet. Br. 28-32. The only court of appeals that had adopted this requirement before *McNally*, however, was the D.C. Circuit. See *United States* v. *Lemire*, 720 F.2d 1327, 1337 (1983) (requiring that "the defendant might reasonably have contemplated some concrete business harm to his employer stemming from his failure to disclose the conflict"), cert. denied, 467 U.S. 1226 (1984). And, although the court purported to reconcile its approach with that of other courts of appeals, it made clear that its formulation "may differ" from their analysis, which focused on materiality. *Ibid.* Congress cannot be deemed to have implicitly adopted a single lower court decision—itself an outlier—as a definitive exposition of honest services fraud.

Review of decisions outside the D.C. Circuit reveals that *Lemire* was the exception, rather than the rule. The pre-*McNally* cases from the Second Circuit that petitioners cite indicate that, in order to prove that an employee defrauded his employer of his honest services, the government must show that "*some* actual harm or injury [to the employer] was at least contemplated." *United States* v. *Von Barta*, 635 F.2d 999, 1006 n.14 (1980) (emphasis added), cert. denied, 450 U.S. 998 (1981); see *United States* v. *Dixon*, 536 F.2d 1388, 1399

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that the "intangible right of honest services" "had no settled or well-known meaning" as applied to private-sector conduct (Br. 25), and their contemplated economic harm test is itself an outlier. Rather, Section 1346 covers what had emerged before *McNally* as paradigm cases of deceptive breaches of loyalty in both the public and the private sectors, on which the courts had reached general consensus. See CREW Amicus Br. 18-20 & nn.9-10.

n.11 (1976) (Friendly, J.). But, unlike the D.C. Circuit in *Lemire*, the Second Circuit did not state that the harm must take an economic form.[12] Likewise, the Seventh Circuit in *United States* v. *Feldman*, 711 F.2d 758, 763, cert. denied, 464 U.S. 939 (1983), and the Fifth Circuit in *United States* v. *Ballard*, 663 F.2d 534, 540 (Unit B Dec. 1981), modified on reh'g, 680 F.2d 352 (Unit B 1982) (per curiam), required a showing of some possible "harm" or "possible detriment" to the employer, but not necessarily economic harm. Because these cases involved fraudulent conduct in a commercial or financial setting, the courts' analyses naturally focused on economic harm. But the cases do not support the conclusion that a contemplated-*economic*-harm requirement was an established element of pre-*McNally* honest-services doctrine.[13]

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[12] The language in *Dixon* cited by petitioners (Br. 28) appeared in a footnote supporting Judge Friendly's observation that no case "ha[d] sustained a conviction for mail fraud on the basis of nothing more than the failure to mail a correct proxy solicitation where this was not in furtherance of some larger scheme contemplating pecuniary loss to someone or direct pecuniary gain to those who designed it." 536 F.2d at 1399. As *Dixon* made clear, however, the scheme before it failed because, *even if* public-official mail-fraud cases, which did not require economic harm, applied to private-sector frauds, Dixon's conduct (unlike those cases) lacked "an element of corruption." *Id.* at 1401. The court thus did "not consider whether the doctrine of [those] cases should be carried over into the private field." *Ibid.*

[13] Contrary to petitioners' contention (Br. 31-32), this reading of pre-*McNally* case law is consistent with the government's brief in *Carpenter* v. *United States*, 484 U.S. 19 (1987), which endorsed pre-*McNally* cases requiring that the fraudulent scheme "contemplate[] some sort of harm to the principal," and cited the statement in *Lemire* that "an identifiable harm to [the employer], apart from the breach itself, [must be] reasonably foreseeable." U.S. Br. at 19-20, *Carpenter*, *supra* (No. 86-422) (quoting *Lemire*, 720 F.2d at 1337). Nowhere did the brief

Indeed, other cases from each of these circuits indicated that the harm contemplated by honest-services schemes need not be economic. In *United States* v. *Newman*, 664 F.2d 12 (1981), the Second Circuit ruled that "[t]he district court erred in holding that, in every mail fraud case based upon a breach of fiduciary duty by a private employee, there must be proof of 'direct, tangible, economic harm to the victim, actual or contemplated.'" *Id.* at 20. The Seventh Circuit also stated that it was "not persuaded" that honest-services fraud, in either the private or the public sector, embodies a contemplated-economic-harm requirement. *United States* v. *Castor*, 558 F.2d 379, 383 (1977), cert. denied, 434 U.S. 1010 (1978). And the Fifth Circuit, in a private sector case, had stated that "a scheme to defraud need not necessarily contemplate loss of money or property to the victims." *United States* v. *Curry*, 681 F.2d 406, 410 (1982). See also *United States* v. *Price*, 788 F.2d 234, 237 (4th Cir. 1986) (rejecting "economic injury" requirement in prosecution of union officials), vacated *sub nom. McMahon* v. *United States*, 483 U.S. 1015 (1987); *United States* v. *Venneri*, 736 F.2d 995, 996-997 (4th Cir.) (rejecting contemplated-economic-harm requirement under plain-error standard), cert. denied, 469 U.S. 1035 (1984).

3. In addition, apart from *Lemire*, see 720 F.2d at 1338-1339, the pre-*McNally* cases did not suggest that potential harm was an independent element that required a separate jury instruction and finding. Rather, they suggest that contemplated harm would be established by a jury finding that the deception was material,

state that the pre-*McNally* cases required the "contemplated harm" to be pecuniary.

which is required in honest-services cases, as in mail fraud generally.

The traditional fraud element of materiality is an element of all mail fraud offenses. *Neder* v. *United States*, 527 U.S. 1, 25 (1999). To establish materiality in the honest-services context, the government must prove that the misrepresentation or nondisclosure had "the natural tendency to influence or is capable of influencing the employer to change his behavior." *Rybicki*, 354 F.3d at 145 (citation omitted); see *Neder*, 527 U.S. at 22 n.5 (quoting Restatement (Second) of Torts § 538, at 80 (1977)). A misrepresentation or nondisclosure would influence an employer to change his behavior only if a different course of conduct would enable the employer to obtain some benefit or to avoid some injury. See *Rybicki*, 354 F.3d at 146 (preferring traditional materiality test to the "*ipse dixit*" "'non-*de minimis* reasonably foreseeable harm' test").[14]

The Fifth Circuit's pre-*McNally* decision in *Ballard* expressly connected proof of materiality and contemplated harm. Although requiring "some detriment to the employer" when an honest-services prosecution rested on an employee's fiduciary breach, 663 F.2d at 540, the court stated that "[t]he possible detriment" derived from "a violation of the employee's duty to disclose *material* information to the employer," *id.* at 540-541 (emphasis added). The court reversed the convictions of several of the defendants because, in the absence of potential harm to their employers, the evidence did not

[14] Contrary to petitioners' view (Cert. Reply Br. 7), the traditional materiality requirement does not permit prosecution of "trivial" frauds. Rather, while screening out unimportant breaches in trivial transactions, it preserves protection when matters are important for non-economic reasons. See pp. 25-26 & note 10, *supra*, and p. 38, *infra*.

satisfy the "traditional definition" of "materiality," which the court stated is met "whenever an employee has reason to believe that the information would lead a reasonable employer to change its business conduct." *Id.* at 541 & n.17. Other pre-*McNally* cases also connected proof of materiality to potential harm, although less explicitly. See, *e.g.*, *United States* v. *Silvano*, 812 F.2d 754, 759 (1st Cir. 1987) (noting the potential-harm requirement but holding that "an employee's breach of a fiduciary duty falls within the strictures of the [mail fraud] statute when it encompasses the breach of a duty to disclose material information to the employer"); *Von Barta*, 635 F.2d at 1005-1006 & n.14 (same).

In sum, the pre-*McNally* cases do not suggest that honest-services fraud has an independent element of harm (let alone economic harm). Instead, those cases support the presumption that Congress intended honest-services fraud, like other mail fraud to include the traditional element of materiality, which embodies a related concept to contemplated harm, but delineates it in a significantly different manner.

F. Neither Constitutional Avoidance Nor The Rule Of Lenity Supports A Contemplated-Economic-Harm Requirement

1. A contemplated-economic-harm requirement is not necessary to avoid "serious constitutional questions." Pet. Br. 37. Petitioners argue that, without that limitation, Section 1346 would constitute "an open-ended delegation of authority to the courts to develop common-law crimes," in violation of separation-of-powers principles, *ibid.*; "federalize vast areas of the law of fiduciary obligations," in violation of principles of federalism, Br. 40; and sweep so broadly and vaguely as to "deprive[]

the citizenry of the fair notice required by due process," Br. 41. Those contentions all rest on the erroneous premise that, without a contemplated-economic-harm requirement, Section 1346 will criminalize "all manner of 'dishonesty' in the private sector," Br. 37, including "mere breaches of workplace rules," Br. 27. Contrary to that premise, honest-services fraud is inherently limited in ways that clarify its scope and narrow its application. Therefore, no serious constitutional questions of vagueness, delegation, or federalism exist.[15]

Honest services fraud contains three basic non-jurisdictional elements: (a) a breach of the duty of loyalty; (b) intent to deceive; and (c) materiality.

Duty of Loyalty. Schemes to deprive others of "the intangible right of honest services" include only those in which an agent (or someone who owes a comparable duty of loyalty) secretly breaches that duty by acting in his own interests while purporting to act in the interests of his principal. See *Weyhrauch*, 548 F.3d at 1247; *Rybicki*, 354 F.3d at 141-142. An agent's action to further his own interests while feigning loyalty to his principal is a classic form of fraud. See *United States* v. *O'Hagan*, 521 U.S. 642, 653-654 (1997).

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[15] Nor does Section 1346, interpreted without a contemplated-economic-harm requirement, raise serious Commerce Clause issues. Contra Pet. Br. 40. Sections 1341 and 1346 criminalize honest-services frauds only if they use either the United States postal system or a "private or commercial interstate carrier." 18 U.S.C. 1341. The federal interest in protecting the postal system justifies criminalizing schemes involving the United States mail. See *Badders* v. *United States*, 240 U.S. 391, 393 (1916). And Congress's authority under the Commerce Clause empowers it to "protect the instrumentalities of interstate commerce," *United States* v. *Lopez*, 514 U.S. 549, 558 (1995), including private or commercial interstate mail carriers, see *United States* v. *Gil*, 297 F.3d 93, 100 (2d Cir. 2002).

While *McNally* itself exemplifies the equation of "honest services" with the duty of loyalty, 483 U.S. at 355, other pre-*McNally* cases illustrate the two general categories involving breaches of this duty: cases involving bribes or kickbacks and cases involving self-dealing or taking official action while operating under an undisclosed conflict of interest. See *United States* v. *Kincaid-Chauncey*, 556 F.3d 923, 942-943 (9th Cir. 2009), petition for cert. pending, No. 09-5076 (filed June 29, 2009); *Weyhrauch*, 548 F.3d at 1247; *Rybicki*, 354 F.3d at 139-141. In the bribery/kickback cases, an employee or public officer generally accepts a payment from a third party in exchange for performing his employment or public duties in a manner favorable to the third party. In the self-dealing/conflict cases, an employee or public officer generally takes action within the scope of his official duties that furthers his undisclosed personal interests.

By limiting actionable honest-services schemes to those involving undisclosed breaches of the duty of loyalty, Congress ensured that Section 1346 does not criminalize "all manner of 'dishonesty.'" Pet. Br. 37. For example, the statute does not cover "the employee who phones in sick so he can go to a ball game," *id.* at 40; nor does it cover a public official (or private executive) who "attempt[s] to use the prestige" of his position "to obtain a restaurant table without a reservation," or who recommends an unqualified friend for a contract (but exercises no authority to direct the contract to him), *Sorich* v. *United States*, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari). Instead, the statute criminalizes only schemes in which an employee or public officer secretly takes official action to further his

own interests while pretending to act in the interests of those to whom he owes a duty of loyalty.

Intent to Deceive. This Court has recognized that a specific intent requirement goes far towards eliminating constitutional concerns of the kind petitioners raise, regarding vagueness and lack of fair warning. *Colautti* v. *Franklin*, 439 U.S. 379, 395 & n.13 (1979); *Screws* v. *United States*, 325 U.S. 91, 101-102 (1945) (plurality opinion). Section 1346's requirement that the defendant have the specific intent to deceive serves that purpose here. Section 1346 does not cover an employee who fails to disclose a conflict of interest because he is unaware of his disclosure duty; nor does it cover an employee who engages in self-dealing with his employer's knowledge or without any intent to mislead. For that reason, petitioners err in asserting that honest-services fraud reaches "*any* breach of a duty of loyalty in the private employment context" or any "violation of Delaware fiduciary rules." Br. 41-42 (citation omitted). Only if the defendant acted "knowingly, with the intent to deceive or cheat" (J.A. 338a) may he be convicted.[16] For example, in *United States* v. *McNeive*, 536 F.2d 1245 (8th Cir. 1976), the court reversed the honest-services conviction

[16] Petitioners' jury was instructed that honest-services fraud requires proof of "the intent to deceive or cheat," and it was also instructed that a breach of fiduciary duty "does not, in and of itself, amount to a violation of the mail or wire fraud statute"; thus, even for a scheme to breach such a duty, "you must still determine whether the government has proven all of the elements of the crime charged beyond a reasonable doubt." J.A. 338a. See *United States* v. *Bush*, 522 F.2d 641, 648 (7th Cir. 1975) (Breach of duty "alone could never be considered a crime under the mail fraud statute. It is only when [the] failure to provide honest and faithful services is combined with material misrepresentations * * * and * * * active concealment that an illegal fraud occurs."), cert. denied, 424 U.S. 977 (1976).

of a public employee who had accepted small, unsolicited gratuities because he "did not materially misrepresent the existence or nature of the gratuity practice" or "actively conceal[] his activity" and he therefore lacked "the requisite intent to defraud." *Id.* at 1252.

Materiality. The materiality element requires that the defendant's deceptive conduct be capable of influencing the victims to change their behavior. *Neder*, 527 U.S. at 22-23; J.A. 338a. As discussed earlier, that requirement limits the offense to deceptive breaches of duty that have a sufficient level of importance to the conduct of the relevant victim's affairs. In commercial settings, the affairs of the victim typically involve business decisions, and undisclosed facts in that context will ordinarily be important because of their economic significance. The significance can be either direct or indirect. A business is harmed directly if an employee takes kickbacks to favor particular suppliers who would otherwise be willing to sell their goods to the principal at a lower price. See Pet. App. 8a. A business may also be harmed indirectly if its reputation for integrity suffers from the deceptive self-dealing of an agent; that harm may jeopardize the business's ability to bid for government work or win the trust of consumers or business partners. But, in other settings, the materiality standard provides necessary flexibility that petitioners' contemplated-economic-harm standard would not. In the non-profit and public sectors (and even in some cases involving private businesses), honest-services schemes may pose no clearly identifiable economic harm but nonetheless threaten significant non-economic harm. The materiality standard ensures that the statutory prohibition captures those "cases of non-economic, yet serious, harm." *Rybicki*, 354 F.3d at 146.

In combination, those elements define a core crime of honest-services fraud that requires no additional non-textual elements to alleviate vagueness issues. Especially since "[v]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in light of the facts of the case at hand," *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 n.7 (1982), any lingering concerns about doubtful applications should be addressed on particular facts, not by judicial amendment of the statute.

2. The rule of lenity likewise does not support a contemplated-economic-harm requirement. Contra Pet. Br. 43-44. The rule of lenity applies only when the text contains a "grievous ambiguity," such that, "after seizing upon everything from which aid can be derived," the Court "can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted); accord *Dean* v. *United States*, 129 S. Ct. 1849, 1856 (2009) ("The simple existence of some statutory ambiguity * * * is not sufficient to warrant application of the rule, for most statutes are ambiguous to some degree.") (quoting *Muscarello*, 524 U.S. at 138).

Section 1346's core coverage is clear: to prohibit schemes of the type considered by this Court in *McNally*, whether public or private. Prosecutions that go beyond that scope can be addressed in specific cases. See, *e.g.*, *United States* v. *Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997) (IRS employee's unauthorized accessing of income tax files in disregard of IRS rules was not honest services fraud.); *United States* v. *Rabbitt*, 583 F.2d 1014 (8th Cir. 1978) (Legislator's acceptance of fees for making referrals to state contracting officials, outside of his official duties, was not honest services fraud.); *Dixon*,

536 F.3d at 1400-1401 (Officer's omissions from a proxy statement of his indebtedness to the company was not honest services fraud on shareholders, because the officer's conduct lacked any "element of corruption."). Far from showing that Section 1346 requires additional judge-made boundaries (Pet. Br. 42 n.13), these cases illuminate that enforcing the existing boundaries can provide clarity about the statute's coverage. For the reasons stated above, Section 1346, properly construed, is not ambiguous, let alone "grievous[ly]" so, on the issue of whether contemplated-economic-harm is a statutory element.

G. Petitioners Are Not Entitled To Reversal Of Their Convictions

Even if the district court should have instructed the jury that it could find petitioners guilty only if their honest-services scheme contemplated economic harm to Hollinger, they are not entitled to a new trial. If the Court finds jury-instruction error, it should remand for the court of appeals to reconsider harmless-error issues in light of this Court's clarification of the applicable legal standards. Cf. *Yeager* v. *United States*, 129 S. Ct. 2360, 2370 (2009) ("declin[ing] to engage in a fact-intensive analysis of the voluminous record, an undertaking unnecessary to the resolution of the narrow legal question we granted certiorari to answer"). Although the court of appeals in this case did conduct harmless-error analysis, Pet. App. 10a, it did so before this Court clarified that the submission of an erroneous, alternative legal theory to the jury could be harmless error and that the analysis is identical to that conducted under *Neder*. See *Hedgpeth* v. *Pulido*, 129 S. Ct. 530 (2008) (per curi-

am).[17] Accordingly, the court of appeals should be afforded the opportunity to "revisit its factual analysis," *Yeager*, 129 S. Ct. at 2370, in light of any newly announced legal standard by this Court. And this Court should permit the court of appeals to determine in the first instance whether Black's "spillover" prejudice argument on his obstruction conviction (Pet. Br. 47-49) was properly preserved and has any merit—a task that no court has yet undertaken. Cf. *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) (noting that this Court is "a court of review, not of first view" and declining to consider arguments "not addressed by the Court of Appeals").

1. In analyzing alternative-theory error for harmlessness, the ultimate inquiry is whether any error was harmless beyond a reasonable doubt. See *Neder*, 527 U.S. at 19. Petitioners argue (Br. 3, 46-47) that the court of appeals erred in concluding that the jurors must have found money-or-property fraud based on a theft theory. They argue that jurors were "not bound to accept" that theory just because the government advanced it. Br. 47. Petitioners reason that, if the jurors rejected the theft theory, they would have relied on the honest-

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[17] The court below noted that the courts of appeals were divided on whether submission of an "illegal theory" could be harmless, and it drew a distinction between "submitting a case to a jury on an erroneous theory of criminal liability" and omitting to give an unambiguously correct instruction. Pet. App. 10a. It then conducted harmless error analysis on the assumption that the latter was involved, without citing *Neder*. But this Court's decision in *Hedgpeth* clarified that "drawing a distinction between alternative-theory error and the instructional errors in *Neder* [and other cases involving omissions or misdescriptions of elements] would be 'patently illogical,'" and it held that alternative-theory error can be found harmless under the *Neder* analysis. 129 S. Ct. at 532 (citation omitted).

services theory, which was flawed, in petitioners' view, because of the failure to instruct the jury to find contemplated economic harm to Hollinger. See Br. 44 (Jurors could have convicted on honest-services charges based on the recharacterization of management fees as non-compete payments when "the recharacterization was accomplished without posing a foreseeable risk of economic harm to Hollinger."). But any rational jury that relied on an honest-services theory would have found that the undisclosed recharacterization of management fees as non-competition payments itself exposed Hollinger to foreseeable economic harm. Such a finding would make any honest-services instructional error harmless beyond a reasonable doubt. On remand, the court of appeals should examine that issue.[18]

The undisclosed recharacterization created two forms of foreseeable economic harm. First, when top executives of a public company secretly falsify the nature of millions of dollars in compensation in order to obtain personal tax benefit, their self-dealing risks undermining public confidence in the integrity and competence of the company's management and thereby injur-

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[18] The court of appeals should also examine petitioners' premise (Br. 47) that the jury might have rejected the theft theory on the ground that petitioners had no fraudulent intent. That premise has no factual foundation on Count 7, which involved the $600,000 in payments from the Forum and Paxton transactions. No evidence suggested that the payments represented management fees. No individual non-competition agreements were executed for the Forum and Paxton sales. And no purchaser requested any such agreements. J.A. 39a, 46a-47a, 140a-153a. Accordingly, the jury could not have found petitioners guilty on Count 7 on the theory that they secretly recharacterized management fees as non-competition payments for personal tax reasons. Rather, a rational jury must have found them guilty on Count 7 on the basis that they stole the money.

ing the company's reputation. That reputational injury can have economic repercussions by affecting the willingness of others to do business with, work for, or invest in the company.

Second, petitioners' scheme also caused Hollinger to make materially false filings with the SEC, exposing the company to SEC enforcement actions and possible shareholder lawsuits. The evidence showed that, because petitioners did not disclose their actions to the company, Hollinger did not disclose the payments in its SEC filings until April 2002. The evidence further showed that, when petitioners finally disclosed the payments, they falsely represented that the payments were for non-competition agreements, were made to satisfy a closing condition in connection with newspaper sales, and had been authorized by Hollinger's independent directors. J.A. 39a, 46a-47a, 56a-60a, 104a-107a, 113a-117a, 123a-125a, 128a-129a, 396a. As the court of appeals explained, these false filings were "bound to get [Hollinger] into trouble" regardless of whether the payments represented legitimate management fees. Pet. App. 9a. Indeed, Hollinger's own lawyers testified that SEC rules required that non-competition payments be disclosed to Hollinger's shareholders; that their nondisclosure would create a significant litigation risk for the company; and that, as early as May 2001, they had apprised petitioners of those facts. J.A. 61a-75a, 82a-94a.[19]

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[19] Hollinger's false filings unquestionably violated SEC rules, which require it to file materially accurate annual and quarterly reports. See 15 U.S.C. 78t(a); 17 C.F.R. 240.12b-20, 240.13a-1, 240.13a-13. The reports must comply with Regulation S-K, 17 C.F.R. 229.10(a)(2), which mandates disclosure of all executive compensation as well as any related-party transactions, including the "non-competition" payments to petitioners. See 17 C.F.R. 229.402, 229.404(a). These requirements

2. Petitioners further claim (Br. 47-49) that, if this Court reverses Black's fraud convictions, his obstruction conviction must also be reversed. Black has made this argument twice before, in successive applications to this Court for bail pending certiorari, which Justice Stevens denied. See *Black* v. *United States*, No. 08A1063 (June 11, 2009); Letter from the Clerk of the Court to the Solicitor Gen. (Aug. 10, 2009) (Application No. 09A144). The Court should likewise reject the claim. As the government has explained, the claim is not properly before the Court because Black failed to raise it in either court below and it was not included in the questions presented by the petition for a writ of certiorari. U.S. Mem. in Opp. at 11 n.3, 20-21, 25, *Black*, *supra* (No. 08A1063) (Bail Opp.).

The claim lacks merit in any event. Black bears the burden to show spillover prejudice. *United States* v. *Edwards*, 303 F.3d 606, 640 (5th Cir. 2002), cert. denied, 537 U.S. 1192, and 537 U.S. 1240 (2003). Reversal of Black's obstruction conviction is not required to remedy "prejudicial spillover" of evidence from the fraud counts. Pet. Br. 47. All of the fraud evidence would have been admissible even if the government had charged Black with only money-or-property fraud and not honest-services fraud. Bail Opp. 21. Nor is reversal warranted

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were explained in the redacted version of the superseding information that was provided to the jury. Doc. 766-2, at 9; see Pet. App. 35a. (Unbeknownst to the jury, Hollinger's failure to disclose the non-competition payments in its SEC filings was one basis for an SEC action against Hollinger for both equitable relief and monetary penalties. See SEC's Complaint for Permanent Injunction and Other Equitable Relief ¶¶ 44-52, at 9-10, *SEC* v. *Hollinger Int'l, Inc.*, No. 04-cv-336 (N.D. Ill. Jan. 16, 2004). Hollinger consented to a judgment against it in that action which included equitable relief. See Final J. and Order of Permanent Inj. and Other Equitable Relief (Jan. 22, 2009).)

on the speculation that the jury might have reached a different verdict on obstruction if it had "know[n] that Black had not committed mail fraud." Pet. Br. 47-48. Black can show no such likelihood. Cf. Pet. App. 10a ("Had the jury believed that the payments for the covenants not to compete were actually management fees owed the defendants, as the defendants argued, it would have acquitted them."). And reversal of Black's fraud convictions for instructional error on the honest-services theory would not remotely establish that Black did not commit mail fraud. Bail Opp. 22-23. But, even assuming that it did, the obstruction count did not require proof that Black *committed* the crime under investigation; it required only that the concealment of records had the purpose of subverting an official proceeding. J.A. 342a-343a. The jury had overwhelming proof of Black's motive to undermine an inquiry into his mischaracterized payments, regardless whether that mischaracterization constitutes fraud.

Finally, petitioners' contention (Br. 49) that the government waived any objection to the obstruction argument by failing to respond to the argument in its brief in opposition lacks merit. This Court's Rule 15.2 did not require the government to respond to the argument, which was raised only at the end of a footnote to the facts section of the certiorari petition, Pet. 12 n.7, and did not bear on the correct resolution of either of the questions presented, see Pet. i. Bail Opp. 24-26.

II. PETITIONERS FORFEITED THEIR CLAIM BASED ON THE JURY'S GENERAL VERDICTS BY OPPOSING SPECIAL VERDICTS

Petitioners' convictions should be affirmed for an independent reason. At trial, petitioners objected to the

government's request that the jury return special verdicts on the fraud counts specifying whether a guilty verdict relied on money-or-property fraud, honest-services fraud, or both. Pet. App. 11a. Then, on appeal, invoking *Yates* v. *United States*, 354 U.S. 298 (1957), petitioners argued that their fraud convictions must be reversed, even if the jury relied on a valid money-or-property theory, because the general verdicts make it impossible to tell whether the convictions instead rest on the purportedly flawed honest-services theory. Pet. C.A. Br. 25-26, 52-53. As the court of appeals correctly held, petitioners forfeited that argument by objecting to the use of special verdicts. Pet. App. 11a.

A. Special Verdicts Can Avoid Reversal Under *Yates*

Yates held that a general verdict must be set aside if the jury was permitted to rely on multiple independent grounds, one of the grounds was legally flawed, and it is impossible to tell whether the jury relied on the flawed theory. 354 U.S. at 311-312; see *Hedgpeth*, 129 S. Ct. at 532. Special verdicts can avoid that problem by clarifying whether "the facts as the jury believed them to be are a legally proper basis for conviction." *Tenner* v. *Gilmore*, 184 F.3d 608, 612 (7th Cir.), cert. denied, 528 U.S. 1052 (1999). The courts of appeals have repeatedly recognized that virtue of special verdicts. See *United States* v. *Williams*, 441 F.3d 716, 720-721 (9th Cir.), cert. denied, 549 U.S. 927 (2006); *Edwards*, 303 F.3d at 642; *United States* v. *Najjar*, 300 F.3d 466, 480 n.3 (4th Cir.), cert. denied, 537 U.S. 1094 (2002); *United States* v. *Boots*, 80 F.3d 580, 589 (1st Cir.), cert. denied, 519 U.S. 905 (1996); *United States* v. *McNutt*, 908 F.2d 561, 565 (10th Cir. 1990), cert. denied, 498 U.S. 1084 (1991);

United States v. *Ruggiero*, 726 F.2d 913, 922-923 (2d Cir.), cert. denied, 469 U.S. 831 (1984).

Special verdicts were historically viewed with disfavor. See *United States* v. *Spock*, 416 F.2d 165, 180-183 (1st Cir. 1969). But "[o]ver the course of the last two decades, * * * '[e]xceptions to the general rule disfavoring special verdicts * * * have been expanded and approved in an increasing number of circumstances.'" *United States* v. *Stonefish*, 402 F.3d 691, 698 (6th Cir. 2005) (citation omitted; brackets in original). Today, courts routinely utilize special verdicts, including to avoid problems under *Yates*. See, *e.g.*, *United States* v. *McCourty*, 562 F.3d 458, 470 (2d Cir. 2009), petition for cert. pending, No. 09-5221 (filed July 8, 2009); *United States* v. *Irving*, 554 F.3d 64, 77 (2d Cir. 2009); *United States* v. *Masferrer*, 514 F.3d 1158, 1163-1164 (11th Cir. 2008), cert. denied, 129 S. Ct. 996 (2009); *United States* v. *Starks*, 472 F.3d 466, 470-471 (7th Cir. 2006); *United States* v. *Smith*, 413 F.3d 1253, 1277 (10th Cir. 2005), cert. denied, 546 U.S. 1120 (2006); *Stonefish*, 402 F.3d at 698-699; *United States* v. *Cianci*, 378 F.3d 71, 90-92 (1st Cir. 2004), cert. denied, 546 U.S. 935 (2005); *Edwards*, 303 F.3d at 642; *Najjar*, 300 F.3d at 480 n.3; *United States* v. *Reed*, 147 F.3d 1178, 1181-1182 (9th Cir. 1998); *McNutt*, 908 F.2d at 565.

B. By Opposing Special Verdicts, Petitioners Forfeited Their *Yates* Claim

1. By opposing special verdicts that would have obviated the *Yates* problem, petitioners forfeited their right to seek reversal based on *Yates*. Petitioners are in the same position as a defendant who, after identifying a possible error in the admission of evidence or presentation of a legal argument, opposes a proposed limiting

or curative instruction. Having bypassed the opportunity to avoid prejudice, such a defendant may not argue on appeal that reversal of his conviction is required to cure unfair prejudice. See *United States* v. *Wheeler*, 540 F.3d 683, 693 (7th Cir. 2008); *United States* v. *Bryant*, 349 F.3d 1093, 1097 (8th Cir. 2003); *United States* v. *Levy*, 578 F.2d 896, 900 (2d Cir. 1978).

2. That conclusion promotes judicial economy by preventing unnecessary appeals and retrials. *Puckett* v. *United States*, 129 S. Ct. 1423, 1432 (2009); *Wainwright* v. *Sykes*, 433 U.S. 72, 88 (1977). Here, special verdicts might have eliminated the basis for petitioners' appeal on the honest-services issue by making clear that the jury's verdicts rested on money-or-property fraud. Pet. App. 11a.

Forfeiture rules also reduce manipulation by precluding defendants from failing to object or agreeing to a procedure at trial and then invoking that procedure as a basis for reversal on appeal. See *Sykes*, 433 U.S. at 89; see also *Ohler* v. *United States*, 529 U.S. 753 (2000); *Luce* v. *United States*, 469 U.S. 38, 42 (1984); *United States* v. *Angiulo*, 897 F.2d 1169, 1216 (1st Cir.), cert. denied, 498 U.S. 845 (1990). As the court below observed, petitioners insisted on general verdicts in order to lay the groundwork for their *Yates* argument, which would have been foreclosed by special verdicts. Pet. App. 11a; J.A. 432a. They have therefore forfeited their *Yates* claim.

3. Two courts of appeals have applied forfeiture (or similar) rules to *Yates*-type arguments when a defendant failed to *request* a special verdict. See, *e.g.*, *Irving*, 554 F.3d at 79 (no plain error in convicting defendant both for possessing and receiving child pornography, possibly based on the same images, because defendant

failed to request "a special verdict to have the jury particularize" the images on which it relied); *United States* v. *Aguilar*, 883 F.2d 662, 690-691 (9th Cir. 1989), cert. denied, 498 U.S. 1046 (1991) (by failing to request special verdicts, defendants forfeited claim that conspiracy convictions must be reversed because they may have rested on legally invalid predicate).

The argument for forfeiture is even stronger where, as here, the government requests a special verdict to protect against possible *Yates* error, and the defendant objects. See *United States* v. *Wilkinson*, 754 F.2d 1427, 1432 (2d Cir.) (by opposing government request for special verdict and failing to request jury instruction, defendant "waived" claim that conviction for operating continuing criminal enterprise must be reversed because of possibility that jury based finding that defendant managed five other participants on participants whom defendant did not manage), cert. denied, 472 U.S. 1019 (1985). Having done so, the defendant may not argue on appeal that the combination of a defective theory and the general verdict requires reversal.[20]

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[20] Petitioners' reliance (Br. 54-55) on *United States* v. *Adcock*, 447 F.2d 1337 (2d Cir.) (per curiam), cert. denied, 404 U.S. 939 (1971), and *United States* v. *Riccobene*, 709 F.2d 214 (3d Cir.), cert. denied, 464 U.S. 849 (1983), is misplaced. *Adcock* involved only a defendant's *failure to request* a special verdict, and it rested on the Second Circuit's position that special verdicts were *per se* improper, 447 F.2d at 1338-1339, a position since abandoned, *Ruggiero*, 726 F.2d at 922-923; *id.* at 925-928 (Newman, J., concurring in part and dissenting in part). *Riccobene* involved whether the defendant's opposition to the government's request for *post-verdict* special interrogatories constituted a forfeiture. 709 F.2d at 228 & n.10. As the courts below explained, post-verdict interrogatories raise significant concerns not presented by special verdicts. Pet. App. 11a-12a, 225a.

C. A Finding Of Forfeiture Is Consistent With Applicable Law, Fairness Concerns, And The Proceedings Below

1. Contrary to petitioners' intimation (Br. 51-52), neither the Federal Rules of Criminal Procedure nor this Court's cases preclude special verdicts. The rules do not address the matter, leaving it instead to the district court's discretion in formulating what are effectively jury instructions. *Reed*, 147 F.2d at 1180. Nor does *Stein* v. *New York*, 346 U.S. 156 (1953), overruled on other grounds by *Jackson* v. *Denno*, 378 U.S. 368 (1964), disallow special verdicts in federal criminal cases. *Stein* concerned whether a trial jury may determine the voluntariness of a confession in a state case. *Stein's* comments on federal practice are dictum. And its observation that, at that time, "no general practice of [using special verdicts] ha[d] developed in American criminal procedure," *id.* at 178, is outdated.

2. Petitioners argue (Br. 52-53, 55-56) that special verdicts would have prejudiced them. They assert that special verdicts can interfere with the jury's "historic function" of "tempering" the law with "common sense." Br. 52 (quoting *United States* v. *McCracken*, 488 F.2d 406, 418 (5th Cir. 1974)). But nothing in the government's proposed special verdict form could have had that consequence. Only if the jury first found petitioners guilty on a mail fraud count did the form ask for the ground. J.A. 430a. The form did not require the jury to answer any question in order to acquit.

Petitioners also err in implying that special verdicts here would have "le[d] jurors through a 'step by step * * * progression'" towards a guilty verdict." Br. 52 (quoting *Spock*, 416 F.2d at 182). That concern arises only when a special verdict requires specific findings on each offense element, or makes resolution of a factual

issue determinative of guilt or innocence without regard to the offense elements. See *Ruggiero*, 726 F.2d at 927 (Newman, J., concurring in part and dissenting in part). The government's proposed special verdict form asked the jury to indicate only on which of the two general theories of mail fraud it had relied, which is not coercive. See *Reed*, 147 F.3d at 1181-1182.

Special verdicts also would not have intruded on the jury's deliberations or improperly required it to support its verdict with reasons. Contra Pet. Br. 53 (citing *Yeager*, 129 S. Ct. at 2368). The jurors were not asked to reveal conversations in the jury room, individual jurors' votes, or anything else about the process of returning their verdicts. And the jury was not required to say anything more if its verdict was not guilty. Nor would special verdicts have entailed *post-trial* judicial exploration into the jury's deliberations, the danger highlighted in *Yeager*.

Special verdicts also would not have confused the jury. Contra Pet. Br. 55-56. Petitioners' concern rests on the incorrect premise that the district court had ruled that the jury need not be unanimous on its mail-fraud theory. But the court had ruled only on the different issue of whether unanimity was required "on what particular misrepresentations were made." Pet. App. 217a. The district court later stated that it had not ruled on whether the jury needed to be unanimous in its choice of fraud theory, *id*. at 226a, and it never did. And the government's proposed special verdict form would have resolved that issue in a manner favorable to petitioners by requiring unanimity on the theory. See *id*. at 228a.

3. A finding of forfeiture would not conflict with Federal Rule of Criminal Procedure 30(d), which provides that a defendant preserves a claim of instructional

error by objecting before the jury retires. See Pet. Br. 50-51, 53. By opposing special verdicts, petitioners did not forfeit their claim that the jury instructions were erroneous. Rather, petitioners forfeited their right to rely on the *Yates* rule that any instructional error requires reversal because the jury returned only general verdicts.[21] A finding that petitioners forfeited reliance on *Yates* would not "circumvent or conflict" with Rule 30(d) by adding an additional requirement for preservation of a claim of instructional error. *Carlisle* v. *United States*, 517 U.S. 416, 426 (1996). Instead, it would simply apply settled principles of forfeiture to the *Yates* context.

Because a finding of forfeiture here would merely apply settled forfeiture principles, petitioners claim (Br. 54) that they did not receive adequate notice of the possibility of forfeiture lacks merit—particular since they addressed that possibility at trial. J.A. 432a.

4. Finally, petitioners are mistaken in arguing (Br. 55 n.15) that they avoided a forfeiture by proposing, as an alternative to special verdicts, a "bifurcated" procedure whereby the jurors, after announcing a general verdict of guilty on any mail fraud count, would be returned to the jury room to answer special interrogatories about the basis for their decision. J.A. 433a-435a. As both courts below recognized, such a procedure is untenable because it could result in the jury's reconsidering its already-announced verdict. See Pet. App. 11a-12a, 225a; accord *Jacobs Mfg. Co.* v. *Sam Brown Co.*, 19

[21] The court below described petitioners' opposition to the special verdicts as "forfeit[ing] their objection to the instruction." Pet. App. 11a. But the government's position was that petitioners' "*Yates* argument fails because they waived it by rejecting a special verdict form." Gov't C.A. Br. 64.

F.3d 1259, 1267 (8th Cir.), cert. denied, 513 U.S. 989 (1994), and 513 U.S. 1190 (1995). Once the district court correctly rejected petitioners' proposal, it offered them a choice between general or special verdicts. Pet. App. 225a. By opposing special verdicts, *id.* at 225a-228a, petitioners forfeited their *Yates* argument.[22]

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[22] Petitioners suggest (Br. 55) that the government waived forfeiture because it did not insist on special verdicts after petitioners objected. Petitioners never raised that argument below. In any event, the government's action did not undo the forfeiture that resulted from petitioners' insistence on general verdicts.

APPENDIX

1. Section 1341 of Title 18, United States Code, provides:

Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution,

such person shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

2. Section 1346 of Title 18, United States Code, provides:

Definition of "scheme or artifice to defraud"

For 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.