No. 08-876

IN THE
Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE,
AND MARK S. KIPNIS,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF JEFFREY K. SKILLING AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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QUESTION PRESENTED

This brief addresses the following question encompassed by the petition for a writ of certiorari:

Whether the federal "honest services" fraud statute, 18 U.S.C. § 1346, requires the government to prove that the defendant's conduct was intended to achieve "private gain" rather than to advance the employer's interests, as the Seventh Circuit held below.

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BRIEF OF JEFFREY K. SKILLING AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

Jeffrey K. Skilling respectfully submits this brief as *amicus curiae* in support of neither party, with the written consent of the parties.[1]

INTEREST OF *AMICUS CURIAE*

Jeffrey K. Skilling is a former executive for Enron Corporation. Once America's seventh-largest company, Enron went bankrupt in a matter of weeks in 2001. In May 2006, a jury convicted Skilling on 19 criminal counts, each predicated on an alleged conspiracy to commit securities or wire fraud in connection with Enron's collapse. He has been incarcerated since December 2006.

A centerpiece of the government's case was "honest services" wire fraud under 18 U.S.C. § 1346. Skilling was convicted under the statute even though, by everyone's admission, he sought only to advance Enron's interests, did not act out of greed, and did not seek or receive *any* private gain from his acts. The Fifth Circuit agreed that Skilling was seeking only to pursue Enron's interests and not his own private gain, but it held that proof of private gain is not necessary for a conviction under § 1346. The sole question, the court held, is whether the defendant breached a state-law fiduciary duty and thereby caused harm to the employer.

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[1] Letters of consent have been filed with the Clerk. No party or counsel for a party to this case authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* or his counsel has made a monetary contribution to the preparation or submission of this brief.

Because the Fifth Circuit's holding conflicts directly with the decisions of other federal circuits, which have held that a § 1346 conviction requires proof that the defendant sought to pursue his own private interest rather than his employer's, Skilling filed a petition for a writ of certiorari (No. 08-1394) ("*Skilling* Pet."). That petition is currently pending before this Court.

Skilling has a strong interest in this case because it presents a distinct but related question concerning the scope of honest-services fraud under § 1346. The result and reasoning of the Court's decision in this case could directly affect his chances of obtaining the reversal of his conviction and release from prison.

INTRODUCTION AND SUMMARY

The substantive question presented by petitioners is whether a private-sector employee who violates a fiduciary duty to his employer may be convicted of "honest services" fraud under 18 U.S.C. § 1346, even if he does not contemplate that his actions will cause economic harm to the employer.

No matter how the Court answers that question, it should not lose sight of an important point of agreement between petitioners, the Government, and the court of appeals in this case. Each recognized in the proceedings below that § 1346 requires proof that the defendant acted for "private gain," rather than to advance the employer's interests. The court of appeals correctly applied that requirement, finding it satisfied in this case because petitioners' acts were self-avowedly designed to achieve a significant tax benefit under Canadian law. *U.S. v. Black*, 530 F.3d 596, 600 (7th Cir. 2008). Neither the Government nor petitioners have challenged that re-

quirement here.

Petitioners instead argue that the decision below is wrong because they did not intend for their private gain to come *at the expense of their employer*. That is, petitioners concede "that they sought a private gain," but they contend that they did not violate § 1346 because that private gain "was intended to be a gain purely at the expense of the Canadian government," not the employer to whom they owed a duty of honest services. *Black*, 530 F.3d at 600.

Whatever may be the merits of that argument, the threshold premise of the decision below is crucial and must be reaffirmed: to establish a violation of § 1346, the Government must show *at least* that the defendant-employee sought to pursue private gain from *some source*. Although the Government has not challenged that requirement here, in numerous other prosecutions and appeals, the Government has advanced the much broader position that a defendant can be convicted under § 1346 for *any* material breach of a legal or ethical duty, even if the defendant did not seek private gain from the breach. That position has been adopted by several circuit courts, *see Skilling* Pet. 19-20, including the Fifth Circuit in Skilling's case, *see U.S. v. Skilling*, 554 F.3d 529, 544 (5th Cir. 2009) (rejecting requirement that defendant had "intent … to obtain personal benefit" (quoting *U.S. v. Gray*, 96 F.3d 769, 774 (5th Cir. 1996)); *id.* at 547 (to establish violation of § 1346, government need prove only "(1) a material breach of a fiduciary duty imposed under state law … (2) that results in a detriment to the employer"). Other circuits—including the Second Circuit en banc in a leading opinion joined by Judge Sotomayor—have rejected

that position, holding instead that a § 1346 conviction will lie only where the employee pursued his own private interests rather than his employer's. *Skilling* Pet. 18-19.

This brief primarily addresses that threshold issue. In analyzing petitioners' argument that the employee's pursuit of private gain must be accompanied by a foreseeable risk of economic harm to the employer, the Court should reject any suggestion by the Government that § 1346 does not require the prosecution even to prove that the employee sought private gain in the first place. As shown below, private gain is a required element in all § 1346 cases.

I.A. Congress enacted § 1346 to reverse the result of *McNally v. United States*, 483 U.S. 350 (1987), and to reinstate pre-*McNally* "honest services" caselaw. In the context of private-sector employers, honest-services cases before *McNally* uniformly involved defendants who acted for private gain, usually by accepting bribes or kickbacks from third parties, or by engaging in secret self-dealing. When a defendant did not act for private gain, courts before *McNally* did not hesitate to reverse convictions for honest-services fraud.

B. Absent a private-gain requirement, the statute would broadly criminalize all acts of poor judgment in the conduct of corporate affairs, even where the employee intended the act to advance the employer's interests rather than his own. There is no evidence that Congress intended to enact an unwritten private corporate code of fair, wise, and ethical conduct, enforceable by threat of federal imprisonment.

C. Absent a requirement of private gain, § 1346 is an unconstitutionally vague and unenforceable statute. If § 1346 permits conviction merely for any harmful material breach of a fiduciary duty, as the Government has argued in Skilling's case and others, then the statute is explicitly a common-law criminal statute, with its scope "found" or "developed" entirely by common-law reasoning of courts applying unwritten fiduciary standards. As such, it provides no forewarning to corporate employees as to which acts taken in service of the employer's interests will land them in federal prison, and it gives virtually unfettered discretion to prosecutors to charge crimes for acts that appear unwise in hindsight.

II. In the years since Congress amended the wire and mail fraud statutes to prohibit honest services fraud, three important conflicts in the circuits have emerged. The Court has already granted two cases for this Term addressing two of the conflicts—the instant case, and *Weyhrauch v. U.S.*, No. 08-1196. It should grant Skilling's petition, which presents the third conflict, as well. The lower courts, corporate employees, and prosecutors would all be best served if the Court addressed the issues raised by these three conflicts comprehensively. Addressing the three cases together would permit the Court to consider the interplay of these related issues, and would provide more complete guidance concerning the scope of the statute.

ARGUMENT

I. THE COURT SHOULD REAFFIRM THE PRE-*McNALLY* REQUIREMENT THAT A DEFENDANT WHO DOES NOT ACT FOR "PRIVATE GAIN" HAS NOT COMMITTED HONEST-SERVICES FRAUD

A. Cases Prior To *McNally* Uniformly Required Proof That The Defendant Misused His Office For "Private Gain"

1. The general mail fraud statute prohibits "any scheme or artifice to defraud" using the mails. 18 U.S.C. § 1341. In *McNally*, this Court considered "a line of decisions from the Courts of Appeals" interpreting that statute to prohibit "schemes to defraud citizens of their intangible rights to honest and impartial government." 483 U.S. at 355. "Under these cases," the Court explained, "a public official owes a fiduciary duty to the public, and misuse of his office *for private gain* is a fraud." *Id.* (emphasis added).

The Court in *McNally* declined to read that judge-made theory into the general mail and wire fraud statutes, emphasizing that "when there are two rational readings of a criminal statute, one harsher than the other," courts should "choose the harsher only when Congress has spoken in clear and definite language." *Id.* at 359-60. "There are no constructive offenses," the Court explained, "and before one can be punished, it must be shown that his case is plainly within the statute." *Id.* at 360 (quoting *Fasulo v. U.S.*, 272 U.S. 620, 629 (1926)). Declining to construe the statute "in a manner that leaves its outer boundaries ambiguous," the Court held that Congress "must speak more clearly than it has" if it

wished to criminalize the kind of "honest services" fraud identified in prior caselaw. *Id.*

Congress responded to that invitation by enacting 18 U.S.C. § 1346, which extended the definition of a scheme or artifice to defraud to include "a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4181, 4508 (1988). Though the operative phrase "intangible right of honest services" has no cognizable meaning on its face, *see infra* at 15-17, its general objective was to capture "the pre-*McNally* understanding of the scope of the mail fraud statute." Gov't Br. in Opp. 12; *see Cleveland v. U.S.*, 531 U.S. 12, 19-20 (2000) (amended statute covers "one of the 'intangible rights' that lower courts had protected under § 1341 prior to *McNally*"); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 114-15 (1991) (Stevens, J., dissenting) (§ 1346 restores "the widely held view of lower courts [pre-*McNally*] about the scope of fraud"). The statute refers to "*the* intangible right of honest services," 18 U.S.C. § 1346 (emphasis added), suggesting that Congress meant to codify a preexisting "'intangible right of honest services[]' which had been protected before *McNally*," rather than "all intangible rights of honest services whatever they might be thought to be." *U.S. v. Rybicki*, 354 F.3d 124, 138 (2d Cir. 2003) (en banc).

2. As *McNally* itself makes clear, "private gain" was a critical component of honest-services fraud at the time of the decision. The scheme in *McNally* itself involved "monetary kickbacks" for the private benefit of the defendants. 483 U.S. at 356 (internal quotation omitted); *see id.* at 375 (Stevens, J., dis-

senting) (scheme was designed to "secretly make hundreds of thousands of dollars available for the private use of petitioners, their relatives, and their paramours"). And in describing the line of lower-court decisions under review, the Court expressly characterized those cases as involving the "misuse of [one's] office *for private gain*." 483 U.S. at 355 (emphasis added); *id.* at 362-63 (Stevens, J., dissenting).

The "private sector" cases discussed in the *McNally* dissent demonstrate the application of the private-gain requirement in that context. Summarizing the existing caselaw, the dissent explained that "[i]n the private sector, purchasing agents, brokers, union leaders, and others with clear fiduciary duties to their employers or unions have been found guilty of defrauding their employers or unions *by accepting kickbacks or selling confidential information*." *Id.* at 363 (emphasis added). Every one of the cited private-sector cases unmistakably involved actions designed to obtain private gain, rather than to advance the employer's interest.[2] Because Congress

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[2] *See U.S. v. Price*, 788 F.2d 234, 235-36 (4th Cir. 1986) (union officials overcharged new applicants for membership, and kept extra money for officials' "own benefit"); *U.S.v. Boffa*, 688 F.2d 919, 923-24 (3d Cir. 1982) (corporate officers bribed a union official with a 1975 Lincoln Continental); *U.S. v. Curry*, 681 F.2d 406, 409 (5th Cir. 1982) (chairman of PAC "converted" $15,000 in campaign funds "to his own personal use"); *U.S. v. Bronston*, 658 F.2d 920, 927 (2d Cir. 1981) (law partner received $12,500 for secretly representing client with interests adverse to another client, over his firm's explicit prohibition); *U.S. v. Von Barta*, 635 F.2d 999, 1003, 1007 (2d Cir. 1980) (self-dealing by bond trader who secretly "pocketed nearly $100,000" while shifting risk to his employer); *U.S. v. Bohonus*, 628 F.2d 1167, 1169 (9th Cir. 1980) (corporate agent personally received kickback payments from supplier); *U.S. v. Bryza*, 522 F.2d 414,

enacted § 1346 to reinstate the honest services fraud doctrine as it existed prior to *McNally*, the decisions cited by the dissent as "thoughtfully considered and correct[]," *id.* at 376, well reflect Congress's understanding of the statute's meaning. *See Rybicki*, 354 F.3d at 138 n.13.

3. Other pre-*McNally* cases from the private sector confirm that private gain was central to the concept of "honest services" fraud. In its leading *Rybicki* opinion, the en banc Second Circuit "reviewed the principal pre-*McNally* decisions involving or purportedly involving 'honest services' fraud in the private sector," beginning with the cases "catalogued by Justice Stevens in his dissent in *McNally*" and "augment[ing]" the list with its own research. *Id.* at 138-39 & n.13. The court concluded that the cases "fall into two general groups." *Id.* at 139. One involves "bribes or kickbacks"; the other involves "self-dealing." *Id.*

In the bribery and kickback cases, a third party seeking to do business with the employer "secretly pays the [employer's] employee (or causes such a payment to be made) in exchange for favored treatment." *Id.* (discussing eight examples). In the "self-dealing" cases, the defendant "typically causes his or her employer to do business with a corporation or other enterprise in which the defendant has a secret interest, undisclosed to the employer." *Id.* at 140 (discussing six examples). The self-dealing cases were "thus of the same general import as the bribery

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415-16 (7th Cir. 1975) (same); *U.S. v. George*, 477 F.2d 508, 510 (7th Cir. 1973) (same); *U.S. v. Procter & Gamble Co.*, 47 F. Supp. 676, 678 (D. Mass. 1942) (corporate agents bribed competitor's employees).

cases," in that both involved undisclosed, improper payments or benefits to employees. *Id.* at 141.

In other words, what is common to *all* pre-*McNally* honest-services fraud cases, *Rybicki* makes clear, is an employee who was pursuing some form of private gain distinct from the normal incentives offered by the employer to promote employee performance. The basic rule drawn from the pre-*McNally* caselaw, and hence enacted in § 1346, is that honest-services fraud constitutes a scheme "to enable an officer or employee of a private entity … purporting to act for and in the interests of his or her employer … secretly to act in his or her … own interests instead." *Id.* at 141-42. Accordingly, where the employee is *not* acting to pursue his own interests instead of his employer's, § 1346 is categorically inapplicable.

Notably, when private-sector employees did *not* act for their own private gain, courts before *McNally* reversed convictions for honest-services fraud. In *United States v. Dixon*, 536 F.2d 1388 (2d Cir. 1976), Judge Friendly's opinion for the Second Circuit cited "abundant authority" from federal courts of appeals holding that "a scheme to use a private fiduciary position *to obtain direct pecuniary gain* is within the mail fraud statute." *Id.* at 1399 (emphasis added). But it reversed the conviction of a corporate officer who failed to make required disclosures to stockholders, on the ground that the officer himself "received no money or property by virtue of the omission" and the undisclosed information was not material. *Id.* at 1400. Distinguishing cases in which the defendant acted "to enhance his private advantage"—"by taking bribes," for example—Judge Friendly concluded that mail fraud requires an

"element of corruption" that was "not present" under the circumstances, where the defendant did not act for private gain. *Id.* at 1400-01.[3]

Even outside the fraud context, courts recognized that the duty of "honest services" is centrally about avoiding the pursuit of private gain. In one of the earliest reported cases to employ the phrase "honest services" to describe any corporate employee duty, the Michigan Supreme Court expressly distinguished the duty from the duty of good faith in the conduct of corporate affairs: "Good faith," the court explained, "includes not only personal upright mental attitude and clear conscience, but also intention to observe legal duties." *Bliss Petroleum Co. v. McNally*, 254 Mich. 569, 573 (1931). "Honest service," by contrast, "includes *elimination of private gain in corporate transactions* conducted by directors and not approved by other authorized disinterested officers, with full knowledge of the facts." *Id.* (emphasis added).

In short, caselaw prior to *McNally* long and consistently recognized that acts taken for private gain are the sine qua non of a breach of the duty of honest services. We have found no pre-*McNally* case from any jurisdiction finding a breach of the duty where

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[3] One court of appeals has stated that pre-*McNally* honest-services cases "do exist" in which the defendant did not act for private gain. *U.S. v. Panarella*, 277 F.3d 678, 692 (3d Cir. 2002). But the only appellate case cited for that proposition is *U.S. v. Bush*, 522 F.2d 641, 643 (7th Cir. 1975), a public-sector case involving a government official. And the Seventh Circuit, construing its own precedent, has stressed that the scheme in *Bush* was in fact undertaken for private gain. *U.S. v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998).

the defendant did not seek to obtain private gain. The Court therefore should reject any suggestion the Government might make in this case that a detrimental breach of fiduciary duty alone—without any accompanying intent to obtain a private benefit from the act—is enough to establish a § 1346 violation.

B. Requiring Private Gain Sensibly Differentiates Between Unwise Or Unethical Acts And Criminal Conduct

Recognizing the central role of private gain in pre-*McNally* caselaw, the court of appeals that issued the decision below has previously held that an "employee deprives his employer of his honest services only if he misuses his position (or the information he obtained in it) for personal gain." *U.S. v. Bloom*, 149 F.3d 649, 656-57 (7th Cir. 1998); *see id.* at 655 ("misuse of position[] for private gain is the line that separates run of the mill violations of state-law fiduciary duty … from federal crime").

Applying that principle in *U.S. v. Thompson*, 484 F.3d 877 (7th Cir. 2007), the court reversed a § 1346 conviction based on a violation of state procurement rules in awarding a travel contract. Even though the employee's conduct was nominally improper, the court reasoned, she "did not bilk the state out of any money or pocket any of the funds that were supposed to be used to buy travel," but instead sought "to pursue the public interest as [she] understood it." *Id.* at 882, 884. And while she also anticipated pleasing her employer and obtaining a salary bonus as a result, the court held that "neither an increase in salary for what one's superiors deem a good job, nor an addition to one's peace of mind, is a 'private benefit' for the purpose of § 1346." *Id.* at 884. Although the

pursuit of "private gain" might "linguistically" encompass the pursuit of standard salary benefits, the *Thompson* court emphasized that no honest-services fraud appellate decision had ever applied the "private gain" requirement that way. *Id.* Rather, the "history of honest-services prosecutions is one in which the 'private gain' comes from third parties who suborn the employee with side payments, often derived via kickbacks." *Id.*

As already shown, there is no basis in the pre-*McNally* caselaw for expanding honest-services fraud to acts taken for reasons other than private gain. Nor is there any basis in policy. To the contrary, eliminating the private gain requirement would sweep in a "staggeringly broad swath of behavior." *Sorich v. U.S.*, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari). In the absence of a requirement of private gain, any material act of bad judgment by an employee could become federal criminal conduct, as exemplified by the parade of horribles listed by Judge Easterbrook in *Thompson*, 484 F.3d at 882-83.

But the problem is not merely hypothetical. Jeff Skilling—contrary to media-fueled public perceptions about his case—is a living example. The Government openly conceded at trial that Skilling stole no money from Enron, that the case against Skilling was not about "greed," that Skilling always sought to pursue Enron's "best interests," and that every act for which he was prosecuted was undertaken for the purpose of protecting Enron and promoting its share value. *Skilling* Pet. 3-4. Indeed, when arguing about the appropriate jury charge in his case, the Government conceded that "the indictment does not

allege, and the government's evidence did not show, that defendants engaged in bribery." *Skilling* R:41327-28. And it successfully objected to Skilling's requested instruction that the prosecution must show "something close to bribery," arguing that the instruction was "setting the bar a little bit high for honest services violations." *Skilling* R:36022.

The Government instead was allowed to proceed under its much broader honest services theory, which was that Skilling simply took on too much leverage and too much risk for the long-term good of Enron, and improperly touted the company. *Skilling* Pet. 3-5. But all corporate officers necessarily take business risks and cheerlead, and a rule that criminalizes every business decision that seems imprudent to prosecutors or lay jurors in hindsight—even if the officer genuinely sought to pursue the interest of his employer—would force officers to proceed at their peril in making everyday business judgments, as happened in Skilling's case. *See U.S. v. Turner*, 551 F.3d 657, 667-68 (7th Cir. 2008). Indeed, in most civil cases a corporate officer would be afforded the benefit of the "business judgment rule," but the Government's theory of honest services in Skilling's case included no such defense. Instead the Government urged the jury to send Skilling to prison simply because he breached his "duty to do [his] job and do it appropriately," *Skilling* Pet. 4—exactly the approach rejected by Judge Friendly in *Dixon*. *See* 536 F.2d at 1400-01.

An employee who commits some wrongful, unethical, or unwise act while faithfully pursuing what he understands to be the employer's objectives may violate some other legal duty—perhaps even a duty

enforced by a different criminal sanction—but he has not committed the federal crime of denying the employer his honest services. *See U.S. v. Brown*, 459 F.3d 509, 522 & n.13 (5th Cir. 2006). Scores of other legal rules and extra-legal norms exist to regulate the conduct of corporate employees and officers. These rules include state tort laws and fiduciary standards, criminal laws prohibiting theft, embezzlement, and money and property fraud, securities laws (both civil and criminal), administrative rules, professional standards, and ethical codes. The *independent* function of the honest-services fraud law is to prohibit employees from using their positions to pursue their own private interests rather than the interests of their employers. Bribes, kickbacks, and self-dealing qualified as honest-services violations in the pre-*McNally* jurisprudence, while other misconduct and lapses in judgment did not, because the former acts clearly demonstrated that the employee was pursuing his own interests, not his employer's. *Bloom*, 149 F.3d at 656-57. Where an employee has not sought such private gain, his conduct, no matter how questionable, unwise, or wrongful, should not be subject to prosecution under § 1346, but should be left to prohibition and punishment under other laws, rules, and norms.

C. Absent A Limitation Tying § 1346 Directly To The Pursuit Of Private Gain By The Employee, § 1346 Is Unconstitutionally Vague

As a host of courts have recognized, the phrase "the intangible right of honest services," standing alone, "is vague and undefined." *U.S. v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008); *see Brown*, 459

F.3d at 520 (§ 1346 is a "facially vague criminal statute"); *U.S. v. Sorich*, 523 F.3d 702, 707 (7th Cir. 2008) (§ 1346 is "amorphous and open-ended"); *U.S. v. Brumley*, 116 F.3d 728, 736 (5th Cir. 1997) (Jolly & DeMoss, JJ., dissenting) (§ 1346 is "general, undefined, vague, and ambiguous").

A statute violates due process, of course, when it is so vague that it "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion). Section 1346, on its face, is just such a statute. "[T]he text of § 1346 simply provides no clue to the public or the courts as to what conduct is prohibited under the statute." *U.S. v. Handakas*, 286 F.3d 92, 105 (2d Cir. 2002), *overruled in part by Rybicki*, 354 F.3d at 144; *see U.S. v. Murphy*, 323 F.3d 102, 116 (3d Cir. 2002) ("the plain language of § 1346 provides little guidance as to the conduct it prohibits"); *Bloom*, 149 F.3d at 656 (§ 1346 provides little guidance as to "how far the intangible rights theory of criminal responsibility really extends").

If the statute is construed, consistent with its history, as criminalizing only bribes, kickbacks, and self-dealing, that construction would go a long way toward providing corporate employees with the notice they need to understand what conduct is subject to criminal sanction, as the en banc Second Circuit's *Rybicki* decision suggests. Indeed, it was *only* by construing the statute that way that the *Rybicki* court was able to uphold the statute against constitutional vagueness challenges. *See* 354 F.3d at 142-43 (as applied), 144 (facial). Absent that limiting

construction, the facially meaningless words of § 1346 remain just that—facially meaningless words.

While petitioners in this case contend that a requirement of reasonably foreseeable economic harm is necessary to cure the constitutional problems in § 1346, that requirement is subject to hindsight bias and juror confusion, and thus would not suffice to provide corporate employees with adequate notice as to which risky business judgments could wind up subjecting them to criminal sanction years later. By contrast, the private-gain requirement recognized in pre-*McNally* caselaw provides employees with at least the clear understanding that if they make business decisions (risky or otherwise) not to advance their understanding of the corporation's goals, but to line their own pockets, they could face criminal prosecution for those decisions.

The private-gain requirement also helps mitigate the other constitutional objections noted by petitioners:

• Requiring private gain significantly limits the risk of "arbitrary and discriminatory enforcement" under the statute. *Morales*, 527 U.S. at 56. Federal prosecutors now wield § 1346 in broad circumstances—particularly when they believe their cases of genuine corporate crime are weak—to obtain convictions simply by creating an air of apparently questionable or unseemly conduct in the case, as prosecutors did in *Thompson* and in Skilling's case. But the office of § 1346 is not to punish general employee misconduct—specific statutes and rules exist to serve that function, as just discussed. Section 1346 instead exists to punish *one particular type of misconduct*: the misuse of authority to pursue pri-

vate gain rather than the employer's interests. Tethering the statute to cases involving private gain precludes overbroad use of the statute to backstop weak prosecutions for conduct more properly governed by other statutes.

• The private-gain requirement also ensures that § 1346 does not merely criminalize unspecified breaches of fiduciary duties—duties not written into the statute, but defined only by judicial decisions over time, in the manner of an impermissible common-law criminal prohibition. *See Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari) (noting "serious argument" that "a freestanding, open-ended duty to provide 'honest services'—with the details to be worked out case-by-case"—amounts to "nothing more than an invitation for federal courts to develop a common-law crime of unethical conduct"); *see also Brown*, 459 F.3d at 521-22; *Bloom*, 149 F.3d at 654; *Skilling* Pet. 25. Requiring private gain limits the statute to a particular, well-recognized, concrete class of fiduciary breach cases, i.e., cases where the employee used his position to pursue his own interests instead of his employer's. On that reading of the statute, courts need not "find" or "develop" over time the basic standards defining criminal employee conduct.

• Finally, the private-gain requirement minimizes the intrusion on the states' traditional authority to regulate corporate employee and officer conduct. Common-law fiduciary duties emerged in state courts as a basis for civil liability, and state courts remain primarily responsible for their enforcement. Construing § 1346 as adding severe federal penalties for ordinary violations of state-law civil duties and

employment obligations—absent proof that the employee sought to use federal mails and wires to achieve his own private gain—would disrupt that scheme. *See Jones v. U.S.*, 529 U.S. 848, 858 (2000); *U.S. v. Sorich*, 531 F.3d 501, 503 (7th Cir. 2008) (Kanne, J., dissenting from denial of rehearing en banc).

II. THE COURT SHOULD ADDRESS RELATED § 1346 ISSUES TOGETHER IN A TRILOGY OF CASES: *BLACK*, *WEYHRAUCH*, AND *SKILLING*

Since Congress enacted § 1346 in 1988, three important conflicts in the courts have arisen over its meaning in application. This Court will address two of those conflicts in cases already granted for the October 2009 Term. In this case, of course, it will consider the question whether an employee's private gain must come at the expense of his employer. In *Weyhrauch v. U.S.*, No. 08-1196, the Court will consider the question whether § 1346 requires proof that the employee violated a disclosure duty established by state law.

Neither case squarely presents one of "the principal devices the Courts of Appeals have used in an effort to limit § 1346": whether a conviction requires proof that the employee's conduct was intended to obtain "private gain." *Sorich*, 129 S.Ct. at 1310-11 (Scalia, J., dissenting from denial of certiorari). Skilling's petition presents exactly that interpretive question. *Skilling* Pet. i. Skilling's petition also raises the question whether § 1346 is unconstitutionally vague, *id.*—a question neither *Black* nor *Weyhrauch* raises explicitly.

This Court has in the past granted review of multiple cases during a single Term to address related issues under a single statute or rule.[4] It should do so here. As already noted, the Government might raise directly in this case the question whether § 1346 always requires proof that the employee sought private gain. But whether the Government expressly raises that issue or not, analysis of the question whether (and when) private gain must come at the employer's expense surely would benefit from a thorough analysis of the threshold private gain requirement itself. And while petitioners here elaborate at length the constitutional doubts arising from the vagueness of § 1346, they did not expressly raise a constitutional challenge in their petition. The Court might deem that challenge fairly encompassed by the petition, but if not, then Skilling's petition would be an ideal vehicle for addressing it.

The *Weyhrauch* petition, too, raises only one of the issues that has divided the courts and confused corporate employees concerning the meaning and application of § 1346. And its resolution, while important, still will solve only part of the problem created by the statute. Weyhrauch argues that the Government must prove the violation of a state-law disclosure duty as a predicate for a § 1346 violation.

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[4] *See, e.g.*, *Brewer v. Quarterman*, 550 U.S. 286 (2007), and *Abdul-Kabir v. Quarterman*, 550 U.S. 233 (2007) (both addressing Texas capital sentencing statute); *INS v. St. Cyr*, 533 U.S. 289 (2001), and *Calcano-Martinez v. INS*, 533 U.S. 348 (2001) (both construing IIRIRA's jurisdiction-stripping provision); *Abbott Labs. v. Gardner*, 387 U.S. 136 (1967), *Gardner v. Toilet Goods Ass'n*, 387 U.S. 167 (1967), and *Toilet Goods Ass'n, Inc. v. Gardner*, 387 U.S. 158 (1967) (all addressing ripeness in review of agency decisions).

The Government responds that the relevant disclosure duty arises directly from the statute—or, more accurately, must be read into the statute—as a matter of federal statutory construction. Neither answer to that question will be entirely satisfying, however, because either way the duties enforced by the criminal statute will still be a matter for courts to determine through common-law-style reasoning and case-law accretion. The statute thus would still fail to give clear warning to those subject to its sanction, and would still confer overbroad authority on courts (and prosecutors) to determine the substance and reach of federal criminal law. And neither approach would require courts to enforce in all cases the one requirement consistently applied by pre-*McNally* courts, and recognized by all Justices in *McNally* itself: the requirement of private gain.

Accordingly, while resolution of the questions presented in *Black* and *Weyhrauch* is necessary and important, so too is resolution of the questions presented in *Skilling*. Lower courts, prosecutors, and corporate employees have endured far too long with weak and inconsistent guidance as to the meaning of § 1346. Granting all three cases will facilitate this Court's analysis of the interrelated issues presented in the cases, and it will ensure that those who must implement the statute, and those who face the threat of its sanction, finally receive the comprehensive guidance as to its meaning and operation to which they are entitled.

CONCLUSION

The Seventh Circuit's holding that proof of private gain is required in all cases under § 1346 should be affirmed.

Respectfully submitted,

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