

No. 08-1394

In The
Supreme Court of the United States

—◆—
JEFFREY K. SKILLING,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals
For The Fifth Circuit**

—◆—
**BRIEF OF THOMAS RYBICKI
AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONER**

—◆—
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QUESTION PRESENTED

Whether 18 U.S.C. § 1346, which states in pertinent part that “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services,” provides fair warning of the conduct it seeks to proscribe and minimal guidelines to law enforcement, or is it unconstitutionally vague.

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INTEREST OF *AMICUS CURIAE*¹

Amicus, Thomas Rybicki, was a named defendant in *United States v. Rybicki*,² a matter central to the controversy concerning the constitutionality of 18 U.S.C. § 1346. Rybicki respectfully submits this brief as *Amicus Curiae* in support of the Petitioner in order to address the vagueness of the statute in the context of the instant matter.

**SUMMARY OF ARGUMENT**

Petitioner, Jeffrey Skilling, was convicted of conspiracy, securities fraud, making false representations to auditors, and insider trading. *See United States v. Skilling*, 554 F.3d 529 (5th Cir. 2009), cert. granted, 130 S.Ct. 393 (2009). As noted by the Circuit Court in affirming the conviction, Skilling argues that his convictions should be reversed because the

¹ Counsel of record for all parties received notice at least 10 days prior to the due date of *Amicus Curiae's* intention to file this brief. The parties have consented to the filing of this *amicus* brief. Pursuant to Supreme Court Rule 37.6, counsel for *Amicus Curiae* states that no counsel for a party 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 other than *Amicus Curiae* or his counsel made a monetary contribution to this brief's preparation or submission.

² *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (*en banc*), cert. denied, 503 U.S. 809 (2004). The undersigned counsel of record for *Amicus Curiae* was previously the trial counsel for the defendant Grae, Rybicki & Partners, P.C.

government used an invalid theory of “honest services” fraud:

“The jury convicted Skilling of one count of conspiracy. The indictment and the government’s theory allowed for three objects of the conspiracy: to commit (1) securities fraud, (2) wire fraud to deprive Enron and its shareholders of money and property, and (3) wire fraud to deprive Enron and its shareholders of the honest services owed by its employees.”

Id. at 542.

In addressing this issue the Circuit Court held that “[w]hen an employee (1) creates a particular goal, (2) aligns the employee’s interests with the employer’s interest in achieving that goal, and (3) has higher-level management sanction improper conduct to reach the goal, then lower-level employees following their boss’s direction are not liable for honest-services fraud.” *Id.* at 545. In that no one at Enron sanctioned Skilling’s improper conduct, the Fifth Circuit affirmed his conviction. *Id.* at 546. Moreover, the Fifth Circuit held that “[t]he elements of honest-services wire fraud applicable here are (1) a material breach of a fiduciary duty imposed under state law, including duties defined by the employer-employee relationship, (2) that results in a detriment to the employer.” *Id.* at 547. Skilling asserts before this Court that as there was no allegation that he sought to advance his own private interest over that of his

employer, application of the “honest services” fraud theory in his case was improper.

The “honest services” fraud statute at issue, 18 U.S.C. § 1346 (*see* 2a, *infra*), was enacted in 1988 to amend Title 18 U.S.C. Part I, Chapter 63, which includes §§ 1341 (mail fraud, *see* 1a, *infra*), and 1343 (wire fraud, *see* 2a, *infra*). Unfortunately, in legislating § 1346 Congress was not clear as to the scope of the statute and courts have struggled with this ambiguity for the past twenty years. Not only does the statute fail to provide “fair warning” of the conduct it proscribes but it provides no guidelines or minimal standards for law enforcement. In this respect it is submitted that § 1346 is so inartfully drafted that it violates the Fifth Amendment’s due process requirements (*see* 1a, *infra*), and should be deemed unconstitutionally vague.³



³ In *United States v. Williams*, 128 S.Ct. 1830, 1845 (2008), the Court held that: “[a] conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.” *See also Pierce v. United States*, 314 U.S. 306, 311 (1941) (crimes must be defined with appropriate definiteness).

ARGUMENT**I. IT IS THE PURVIEW OF CONGRESS TO CLEARLY LEGISLATE WHAT SHALL BE A CRIME AGAINST THE UNITED STATES AND SUCH DUTY IS NOT DELEGABLE TO THE COURTS**

It is well settled that there are no common law offenses against the United States. Thus, criminal offenses against the United States must be explicitly defined and proscribed by Congress. In *United States v. Wiltberger*, 5 Wheat. 76 (1820), the Court recognized Congress' authority to proscribe offenses when it held that "[i]t is the legislature, not the court, which is to define a crime, and ordain its punishment." *Id.* at 95.

In exercising its authority, however, Congress must clearly define what it intends to be a crime. As stated by the Court in *United States v. Harriss*, 347 U.S. 612 (1953):

"The Constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute. The underlying principle is that no man shall be held criminally responsible for conduct which he could not reasonably understand to be proscribed."

"On the other hand, if the general class of offense to which the statute is directed is plainly within its terms, the statute will not be struck down as vague, even though

marginal cases could be put where doubts may arise.”

Id. at 617-18. *See also Williams, supra*, at 1845.

Similarly, in *Bouie v. City of Columbia*, 378 U.S. 347 (1964), the Court held that “[t]he basic principle that a criminal statute give fair warning of the conduct that it makes a crime has often been recognized by this Court.” *Id.* at 350-51. This concept of providing “fair warning” may be found throughout our criminal jurisprudence and has been recently described as the “touchstone” upon which a statute is deemed to pass Fifth Amendment muster. *See United States v. Lanier*, 520 U.S. 259, 267 (1997) (the touchstone is whether the statute standing alone or as construed gives fair warning that conduct was criminal).

To determine whether a particular statute does in fact give fair warning, certain rules for statutory construction are employed. For example, in *United States v. Fisher*, 2 Cranch 358 (1805) (Marshall, C.J.), the Court stated:

“It is undoubtedly a well established principle in the exposition of statutes, that every part is to be considered, and the intention of the legislature to be extracted from the whole. It is also true, that where great inconvenience will result from a particular construction, that construction is to be avoided, unless the meaning of the legislature be plain; in which case it must be obeyed.”

Id. at 386. *See also Jerome v. United States*, 318 U.S. 101, 105 (1942) (courts should be reluctant to expand the defined offenses beyond the clear requirements of the terms of the statute).

In *United States v. Thind*, 261 U.S. 204, 209 (1922), the Court held that the words of the statute are to be interpreted in accordance with the understanding of the common man from whose vocabulary they were taken. Moreover, in *Boston Sand Co. v. United States*, 278 U.S. 41, 48 (1928), the Court stated that “[i]f Congress has been accustomed to use a certain phrase with a more limited meaning than might be attributed to it by common practice, it would be arbitrary to refuse to consider that fact when we come to interpret a statute.” Similarly, in *United States v. Jin Fuey Moy*, 241 U.S. 394, 401 (1916) (Holmes, J.), the Court asserted that a “statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score.” *See also United States v. Petrillo*, 332 U.S. 1, 6 (1946) ([i]f the language Congress employs provides an adequate warning as to what conduct falls under its ban, and marks boundaries sufficiently distinct for judge and juries to administer the law in accordance with the will of Congress, then it is not unconstitutionally vague).

If, however, a statute does not provide a “fair warning” of what conduct is deemed criminal it may be struck down by the court as unconstitutionally vague. In *Connally v. General Construction Company*, 269 U.S. 385 (1925), the Court held:

“That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law.”

Id. at 391. See also *United States v. Universal Corp.*, 344 U.S. 218, 222 (1953) (criminal outlawry should not be derived from an ambiguous implication); *United States v. Cardiff*, 344 U.S. 174, 176 (1952) (Douglas, J.) (vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or which acts are prohibited); and *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1938) (no one may be required at peril of life, liberty, or property to speculate as to the meaning of a penal statute); but see *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 494-95 (1982) (a statute is facially vague only when impermissibly vague in all of its applications).⁴

⁴ Should the ambit of a criminal statute be unclear, the ambiguity should be resolved in favor of lenity. See *United States v. Bass*, 404 U.S. 336, 347 (1971); *Rewis v. United States*, 401 (Continued on following page)

Aside from “fair warning” a statute must also protect against arbitrary and discriminatory enforcement. Should Congress not provide minimal guidelines to govern law enforcement the statute may be deemed unconstitutionally vague. As noted by the Court in *Smith v. Goguen*, 415 U.S. 566 (1973):

“In such cases perhaps the most meaningful aspect of the vagueness doctrine is not actual notice, but the other principle element of the doctrine – the requirement that a legislature establish minimal guidelines to govern law enforcement.”

“Statutory language of such a standardless sweep allows policemen, prosecutors, and juries to pursue their personal predilections. Legislatures may not so abdicate their responsibilities for setting the standards of their criminal law.”

Id. at 574-75. See also *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (vagueness may invalidate a criminal law if it authorizes and even encourages arbitrary and discriminatory enforcement); *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (the more important aspect of the vagueness doctrine is that legislature establish minimal guidelines to govern law enforcement); and *Papachristou v. City of Jacksonville*, 405 U.S. 156, 168 (1971) (vagueness appears not only on the lack of notice given a potential offender, but also on the effect

U.S. 808, 812 (1971); *Ladner v. United States*, 358 U.S. 169, 178 (1958); and *Bell v. United States*, 349 U.S. 81, 83 (1955).

of the unfettered discretion it places in the hands of the police).

It is respectfully submitted that 18 U.S.C. § 1346 neither provides “fair warning” nor “minimal guidelines to govern law enforcement.”

II. 18 U.S.C. § 1346 SHOULD BE INVALIDATED AS THE LANGUAGE OF THE STATUTE IS UNCONSTITUTIONALLY VAGUE

Prior to 1987 numerous courts throughout the nation interpreted § 1341 to encompass a scheme or artifice to defraud another of an intangible right to honest services. In *McNally v. United States*, 483 U.S. 350 (1987), this Court held that the mail fraud statute, § 1341, is limited in scope to the protection of tangible property rights. *McNally* involved the prosecution of a Kentucky public official (Gray) and a private individual (McNally) for violation of the mail fraud statute, § 1341. The government’s theory was that McNally deprived the citizens and government of Kentucky of certain “intangible rights” to have the “Commonwealth’s affairs conducted honestly.” *Id.* at 352. The Court held, however, that while the mail fraud statute protects property rights, it does not refer to the intangible right of the citizenry to good government:

“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, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.”

Id. at 360.⁵

Within a year of the Court’s decision in *McNally* Congress did attempt to speak more clearly than it had in respect to § 1341. As part of the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4181, 4508 (1988), Congress enacted 18 U.S.C. § 1346 which states that the term “scheme or artifice to defraud” includes a scheme or artifice to deprive another of the intangible right of honest services (*see* 2a, *infra*).

While the terms “scheme” and “artifice” contained in § 1346 are adequately defined, especially in relation to §§ 1341 (mail fraud) and 1343 (wire fraud), the phrase “the intangible right of honest services” lacks circumscription. Individually the words contained in the statute have general meanings capable of definition. Together, however, the phrase “the intangible right of honest services” continues to defy

⁵ After determining that the mail fraud statute pertained solely to property rights the Court in *McNally* held that the jury instruction on the substantive mail fraud count permitted a conviction for conduct not within the reach of § 1341. *Id.* at 361.

limitations that courts and commentators attempt to place around and upon it.

First, the words “intangible right” are preceded by the definite article “the.” In this usage the definite article “the” serves as an adjective and modifies the noun “right.” Consequently, the word “the” is referring to a particular “intangible right” rather than a category or group of rights. As the definite article “the” as well as the noun “right” are singular, it is clear that Congress was speaking of a singular privilege.⁶ This severely restricts the scope of the statute to a specific “intangible right.” This specific right, which is the subject of the statute, is “honest services.” The definition of the word “honest” is clear enough for all to know that the statute is intended to proscribe deceit and does not merit further analysis.⁷ In enacting the statute, however, Congress used the word “honest” and joined it with the plural of “services” which engenders syntactic ambiguity. The plural “services” is, to a certain extent, inconsistent with the use of the definite article “the” and the singular noun “right” in the beginning of the phrase.

Second, to compound matters, Congress employed the preposition “of” between “intangible right”

⁶ See *Cleveland v. United States*, 531 U.S. 12, 19-20 (2000) (amended statute covers one of the intangible rights that lower courts had protected under § 1341 prior to *McNally*: the intangible right of honest services).

⁷ Webster’s Third New International Dictionary, Merriam-Webster, Inc., 1986 (honest: free from fraud and deception).

and “honest services” rather than the preposition “to.” By using “of” Congress seems to indicate that the object of the intangible right was the honest service(s) making it a single term of art. If the preposition “to” was employed then it could fairly be said that the intangible right was in respect to the “honest services” and each term could be separately parsed. Consequently, neither the word “services” nor the term “honest services” is readily definable by reference to the other words of the phrase or in the context of the statute.

Third, in its broadest sense, the word “service(s)” is commonly defined to include “employment, esp. public employment,” as well as “work done or a duty performed for another or others.”⁸ Therefore, “services” could be fairly construed to include both commercial and public sector activities. Unfortunately, Congress was not very clear as to which particular “services” it was requiring be provided with honesty. Nor was Congress explicit as to what “the intangible right of honest services” encompassed.⁹ It is clear that by pluralizing “services” Congress intended to bring under the umbrella of § 1346 two or more types of

⁸ Webster’s New World Dictionary, Third College Edition, Simon & Schuster, 1991.

⁹ One of several definitions of the word intangible is “incapable of being defined with certainty or precision: vague, elusive.” See Webster’s Third New International Dictionary, *supra*. See also Synonyms and Antonyms, Chambers Harrap Publishers, Ltd., 2004 (intangible: elusive, imponderable, indefinite, vague).

“services.” It is not clear from the plain language of the statute if Congress intended any restriction on the number, class or category of “services” which may be prosecuted within the ambit of the statute. Absent any express limitations in the statute, it may be read to include within its scope any and all activities wherein “services” are provided, whether central to the deceit or which merely constitute marginal acts.¹⁰

Resort to legislative history for an insight to Congress’ meaning and intent is of little value. Entries in the Congressional Record are meager and do not shed much light with the exception of explaining that § 1346 was intended to overturn *McNally* (134 Cong. Rec. H11251 (daily ed. Oct. 21, 1988)); and to reinstate “all of the pre-*McNally* caselaw” (134 Cong. Rec. S17360 (daily ed. Nov. 10, 1988)).¹¹

Post-enactment, the constitutionality of § 1346 divided courts, with several arguing that it is simply too vague to provide “fair warning” or “minimal

¹⁰ The absence of a definitional section prompts twin constitutional concerns: statutes with undefined phrases might present an unconstitutional delegation to the courts and/or be unconstitutionally vague. Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv. L. Rev. 2085, 2104 (June 2002). *See generally*, Dorf, *Facial Challenges to State and Federal Statutes*, 46 Stan. L. Rev. 235 (January 1994).

¹¹ For a full treatment of the legislative history of § 1346, *see* Kurland, *The Guarantee Clause as a Basis for Federal Prosecutions of State and Local Officials*, 62 S. Cal. L. Rev. 367, 488-490, fn. 450-452 (1989). *See also* *United States v. Brumley*, 116 F.3d 728, 742-745 (Jolly and DeMoss, JJ., dissenting).

guidelines to law enforcement.” See *United States v. Handakas*, 286 F.3d 92, 104 (2d Cir. 2002), overruled in part by *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (“The plain meaning of ‘honest services’ in the text of § 1346 simply provides no clue to the public or the courts as to what conduct is prohibited under the statute”); *United States v. Bloom*, 149 F.3d 649, 656 (7th Cir. 1998) (“No one can be sure how far the intangible rights theory of criminal responsibility really extends because it is a judicial gloss on § 1341”); and *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir. 1997) (*en banc*) (“Before *McNally*, the meaning of ‘honest services’ was uneven”).¹²

The constitutionality of the statute has been called into question most often by dissent. In *Brumley* the dissent argued that before *McNally* the doctrine of honest services was not a unified set of rules and “Congress could not have intended to bless each and every pre-*McNally* lower court ‘honest services’ opinion.” *Id.* at 733. Further, the dissent urged that “[t]he wording of § 1346 simply does not effect a change in the portion of the *McNally* opinion which held that the mail fraud statute does not reach “schemes to defraud citizens of their intangible rights to honest and impartial government.” *Id.* at 745 (Jolly and DeMoss, JJ., dissenting).

¹² The unevenness of the “honest services” case law pre-*McNally* is acutely evidenced by the multitude of dissimilar matters identified by the *McNally* majority and Justice Stevens in the dissent, *passim*.

Indeed, the scope of the statute caused a split among the circuits with some courts holding that § 1346 required as an element personal gain. *See United States v. Thompson*, 484 F.3d 877, 884 (7th Cir. 2007); *United States v. Turner*, 465 F.3d 667, 676 (6th Cir. 2006); *United States v. Rybicki*, 354 F.3d at 141-42; and *United States v. Bloom*, 149 F.3d 649, 656-57 (7th Cir. 1998). Other Circuits, however, did not require personal gain to be an element of the statute. *See United States v. Skilling, supra*; *United States v. Welch*, 327 F.3d 1081, 1107 (10th Cir. 2003); and *United States v. Panarella*, 277 F.3d 678, 692 (3d Cir. 2002).

Illustrative of the contrasting views among the judiciary regarding the vagueness of § 1346 is the *Rybicki* matter. In September, 1995, Thomas Rybicki was charged in New York State Supreme Court with engaging in a scheme to defraud and a single count of commercial bribery. At issue were payments made to the employees of insurance companies through middlemen by Rybicki and his co-defendants to expedite the settlement of personal injury claims. The state trial judge subsequently dismissed the charge of scheming to defraud. In May, 1998, a former state prosecutor familiar with the matter, and now employed by the U.S. Attorney's office in the Eastern District of New York, obtained a federal indictment under 18 U.S.C. §§ 371 (conspiracy), 1341 (mail fraud), and 1343 (wire fraud) in combination with § 1346. Consequently, instead of a single count of commercial bribery in state court, Rybicki was

charged with 25 counts of mail and wire fraud in a scheme to deprive insurance companies of the “honest services” of their employees.

During trial the government conceded that all of the settlements were for “fair value.” Additionally, that even though payments were made to adjusters, no settlement of a claim was inflated above what would have been a “reasonable range for that settlement.” Yet, although no financial loss was proven by the government at the time of trial, Rybicki was still convicted of depriving the insurance companies of the honest services of their employees, lost his privilege to practice law, his law firm was closed down, he was fined \$20,000 with an \$1,150 special assessment, and sentenced to a term of imprisonment of one year and a day with three years of supervised release. *Rybicki*, 354 F.3d at 127-28.¹³

Following conviction a three member panel of the Second Court held in *United States v. Rybicki*, 287 F.3d 257 (2d Cir. 2002), affirmed but modified in part, 354 F.3d 124 (*en banc*), as follows:

“We hold that in order to convict a defendant based upon a scheme to defraud another of the intangible right of honest services, as contemplated by 18 U.S.C. § 1346, it is unnecessary to prove that the defendant intended

¹³ Rybicki has completely satisfied his sentence and has been readmitted to the practice of law before the courts of the State of New York.

economic or pecuniary harm or that any such harm actually resulted from the fraud. All that is required is proof (1) that the defendant engaged in a scheme to defraud; (2) with the intent to deprive another of the intangible right of honest services; (3) that it was reasonably foreseeable to the defendant that the scheme could result in some economic or pecuniary harm to the victim that is more than *de minimis*; and (4) that the mails or wires were used in furtherance of the scheme.”

Id. at 259-60.

The Second Circuit granted review *en banc* of the aforementioned *Rybicki* panel decision. In its *en banc* decision the Second Circuit affirmed the conviction but modified the elements of “honest services” fraud to include (1) a scheme or artifice to defraud; (2) for the purpose of depriving another of the intangible right of honest services; and (3) the use of the mails or wires in furtherance of the scheme. The Court *en banc* did not hold, as did the *Rybicki* panel, that a required element included a reasonable “foreseeability that the scheme could cause some economic or pecuniary harm to the victim that is more than *de minimis*.” Instead, the Court *en banc* adopted a “materiality” test holding that “the misrepresentation or omission at issue for an ‘honest services’ fraud conviction must be ‘material,’ such that the misinformation or omission would naturally tend to lead or is capable of leading a reasonable employer to change its conduct.” (citing *United States v. Gray*, 96 F.3d

769, 774-75 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997)). *Rybicki*, 354 F.3d at 145-46.

In a vigorous dissent to the Second Circuit's majority opinion, Circuit Judge Jacobs, with three other members of the Second Circuit argued that the "honest services" amendment to the wire and mail fraud statute, 18 U.S.C. § 1346, flunks the test for facial vagueness set forth by the Supreme Court in *City of Chicago v. Morales*, 527 U.S. 41, 119 S.Ct. 1849, 144 L. Ed. 2d 67 (1999)." Further, that "[i]t is only too obvious that there is no settled meaning to the phrase 'the intangible right of honest services' that is capable of providing constitutionally protected notice." *Rybicki*, 354 F.3d at 156, 160. As noted by the dissent in *Rybicki*:

"The majority opinion's search for a meaning of art leans heavily on the overruled pre-*McNally* case law of other circuits. But [e]ven the circuits that have reinstated pre-*McNally* law recognize that *ad hoc* parameters are needed to give the statute shape.' *Handakas*, 286 F.3d at 109 (collecting cases). Although a number of circuits have upheld section 1346 against a claim of facial vagueness, there is now wide disagreement among the circuits as to the elements of the 'honest services' offense. These opinions, taken together, refute rather than support the idea that section 1346 has any settled or ascertainable meaning or that the offense it describes has known contours. . . ."

Rybicki, 354 F.3d at 162. See also *United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008) (“[t]he central problem is that the concept of honest services is vague and undefined by the statute. So, as one moves beyond core misconduct covered by the statute (e.g. taking a bribe for legislative vote), difficult questions arise in giving coherent content to the phrase through judicial glosses”).

Although the Second Circuit panel and the Court *en banc* affirmed the convictions, the composition of the Court’s majority and dissent in doing so bears comment. On the three member panel sat Chief Judge Walker with Circuit Judges Cabranes and Straub. In the decision authored by the Chief Judge it was specifically stated that the panel agreed with the *Handakas*’ panel’s observations concerning the vagueness of the phrase “honest services,” but was bound by precedent upholding convictions under § 1346 for similar schemes. *Rybicki*, 287 F.3d at 263-64.¹⁴

When the Court sat *en banc*, however, Chief Judge Walker and Judge Cabranes joined Judge Jacob’s dissent (along with Judge Parker), and writing separately stated:

¹⁴ To the extent that the *Handakas* panel determined that § 1346 was unconstitutionally vague the *Rybicki* Court *en banc* held that as *Handakas*’ conduct did not come within the reach of § 1346 the panel need not have reached that determination. *Rybicki*, 354 F.3d at 144.

“We write separately to emphasize and explain that it is the opportunity of *en banc* review that frees us from Circuit precedents that compelled us in previous cases to apply the statute that we now would hold unconstitutional on its face.”

Rybicki, 354 F.3d at 165 (Walker, C.J., dissenting).

If Chief Judge Walker and Judge Cabranes were not bound by Second Circuit precedent at the time the matter was first presented to the Second Circuit, then two of the three members of the panel would have deemed the statute unconstitutional and the convictions of the defendants would have been reversed. Instead the convictions were affirmed and the individual defendants lost their liberty being sentenced to terms of imprisonment for a year and one day. *Id.* at 128. Although the defendants’ terms of incarceration in *Rybicki* were not as lengthy as that imposed upon Skilling, the loss of even a single day of liberty is lamentable. Any loss of liberty is undoubtedly tragic if the result of an unconstitutionally vague statute.

The conflicting interpretations of § 1346 by so many courts and other authorities leads to the inescapable conclusion that the statute is indeed unconstitutionally vague. In order to make this statute workable the courts have been required to tether disparate pre-*McNally* case law to a vague post-*McNally* statute. To avoid the clear holding of this Court’s decision in *McNally*, that § 1341 does not include within its compass intangible rights, courts

have fashioned *ad hoc* interpretations of § 1346 that could not have been intended by Congress' attempt to legislatively reverse *McNally*. Simply stated, the plain language of § 1346 does not give fair warning that it encompasses an act in a commercial setting which did not cause any pecuniary harm to an employer who was purportedly deprived of "honest services."

Of great significance is the fact that in more than twenty years of grappling with this statute, the courts have not yet been able to discern the "outer boundaries" of § 1346. Should the outer limits of the statute not be subject to definition, then conceivably all perceived offenses, large and small, may fall within its ambit. Nor does the statute provide any constraints on law enforcement. For example, even though no specific federal or state statute, rule or regulation proscribes an act of an individual, § 1346 could still be used as a mechanism by which such activity is criminalized in the discretion of an overly zealous prosecutor.

Moreover, § 1346 should not be interpreted so expansively that a circuit court finds itself at odds with a solid minority of the court, including its chief judge, as occurred in *Rybicki*. Rather, Congress must speak clearly as to the scope and the breadth of the statutes it enacts. Failure to do so can only result in a lack of "fair warning" and insufficient guidance to law enforcement. *See Sorich v. United States*, 129 S.Ct. 1308, 1311 (2009) (Scalia, J., dissenting).



CONCLUSION

For all of the foregoing reasons, it is respectfully submitted that 18 U.S.C. § 1341 should be deemed vague and, therefore, unconstitutional.

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Respectfully submitted,

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APPENDIX

The Fifth Amendment to the United States Constitution provides in pertinent part that:

“[n]o person shall . . . be deprived of life, liberty, or property, without due process of law. . . .”

18 U.S.C.A. § 1341 (Frauds and swindles):

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined under this

title or imprisoned not more than 20 years, or both. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C.A. § 1343 (Fraud by wire, radio, or television):

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, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, 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.A. § 1346 (Definition of “scheme or artifice to defraud”):

For the purposes of this chapter, the term “scheme or artifice to defraud” includes a scheme or artifice to deprive another of the intangible right of honest services.
