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 FOR THE PETITIONERS

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. § 1346, which defines "scheme or artifice to defraud" under the mail and wire fraud statutes to include a scheme or artifice to "deprive another of the intangible right of honest services," applies to the conduct of a private individual whose alleged "scheme to defraud" did not contemplate economic or other property harm to the private party to whom honest services were owed.

2. Whether a court of appeals may avoid review of prejudicial instructional error by retroactively imposing an onerous preservation requirement not found in the federal rules.

PARTIES TO THE PROCEEDING

The three petitioners were defendants in the district court. Co-defendant Peter Y. Atkinson, who was also an appellant in the Seventh Circuit, is not a party before this Court. F. David Radler and The Ravelston Corporation Limited—a privately held Canadian corporation—were defendants in the district court but entered into plea agreements with the government before trial. They were not parties in the Seventh Circuit and also are not parties before this Court.

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BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a-17a) is published at 530 F.3d 596.

JURISDICTION

The judgment of the court of appeals was entered June 25, 2008. A petition for rehearing was denied August 13, 2008. Justice Stevens extended the time within which to file a petition for a writ of certiorari until January 10, 2009. The petition was filed on January 9, 2009, and granted on May 18, 2009. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1341, part of Chapter 63 of Title 18 of the United States Code, provides in its entirety:

"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."

18 U.S.C. § 1346, also found in Chapter 63, reads in its entirety:

"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."

STATEMENT

In a lengthy set of criminal charges that the jury overwhelmingly rejected, the government accused petitioner Conrad M. Black and his co-defendants of treating the public company of which they were officers as Black's personal piggy bank from which he siphoned off money to support a lavish lifestyle, principally through payments made under allegedly bogus non-competition agreements arising from transactions between the company and third parties.

While petitioners' alleged theft of money or property from their employer was the government's principal theory of mail fraud, the government was not content to rest on that allegation alone. Instead, the government successfully insisted on a jury instruction permitting conviction for mail fraud on the alternative theory that petitioners deprived the company or its shareholders of the "intangible right of honest services."

After a four-month trial, the jury acquitted petitioners on nearly all counts, soundly rejecting the government's principal theory of prosecution—that petitioners "stole money and property from the company" through non-competition agreements associated with the company's sale of its community newspapers to other companies. J.A. 228a. Petitioners were instead convicted on just three of the mail fraud counts. The jury instructions on mail fraud did not require the jury to find that petitioners caused even a *risk* of economic harm to the company in order to convict them of depriving the company of its "intangible right of honest services." Instead, the jury was allowed to convict under those instructions even if it found, consistent with testimony from the government's primary witness, that petitioners sought a lawful tax benefit in another country, with no contemplated detriment to their employer, but in the process fell short of complying entirely with their Delaware-law duty of loyalty to the company.

That anyone could even consider such conduct to be a federal crime, punishable by up to twenty years in prison and a predicate for money laundering and racketeering charges, is the unfortunate consequence of Congress's decision some twenty years ago to expand the definition of a scheme to defraud to include the vaguest of terms: encompassing any plan to deprive another of "the intangible right of honest services." The government has stretched this malleable phrase, unknown in the common law, far beyond the public corruption context that gave rise to its enactment, treating the statute as "nothing more than an invitation for federal courts to develop a common-law crime of unethical conduct." *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari). The convictions here, after the government's primary witness completely undermined the government's principal theory that petitioners fraudulently schemed to obtain money or property, are reason enough to place predictable and intelligible limits on an ambiguous theory of criminality that has bedeviled the lower courts for two decades.

1. Petitioners were executives of Hollinger International, Inc. (Hollinger), a publicly held Delaware company that owned and operated several large newspapers and hundreds of smaller publications. Petitioner Black was Hollinger's Chairman and CEO. Petitioner John A. Boultbee was its Executive Vice President, and, for a time, its Chief Financial Officer. Petitioner Mark S. Kipnis was the Corporate Counsel, Secretary and Vice President of Law.[1]

Hollinger's roots were in Black's and co-defendant David Radler's acquisition in 1969 of a single Canadian newspaper, the *Sherbrooke Daily Record*. J.A. 130a-132a. (Radler, President and Chief Operating Officer of Hollinger, agreed to testify

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[1] Co-defendant Peter Y. Atkinson, also convicted at trial, was Vice President of Hollinger.

for the government in exchange for leniency, and was the star witness for the prosecution.) Under their successful management, Hollinger ultimately purchased hundreds of community newspapers, as well as several national and other large newspapers. These included the *Jerusalem Post*, *The Chicago Sun Times*, and the *Daily Telegraph* of London, as well as the launching of the *National Post* in Canada. *Id.* at 161a-180a. Under Black's leadership over nearly two decades, the *Telegraph* alone enriched Hollinger and its shareholders to the tune of hundreds of millions of dollars. *Id.* at 163a-168a. Black built Hollinger's international newspaper empire from a mere $20,000 in equity to market capitalization well in excess of $1 billion. *Id.* at 180a.

Black and Radler managed the business through their combined majority ownership interest in Ravelston Corp. Ltd., a private Canadian company. Ravelston, in turn, had a controlling interest in Hollinger, Inc., a holding company that controlled Hollinger through a super-majority of voting shares.[2] Consistent with the management structure, Hollinger typically did not pay petitioners or Radler directly. Instead, Ravelston usually compensated them from the management fees that Hollinger's board of directors approved for payment to Ravelston.

Beginning in the late 1990s, Hollinger's board approved Black's proposal to divest the company of

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[2] In the district court, Hollinger International was often referred to as "International." We follow the shorthand used by the court of appeals, referring to Hollinger International as "Hollinger."

most of its smaller newspapers based on his prescient prediction that the Internet would adversely affect print media. Although Black's strategy proved to be an enormous financial success for Hollinger and its shareholders, the government came to believe that the transactions implementing this legitimate business plan were somehow criminally tainted. In the government's view, petitioners plotted to steal from Hollinger by causing companies purchasing Hollinger's newspapers to divert to petitioners and others part of the purchase price under bogus covenants not to compete.[3]

Petitioners' straightforward defense—that the non-competition agreements were legitimate—was amply supported by even the government's proofs. Most of the agreements had been included as part of Hollinger's deals with sophisticated purchasers who quite understandably had no desire to risk competition from the executive team that had successfully built Hollinger into an international media empire. The jury returned acquittals on all counts related to non-competition agreements signed in these third-party deals. One particular set of agreements, not directly connected to a newspaper sale, resulted in two of the three mail fraud convictions. These agreements—which, unlike the earlier non-competes, restricted Black, Boultbee, and others from competing with Hollinger and its affiliates after leaving Hollinger—minimized the tax burden of the Canadian defendants.

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[3] Kipnis, the corporate counsel, was neither party to, nor paid under, the covenants. Instead, the government charged that his legal services in preparing the paperwork aided and abetted the scheme to defraud.

Under then-applicable Canadian law, payments received pursuant to non-competition agreements were non-taxable, even if the payments were in lieu of other income the payees might have received, so long as the payees were legally bound by the non-competes, which indisputably was the case here. In order for the Canadian defendants to obtain the benefit of the favorable Canadian tax ruling *without* imposing any cost or other detriment on Hollinger, Radler simply caused some of the management fees that otherwise would have been paid by Hollinger to Ravelston (and, in due course, by Ravelston to the various officers) to be re-characterized as non-compete payments made directly to those officers.

The government attempted to anticipate petitioners' defense by alleging in the original indictment that petitioners had schemed to defraud not only Hollinger, but also the Canadian fisc. Before trial, however, the government abandoned its "fraud on Canada" theory of mail fraud, and filed a superseding information deleting Canada as an alleged victim. Pet. App. 24a-92a. Notably, the information, like the preceding indictment, did not stop at alleging a scheme to *steal money* from Hollinger. Lacking enough confidence in its "looting" allegations to rely on them alone, the government further alleged that petitioners' supposed scheme *also* "fraudulently deprived [Hollinger] International of its right to receive their honest services." Pet. App. at 36a-37a. Again and again, the information invoked petitioners' state-law duty of "loyalty" and alleged that petitioners breached that "fiduciary duty" to Hollinger. *E.g., id.* at 52a, 25a-34a.

2. Petitioners' defense included *uncontradicted* expert testimony establishing that the re-

characterization of management fees as non-compete payments was entirely proper under Canadian law. Pet. App. 142a-148a.

Significant parts of the government's own case bolstered petitioners' defense. For example, of the three fraud counts on which petitioners were convicted, the two involving the most substantial transaction accused petitioners of improperly taking $5.5 million from American Publishing Company (APC), a Hollinger subsidiary that had owned most of Hollinger's U.S. newspapers. Petitioners pointed out that the $5.5 million payment was part of a larger amount that the Hollinger board had approved for services received under Hollinger's management agreements with Ravelston. APC and dozens of other Hollinger subsidiaries routinely paid such management fees to Ravelston, on Hollinger's behalf and in proportionate shares, with the express approval of Hollinger's audit committee. J.A. 159a-160a, 181a-186a, 189a-190a. Radler—the government's star witness, the President of APC, and the man who devised the APC non-competition agreements—*agreed with petitioners on this point*. *Id*. at 182a-183a.

Radler's testimony supporting petitioners' defense that they neither intended nor contemplated harm to Hollinger was hardly a surprise to the government. Radler testified unequivocally in the grand jury, on direct examination for the government as its main witness at trial, and again on cross examination, that the $5.5 million *was* part of the overall annual management fee amount that the board had *already* approved. J.A. 159a-160a, 181a-183a, 188a-189a. Radler also testified that it was he who tied payment of the $5.5 million to non-compete agreements, signed by Black, Boultbee, Radler and Atkinson. *Id.* at 153a, 157a. Those agreements barred the four officers from competing with any publication owned by *any affiliate* of APC (including Hollinger itself) for three years after their departure from Hollinger. *E.g.,* Pet. App. 156a-163a (Noncompetition Agreement).[4]

In particular, Radler testified that the $5.5 million was part of a *larger* amount *previously* approved by the audit committee. *Id*. at 182a. Because the payments were owed and originally approved as management fees, it was of no legal significance whether the board would have agreed to pay the $5.5 million solely in exchange for non-compete promises. Nor is it surprising that these payments were handled unlike the *other* management fee payments that the board approved. The payments needed to be characterized as non-compete payments, rather than compensation, Radler explained, to satisfy the Canadian tax rules. J.A. 157a. The government was reduced to arguing to the jury that its most important

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[4] The government has repeatedly mischaracterized the agreements as preventing competition with only *APC*'s holdings—which by then included just one small newspaper in Mammoth Lake, California. Opp. 2-3; Govt C.A. Brief 14, 17, 49, 87. And it continued to do so even after petitioners pointed out the language in the agreements that prevented competition with publications owned by APC *affiliates* too. Appellants' Brief 41-42; Pet. App. 158a-159a (noncompetition provision of APC noncompetition agreement). When the agreements were signed, Hollinger itself owned approximately 100 newspapers in the greater Chicago area alone. J.A. 193a-194a; DX JB Newspapers 1.

witness—and the person in the best position to know—was flat-out wrong.[5]

The other fraud conviction (count 7) arose out of Hollinger's sale of newspapers to Forum Communications and Paxton Media Group ("Forum/Paxton"). According to Radler's contemporaneous documentation, the purchasers demanded non-competition agreements with individual officers as part of the purchase. J.A. 374a-375a. Hollinger board member Richard Perle co-signed Executive Committee Consents specifically approving the execution of non-compete agreements by Hollinger and the officers. *Id.* at 382a-387a. The board then unanimously approved and adopted these Consents. *Id.* at 367a-368a. Petitioners did not learn until much later that, due to oversight and notwithstanding the approvals, the individual non-compete agreements were never drafted. The payments were therefore made without written agreements in place.

Radler himself testified that he believed non-competition agreements had been prepared for the Forum/Paxton transactions. Moreover, Radler explained that $600,000 was allocated from the Forum/Paxton reserve to make payments under the

[5] The government attempted, to no avail, to contradict its own witness and, on appeal, went so far as to assert, for the very first time, that Radler had *perjured* himself in the grand jury and at trial when he testified that the payments had been authorized (Govt. C.A. Brief at 36). This, after the government's *post-trial* representations that Radler deserved a lenient sentence because "the information and testimony" he provided "was accurate and complete *in all respects*." J.A. 445a-446a (Radler sentencing memorandum agreeing with government's sealed motion) (emphasis added).

non-competes because Radler "thought the money had been set aside" for that purpose. *Id*. at 142a.

3. Throughout summation the government emphasized that its two theories of fraud—theft of money and honest-services fraud—operated independently. The prosecutor reminded jurors that while "one of the theories behind this fraud" was that petitioners "stole money and property from the company," "[t]here's also a second theory" that "has to do with something called honest services." J.A. 228a. The prosecutor added that "[s]tealing money and property is one kind of intent to defraud, and that is serious. Depriving the company and the shareholders of honest services, breaching this duty of loyalty, is just as serious." *Id.* In urging conviction under this second theory, the government elicited—and emphasized in summation—testimony that petitioners violated state-law fiduciary duties as officers of a Delaware public company. *See, e.g.*, *id.* at 108a-111a, 118a-120a, 222a-223a, 229a, 233a-240a.

Consistent with the case law of several other circuits, petitioners sought an instruction that "[i]n order to prove a scheme to defraud, the government must prove that it was reasonably foreseeable to the defendant that the scheme could result in some economic harm to the victim." Pet. App. 187a. The government sought an instruction exactly to the contrary: "In order to prove a scheme to defraud, the government does not have to prove that the defendants contemplated actual or foreseeable financial harm to the victims." *Id.* at 193a; J.A. 284a. Acknowledging that case law on honest-services-fraud from a number of other circuits was "contrary" to its position, the government insisted that under Seventh Circuit precedent "we don't have to show foreseeable harm." Pet. App. 208a. The government withdrew its proposed instruction only after the judge rejected *petitioners'* proposed instruction as inconsistent with the law of the circuit. The government reserved the right to renew its request if petitioners so much as "suggest[ed]" to the jury a need to find there was any "foreseeable harm" to Hollinger. *Id.*

As a result, the judge instructed the jury that the "scheme to defraud" could be *either* a scheme to "obtain money or property" from another *or* a failure by petitioners to render "honest services" to Hollinger. J.A. 335a. To convict on the honest-services theory the jury could put aside the allegations of theft and instead find that the petitioner "misused his position for private gain for himself and/or a co-schemer" and that he "knowingly and intentionally breached his duty of loyalty" under Delaware corporate law. *Id.* at 335a-336a. That duty required "act[ing] in the corporation's best interests," which the instructions equated with being "entirely fair" to the corporation. *Id.* at 336a. The jury could not deem a transaction "entirely fair" without concluding that it resulted from a "fair process." *Id.* at 336a-337a.[6]

[6] On the "intent to defraud" element of mail fraud, the jury needed to find only an "intent to deceive or cheat Hollinger * * * in order to cause a gain of money or property to the defendants or others; and the potential loss of money or property to another; *or*, to deprive the corporation and its shareholders of their right to the honest services of their corporate officers." J.A. 338a (emphasis added). Not considering this last alternative to have sufficiently watered down the intent element, the government also insisted on an "ostrich instruction," even though any finding under one would seemingly be at odds with the requirement of specific intent. Tr 15187-88.

The jury therefore was permitted to return guilty verdicts on the fraud counts even after rejecting the government's main theory—that petitioners stole money from Hollinger. The jury could convict even if it accepted the testimony of the *government's* principal witness and concluded that Hollinger faced *no risk* of pecuniary harm. Indeed, it could convict even if jurors agreed with the defense that the petitioner-payees only "benefited" to the extent of paying lower Canadian taxes, a benefit that was *not* at Hollinger's expense.

The prosecution suggested that the jury be required to deliver "special verdicts" identifying, in the event of conviction, the theory of fraud it had accepted. When petitioners argued that special verdicts would infringe on their Sixth Amendment rights and were incompatible with the Seventh Circuit's rejection of a unanimity requirement on the theory of fraud, the prosecution advised the court that it had no objection to general verdicts. Pet. App. 228a. With that concession, the court—which had already declined petitioners' offer to use *post*-verdict interrogatories instead of special verdicts—had no reason to consider whether special verdicts would have been an appropriate exercise of discretion under these facts. *Id*. ("THE COURT: General form. Okay.").

The jury acquitted petitioners on all but three of the twelve fraud counts it considered—necessarily rejecting the government's sweeping claims that petitioners had embarked on a massive scheme to loot

Hollinger.[7] The jury also acquitted all petitioners of several tax charges, and it further acquitted Black of a RICO charge (for which every predicate act was mail fraud, wire fraud, or transportation of money taken by fraud).

The jury convicted Black of a single additional count charging obstruction of justice for conduct in Toronto, Canada. The charge stemmed from Black's response to a call from his assistant, who had decided to move Black's personal papers and effects during regular business hours from their office to her home, where she was setting up a new office in advance of imminent eviction by Hollinger's new management. J.A. 199a-202a. The government speculated that Black moved his belongings upon word he would soon be receiving a document request from the SEC in Chicago. J.A. 240a-241a. Not only was it the SEC's *sixth* document request, the evidence showed without contradiction that Black learned of it only *after* the materials were moved. Moreover, on each of the other five occasions Black had given several lawyers free rein over both his office and home (where he ended up taking the materials after responding to his assistant's call), producing over 110,000 pages in response. J.A. 196a-197a, 423a-428a. The key issue on the obstruction count was whether, by moving these documents, Black merely proceeded as any tenant would at the end of his tenancy or, instead, acted "corruptly"—with the "improper purpose" of "subvert[ing] or undermin[ing]

[7] The government withdrew its money laundering charge against Black before the case went to the jury, and the court granted Kipnis's post-verdict motion for judgment of acquittal on count 7.

the fact-finding ability of an official proceeding" looking into whether he had engaged in fraud. J.A. 342a-343a.

4. The court of appeals affirmed petitioners' convictions. Although the jury was instructed on two *alternative* theories of fraud, and petitioners challenged the *legal adequacy* of one of those two alternatives (the honest-services instruction), the court focused much of its analysis on the *factual sufficiency* of the government's evidence on the *other* theory—that petitioners wrongfully took Hollinger's money. Because the court believed that the government introduced legally sufficient evidence from which a jury *could* have found a "money fraud," it assumed the jury *did* find such a fraud despite the flawed honest-services instruction that permitted a guilty verdict even if the jury rejected the "money fraud" charge. Pet. App. 3a-5a, 10a.

The court acknowledged that "all [the jury] had to find to support a conviction for honest services fraud was that the defendants had deliberately failed to render honest services to Hollinger and had done so to obtain a private gain" (Pet. App. 5a-6a), but it rejected petitioners' argument "that for the statute to be violated, the private gain must be at the expense of the persons (or other entities) to whom the defendants owed their honest services." *Id*. at 6a. The court emphasized that "[t]he defendants do not deny that they sought a private gain" in the form of lower Canadian taxes, and on that basis dismissed their position as a "no harm-no foul argument." *Id*. at 6a. And although the court disclaimed any intention to impose on "every corporate employee" a duty to "advise his employer of his tax status," it speculated nonetheless that Hollinger's audit committee might have renegotiated the management fees owed to Ravelston if the committee had only known of the extent to which some of the individuals could benefit from Canadian tax rules. This demonstrated, in the court's view, "how honest services fraud bleeds into money or property fraud." *Id.* at 8a-9a.

Finally, the court ruled that "[e]ven if our analysis of honest services fraud is wrong, the defendants cannot prevail." *Id.* at 9a. It reasoned that the error was "harmless" because the "government's honest services theory" was that petitioners abused their positions "to line their pockets with phony management fees disguised as compensation for covenants not to compete," and, in any event, petitioners "forfeited their objection" to the honest services instruction by declining when "the *government* requested a verdict that would require the jury to make separate findings on money or property fraud and on honest services fraud." *Id.* at 10a-11a (emphasis added). The court imposed this new forfeiture theory of harmless error without citation to authority.

SUMMARY OF ARGUMENT

I. This Court held in *McNally v. United States*, 483 U.S. 350 (1987), that the mail fraud statute could not be used to prosecute schemes to deprive the citizenry of the intangible right to honest and impartial government. Under the "intangible rights" theory that this Court rejected in *McNally*, "a public official owe[d] a fiduciary duty to the public, and misuse of his office for private gain [was] a fraud." *Id.* at 355. As the Court explained, the indeterminacy and inherent ambiguity of this theory ran afoul of the rule that "[t]here are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute.'" *Id.* at 360 (quoting *Fasulo v. United States*, 272 U.S. 620, 629 (1926)). "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," the Court therefore limited the mail fraud statute "to the protection of property rights." 483 U.S. at 360. "If Congress desires to go further," the Court concluded, "it must speak more clearly than it has." *Id.*

Congress's response—Section 1346—failed to do the one thing that this Court asked. Far from speaking clearly, the statute is a model of vagueness. In a single sentence, it enjoins against "depriving another" of the "intangible right of honest services." No one who is not a federal prosecutor believes that a deprivation of "honest services," by itself, adequately and clearly describes an offense with the specificity required by the Constitution. Instead, the lower courts have construed this language merely as a direction to revive the body of case law that antedated *McNally*.

This approach effectively licenses prosecutors to target anything that offends their ethical sensibilities, especially when the defendant is likely to generate career-building headlines, so long as they can pick and choose from the smorgasbord of pre-*McNally* authority some arguably analogous prosecutions. For the last two decades, the lower courts have parsed these cases—accepting some while rejecting or qualifying others—to develop, in violation of longstanding authority, *see United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812), a body of common law federal "crimes" that no reasonable person could anticipate.

The effort to interpret Section 1346 based on pre-*McNally* cases is particularly indeterminate where, as here, purely *private* conduct is at issue. The applicability of the intangible rights doctrine to the private sector was far from uniformly established in 1987. To be sure, the intangible rights theory had been applied to private conduct in a few cases where employees had accepted kickbacks, sold confidential information, or defrauded the victim of a right to privacy. *See McNally*, 483 U.S. at 362-64 & nn. 3, 4 (Stevens, J., dissenting). But compared to the larger body of public corruption cases, the doctrine was embryonic. Indeed, in *McNally* itself the Sixth Circuit had held that "misconduct of a fiduciary in the administration of exclusively private matters in his capacity as a private individual"—the type of misconduct alleged here—was "not actionable as a violation of the mail fraud statute under an intangible rights theory." *United States v. Gray*, 790 F.2d 1290, 1295 (6th Cir. 1986).

Whatever the precise scope of Section 1346, it is clear that petitioners' convictions must be reversed because the district court refused to instruct the jury on the *one* requirement that is apparent from the text and history of the statute. Section 1346 does not define a free-standing crime, but merely provides that the "schemes to defraud" previously proscribed by the mail fraud statute now "include" schemes "to deprive another of * * * honest services." That language precludes prosecutions for allegedly "dishonest" conduct outside the common understanding of "fraud." That understanding, as was clear in the lower courts before *McNally*, has always required the government to establish that a defendant contemplated that the victim suffer some identifiable economic injury.

Although Section 1346 was enacted with little significant debate, the sparse legislative history confirms this conclusion. In the pre-*McNally* cases of which the statute's sponsors were aware, the defendant's conduct created a foreseeable risk of economic harm to those who purportedly were the victims under an honest services theory. Indeed, the requirement that "the defendant intended or contemplated loss" to the victim was expressly set forth in one of the bills introduced to "overrule" *McNally*, and it was the holding of *United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983), a case mentioned repeatedly in the legislative record as authority for that requirement.

In *Lemire*, the District of Columbia Circuit had decisively rejected the government's bid to "criminalize any intentional undisclosed breach of duty to an employer." *Id.* at 1336. Because "[e]mployee loyalty is not an end in itself" but "a means to obtain and preserve pecuniary benefits," the court joined the Second Circuit in holding that "[t]here must be a failure to disclose something which in the knowledge or contemplation of the employee poses an independent business risk to the employer." *Id.* at 1337 (citing cases); *see also id*. at 1338 ("Under our standard for wire fraud, the jury would have had to find that the defendants' failure[s] to disclose * * * were in furtherance of a scheme to defraud [the victim] of a business opportunity or economic benefit").

This Court should interpret Section 1346 in keeping with the understanding reflected in *Lemire* because the government's alternative reading gives rise to serious constitutional questions of separation of powers, federalism and due process. The rule of lenity also strongly counsels in favor of that more limited reading. As this Court recognized in

Cleveland v. United States, 531 U.S. 12, 25 (2000), it is especially important to construe the mail and wire fraud statutes with federalism and lenity firmly in mind, because (as occurred here) those statutes are oft-used predicates for draconian RICO and money laundering charges.

The government argued below that none of this really matters, because—it still maintains—the honest services theory was merely another label for its "money fraud" theory. Opp. 4, 15. But the jury was given two *distinct* theories on the fraud counts, and the government insisted on the honest-services alternative, predicated on supposed violations of Delaware corporate law, so as to give the jury a basis for convicting *apart from* theft. As this Court recently reaffirmed in *Hedgpeth v. Pulido*, 129 S. Ct. 530 (2008), "a conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." Such error is harmless only if the government can negate, beyond a reasonable doubt, the possibility that the error influenced the jury's verdict. *Yates v. United States*, 354 U.S. 298 (1957); *Neder v. United States*, 527 U.S. 1 (1999).

The Seventh Circuit misapplied these precedents, speculating instead that the jury might have convicted anyway if properly instructed. Pet. App. 10a. Apart from invoking the wrong legal standard, this is a most implausible assertion, given the jury's spectacular rejection of the bulk of the government's fraud case. The obstruction conviction also must be reversed, because the erroneous instructions and substantial inflammatory evidence on those counts could not help but prejudice the jury's decision whether Black acted with a corrupt intent—a point the government waived by not contesting it when opposing certiorari.

II. The court of appeals alternatively concluded that petitioners were barred from showing that they were wrongfully convicted because they declined the government's suggestion that the jury deliver special verdicts. This heavy sanction is nowhere to be found in the rules for preserving instructional error. In fact, there is no provision in the criminal rules for special verdicts at all. Petitioners complied with the requirements that do exist, and the lower court was without authority to create new ones, especially when it announced the rule, and then punished an earlier failure to "comply" with it, in the same ruling.

Even if courts had the power to alter the federal rules through ad hoc decision-making, the judicial amendment imposed here is a particularly poor candidate. The court held that criminal defendants may be presented with a Hobson's choice: accept a special verdict form, a tool that the courts overwhelmingly view as "a disfavored procedure" that invades the defendant's basic right to a fair trial, 26 MOORE'S FEDERAL PRACTICE: CRIMINAL § 631.03[1] (3d ed. 2008), or lose the right to show that they were convicted of engaging in innocent conduct. If such a choice could ever be imposed, it must be accomplished in accordance with established mechanisms for prospective rule-making.

ARGUMENT

I. SECTION 1346 MAY BE APPLIED TO PRIVATE SECTOR RELATIONSHIPS ONLY IF THE JURY FINDS THAT DEFENDANTS CONTEMPLATED ECONOMIC HARM TO THE PARTY TO WHOM "HONEST SERVICES" WERE OWED

Section 1346 of Title 18 defines the "scheme[s] to defraud" that are punishable under the mail and wire fraud statutes to "include[]" schemes "to deprive another of the intangible right of honest services." The principal question in this case is whether a mail fraud charge based on a private individual's alleged scheme to defraud a private entity of "honest services" can be sustained without a jury finding that the defendant contemplated some identifiable economic harm to the victim. The Seventh Circuit rejected any such requirement in this case, believing that it is sufficient for conviction that a defendant failed to comply with Delaware rules of corporate governance and received a "benefit" in the form of a *lawful* tax break in a foreign country—*i.e.*, a "benefit" that was not *at the expense* of the supposed victim. Indeed, petitioners likely stand convicted of mail *fraud* under federal criminal law merely because, in the estimation of the jury, their dealings with their employer were not "entire[ly] fair" under Delaware corporate law.

A majority of the courts of appeals that have considered the question, however, have concluded that Section 1346 may be applied in private sector cases only if the jury is required to find that the defendant contemplated some identifiable economic harm *to the victim*—that is, to the party to whom the duty of "honest services" was owed. In keeping with the reasoning of *Lemire*, 720 F.2d at 1327, a leading pre-

McNally case from the D.C. Circuit, the majority rule "construe[s] the intangible right to honest services in the private sector as ultimately dependent upon the property rights of the victim." *United States v. Frost*, 125 F.3d 346, 369 (6th Cir. 1997); *United States v. Vinyard*, 266 F.3d 320, 328 (4th Cir. 2001) (adopting *Frost*); *United States v. deVegter*, 198 F.3d 1324, 1328-29 (11th Cir. 1999) (adopting "well-reasoned standard[s]" of *Frost* and *Lemire*). Thus, "[a]bsent reasonably foreseeable economic harm, '[p]roof that the employer simply suffered only the loss of the loyalty and fidelity of the [employee] is insufficient to convict.'" *United States v. Sun-Diamond Growers*, 138 F.3d 961, 973 (D.C. Cir. 1998) (quoting *Frost*, 125 F.3d at 368), *aff'd*, 526 U.S. 398 (1999); *see also United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996).[8] For the reasons set forth below, the majority view is correct and requires reversal of all counts of conviction.

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[8] The First Circuit has taken a similar position. *See United States v. Martin*, 228 F.3d 1, 17-18 & n.22 (1st Cir. 2000); *see also United States v. Serafino*, 281 F.3d 327, 332 (1st Cir. 2002) (government's proof "plainly sufficed to establish the requisite cognizable financial harm to MBC under section 1346") (citing *Jain*, 93 F.3d at 441-42). The Second Circuit applies a similar rule in "self-dealing" cases of the type that the prosecution charged here. *See United States v. Rybicki*, 354 F.3d 124, 141 (2d Cir. 2003) (en banc) ("In the self-dealing context, * * * the defendant's behavior must thus cause, or at least be capable of causing, some detriment – perhaps some economic or pecuniary detriment – to the employer.").

A. The Statutory Text And History Require The Government To Prove A Foreseeable Risk Of Economic Harm

1. It is common ground in the lower courts that the text of Section 1346 is not, by quite a distance, a model of legislative precision. As the en banc Second Circuit observed, one would have to "labor long and with difficulty in seeking a clear and properly limited meaning of 'scheme or artifice to deprive another of the intangible right of honest services' simply by consulting a dictionary for the literal, 'plain' meaning of the phrase." *Rybicki*, 354 F.3d at 135; *United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008) ("The central problem is that the concept of 'honest services' is vague and undefined by statute.").

Congress' use of the definite article ("the") and the phrase "right of" (rather than "right to") suggests that it *believed* it was invoking a term of art. *Rybicki*, 354 F.3d at 137-38.[9] Courts ordinarily will

[9] When a phrase conferring or enumerating a right does so through a formulation using "right of," followed by the benefit to be received, as opposed to a right "to" that benefit, it almost invariably is a term of art with a meaning only as an entire phrase. *See, e.g., United States v. Union Pac. R.R. Co.,* 353 U.S. 112, 113 (1957) (interpreting the phrase "right of way" as a whole). In contrast, phrases involving the formulation "right to," followed by a benefit to be conferred on the recipient, are more commonly separated into their component parts and defined by finding the meaning of each individual word. The right to counsel, for example, is the right to have representation by a lawyer; but a "right of way" cannot be defined through the same deconstruction of the phrase. Congress's use of the word "of," followed by a noun, therefore signals that the entire phrase—intangible right of honest services—was meant to have its own separate meaning as a term of art, unlike "intangible right *to*

[Footnote continued on next page]

infer that Congress intended "to incorporate the established meaning" of terms "that have accumulated settled meaning under the common law." *Neder*, 527 U.S. at 21 (internal quotation marks omitted); s*ee also Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 59 (1911). This canon is of limited utility, however, in mapping the scope of Section 1346 because the phrase "the intangible right of honest services"—at least as applied to conduct in the private sector—had no settled or well-known meaning in law (common or otherwise) in 1988.

Not a single pre-*McNally* case used the phrase "the intangible right of honest services." Moreover, the phrase cannot be read simply as a broad restoration of all pre-*McNally* case law addressing intangible rights, since the text does refer to "honest services," not to all conceivable intangibles. As this Court explained in *Cleveland v. United States*, 531 U.S. 12, 19-20 (2000), Section 1346 covers only "one of the 'intangible rights' that lower courts had protected under § 1341 prior to *McNally*." Yet even references to "honest services" in pre-*McNally* case law scarcely remit the Court to a settled body of doctrine, especially in the private sector. As the en banc Fifth Circuit has noted, "Congress could not have intended to bless each and every pre-*McNally* lower court 'honest services' opinion," because the doctrine never was a "unified set of rules" even in the public corruption area where the pre-1988 doctrine was more per-

[Footnote continued from previous page]

honest services," a term whose meaning *might* be ascertainable by defining "honest services" alone and combining it with the meaning of a "right to" something.

vasive and developed. *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir. 1997) (en banc).

The imprecision of the statutory language, together with the indeterminacy of the pre-*McNally* private-sector case law, bodes poorly for the constitutionality of Section 1346 when the Court is forced to confront it. As Judge Jacobs of the Second Circuit wrote for himself and three colleagues, "surely no unambiguous meaning can be assigned to a phrase that has no meaning except what can be distilled from *some* pre-McNally cases provided that *other* pre-McNally cases are ignored. * * * Ordinary people cannot be expected to undertake such an analysis; rare is the lawyer who could do it; and no two lawyers could be expected to agree independently on the elements of an offense that must be defined by such a project." *Rybicki*, 354 F.3d at 158, 160 (Jacobs, J., dissenting).

In this case, however, the convictions must be reversed on a much narrower ground, because the prosecution disregarded the *one* restriction that is compelled by any fair reading of the language and history of Section 1346. Sections 1341 and 1343 outlaw three types of "scheme[s] or artifice[s]": schemes or artifices (1) "to defraud"; (2) "for obtaining money or property" by certain means; and (3) to supply or furnish "for unlawful use any counterfeit or spurious coin." Congress did *not* add to this list a fourth category. Instead, it chose to "include[]" schemes "to deprive another of the intangible right of honest services" within the meaning of a scheme "*to defraud.*" In denoting this new category of schemes as a species of *fraud*, Congress surely "had in mind" a conventional concept of fraud as the evil it was targeting. *Cf. Solid Waste Agency Of Northern Cook Cty. v.*

Army Corps Of Engineers, 531 U.S. 159, 172 (2001) (rejecting government's argument that in defining "navigable waters" as "waters of the United States" Congress intended to read "navigable waters" out of the statute); *Boyle v. United States*, 129 S. Ct. 2237, 2243 (2009) (RICO statute provides that the term enterprise "includes" certain "specifically enumerated" items, and it may include "others that fall within the ordinary meaning of" enterprise).

The text of the statute therefore makes clear that it targets employee dishonesty—the "depriv[ation] * * * of honest services"—only insofar as such dishonesty may be understood as "*fraud.*" The statutory formulation therefore cannot encompass mere breaches of workplace rules or employee disloyalty that pose no significant risk of tangible economic injury to the employer, because it has long been recognized that one essential element of "fraud" is "pecuniary loss" to another. *See* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "defraud" as: "To cause injury or loss to (a person) by deceit."). The chapter of the Restatement of Torts addressing "Fraudulent Misrepresentation (Deceit)," for example, explained at the time of Section 1346's enactment that one who "fraudulently" makes misrepresentations to another "is subject to liability to the other in deceit *for pecuniary loss caused*" by "justifiable reliance upon the misrepresentation." Restatement (Second) of Torts § 525 (1977) (emphasis added); *see generally Neder,* 527 U.S. at 22 (looking to the Restatement to determine an element of mail fraud).

To be sure, proof of *actual* economic injury is not required in federal fraud prosecutions, for Congress chose to criminalize "the '*scheme* to defraud,' rather than the completed fraud." *Neder*, 527 U.S. at 25 (emphasis added). But by the same token it has always been understood that one who neither "intends nor has reason to expect" that his conduct will cause others a "pecuniary loss" does not "bring him[self] within the rule" that proscribes "fraud." Restatement, § 531 & cmt. b. As Judge Friendly said in a leading pre-*McNally* case, "[w]hile the statute must reach some schemes or artifices to defraud that do not in themselves involve 'obtaining money or property by means of false or fraudulent pretenses,'" and the "scheme" language relieves the government of the burden of proving "that the [victims] were in fact defrauded * * * 'this does not mean that the government can escape the burden of showing that some actual harm or injury was *contemplated*.'" *United States v. Dixon*, 536 F.2d 1388, 1398-1400 & n.11 (2d Cir. 1976) (quoting *United States v. Regent Office Supply Co*., 421 F.2d 1174, 1180 (2d Cir. 1970) (emphasis in original)); *see also United States v. von Barta*, 635 F.2d 999, 1006 & n.14 (2d Cir. 1980) ("breach of an employee's fiduciary duty, without more, does not violate the mail fraud statute"; the government must prove materiality *and* "that some actual harm or injury was at least contemplated").

In *United States v. Lemire*, 720 F.2d 1327, 1335-37 (D.C. Cir. 1983), the District of Columbia Circuit provided perhaps the most thorough and careful pre-*McNally* analysis of contemplated economic harm as an essential element of honest-services "fraud" in the private sector. Like this case, *Lemire* involved a fiduciary's alleged violation of his duty of loyalty. Showing that the only timeless constant in criminal law across the decades is the government's penchant for pushing the mail fraud statute to the point of absurdity, *see, e.g. Dixon*, 536 F.2d at 1398 (expressing "some wonder why the prosecutor thought it necessary or desirable to include the mail fraud counts"), the government apparently argued in *Lemire* that "any intentional undisclosed breach of duty to an employer" was mail "fraud." 720 F.2d at 1336. The D.C. Circuit roundly rejected this submission, noting that "[o]nce * * * disloyalty alone becomes the crime, little remains before every civil wrong is potentially indictable." *Id.* at 1336-37 & n.11 (citation and internal quotation marks omitted).

The court explained that in the private sector "[e]mployee loyalty is not an end in itself, it is a means to obtain and preserve pecuniary benefits for the employer." *Id.* at 1336. Thus, because "[a]n employee's undisclosed conflict of interest does not by itself pose the threat of economic harm to the employer," the court held "that an intentional failure to disclose a conflict of interest, without more, is not sufficient evidence of the intent to defraud an employer necessary under the wire fraud statute." *Id.* at 1337. Agreeing with the Second Circuit in *Dixon* and *von Barta*, *supra*, the court emphasized that the government must prove, and the jury must find, "a failure to disclose something which in the knowledge or contemplation of the employee poses an independent business risk to the employer." *Id.*; *see also id.* at 1338 (defendants must scheme to deprive the victim of "a business opportunity or economic benefit"); *id.* at 1341 (noting the "need to find that the defendants contemplated some kind of pecuniary harm to the employer").

In warning of the need to rein in prosecutors with a contemplated pecuniary harm requirement, *Lemire* also cited *United States v. Feldman*, 711 F.2d 758 (7th Cir. 1983), where the government prosecuted an employee who had hid his interest in an account collateralized by phony bank guarantees. In affirming the conviction, the Seventh Circuit made clear that a conviction could not be based solely on the employee's mere violation of a policy against a secret financial interest in customer accounts. *Id*. at 763. As the court explained, "breach of duty" and "receipt of secret profits" "must be accompanied by a scheme formed with the intent *to defraud*." *Id*. (emphasis in original). Thus, a "breach of duty can support conviction * * * only if the nondisclosed information * * * could or does result in harm to the employer." *Id*.

The Fifth Circuit took a similar approach that likewise focused on the foreseeability of economic harm to the employer. In *United States v. Ballard*, 663 F.2d 534 (5th Cir. 1981), the court affirmed the conviction of a power company employee who secretly received kickbacks from employees of companies that the defendant installed as intermediaries in his employer's purchases of oil. The court ruled that violation of a duty to disclose "material" information is a "detriment" to one's employer when the employee "has reason to believe the information would lead a reasonable employer to change its business conduct"—a fact established by proof that the undisclosed information would have allowed the employer "to purchase the oil at a significantly lower price." 663 F.2d at 541-542. On the other hand, the court *reversed* the convictions of the intermediary companies' employees who secretly profited, finding it legally insufficient that their employers may have wanted to transact directly with the power company so as "to gain favor with" it as a "customer for the future." *Id. Lemire* explained that "[b]y rejecting that argument," the *Ballard* court "effectively asserted that general threats to business interests posed by employee conflicts of interest are too speculative to support a mail fraud conviction." 720 F.2d at 1338 n.15.

Lemire used the *Ballard* decision to demonstrate that although materiality is *part of* the fraud analysis, it does not *replace* the need to prove intent to defraud as a separate element of honest-services fraud. "Since an employer presumably would 'change its business conduct' only if, upon disclosure of the conflict and any other relevant information, it saw new opportunities for profit or savings, or dangers of economic harm, the notion of materiality of nondisclosure or misrepresentation in the wire fraud context must logically focus on the reasonable foreseeability by the employee of potential economic harm to his employer stemming from the employer's ignorance of information relevant to the conflict." 720 F.2d at 1338.

Thus, it was well understood when Congress enacted Section 1346—just as it is today—that a private actor's conduct can be "fraud" *only if* he intended some identifiable economic injury to the victim. Indeed, just one month before this Court decided *McNally*, the government agreed that, in the "uniformly held" view of the lower courts, the mail fraud statute reaches "a scheme to use a private fiduciary position to obtain direct pecuniary gain" where "that scheme contemplates some sort of harm to the principal." Brief for the United States at 32, *Carpenter v. United States*, No. 86-422 (May 1, 1987). The government's brief elaborated on the *type* of contemplated harm that must be established, citing the "thoughtful opinion" of the D.C. Circuit in *Lemire* as authority for the requirement that such harm be "identifiable" and "apart from the breach itself." *Id.*

at 33 (footnotes omitted; alterations in original). Of course, there can be no doubt that the contemplated harm requirement in *Lemire's* "thoughtful opinion" was "an economic harm." 720 F.2d at 1338.

In sum, in enacting Section 1346, Congress did not make a federal crime out of any arguable failure to render "honest services," but sought to target such conduct only as part of a broadened understanding of "scheme *to defraud*." It did not remotely license federal prosecutors, as here, to pursue their own untethered understanding of "honesty" apart from any conventional understanding of "fraud." Because the latter has always required, at a minimum, that the defendant be shown to have intended some sort of economic injury to the victim, petitioners were deprived of the one protection that the language of the statute clearly affords them.

2. The legislative history of Section 1346 supports the conclusion that the government cannot prevail without a jury finding that the defendants contemplated economic harm to the victim.

A month after this Court decided *McNally*, Representatives Mfume and Synar introduced The Mail Fraud Amendment Act of 1987, H.R. 3050, 100th Cong. (1987), with the intent "simply to correct a judicial interpretation which has severely restricted the Federal Government's power to attack public corruption under the mail fraud statute." 133 Cong. Rec. H6798-02 (July 29, 1987) (Rep. Mfume). Like other bills that were introduced to "overrule" *McNally*, this bill principally targeted the effect of *McNally* on conduct by government officials and employees.

Other proposals were broader, including a bill introduced a week later—The Fraud Amendments Act of 1987, H.R. 3089, 100th Cong. (1987). It would have expansively defined "defraud" throughout the United States Code to "include[] defrauding another (1) of intangible rights of any kind whatsoever in any manner or for any purpose whatsoever; or (2) by using material private information wrongfully stolen, converted, or misappropriated in breach of any statutory, common law, contractual, employment, personal, or other fiduciary relationship." An identical bill (S. 1898) was introduced in the Senate on November 30, 1987. Although these proposals, ultimately abandoned, would have expanded fraud prosecutions in the direction now advocated by the government, even their sponsors' attention was focused "particularly" on "political corruption." 133 Cong. Rec. E3240-02 (Aug. 4, 2007) (Rep. Conyers) (adding only one other specific objective of the bill: prosecution of insider trading on confidential information).[10]

Two other bills were introduced in the Senate the following year—The Anti-Public Corruption Act of 1988, S. 2531, 100th Cong. (1988), and The Anti-Corruption Act of 1988, S. 2793, 100th Cong. (1988)—but they too were not enacted. The first dealt solely with public corruption. It was proposed by the Department of Justice at the only hearing Congress held to consider any of these bills—before the House Judiciary Committee on May 12, 1988.

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[10] Before Congress voted to enact Section 1346 this Court held that *McNally* did not prevent prosecution of cases involving misappropriations of confidential commercial information, because such information is property protected under the mail fraud statute. *See Carpenter v. United States*, 484 U.S. 19 (1987).

The overriding focus of that hearing was "how we can continue to use the intangible rights doctrine in the mail or wire fraud statutes to prosecute public officials who use their office in a corrupt fashion." *Hearing on H.R. 3089 and H.R. 3050 Before the Subcomm. on Criminal Justice of the Comm. on the Judiciary*, 100th Cong. 1 (1988) (Opening Statement of Chairman Conyers).

"On its face," Section 2 of S. 2793 "would have been a fairly comprehensive, articulate and clear attempt to define criminal conduct" in the public sector. *Brumley*, 116 F.3d at 744 (Jolly, J., dissenting). In separate subsections it targeted those who defraud state and local inhabitants of "the honest services" of state local officials, the same inhabitants of "a fairly and impartially conducted election process," and United States inhabitants of "the honest services of" federal public officials. Section 3 of the bill would have created Section 1346, defining the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive an organization of the intangible 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*." S. 2793, § 3 (italics added). Although the wording of this bill varied from others before it, the "purpose" asserted was the same: "to overturn" this Court's *McNally* decision. 134 Cong. Rec. S12581-04 (Sept. 15, 1988) (Sen. Biden).

Senator Biden, one of the sponsors of S. 2793, explained that his proposal responded to those courts and commentators that "had criticized the intangible rights doctrine as having the potential to include within the ambit of the criminal law, every breach of duty owed by one person to another, whether or not any harm was contemplated or possibly could have resulted from the scheme." 134 Cong. Rec. S12581-04. "Indeed," Senator Biden continued, "before *McNally* a number of courts had begun to move toward an approach that required a showing of some foreseeable harm to the person to whom the duty was owed." *Id.* He specifically mentioned *Lemire* as one of those cases where the courts had begun to place such limits on a theory that otherwise could turn "every breach of fiduciary duty" into a crime. 134 Cong. Rec. S12581-04; *see also* 134 Cong. Rec. S15999-01 (Oct. 14, 1988) (Senator Biden) (bill's limitation on schemes where loss or harm is contemplated or intended is "in keeping with" what cases such as *Lemire* have "held").[11]

The bill that *did* pass—an amendment to The Anti-Drug Abuse Act of 1988, H.R. 5210, 100th Cong. (1988)—was a shorter version of Section 3 of S. 2793. Unlike S. 2793, it applied to schemes aimed at "another" (rather than "an organization"). It also deleted the language (italicized above) that expressly referred to the defendant's intent to inflict economic harm. No explanations were given for the changes. In fact, the enacted text was "never referred to any committee of either the House or the Senate, was

[11] Senator Biden mentioned three other cases that supported a requirement of "contemplated" or "foreseen" harm—*Ballard*, *Feldman*, and *United States v. Siegel*, 717 F.2d 9, 14 (2d Cir. 1983). In *Siegel*, as in the other cases, the defendants not only could have foreseen economic harm, they knowingly inflicted it. As corporate officers, they concealed their "misappropriation of more than $100,000" in company merchandise which they then sold for, among other things, personal enrichment. *Id.* at 15.

never the subject of any committee report from either the House or the Senate, and was never the subject of any floor debate reported in the Congressional Record." *Brumley*, 116 F.3d at 742 (Jolly, J., dissenting). It passed as a last-minute amendment to the Anti-Drug Abuse Act of 1988—one of thirty unrelated criminal law provisions.

There is good reason to believe, however, that Congress chose the simpler phrasing as a preferred way to reinstate pre-McNally case law, which included the limitations set forth in *Lemire* and similar cases. That is because the amendment was cast in terms of what is "included" in a "scheme to defraud," a phrase that had widely been interpreted by the lower courts to encompass a contemplated harm requirement in any event. In fact, in introducing the language that was enacted, literally at the midnight hour (12:45 a.m. on the last day of that Congress), Representative Conyers simply stated that it "restor[ed] the mail fraud provision to where that provision was before the *McNally* decision," and that "[n]o other change in the law [was] intended." 134 Cong. Rec. H11108-01 (Oct. 21, 1988). Senator Biden, the sponsor of S. 2793, later described the bill in the same terms. *See* 134 Cong. Rec. S17360-02 (Nov. 10, 2008) (statement of Senator Biden) (noting that Congress intended to "reinstate" the pre-*McNally* case law "without change" when it enacted Section 1346).

Thus, whatever else might be said about the scope of the sponsors' intent to "restore" pre-*McNally* cases by enacting Section 1346, it seems reasonably certain that the requirement at issue here—*i.e.*, that the prosecution be required to prove that the defendants contemplated identifiable economic harm to the victim—was very much a focus of legislative concern. It is the one requirement of pre-*McNally* law of which Congress undoubtedly was specifically aware and that it intended courts to enforce under Section 1346.

B. The Majority Rule Is Also Supported By The Need To Avoid The Difficult Constitutional Questions That Would Arise From Applying Section 1346 More Broadly In The Private Sector

The need to interpret Section 1346 in keeping with conventional notions of "fraud," and in particular the requirement that the defendant have intended to inflict economic injury on the victim, is confirmed by the serious constitutional questions that would arise from a broader construction of Section 1346 as targeting all manner of "dishonesty" in the private sector. *Cf. Northwest Austin Mun. Utility District No. 1 v. Holder*, 129 S. Ct. 2504, 2513 (2009). Were Section 1346 read as the government has urged in this case, it would essentially become an open-ended delegation of authority to the courts to develop common-law crimes, and, in particular, "a common-law crime of unethical conduct." *Sorich*, 129 S. Ct. at 1310. From the earliest days of the Republic, however, this Court has consistently refused to embark on such an exercise, which would cast the judiciary in the law-making role that the Constitution assigns to Congress and would likely violate "separation of powers in a manner that trenches particularly harshly on individual liberty." *Whalen v. United States*, 445 U.S. 684, 689 (1980).

1. By the time this Court decided *United States v. Hudson* in 1812, it was already "long since settled in public opinion" that federal courts lack authority to define and punish penal offenses in the common

law fashion. 11 U.S. at 32; *see also United States v. Worrall*, 2 U.S. (Dall.) 384 (Chase, Circuit Justice, C.C.D. Pa. 1798). *Hudson* stressed the limited powers that the states had ceded to the federal government, and it reasoned that any law-making power to define crimes that the Constitution bestowed on the national government was given to Congress, not to the courts. *Id.* at 33-34. Despite Justice Story's view to the contrary, this proposition was considered so unassailable that the Attorney General declined to challenge it a mere four years later. *See United States v. Coolidge*, 14 U.S. (1 Wheat.) 415 (1816), *rev'g*, 25 F. Cas. 619, 619-20 (Story, Circuit Justice, C.C.D. Mass. 1813).

A narrow reading of *Hudson* might limit its holding to the proposition that federal courts lack inherent authority to define crimes, though not necessarily that Congress lacks all power to delegate law-making authority to the judiciary. This Court, however, has for nearly two hundred years treated *Hudson* as standing for the broader proposition that federal crimes must be "explicitly prescribed by Congress." *Jerome v. United States*, 318 U.S. 101, 104-05 (1943); *see also Liparota v. United States*, 471 U.S. 419, 424 (1985); *United States v. Britton*, 108 U.S. 199, 206 (1883). Under this understanding, "[i]f Congress has not declared an act * * * to be a crime against the United States, the courts have no power to treat it as such." *United States v. Reese*, 92 U.S. 214, 216 (1875); *see also Morissette v. United States*, 342 U.S. 246, 263 (1952) (the "doctrine which denies to the federal judiciary power to create crimes forthrightly" also precludes "constituting them from anything less than the incriminating components contemplated by the words used in the statute"). Indeed, as recently as last year, three Justices cited

Hudson to reject the suggestion that broad, ambiguous language can "'effectively' license[] [the Court] to write a brand-new law," because "*we cannot accept that power in a criminal case*, where the law must be written by Congress." *United States v. Santos*, 128 S. Ct. 2020, 2030-31 (2008) (plurality opinion of Scalia, J., joined by Souter and Ginsburg, JJ.) (emphasis added).

The government's sweeping interpretation of Section 1346, bereft as it is of any significant legislative constraint on the conduct that might be deemed criminal under the statute, would require the Court to decide whether Congress may lawfully delegate to the courts so broad a power to make penal law. Yet nothing in the text or the history of Section 1346 remotely suggests that Congress intended to test that constitutional line. Under settled law, that is reason enough to reject the government's position. *See, e.g., Mesa v. California*, 489 U.S. 121, 136-37 (1989).

2. Apart from separation of powers, the government's expansive interpretation cannot surmount the settled constraints of federalism. This Court ordinarily requires that Congress, rather than the courts, unambiguously determine how deeply the federal government has ventured into traditional state concerns (*e.g., United States v. Bass*, 404 U.S. 336 (1971)), and this concern is especially acute where, as here, judicial law-making in specific cases may well exceed the constitutional authority that Congress itself has over the subject matter.

With respect to private conduct, Congress enacted Section 1346 pursuant to its constitutional power over commerce.[12] The mail and wire fraud statutes are, respectively, also partly and wholly based on Congress' commerce powers. Yet the government's interpretation of Section 1346 would reach purely intrastate private conduct that is in some sense "dishonest," even if the defendant did not so much as contemplate a *risk* of economic injury to the victim. Indeed, one of the three "fraud" convictions in this case (count 7) relied for federal jurisdiction on a delivery by private carrier from Marion, Illinois to Chicago, Illinois.

This Court has previously refused to impute to Congress the intent to federalize vast areas of the law of fiduciary obligations even under a civil statute clearly directed at commerce. *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 477-80 (1977). Here, the government interpretation creates federal *criminal* liability for *all* types of dishonest conduct *in addition* to fiduciary self-dealing, even purely local conduct (like the employee who phones in sick so he can go to a ball game, *see Sorich*, 129 S. Ct. at 1309), where any substantial connection to interstate commerce is at best tenuous. *Compare United States v. Morrison*, 529 U.S. 598 (2000). Broadly interpreting this statute in this fashion would raise serious questions as to its constitutionality. *E.g.*, *Jones v. United States,* 529 U.S. 848, 857-58 (2000). "[I]n the absence of a clear statement by Congress," therefore, this Court should decline the government's invitation "to approve [this] sweeping expansion of federal criminal

[12] With respect to public corruption, Congress also relied on the Constitution's guarantee, in Article IV, Section 4, of a republican form of government. 133 Cong. Rec. H10656-01 (Nov. 19, 1987).

jurisdiction." *Cleveland v. United States*, 531 U.S. 12, 24 (2000); *see also id.* at 26 ("we decline to attribute to § 1341 a purpose so encompassing where Congress has not made such a design clear"); *Rewis v. United States*, 401 U.S. 808, 812 (1971). *Williams v. United States*, 458 U.S. 279, 290 (1982).

3. Finally, the government's all-encompassing interpretation would also raise serious questions of constitutionality under the Fifth Amendment. A statute that reaches any "dishonest" conduct in the private sector, where one does not even *contemplate* exposing another to economic harm, deprives the citizenry of the fair notice required by due process.

It has long been a cornerstone of the rule of law in this country that "[i]f the legislature undertakes to define by statute a new offence, and provide for its punishment, it should express its will in language that need not deceive the common mind. Every man should be able to know with certainty when he is committing a crime." *United States v. Reese*, 92 U.S. 214, 220 (1875); *see also Kolender v. Lawson*, 461 U.S. 352, 357 (1983). For that reason, the Due Process Clause forbids laws that criminalize conduct "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." *United States v. Lanier*, 520 U.S. 259, 266 (1997) (quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926)).

As many courts have warned, without a contemplated or foreseeable economic harm requirement the statute "would potentially criminalize *any* breach of a duty of loyalty in the private employment context." *Vinyard*, 266 F.3d at 328. Without even that minimal "substantive limit" on how the doctrine applies to those in the private sector, *see Frost*, 125 F.3d at

369, Section 1346 would create the type of forbidden "standardless sweep" that "allows police, prosecutors and juries to pursue their personal predilections." *Smith v. Goguen*, 415 U.S. 566, 575 (1974).[13] Indeed, in *this* case the government convicted petitioners on the theory that they "deprived" Hollinger of "honest services" by engaging in transactions that, in violation of Delaware fiduciary rules, were less than "entirely fair" to Hollinger. J.A. 336a. If *that* is a correct interpretation of Section 1346, the law cannot possibly be constitutional. *See, e.g.*, *United States v. Cohen Grocery*, 255 U.S. 81, 89 (1921).

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[13] The lack of fair warning, the risk that prosecutors will simply pursue personal predilections, and the intrusion into matters best left to the States (if anyone at all) are all evidenced by the types of cases federal prosecutors already have brought in the name of fighting fraud. Only where the courts have interposed common sense have these efforts occasionally failed. *See, e.g., United States v. McNeive*, 536 F.2d 1245, 1252 (8th Cir. 1976) (government "grossly exceeded" mail fraud statute's limitations by pursuing a plumbing inspector who accepted tips in the performance of non-discretionary duties); *United States v. Czubinski*, 106 F.3d 1069, 1077 (1st Cir. 1997) ("we find no evidence that Congress intended to create what amounts to a draconian personnel regulation"); *United States v. Handakas*, 286 F.3d 92, 107 (2d Cir. 2002) (rebuffing government's wire fraud prosecution of a breach of state law contractual rules) (overruled by *Rybicki*). As Cardinal Roger M. Mahony of the Los Angeles Archdiocese has come to learn, Section 1346 also grants the U.S. Attorney license to use the grand jury's coercive powers to "determin[e] whether Mahony, and possibly other church leaders, committed 'honest services fraud' by failing to adequately deal with priests accused of sexually abusing children." Scott Glover & Jack Leonard, *Cardinal Mahony Under Federal Fraud Probe Over Abusive Priests, Sources Say*, LOS ANGELES TIMES, Jan. 29, 2009.

The statute at issue in *Cohen* made it unlawful, during wartime, willfully "to make any unjust or unreasonable rate or charge in the handling or dealing in or with any necessaries." The statute could not be enforced against a dealer in sugar, this Court concluded, because by "forbid[ding] no specific or definite act," the law left open "the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *Id.* at 89. This Court agreed with the lower court that "attempt[ing] to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." *Id*.

The statute that this Court invalidated in *Cohen* was, if anything, more definitive than the government's conception of Section 1346 as a general regulation of "honesty" in the marketplace. Because the government's interpretation would be "in general language broad enough to cover wrongful acts without as well as within the constitutional jurisdiction," *Reese*, 92 U.S. at 221, it fails the basic rule that Congress may not "set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *Id*.

* * *

The rule of lenity cautions that "'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.'" *Jones*, 529 U.S. at 858 (citation omitted). Under this rule, the Court "interprets ambiguous criminal statutes in favor of defendants, not prosecutors." *Santos*, 128 S. Ct. at 2028 (plurality opinion). Lenity is "especially appropriate" in mail fraud prosecutions, "because, as this case demonstrates, mail fraud is a predicate offense under RICO * * * and the money laundering statute." *Cleveland*, 531 U.S. at 25.

Here, although every conventional tool of statutory analysis actually forecloses the government's position, any ambiguity must be resolved in petitioners' favor. Indeed, petitioners could have studied the statute, its legislative history, and even the pre-*McNally* case law at length, and still have come away without fair warning that it would be "mail fraud" to call management fees non-compete payments where the payees had earned the fees, the Hollinger board had already approved their payment, and the recharacterization was accomplished without posing a foreseeable risk of economic harm to Hollinger.

C. The Failure To Instruct On The Essential Finding Of Contemplated Economic Harm Deeply Prejudiced Petitioners

The instructional error requires reversal on the only four counts that survived the jury's skepticism of the government's spectacularly overcharged case. The Seventh Circuit affirmed the mail fraud convictions by misapplying this Court's harmless error precedents. The instructional error also prejudiced the jury's consideration of the obstruction count filed against Black, allowing it to convict on a mistaken belief—fueled by prejudicial evidence and flawed instructions—that Black had something to hide.

1. The Seventh Circuit held that "even if [its] analysis of honest services fraud is wrong, the defendants cannot prevail," because any instructional error was "harmless." Pet. App. 9a-10a. It reached

that conclusion only by misapplying this Court's harmless error test—a test reaffirmed last Term in *Hedgpeth v. Pulido*, 129 S. Ct. 530 (2008). The Seventh Circuit misconstrued the inquiry as whether the jury *could* have found petitioners guilty had it been *properly* instructed. The correct analysis reveals at least a reasonable doubt whether the *improper* instructions that *were* used tainted the verdict the jury *did* return. Prejudice, evaluated under the correct test, is plain.

In *Pulido*, this Court reiterated that "[a] conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one." *Id*. at 530. *Pulido* made clear that this type of "*Yates* error" in jury instructions (*see Yates v. United States*, 354 U.S. 298 (1957)) is "harmless" only if a court can declare confidently that the legal error had no effect on the verdict. Where, as here, the jury was improperly instructed on an element of the offense, the government must negate the possibility of prejudice beyond a reasonable doubt. *Neder*, 527 U.S. at 15; *Chapman v. California*, 386 U.S. 18, 24 (1967).

The Seventh Circuit misapplied *Yates*. It noted the government's theory that petitioners "abused their positions with Hollinger to line their pockets with phony management fees disguised as compensation for covenants not to compete." Pet. App. 10a. To be sure, that *was* the government's *primary* conjecture. But the government insisted on instructing the jury it also should convict if it found something quite different: that petitioners committed mail fraud by breaching their "fiduciary duty of loyalty" to Hollinger. J.A. 228a. With full support from the jury charge, the government argued that the two theories should be considered in the disjunctive: "it's that theft of money and property causing" either gain to defendants "or the potential loss of money or property to another," on the one hand, "or depriving the corporation" of the "right of honest services of the corporate officers," on the other hand. J.A. 239a-240a (government's summation).

That is exactly the way the government defended the convictions in the district court when the issue was sufficiency of the evidence. "[A] reasonable jury could conclude that corporate officers and directors abused their positions of trust within the corporation to gain a favorable tax benefit—even if there were no 'monetary loss or financial damage' to [Hollinger]" and "even if defendants honestly believed that the APC money was nothing more than unpaid management fees." J.A. 440a.

On appeal, the government backtracked, arguing instead that the jury would have convicted only if it found a theft of Hollinger's money. *E.g.*, Opp. 15. The court of appeals, in turn, noted findings the jury "could" have made if it credited *some* of the government's evidence: "It is true that Radler, who pleaded guilty and testified for the government, said he thought the audit committee had approved the so-called management fees. But the members of the committee testified otherwise and the jury was entitled to believe them." Pet. App. 3a-4a. In the court's view, error under such circumstances may safely be deemed harmless. Pet. App. 10a.

Of course jurors are entitled to believe one government witness over another where, as here, "the evidence was conflicting." Pet. App. 3a. And each juror would have been well within his or her rights to reject the testimony of Radler—the government's *key* witness whom it deemed fully truthful (*supra*, n. 5)—even after that witness consistently swore that the non-compete money petitioners received *was* management fees owed, and *approved*, by Hollinger. "Had the jury convicted on proper instructions it would be the end of the matter." *Morissette*, 342 U.S. at 276.

But as this Court emphasized in *Morissette*, juries are not bound to accept the government's theory. *Id.* Properly instructed jurors might instead have concluded that if Radler believed Black and the other officers were collecting money that rightfully was theirs, then petitioners—who relied on Radler for their information about these payments, and who, as the government characterizes what a reasonable jury could have found, "honestly believed that the APC money was nothing more than unpaid management fees," J.A. 440a—simply had no fraudulent intent. In short, the jurors, consistent with their verdicts on every other fraud count, "might have refused to brand" each petitioner "as a thief." *Id.* "Had they done so, that too would have been the end of the matter." *Id.*

2. The instructional error—an error allowing conviction for innocent conduct—also requires reversal of Black's conviction for corruptly impeding the investigation and prosecution of the same innocent conduct. Petitioners explained in seeking certiorari that the key element was whether Black had a "corrupt[]" intent when he assisted in moving his belongings shortly before being evicted from his office. The evidence supporting a bad intent was ambiguous at best; "there was a serious risk of prejudicial spillover from the mountains of highly inflammatory evidence introduced on the fraud counts"; and "[a] jury know-

ing that Black had not committed mail fraud would have been much more likely to conclude that he acted with a clean conscience rather than a corrupt intent." Pet. 11-12 n.7. The government, in opposing review, made no effort to deny that if the mail fraud counts are reversed, then the only other conviction must fall too.

The conviction stemmed from a decision by Black's assistant to move some of Black's belongings from their Toronto office to the assistant's Toronto home, where she was setting up a new office as a result of eviction by Hollinger's new management. The government made much of the date—May 20, 2005—one day after SEC counsel told Black's lawyers that a new document request was forthcoming. Apart from the undisputed fact that Black needed to completely clear out of the office within days (J.A. 198a-199a, 376a-377a), his lawyers testified unequivocally that they did *not* tell him about the SEC call until the following week. C.A. Sep. App. 424-428. And this was going to be the agency's *sixth* request for documents—Black had always fully complied with the previous requests by giving lawyers free rein to search his office *and* home. *Id.* at 485-96; J.A. 423a-424a. The record on this count, such as it was—*e.g.*, a *Canadian* document preservation order of uncertain applicability, Black's awareness of video cameras in the building, a "scheme" hatched and carried out in broad daylight with the knowledge of several witnesses, and the prompt return of the boxes in compliance with Canadian civil process—sufficed, in the estimation of the court of appeals, to get the case to the jury, but it hardly could have overwhelmed anyone on the issue of intent.

The government, in opposing certiorari, disputed that ruling for petitioners on the validity of the mail fraud instructions would require reversal of the mail fraud counts. Opp. 15-16. But it did not dispute that if *any* counts are reversed, *all* must be reversed. For one thing, a juror believing Black truly had something to hide (because he was guilty of fraud) would be much more likely to infer a corrupt intent from the circumstantial evidence than would a juror who realizes Black had *nothing* to hide. For another, the government introduced substantial evidence that put Black in a bad light on the fraud counts, and the prejudicial spillover was undeniable. *See, e.g., United States v. Rooney*, 37 F.3d 847, 856 (2d Cir. 1994) (reversing false statements convictions due to risk of prejudicial spillover from evidence that the government introduced on another count for which its theory of guilt was legally flawed); *United States v. Murphy*, 323 F.3d 102, 118-22 (3d Cir. 2003).

The government has waived the issue by choosing to refute none of it in opposing certiorari. *See* Sup. Ct. R. 15.2; *Carcieri v. Salazar*, 129 S. Ct. 1058, 1068 (2009); *see also Aetna Health, Inc. v. Davila*, 542 U.S. 200, 212 n. 2 (2004). But even apart from waiver, the error here was not remotely harmless. Any juror would have had abundant reason to doubt that Black corruptly intended to undermine the fact-finding of an official proceeding if he concluded that Black had no reason to fear an investigation of his conduct. That doubt would only have heightened without the influence of considerable prejudicial evidence. Having acquitted on every other count, the jury had only its incorrect understanding of the law applicable to counts 1, 6 and 7 as reason to believe Black would try to impede a search for the truth. All counts of conviction must therefore be reversed.

II. THE SEVENTH CIRCUIT ERRED IN MANUFACTURING AN AD HOC AMENDMENT TO THE FEDERAL RULES THAT RETROACTIVELY IMPOSED AN ONEROUS REQUIREMENT FOR PRESERVING INSTRUCTIONAL ERROR

Petitioners fully complied with each requirement found in Rule 30(d), Fed. R. Crim. P., for preserving objections to the jury instructions. Pet. App. 193a-194a; 207a-208a; 248a. Undeterred, the government convinced the Seventh Circuit to adopt a new rule: a defendant forfeits his challenge to the legality of his conviction if he declines the government's *suggestion*, even one the prosecution later withdraws, that the jury deliver special verdicts on every affected count.

The Seventh Circuit had no authority to create novel procedural requirements, much less to *impose penalties* for violating them. It is particularly appropriate to apply the prohibition on ad hoc rule amendments here, because the new rule would require criminal defendants to accept a verdict form that is widely disfavored for intruding on the fundamental right to a fair trial, if they seek to establish that they were convicted based on innocent conduct.

1. Federal Rule of Criminal Procedure 30(d) "clarifies what, *if anything*, counsel must do to preserve a claim of error regarding an instruction or failure to instruct." *Id.* (advisory committee notes) (emphasis added). A defendant need only "inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate." *Id.* Petitioners unquestionably complied with these requirements, fully satisfying Rule 30(d)'s purpose of "enabl[ing] a trial court to correct any instructional mistakes before the jury retires." *Jones v. United*

States, 527 U.S. 373, 387-88 (1999). That should have been the end of the issue.

Instead, the Seventh Circuit improperly grafted an extra preservation requirement and sanction onto Rule 30(d)'s specific and exclusive list: Petitioners "forfeited their objection" to the jury instructions because they did not acquiesce in the government's "request[]" for a special verdict form. Pet. App. 11a. The court cited no authority—because none exists—for its novel rule. Rule 30(d) clearly states the one circumstance when such a sanction may be imposed: "Failure to object in accordance with this rule."

Special verdicts would be a particularly odd candidate for allowing ad hoc rule amendments. Over half a century ago, this Court noted that federal rules provide for special verdicts in *civil* cases, but "no general practice of these techniques has developed in American criminal procedure." *Stein v. New York*, 346 U.S. 156, 178 (1953), *overruled on other grounds by Jackson v. Denno*, 378 U.S. 368 (1964). Indeed, this Court explained, "[o]ur own Rules of Criminal Procedure make no provision for *anything but* a general verdict." *Id.* (emphasis added). Since the 1930s, these rules have established calibrated procedures for special verdicts in *civil* trials, including a separate sanction for non-compliance. Fed. R. Civ. P. 49. In criminal *bench* trials, conducted only with a defendant's consent, the rules allow for "specific findings of fact" upon "timely request" of one of the parties. Fed. R. Crim. P. 23(a) & (c). But the rules contain nothing of the sort in federal criminal *jury* trials.

And for good reason. The right to a general verdict in a criminal case is "one of the most essential features of the right of trial by jury * * * and the removal of this safeguard would violate its design and destroy its spirit." *United States v. Spock*, 416 F.2d 165, 181 (1st Cir. 1969) (internal quotation marks omitted). After all, the Sixth Amendment "right to trial by jury" "usually implies one simple general verdict that convicts or frees the accused." *Stein*, 346 U.S. at 178.

Special verdicts can impair a defendant's constitutional rights in several ways. First, they "infringe on [the jury's] * * * power to arrive at a general verdict without having to support it by reasons or by a report of its deliberations." *United States v. McCracken*, 488 F.2d 406, 418 (5th Cir. 1974). Second, they run a serious risk of confusing juries. *E.g.*, *United States v. Blackwell*, 459 F.3d 739, 766 (6th Cir. 2006); *see* Statement of Justice Black and Justice Douglas on the Rules of Civil Procedure and the Proposed Amendments, 31 F.R.D. 587, 619 (1963). Third, by leading jurors through a "step by step * * * progression of questions[,] each of which seems to require an answer unfavorable to the defendant," special verdicts can coerce "a reluctant juror" to convict. *Spock*, 416 F.2d at 182; *United States v. James*, 432 F.2d 303, 307 (5th Cir. 1970). Fourth, special verdicts "partly restrict [the jury's] historic function * * * of tempering rules of law by common sense brought to bear upon the facts of a specific case." *McCracken*, 488 F.2d at 418; *Spock*, 416 F.2d at 181.

Although many lower courts no longer consider special verdicts *invariably* "improper and in and of themselves erroneous," *United States v. Adcock*, 447 F.2d 1337, 1339 (2d Cir. 1971), they remain "generally disfavored," *United States v. Pforzheimer*, 826 F.2d 200, 205 (2d Cir. 1987), *United States v. Ellis*, 168 F.3d 558, 562 (1st Cir. 1999) (same), unless *the* *defendant* consents.[14] This case, of course, is well outside that narrow exception. A special verdict would have unconstitutionally "infringe[d] on [the jury's] * * * power to arrive at a general verdict without having to support it by reasons." *McCracken*, 488 F.2d at 418; *Spock*, 416 F.2d at 181. Indeed, obtaining a report of the jurors' thought processes—nothing short of an invasion of "the jury's sovereign space," *Yeager v. United States*, 129 S. Ct. 2360, 2368 (2009)—was *the entire point* of the government's suggestion.

2. Even if special verdicts did not pose such a serious risk of prejudice to a criminal defendant's rights, reversal still would be required. This Court's well-established precedents bar a court from changing the criminal rules through an end-run around the rulemaking process. No federal court has "the power to develop rules that circumvent or conflict with the Federal Rules." *Carlisle v. United States*, 517 U.S. 416, 426 (1996); *see also Bank of Nova Scotia v. Kilpatrick*, 487 U.S. 250, 255 (1988). Adding a new requirement to the rules violates that prohibition. *See United States v. Hyde*, 520 U.S. 670, 674 (1997). In *Hyde*, this Court held that Rule 11's "list" of "prerequisites to accepting a guilty plea" is exclusive, explaining that the Court's "task * * * is not to act as policymaker, * * * but rather to determine what the Rules actually provide." *Id.* at 678 n.3. It rejected the lower court's approach, which would

[14] *E.g.*, Wayne R. LaFave et al., 6 *Criminal Procedure* § 24.10(a) (3d ed.) (adding that special verdicts are "at least 'suspect' as a matter of due process"); *United States v. Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981) (the "prohibition is for the benefit of the defendant").

have "read an additional prerequisite into this list." *Id. at* 674; *see also Carlisle*, 517 U.S. at 420-21 (a rule stating when a motion "may be made" leaves "no room" for a judge to accept a motion outside that timeframe); *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (applying the maxim *expressio unius est exclusio alterius* to reject additions to the particularity requirements in Federal Rule of Civil Procedure 9(b)).

The rule for preserving a claim of instructional error can only be changed "by the process of amending the Federal Rules," "not by judicial interpretation." *Id.*; *see also Libretti v. United States*, 516 U.S. 29, 50 (1995) (declining to read a fair notice provision into former Rule 31(e)—which, until rescinded, was the *only* federal rule authorizing special verdicts in criminal cases—because, *inter alia*, it "is not among the * * * safeguards" specifically listed in the Rule). The need for adherence to established rulemaking procedures is at its height where, as here, the new rule imposes harsh sanctions without proper notice. Fed. R. App. P. 47(a)(1) & (b) (even local written rules may not be created or enforced without "notice and opportunity for comment"); *see also* Fed. R. Crim. P. 57(a)(1) & (b) (same).

It is little surprise therefore that the courts, until now, have expressly "reject[ed] the prosecution's effort to salvage an invalid conviction by faulting the defendant for failing to request interrogatories." *United States v. Ruggiero*, 726 F.2d 913, 926 (2d Cir. 1984) (Newman, J., concurring in part and dissenting in part) (discussing *Adcock*, *supra*). The Second Circuit rejected the government's forfeiture rule in *Adcock*, *supra*, and has reaffirmed that aspect of *Adcock*. *See, e.g., Pforzheimer*, 826 F.2d at 206 (same). The Third Circuit likewise held that it would "not impose upon the defendants the harsh penalty of waiver merely for requesting that the district court exercise its discretion in a manner contrary to the government's preferences" for special interrogatories *United States v. Riccobene*, 709 F.2d 214, 228 (3d Cir. 1983).

3. Finally, the circumstances of this case amply demonstrate why rules should be put out for notice, comment and deliberation, rather than invented on the fly. For one thing, the Seventh Circuit imposed its penalty on petitioners for rejecting a *suggestion* by *the government*, made in "an abundance of caution," and then *withdrawn*. Pet. App. 228a; *see supra* at 13. The government therefore removed the special verdict issue from the trial judge's consideration before jury deliberations—only to trot it out again as an appellate issue.[15]

Moreover, the instruction had no possible consequence but to confuse the jury, because the judge had already ruled that, to convict, the jurors need not be unanimous on which theory of fraud they found. *See* Pet. App. 217a. Because the jury could convict with *some* jurors finding a scheme to obtain money, *other* jurors finding a scheme to deprive of honest services,

[15] In fact, when the government withdrew its request, the judge had *already* ruled that *post*-verdict interrogatories were inappropriate due to "potential problems with inconsistencies with the verdict" and their novelty (Pet. App. 225a)—concerns that also apply to the government's suggested approach. In any event, petitioners' suggestion should have insulated them from a waiver sanction. After all, they did exactly what *the government* previously argued defendants should do if they want to *avoid* a waiver problem. *Riccobene*, 709 F.2d at 228.

and the *remainder* finding *both*, a special verdict consistent with the judge's determination of the law of mail fraud would have been unworkable, an invasion of the jurors' thought processes during their deliberations, and a source of significant confusion.

Finally, the government argued to the court of appeals, and still maintains before this Court, that "the jury would have acquitted" petitioners under the honest services theory had it believed the money was "legitimately owed to them," because this theory so "overlap[ped]" with the "money fraud" theory that both theories were one and the same. Opp. 4, 15. Yet now the government would penalize petitioners for not requiring the jury to state *separately* which of the two supposedly *identical* theories they believed. The government cannot fairly argue for a sanction—where that sanction is based on the assumption that two theories were analytically distinct—just so it can avoid defending on the merits the untenable position that the theories were identical all along.

CONCLUSION

For the reasons stated above, the Court should reverse the judgment of the court of appeals with instructions to vacate petitioners' convictions on all counts.

Respectfully submitted.

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