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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,

Respondent.

♦

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

♦

BRIEF OF *AMICUS CURIAE* CITIZENS FOR RESPONSIBILITY AND ETHICS IN WASHINGTON IN SUPPORT OF RESPONDENT

♦

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QUESTIONS PRESENTED

This brief addresses the following questions implicated by the petition for a writ of certiorari:

1. Whether prosecution under the federal honest services fraud statute, 18 U.S.C. § 1346, requires the government to prove a defendant's scheme to defraud the public of the honest services of a public official threatened or caused tangible harm.

2. Whether 18 U.S.C. § 1346 is void for vagueness, at least as applied to schemes to defraud the public of the honest services of public officials.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

INTRODUCTION AND SUMMARY OF ARGUMENT...2

ARGUMENT... 8

I. THE COURT SHOULD REFRAIN FROM INTERPRETING SECTION 1346 AS IMPOSING A REASONABLY FORESEEABLE HARM LIMITATION ON PROSECUTION OF SCHEMES TO DEFRAUD THE PUBLIC OF THE HONEST SERVICES OF PUBLIC OFFICIALS.............................8

A. The Rationale Behind The Reasonably Foreseeable Harm Limitation Does Not Apply To Public Sector Cases 8

B. By Targeting As Actionable Under Section 1346 Conduct That "Defraud[s]," Congress Did Not Intend To Criminalize Only Those Schemes That Threaten Tangible Harm 12

II. SECTION 1346 IS NOT VOID FOR VAGUENESS, AT LEAST AS APPLIED TO SCHEMES TO DEFRAUD THE PUBLIC OF THE HONEST SERVICES OF PUBLIC OFFICIALS 17

CONCLUSION 22

TABLE OF AUTHORITIES

Page(s)

CASES

Boos v. Barry,
485 U.S. 312 (1988).. 21

Gonzales v. Carhart,
550 U.S. 124 (2007).. 21

Hoffman Estates v.
Flipside, Hoffman Estates, Inc.,
455 U.S. 489 (1982).............................. 7, 17, 18

Kolender v. Lawson,
461 U.S. 352 (1983).................................... 7, 17

McNally v. United States,
483 U.S. 350 (1987)................................ *passim*

Nationwide Mut. Ins. Co. v. Darden,
503 U.S. 318 (1992).. 18

Neder v. United States,
527 U.S. 1 (1999).. 18

Smith v. Goguen,
415 U.S. 566 (1974).................................. 18, 21

United States v. Ballard,
663 F.2d 534 (5th Cir. 1981).......................... 13

United States v. Blagojevich (In re Motion to Disclose Intercepted Communs.),
594 F. Supp. 2d 993 (N.D. Ill. 2009)................ 5

United States v. Blumeyer,
114 F.3d 758 (8th Cir. 1997)..........................20

United States v. Brown,
540 F.2d 364 (8th Cir. 1976)..........................19

United States v. Brumley,
116 F.3d 728 (5th Cir. 1997)..........................20

United States v. Bryan,
58 F.3d 933 (4th Cir. 1995)..............................5

United States v. Bush,
522 F.2d 641 (7th Cir. 1975)..........................19

United States v. deVegter,
198 F.3d 1324 (11th Cir. 1999).............6, 9, 11

United States v. Diggs,
613 F.2d 988 (D.C. Cir. 1979)........................19

United States v. Dixon,
536 F.2d 1388 (2d Cir. 1976) 13

United States v. Frost,
125 F.3d 346 (6th Cir. 1997)....................11, 21

United States v. Ganim,
510 F.3d 134 (2d Cir. 2007), *cert. denied*,
128 S. Ct. 1911 (2008)................................5, 20

United States v. Gee,
432 F.3d 723 (7th Cir. 2005)............................ 3

United States v. Gray,
96 F.3d 769 (5th Cir. 1996)............................ 21

United States v. Hasner,
340 F.3d 1261 (11th Cir. 2003)...................... 11

United States v. Holzer,
816 F.2d 304 (7th Cir. 1987).................... 14, 19

United States v. Jefferson,
562 F. Supp. 2d 719 (E.D. Va. 2008) 20

United States v. Jennings,
487 F.3d 564 (8th Cir. 2007).................. 3, 5, 20

United States v. Keane,
522 F.2d 534 (7th Cir. 1975).......................... 19

United States v. Kincaid-Chauncey,
556 F.3d 923 (9th Cir. 2009).................... 20, 21

United States v. Lemire,
720 F.2d 1327 (D.C. Cir. 1983)............. *passim*

United States v. Lopez-Lukis,
102 F.2d 1164 (11th Cir. 1997)...... 6, 10, 11, 20

United States v. Mack,
159 F.3d 208 (6th Cir. 1998).......................... 11

United States v. Mandel,
591 F.2d 1346 (4th Cir. 1979)........................ 19

United States v. Margiotta,
688 F.2d 108 (2d Cir. 1982) 19

United States v. McNeive,
536 F.2d 1245 (8th Cir. 1976) 14, 15

United States v. Middlemiss,
217 F.3d 112 (2d Cir. 2000) 20

United States v. Panarella,
277 F.3d 678 (3d Cir. 2002) 3, 5

United States v. Paradies,
98 F.3d 1266 (11th Cir. 1996) 19

United States v. Rabbitt,
583 F.2d 1014 (8th Cir. 1978) 15

United States v. Ring,
2009 U.S. Dist. LEXIS 54007
(D.D.C. 2009) 4, 20

United States v. Rybicki,
354 F.3d 124 (2d Cir. 2003) 17, 18, 22

United States v. Sawyer,
85 F.3d 713 (1st Cir. 1996) 6, 9, 20

United States v. Silvano,
812 F.2d 754 (1st Cir. 1987) 19

United States v. Sorich,
523 F.3d 702 (7th Cir. 2008) 20

United States v. Sun-Diamond Growers,
526 U.S. 398 (1999)... 3

United States v. Waymer,
55 F.3d 564 (11th Cir. 1995).......................... 21

United States v. Weyhrauch,
548 F.3d 1237 (9th Cir. 2008),
cert. granted in part,
129 S. Ct. 2863 (2009).............................. 10, 20

United States v. White,
472 F.3d 458 (7th Cir. 2006).......................... 20

United States v. Woodward,
149 F.3d 46 (1st Cir. 1998) 3

STATUTES

18 U.S.C. § 201(b)(1)(A)... 3

18 U.S.C. § 666(a)(1)(B)... 3

18 U.S.C. § 1341 .... 2, 12

18 U.S.C. § 1346 .... *passim*

Internal Revenue Code § 501(c)(3)............................. 1

OTHER AUTHORITIES

134 Cong. Rec. S17360 (daily ed. Nov. 10, 1988) 12

Anti-Corruption Act of 1988,
S. 2973, 100th Cong. (1988)..................... 16, 17

Anti-Drug Abuse Act of 1988,
Pub. L. No. 100-690, 102 Stat. 4181 (1988) 2

John C. Coffee, *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427 (1998)........................2, 10

U.S. Dep't of Justice, *Report to Congress on the Activities and Operations of the Public Integrity Section for 1987* (1987)............................... 4

U.S. Dep't of Justice, *Report to Congress on the Activities and Operations of the Public Integrity Section for 2006* (2006)................................ 4

U.S. Dep't of Justice, *Report to Congress on the Activities and Operations of the Public Integrity Section for 2007* (2007)................................ 4

INTEREST OF *AMICUS CURIAE*[1]

Citizens for Responsibility and Ethics in Washington ("CREW") is a non-profit, non-partisan corporation organized under section 501(c)(3) of the Internal Revenue Code. Through a combined approach of research, advocacy, public education, and litigation, CREW seeks to protect the rights of citizens to be informed about the activities of government officials and to ensure the integrity of those officials. Among its principal activities, CREW monitors the activities of members of Congress and, where appropriate, files ethics complaints with Congress. CREW also prepares written reports, including a yearly report it disseminates publicly about the most unethical members of Congress.

CREW's core beliefs include the belief that no public official is above the law and that our nation's laws must be applied equally to all. CREW files its brief as an entity that monitors the legislative branch to ensure the people are represented by honest officials working for the public interest, rather than their own personal, pecuniary interests. Toward that end, CREW advances a construction of 18 U.S.C. § 1346 (the honest services fraud statute) that preserves its utility as an indispensable prosecutorial tool for fighting public corruption.

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[1] Counsel of Record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*'s intention to file this brief. No party or counsel for any party to this case authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* has made a monetary contribution to the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

I. Congress, responding to this Court's invitation to "speak more clearly" its intent to criminalize government corruption under the mail fraud statute, *McNally v. United States*, 483 U.S. 350, 360 (1987), enacted 18 U.S.C. § 1346 in 1988. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, 102 Stat. 4181 (1988). The statute punishes as mail fraud under 18 U.S.C. § 1341 use of the mails to execute "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1341. Through section 1346, Congress intended to target public sector corruption, and the statute has proven an invaluable prosecutorial tool for this purpose. *See* John C. Coffee, *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 456-59 (1998) (discussing the emphasis on public corruption in House and Senate discussion of section 1346).

Although public corruption may be prosecuted under a number of statutes, the honest services statute offers pronounced advantages when prosecuting bribery, with its difficult requirement of proving a *quid pro quo* – an intent to influence or be

influenced.[2] A well-established application of section 1346 allows prosecutors to indict public officials on the basis of their intentional non-disclosure of a material conflict of interest (a conflict often created by the acceptance of bribes). *See*, *e.g.*, *United States v. Woodward*, 149 F.3d 46, 30 (1st Cir. 1998); *see also United States v. Panarella*, 277 F.3d 678, 697 (3d Cir. 2002) (a public official's duty to disclose conflicts of interest arises in part from the practical difficulty of detecting and prosecuting bribery schemes). Securing a conviction under section 1346 requires proof only of the official's intent to deceive with respect to material information, a much easier evidentiary burden than the bribery statutes impose. Prosecutors also regularly use the intentional non-disclosure basis of liability recognized in section 1346 to prosecute self-dealing schemes. *See*, *e.g.*, *United States v. Jennings*, 487 F.3d 564, 578 (8th Cir. 2007). As a result, section 1346 has become an indispensable weapon in the prosecutorial arsenal for fighting government corruption.

A. Universally limiting the scope of section 1346 to only those schemes that result in tangible economic impact under the "reasonably foreseeable harm" test petitioner advances would deprive prosecutors of this critical tool. Such a limitation

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[2] Conviction under 18 U.S.C. § 201(b)(1)(A) (bribery of public officials and witnesses) requires proof of a defendant's "intent 'to influence' an official act or 'to be influenced' in an official act." *United States v. Sun-Diamond Growers*, 526 U.S. 398, 404-05 (1999). Conviction under 18 U.S.C. § 666(a)(1)(B) (theft or bribery concerning programs receiving federal funds) requires proof of a public official's "intent to be influenced or rewarded" by the receipt of a thing of value. *United States v. Gee*, 432 F.3d 723, 714-15 (7th Cir. 2005).

could also, like this Court's decision in *McNally*, "thr[o]w hundreds of convictions into doubt and threaten[] the continuance of dozens of ongoing corruption and election fraud cases," sending prosecutors on a search for new legal arguments to "salvage convictions . . . now under a cloud." U.S. Dep't of Justice, *Report to Congress on the Activities and Operations of the Public Integrity Section for 1987* 5 (1987).

At both the federal and state levels, honest services charges have been brought against public officials and their paymasters who have engaged in the most reprehensible betrayals of the public trust. Honest services fraud charges factored prominently in the indictments brought against former lobbyist Jack Abramoff and his associates and co-conspirators, who participated in one of the most visible public corruption scandals in recent history.[3] State and local officials subjected to prosecution under section 1346 have included governors, state legislators, mayors, and an assortment of

[3] Others indicted in the Abramoff scandal include Michael Scanlon, former public relations specialist; former Congressman Robert Ney; former lobbyist Kevin Ring; Tony Rudy, former lobbyist and staffer for former Congressman Tom Delay; Neil Volz, former lobbyist and Chief of Staff to Congressman Ney; William Heaton, former Chief of Staff to Congressman Ney; and Mark Zachares, former staffer to the House of Representatives Transportation and Infrastructure Committee. *See* U.S. Dep't of Justice, *Report to Congress on the Activities and Operations of the Public Integrity Section for 2007* 18-24 (2007); U.S. Dep't of Justice, *Report to Congress on the Activities and Operations of the Public Integrity Section for 2006* 15-16 (2006); *United States v. Ring*, 2009 U.S. Dist. LEXIS 54007 (D.D.C. 2009). The prosecution of Mr. Ring is ongoing.

appointees,[4] and the prosecution of former Illinois governor Rod Blagojevich is ongoing. *United States v. Blagojevich (In re Motion to Disclose Intercepted Communs.)*, 594 F. Supp. 2d 993 (N.D. Ill. 2009). Because state prosecutors may be reluctant to bring charges against their political allies or supporters, federal prosecutors with no such connections play an indispensable role in holding corrupt politicians accountable. *See Panarella*, 277 F.3d at 694. The critical role of the honest services fraud statute in combating federal, state, and local corruption weighs strongly against adopting an interpretation of 18 U.S.C. § 1346 that would apply a "reasonably foreseeable harm" test to public sector cases to criminalize only those schemes that threaten victims with tangible (money or property) harm.

B. Nor would such an interpretation accord with either congressional intent in enacting section 1346 or the judicially articulated rationales for applying the reasonably foreseeable harm test to private sector cases. No court, pre- or post-*McNally*, has required the government to prove a defendant's scheme to deprive the public of a public official's honest services threatened the public with tangible harm. Certainly the enacting Congress could not have intended for the reasonably foreseeable harm test to be applied to public sector cases; section 1346 was enacted to overrule *McNally* and reinstate prior honest services case law, which extended liability "to schemes to defraud another of intangible rights,

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[4] *See*, *e.g.*, *Jennings*, 487 F.3d 564 (legislator); *United States v. Ganim*, 510 F.3d 134 (2d Cir. 2007), *cert. denied*, 128 S. Ct. 1911 (2008) (mayor); *United States v. Bryan*, 58 F.3d 933 (4th Cir. 1995) (state lottery director).

including an intangible right of honest services." *United States v. deVegter*, 198 F.3d 1324, 1327 (11th Cir. 1999), *quoting United States v. Lopez-Lukis*, 102 F.2d 1164, 1168-69 (11th Cir. 1997).

Courts developed the "reasonably foreseeable harm" test to address unique features of the private sector employer-employee relationship, and the test has no rational application beyond that context. The premise underlying the test's applicability to the private sector is that because employee loyalty presents no "significant benefit" to a private sector employer, only those schemes involving "a failure to disclose something which in the knowledge or contemplation of the employee poses an independent business risk to the employer" should be subject to prosecution as honest services fraud. *United States v. Lemire*, 720 F.2d 1327, 1336, 1337 (D.C. Cir. 1983). In other words, only those betrayals that put the private sector employer at financial risk may serve as the basis for an honest services fraud charge.[5] By contrast, "[p]ublic officials may be held to a higher standard of public trust; and conflicts of interest may harm the public merely by giving the illusion of unfairness." *Id.* at 1337 n.13. The corrupt acts of public officials deprive the public of the intangible, but no less important right "either to disinterested decision making itself or, as the case may be, to full disclosure as to the official's potential motivation behind an official act." *United States v. Sawyer*, 85 F.3d 713, 724 (1st Cir. 1996).

[5] Even in the private sector context the law is mixed as to whether proof of a tangible, economic harm is required in order to secure a conviction for honest services fraud, as the Seventh Circuit's ruling here illustrates.

II. Nor is the Court required to adopt the limiting construction advanced by petitioner to save section 1346 from being void for vagueness. A statute is impermissibly vague only when it fails to provide notice of the conduct it proscribes or encourages arbitrary or discriminatory enforcement. *See Kolender v. Lawson*, 461 U.S. 352, 356 (1983). And a statute that threatens no constitutionally protected conduct is facially vague only when vague in all of its applications. *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982).

Petitioner's vagueness argument rests on the proposition that the "right to honest services" lacks a commonly understood or recognized meaning, rendering it constitutionally infirm. This ignores the conduct at the core of the case law Congress reinstated with the enactment of section 1346 – bribery, kickback, and self-dealing schemes – that is subject to prosecution under the honest services fraud statute. Given this well-developed body of case law, no public official plausibly can claim a lack of knowledge that engaging in such conduct will subject the official to criminal liability under section 1346. The honest services fraud statute neither fails to provide perpetrators of these schemes fair notice of the conduct prohibited nor gives law enforcement too much discretion.

ARGUMENT

I. THE COURT SHOULD REFRAIN FROM INTERPRETING SECTION 1346 AS IMPOSING A REASONABLY FORESEEABLE HARM LIMITATION ON PROSECUTION OF SCHEMES TO DEFRAUD THE PUBLIC OF THE HONEST SERVICES OF PUBLIC OFFICIALS.

A. The Rationale Behind The Reasonably Foreseeable Harm Limitation Does Not Apply To Public Sector Cases.

Petitioner advances a construction of section 1346 that would, under a "reasonably foreseeable harm test," limit the statute's reach to only those schemes that threaten their victims with tangible, economic harm. Developed in response to the unique character of the private sector employer-employee relationship, the reasonably foreseeable harm test purports to correspond to the reality of that relationship, in which "[e]mployee loyalty is not an end in itself, it is a means to obtain and preserve pecuniary benefits for the employer." *Lemire*, 720 F.2d at 1336. Following this premise, the *Lemire* court interpreted the mail and wire fraud statutes as reaching "only breaches of duty that are accompanied by a misrepresentation or non-disclosure that is intended or is contemplated to deprive the person to whom the duty is owed of some legally significant benefit." *Id.* at 1335. Under this approach, where employee loyalty is not viewed, in and of itself, as a "significant benefit" to a private sector employer, the employer is deprived of the

honest services of his or her employees only when their conduct involves "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.

The rationale for this limiting construction of the honest services fraud statute in the private sector context does not, however, extend to public sector cases. Public officials are held "to a higher standard of public trust" than their private counterparts, and "conflicts of interest may harm the public merely by giving the illusion of unfairness." *Lemire*, 720 F.2d at 1337 n.13. Public corruption deprives the public of government transparency, a benefit no less "legally significant" than the tangible, economic harm a private employer may face when deprived of an employee's honest services. More specifically, "[w]hen an official fails to disclose a personal interest in a matter over which she has decision-making power, the public is deprived of its right either to disinterested decision making itself or, as the case may be, to full disclosure as to the official's potential motivation behind an official act." *Sawyer*, 85 F.3d at 724. Because transparency is undermined whenever a public official engages in a secret scheme motivated by private gain rather than public interest – whether or not the scheme also causes tangible injury to the public – official loyalty *is* an end in and of itself. Correspondingly, betrayal of this loyalty is actionable under section 1346. *See deVegter*, 198 F.3d at 1328-29.

Applying the reasonably foreseeable harm test to the public sector context would leave many truly

reprehensible corrupt acts of bribery or self-dealing unpunished because they did not threaten the public with a tangible loss. The example offered by Professor Coffee – a legislator who receives a series of bribery payments to oppose legislation where the legislator independently opposes the legislation for "good" public policy reasons – illustrates the folly of such an application. "The legislator may sincerely believe that the legislation is ill-advised, but the bribery is no less corrupt as a result." Coffee, *supra* at 451. That corruption deprives the public of the official's honest services even where his actions in opposing legislation may, standing alone, actually benefit the public. That is why the honest services fraud statute, at least in the public sector context, focuses on "the manner in which officials make their decisions," and not the "results of a legislative decision." *Lopez-Lukis*, 102 F.3d at 1169.

Moreover, in the public sector context it is difficult to "meaningfully measure 'harm.'" Coffee, *supra* at 451. Public policy matters are practically defined by reasonable disagreement "over which of the many competing interests in society deserve support from the state,"[6] and one person's loss can be another's gain. This dynamic, in turn, reinforces the public's underlying interest in transparency itself, which allows the public to "evaluate the motivations of public officials who are purporting to act for the common good to determine whether they are in fact acting for their own benefit." *Id.* Depriving the public of such transparency is no less a deprivation of a "legally significant benefit[]," *Lemire*, 720 F.2d

[6] *United States v. Weyhrauch*, 548 F.3d 1237, 1247 (9th Cir. 2008), *cert. granted in part*, 129 S. Ct. 2863 (2009).

at 135, than depriving a private sector employer of a tangible economic benefit.

Recognizing the critical differences between the public and private sector, those circuits that have adopted the reasonably foreseeable harm test have been careful to cabin its application to private sector conduct. *See*, *e.g.*, *deVegter*, 198 F.3d at 1328 ("The meaning of the intangible right of honest services has different implications, however, when applied to public official malfeasance and private sector misconduct.")*; United States v. Frost*, 125 F.3d 346, 369 (6th Cir. 1997) ("[W]e stress that we are not reviewing the standard applicable to defendants accused of depriving the public of the honest services of public officials."). *See also United States v. Hasner*, 340 F.3d 1261, 1271 (11th Cir. 2003) (rejecting argument that defendants' convictions should be reversed because their scheme had caused no "cognizable harm" and had, in fact, "furthered the public good")*; United States v. Mack*, 159 F.3d 208, 215-16 (6th Cir. 1998) (lower court did not err in failing to charge the jury with finding defendant had caused "concrete business harm" to his public sector employer or to the people of Ohio); *Lopez-Lukis*, 102 F.3d at 1169 ("That the result of the bribed commissioner's vote actually benefits the electorate would not change the fraudulent nature of her conduct.").

B. By Targeting As Actionable Under Section 1346 Conduct That "Defraud[s]," Congress Did Not Intend To Criminalize Only Those Schemes That Threaten Tangible Harm.

The mail fraud statute, by its express terms, criminalizes a "scheme or artifice to defraud," 18 U.S.C. § 1341, that section 1346 defines to include "a scheme or artifice to deprive another of the intangible right of honest services." Petitioner argues Congress' use of the word "defraud" – contended to be a term of art – necessarily encompasses only conduct that results in a "pecuniary loss to another." Pet'r's Brief 27. The fallacy of this argument is revealed both by Congress' intent in enacting the statute and the pre-*McNally* case law Congress reinstated through section 1346.

Congress enacted section 1346 in response to this Court's invitation to "speak more clearly" Congress's intent to criminalize government corruption under the mail fraud statute. *McNally,* 483 U.S. at 360. Intended to incorporate pre-*McNally* case law,[7] section 1346 focuses on fraud that results in the deprivation of "the *intangible* right of honest services." 18 U.S.C. § 1346 (emphasis added).

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[7] *See* 134 Cong. Rec. S17360 (daily ed. Nov. 10, 1988) (intent of section 1346 "is to reinstate all of the pre-McNally caselaw pertaining to the mail and wire fraud statutes without change.").

Pre-*McNally* case law did not limit actionable fraud to only that which resulted in a threat of tangible harm, particularly in the public sector context. As discussed *infra*, even those pre-*McNally* private sector cases such as *Lemire* that applied a reasonably foreseeable harm test excepted public corruption cases from this analysis. "Public officials may be held to a higher standards of trust; and conflicts of interest may harm the public merely by giving the illusion of unfairness." *Lemire*, 720 F.2d at 1337 n.13. In *United States v. Dixon*, 536 F.2d 1388 (2d Cir. 1976), Judge Friendly declined to extend the honest services doctrine to a private sector scheme that did not threaten its victim with economic harm, but recognized that fraud not resulting in economic harm may still be actionable in the public sector context:

> This doctrine of the deprivation of honest and faithful services has developed to fit the situation in which a public official avails himself of his public position to enhance his private advantage, often by taking bribes. Such actions may not deplete the fisc; indeed . . . they may have enriched it, but they are nonetheless *frauds* since the public official has been paid to act in breach of his duties.

Id. at 1400 (emphasis added). *See also United States v. Ballard*, 663 F.2d 534, 541 (5th Cir. 1981) ("[t]he standard of materiality . . . applies to employers in the private sector; public officials may have a special duty to disclose, based on the public trust, which

lowers the threshold of materiality."). And in *United States v. Holzer*, 816 F.2d 304 (7th Cir. 1987), a prominent pre-*McNally* public sector case, the court affirmed the conviction of a judge who had accepted bribes, despite the absence of "demonstrable loss either to a litigant or to the public at large." *Id.* at 308. This conclusion reflected the practical difficulty of proving tangible harm in this context: "How can anyone prove how a judge would have ruled if he had not been bribed?" *Id.*

Although some pre-*McNally* cases identified a lack of tangible harm as a factor in reversing convictions for honest services fraud in the public sector, they viewed this as part of the prosecution's overall failure to establish the defendant had engaged in a scheme to defraud at all. Far from setting a precedent that all honest services fraud convictions must be based on a showing of threatened tangible harm, these cases stand for the unremarkable proposition that the absence of injury may evidence the absence of a scheme to defraud in the first place. Thus, in *United States v. McNeive*, 536 F.2d 1245 (8th Cir. 1976), an oft-cited pre-*McNally* case, the Eighth Circuit reversed the mail fraud conviction of a city plumbing inspector who repeatedly had accepted $5 "tips" accompanying plumbing permit applications from a single plumbing company. *Id.* at 1246. Unlike defendants in the typical bribery case or one involving a failure to disclose a conflict of interest, the *McNeive* defendant did not exercise discretion over the issuance of plumbing permits; the "tips" he received were not, and could not be, characterized as bribes; and there was "no evidence that McNeive materially

misrepresented any facts in order to assure continuation of the gratuities scheme or that he actively concealed the scheme." *Id.* at 1250-52. Under these facts, the absence of a "tangible or pecuniary injury" simply buttressed the court's conclusion that no scheme to defraud existed. *Id.*

Similarly, in *United States v. Rabbitt*, 583 F.2d 1014 (8th Cir. 1978), the court reversed the conviction of a state legislator who had received fees from an architectural firm in exchange for introducing the firm to state government officials responsible for awarding architectural contracts. *Id.* at 1020. Because the actual awarding of architectural contracts was not one of the defendant's duties, the court did not see how the fees paid to him could be part of a scheme to buy his discretion – he simply had no discretion to exercise. *Id.* at 1024-25. Having failed to otherwise present evidence of a scheme to defraud, the prosecution's additional failure to show the allegedly fraudulent conduct "deprived the public . . . of some potential tangible gain such as favorable contracts" provided further support for the court's conclusion there was no scheme to defraud (and therefore no honest services fraud). *Id.* at 1025. But had the prosecution been able to show the defendant's conduct "deprived the public . . . of its right to honest and fair dealing . . . or of its right to disclosure of the officer's interest in the transaction at issue," no additional showing of tangible harm would have been necessary. *Id.*

As this case law makes clear, universally limiting the application of section 1346 to schemes

that threaten tangible harm would *change*, not restore, the public sector honest services fraud law as interpreted pre-*McNally*. Congress' intent behind its enactment of section 1346 can only be realized by applying the reasonably foreseeable harm test, if at all, to private sector cases.

The legislative history of section 1346 confirms Congress knew how to make tangible harm an element of honest services fraud when it desired that outcome. Just prior to passage of the current section 1346, Congress considered the Anti-Corruption Act of 1988, S. 2973, 100th Cong. (1988). Section 2 of that Act dealt with public corruption, and would have punished "[w]hoever deprives or defrauds, or attempts to deprive or to defraud" the public of the "honest services" of a public official, without limiting actionable frauds to those that put the victim at risk of tangible harm. In contrast, section 3 of the Act, entitled "White Collar Crime," would have made punishable as a "scheme or artifice to defraud" one that "deprive[s] 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*." (emphasis added). Thus, while section 3 reflects a clear and conscious choice by Congress to punish only that fraud that puts the victim at risk of tangible harm, section 2 represents a congressional decision to punish all public sector fraud, even if it neither contemplates nor results in tangible harm.

In its stead, Congress enacted the current section 1346, essentially an altered version of section 3 of the Anti-Corruption Act of 1988. With public corruption squarely in mind, Congress intended section 1346 "merely to overturn the *McNally* decision. No other change in the law [was] intended." Removing any doubt about whether tangible harm is required for future prosecution of public sector fraud, Congress excised the reference in section 3 of the Anti-Corruption Act of 1988 to "intentional or contemplated loss or harm." Thus, with the passage of section 1346 Congress put in place legislation that criminalizes public sector fraud, even if it does not intend or contemplate tangible harm.

II. SECTION 1346 IS NOT VOID FOR VAGUENESS, AT LEAST AS APPLIED TO SCHEMES TO DEFRAUD THE PUBLIC OF THE HONEST SERVICES OF PUBLIC OFFICIALS.

Under this Court's void for vagueness doctrine, a statute that threatens no constitutionally protected conduct is evaluated as applied, and is facially vague only when vague in all of its applications. *Hoffman Estates*, 455 U.S. at 494-95.[8] That a statute's application to some conduct may be "uncertain" does not render it unconstitutional. As

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[8] *Compare Kolender*, 461 U.S. at 358 n.8 ("[W]e permit a facial challenge if a law reaches a substantial amount of constitutionally protected conduct.") (internal quotations and citations omitted). *See also United States v. Rybicki*, 354 F.3d 124, 150-51 (2d Cir. 2003 (Raggi, J. concurring) (citing authority for proposition that fraud enjoys no constitutional protection).

long as the statute implicates no constitutional freedoms and applies to identified conduct – either by its own terms "or as authoritatively construed," *Smith v. Goguen*, 415 U.S. 566, 577-78 (1974), – or "requires a person to conform his conduct to an imprecise but comprehensible normative standard," *Hoffman Estates*, 455 U.S. at 495 n.7 (internal quotations and citations omitted), it will pass constitutional muster. By contrast, those statutes that specify "no standard . . . at all," such that they "ha[ve] no core," are void for vagueness. *Id.* (internal quotations and citations omitted).

In evaluating the meaning of a challenged statute, a reviewing court may look beyond the text,, to consider "'terms that have accumulated settled meaning under . . . the common law." *Neder v. United States*, 527 U.S. 1, 21 (1999), *quoting Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992). From these terms, the court "'must infer, unless the statute otherwise dictates, that Congress means to incorporate the[ir] established meaning.'" *Id.*

Section 1346 has a readily identifiable core defined by Congress' reference to "*the* intangible right to honest services," (emphasis added), a phrase intended to incorporate the pre-*McNally* application of the intangible rights doctrine as applied to honest services fraud. *See, e.g.*, *United States v. Rybicki*, 354 F.3d 124, 136-38 (2d Cir. 2003). A large and uniform body of case law (both pre- and post-*McNally*) identifies those acts clearly prohibited by the honest services fraud statute, especially as to public sector corruption. The pre-*McNally* cases, as

summarized by the *McNally* Court itself, stand for the proposition that "a public official owes a fiduciary duty to the public, and misuse of his office for private gain is a fraud." *McNally*, 483 U.S. at 355. Even Justice Steven's dissent in *McNally* acknowledged the fiduciary duty a public official owes the public, which if violated is punishable as fraud: "if he deliberately conceals material information from [the public] he is guilty of fraud . . . the systematic and long-continued receipt of bribes by a public official, coupled with active efforts to conceal the bribe-taking from the public and the authorities . . . is fraud." *Id.* at 372 (Stevens, J., dissenting), *quoting Holzer*, 816 F.3d at 307-08. Applying this commonly understood meaning of honest services fraud, pre-*McNally* courts typically affirmed convictions of public officials for engaging in bribery and kickback schemes, as well as schemes to hide material conflicts of interest.[9] Post-*McNally* cases likewise have applied the honest services fraud statute to this same conduct, which has come to be recognized as within the "core categories" of public

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[9] *See United States v. Paradies*, 98 F.3d 1266, 1283 (11th Cir. 1996) (citing pre-*McNally* cases "uniformly constru[ing] the mail fraud statute to cover the situation where public officials received bribes or kickbacks thereby depriving the citizenry of their 'intangible right' to good and honest government.") (citation omitted). Pre-*McNally* case law also establishes non-disclosure of a material conflict of interest as a basis for a mail fraud conviction. *See United States v. Silvano*, 812 F.2d 754, 759 (1st Cir. 1987); *United States v. Margiotta*, 688 F.2d 108, 128 (2d Cir. 1982); *United States v. Diggs*, 613 F.2d 988, 998 (D.C. Cir. 1979); *United States v. Mandel*, 591 F.2d 1346, 1363-64 (4th Cir. 1979); *United States v. Brown*, 540 F.2d 364, 374-75 (8th Cir. 1976); *United States v. Bush*, 522 F.2d 641, 647-48 (7th Cir. 1975); *United States v. Keane*, 522 F.2d 534, 546-50 (7th Cir. 1975).

sector honest services fraud. *Sawyer*, 85 F.3d at 724; *Weyhrauch*, 548 F.3d at 1247.[10]

With the core categories of honest services fraud well-established, those who use the mails to executive bribery, kickback, or self-dealing schemes have fair notice their conduct may subject them to criminal sanctions. The scienter requirements of section 1341 alleviate any further vagueness

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[10] *See United States v. Kincaid-Chauncey*, 556 F.3d 923, 943 (9th Cir. 2009) (citing cases recognizing bribery and conflict of interest theories); *United States v. Sorich*, 523 F.3d 702, 707 (7th Cir. 2008) ("[I]n most honest services cases, the defendant violates a fiduciary duty in return for cashkickbacks, bribes, or other payments."); *United States v. Ganim*, 510 F.3d 134, 148 (2d Cir. 2007) (recognizing bribery as basis for § 1346 conviction); *Jennings*, 487 F.3d at 578 (affirming § 1346 conviction of state legislator on conflict of interest theory); *United States v. White*, 472 F.3d 458, 460 (7th Cir. 2006) (affirming conviction on conflict of interest theory); *United States v. Middlemiss*, 217 F.3d 112, 119–20 (2d Cir. 2000) (affirming conviction of public relations officer of Port Authority on conflict of interest theory); *United States v. Brumley*, 116 F.3d 728, 735 (5th Cir. 1997) (affirming § 1346 conviction of Director of Texas Workers' Compensation Commission on bribery theory); *United States v. Blumeyer*, 114 F.3d 758, 766 (8th Cir. 1997) (affirming § 1346 conviction of insurance company executives on bribery theory); *Lopez-Lukis*, 102 F.3d at 1169 ("If the official . . . secretly makes his decision based on his own personal interests – as when an official accepts a bribe or personally benefits from an undisclosed conflict of interest – the official has defrauded the public of his honest services."); *Sawyer*, 85 F.3d at 724 ("The cases in which a deprivation of an official's honest services is found typically involve either bribery of the official or her failure to disclose a conflict of interest, resulting in personal gain."); *United States v. Ring*, 2009 U.S. Dist. LEXIS 54007, *18 (D.D.C. 2009) (recognizing bribery and conflict of interest theories); *United States v. Jefferson*, 562 F. Supp. 2d 719, 721–23 (E.D. Va. 2008) (same).

concerns, as prosecutors must prove a defendant's specific intent to defraud, which prevents the statute from being a trap for those who act in good faith and limits prosecutorial discretion. *See United States v. Frost*, 125 F.3d 346, 370-72 (6th Cir. 1997); *United States v. Gray*, 96 F.3d 769, 777 (5th Cir. 1996); *United States v. Waymer*, 55 F.3d 564, 568 (11th Cir. 1995).

That the statute's absolute metes and bounds have yet to be delimited neither renders it void for vagueness nor decriminalizes the acts commonly recognized and understood to fall within its strictures. Rather, section 1346 falls into the category of statutes "that by their terms or as authoritatively construed apply without question to certain activities, but whose application to other behavior is uncertain." *Smith*, 415 U.S. at 577-78. Invalidating the honest services fraud statute because it may blur at its edges would violate "the elementary rule . . . that every reasonable construction must be resorted to . . . in order to save a statute from unconstitutionality." *Gonzales v. Carhart*, 550 U.S. 124, 154 (2007) (quotations and citations omitted). Indeed where, as here, the challenged statute is susceptible to a narrower construction, federal courts have the duty to accept that construction. *Boos v. Barry*, 485 U.S. 312, 331 (1988) (citations omitted). Recognizing this duty, courts properly have applied limiting constructions to section 1346 that bound its outer reaches and eliminate separation of powers and federalism concerns. *See Kincaid-Chauncey*, 556 F.3d at 940 n.13 (surveying public sector limiting principles);

Rybicki, 354 F.3d at 145-47 (surveying private sector limiting principles).

In sum, abundant pre- and post-*McNally* case law establishes clear parameters for those who would engage in illegal and fraudulent schemes and those who would prosecute the perpetrators of such schemes. The ability of these courts to clearly define those acts falling within the proscriptions of the honest services fraud statute fatally undermines any claim the statute is void for vagueness, at least as to public sector corruption.

CONCLUSION

The Seventh Circuit's interpretation of section 1346 as not requiring proof that defendants' scheme resulted in tangible harm, at least in the context of public corruption, should be upheld.