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

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REPLY BRIEF FOR PETITIONERS

Our opening brief demonstrated that an intent to inflict some economic harm on the victim has long been understood as an essential part of the "intent to defraud" that the government must prove in private-sector mail fraud cases. This understanding has been reaffirmed by a majority of circuits that have considered this issue since Congress enacted 18 U.S.C. 1346 in 1988, and it is clearly inconsistent with the Seventh Circuit's view that one can be guilty of mail fraud for securing a *lawful* tax benefit in Canada without disclosing that fact to his employer.

The government contends that the majority rule unjustifiably adds a non-textual "element" of contemplated harm to mail fraud prosecutions, and proposes that the true path lies in the recognition that the 1988 Congress relied on the established element of materiality as the sole limitation on what federal prosecutors might choose to charge as "honest services fraud." This is a surprising argument, because the government argued vigorously in *Neder v. United States*, 527 U.S. 1 (1999), a full decade after Congress supposedly contemplated such a thing, that materiality (which does *not* appear in the statutory text) is *never* an element of mail fraud. The government deservedly lost that argument, but it is a bit much for it now to say that in 1988 Congress clearly relied on a requirement for which the Solicitor General could find *no* evidence in 1999.

More fundamentally, the government's argument is misdirected. Mail fraud is a specific intent crime. Petitioners do not propose to add any "elements" to

the statute; they simply insist on fidelity to a traditional understanding of "intent *to defraud*." The government, by contrast, would treat nondisclosure "frauds" as general intent crimes, in which the government's burden is fully met by showing a knowing failure to disclose—*i.e.*, the defendant knew he was not speaking. As the government sees it, anyone who stays silent in violation of a "duty" of disclosure (even one discovered post-hoc by an ambitious prosecutor) has the "specific intent" to "deceive" because, by knowingly failing to disclose, he necessarily "specifically" intends to withhold "honest services." GB 21-22.

Equally baseless is the government's insistence that this Court choose between contemplated harm and materiality. *Both* specific intent *and* materiality are mail fraud elements that the government must prove beyond a reasonable doubt. Without both, federal prosecutors would be free to federalize significant bodies of law reserved to the states, extending the statute well beyond its purposes or anything its language can constitutionally bear. The government gives short shrift to the constitutional difficulties posed by Section 1346, even though no other federal criminal statute has prompted courts to expend so much effort, in so many published opinions, grappling with those difficulties in an effort to articulate a properly limited interpretation. There is no justification for this "casual—almost summary—rejection of the accumulated wisdom of the many distinguished federal judges who have thoughtfully considered and correctly answered the question" at issue here. *McNally v. United States*, 483 U.S. 350, 376 (1987) (Stevens, J., dissenting).

According to the government, however, a properly limited reading of Section 1346 can be derived from *McNally*, which the government describes, at the highest conceivable level of generality, as a case involving a breached "duty of loyalty." This new manifestation of "the intangible right of honest services"—manufactured since certiorari was granted—apparently has nothing to do with Delaware law, which the government does not embrace even *once* in its merits brief even though it was a centerpiece of the trial and the yardstick by which the government urged the trial court and jury to measure petitioners' conduct. Presumably the government does not relish explaining how a twenty-year felony can be teased out of a defendant's failure to be "entirely fair" in violation of principles of state corporate law.

No reading of *McNally* can justify the manner in which the government employed Section 1346 here: to prosecute alleged "thefts" of property—which, of course, *remained* within the meaning of "scheme to defraud" after *McNally*—without the nuisance of proving each element of "theft." Congress enacted Section 1346 to cover certain *additional* "schemes" *other than* theft-by-fraud that were *excluded* from the mail fraud statute by *McNally*—primarily kickbacks and bribes where the scheme is meant to harm the victim but not to obtain money directly from *him* (the money coming from a party who is far from deceived). Congress did not pass the statute to give the government a way to call someone a thief who isn't.

Under the government's approach, Section 1346 might fairly be renamed "Money-Fraud Lite"—the same "theft" offense with only some of the necessary elements. If, as the government says, "[s]urely Congress did not enact Section 1346 merely to provide an

additional ground on which to prosecute cases that already could have been prosecuted as money-or-property frauds" (GB 23), then just as surely the government cannot complain if this Court finally puts a stop to prosecutions that abuse the statute in precisely that manner. Indeed, while the government now says that the contemplated-economic-harm requirement would essentially gut the statute (*id*. at 22-23), it opposed review in this case (as it has in many others) by contending precisely the opposite—that the approach followed by the majority of circuits produces only "slight" differences unworthy of this Court's attention. Opp. 14. The insincerity of the claim that the majority rule would "deprive Section 1346 of almost all practical effect" (GB 22) is also confirmed by the fact that the contemplated-economic-harm rule has been the law in large swaths of the country for years without the Solicitor General ever seeking its reversal in this Court.

In the end, the government does not even defend on its own terms the reasoning the Seventh Circuit used to affirm the convictions. Beyond its new, equally unpersuasive, grounds for reversing the majority rule, the government falls back on a contrived harmless-error argument and an invented forfeiture rule. The forfeiture argument—which would preclude review solely because a defendant had the temerity to *ask* the trial court to exercise its discretion contrary to the prosecutor's preference—is precluded by the existing rules and this Court's cases. It is also ironic that the government continues to press this invented forfeiture claim while at the same time insisting that *it* be relieved from this Court's actual rules with respect to the obstruction conviction. In any event, the harmlessness arguments are incredible. The government now expects this Court to be-

lieve that "any" rational juror would readily have found, beyond a reasonable doubt, that petitioners contemplated inflicting economic loss after *this* jury spectacularly rejected the great bulk of the "looting" allegations that the government *did* make.

ARGUMENT

I. CONTINUATION OF THE CONTEMPLATED-ECONOMIC-HARM REQUIREMENT IS COMPELLED BY SECTION 1346 AND THE CONSTITUTION.

The government's newest position is that the "text" of Section 1346 requires that the statute be construed identically in all its applications, in public or private settings, and that no textual basis supports the creation of a contemplated-economic-harm requirement. According to the government, the only relevant guidepost is Congress' desire to overturn *McNally* so as to outlaw all "material" breaches of a fiduciary duty of "loyalty." A contemplated-harm requirement, as the government sees it, would effectively reinstate *McNally*. Every aspect of this argument is wrong. While Congress surely meant to overturn the outcome in *McNally*, it did not clearly invite a vast expansion of federal jurisdiction over private conduct, and the Court can certainly give effect to Section 1346 without issuing the government the blank check it seeks.

1. The first sentence of the mail fraud statute reaches the use of the mails to execute "any scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses." The narrow issue in *McNally* was whether this "disjunctive" language should be "construed independently" so as to define two distinct punishable "schemes": [1] "to defraud" and [2] to "obtain[] money or property." *See McNally*, 483 U.S. at 358; *id.* at 364-65

(Stevens, J., dissenting). The Court rejected the disjunctive reading and held that the statute reached only those "schemes to defraud" that seek to deprive the victim of "money or property." *Id.* at 359-60.

This interpretation excluded from Section 1341 schemes like the public corruption at issue in *McNally*, where a state official awards a contract on the understanding that he will receive kickbacks. *Id.* at 360. Although those schemes obviously involve money (a bribe or kickback), the defendant does not scheme to obtain it from *the victim* of the deception, but rather from a party who is complicit instead of deceived. Section 1346 makes clear that this *additional* class of cases is now, once again, properly reachable through Section 1341. Under Section 1346, therefore, the intended corrupt gain and the contemplated loss need not be two sides of the same coin. *See, e.g., United States v. von Barta*, 635 F.2d 999, 1003-07 (2d Cir. 1980).

In making this change, however, Congress did not create a new non-fraud offense or even take the smaller step of redefining "fraud." It did not, for example, adopt a fully disjunctive reading of Section 1341 by defining a "scheme to defraud" to *mean* a deprivation of "honest services." Section 1346 instead says that a "scheme to defraud" now "*includes*"—in addition to the money and property frauds to which *McNally* had limited the phrase—a scheme to "deprive another of the intangible right of honest services." The language thus recaptures the corruption cases that had been ruled out by *McNally*; it does not swallow what was *already* included in Section 1341 through a theory that all schemes to steal from the victim reflect a lack of "honesty."

2. The government contends that "the scheme involved in *McNally* itself" marks the beginning and the end of divining Section 1346's contours. GB 11, 13, 16-17. That scheme, it says, provides a clear and workable definition of fraud under Section 1346—"a breach of the fiduciary duty of loyalty, carried out with an intent to deceive, on a material matter" (*id.* at 11-12)—and a contemplated-economic-harm requirement would impermissibly add an "extra-textual" "element" to this "*McNally*-based" list. *Id.* at 18-20.

McNally did not establish some "fiduciary duty of loyalty" as the "paradigm" of honest-services fraud prosecutions that Congress purportedly "reinstate[d] * * * in *both* public and private contexts." *Id.* at 13 (emphasis added). The scheme alleged in *McNally* was a deprivation of "the intangible right of the citizenry to good government" (483 U.S. at 356), not one to violate some highly abstract (and apparently federal) "duty of loyalty" that applies equally to public and private settings. This Court's opinion does not even *contain* the word "loyalty." Neither does Section 1346.

"*McNally* itself" did not in *any* respect address the meaning of *private*-sphere duties: The Court assumed that the defendants were "public fiduciar[ies]," 483 U.S. at 355-56 & 360, because the government had proceeded under (and did not challenge) the Sixth Circuit's rule that "misconduct of a fiduciary in the administration of exclusively private matters is not actionable * * * under an intangible rights theory." *United States v. Gray*, 790 F.2d 1290, 1295 (6th Cir. 1986). Indeed, if "*McNally* itself" were this Court's sole point of reference for interpreting Section 1346, the statute could be read as simply re-

turning the law to where the Sixth Circuit had left it in that case—and thus not to apply *at all* outside of public corruption prosecutions. *See also* 134 Cong. Rec. 33,297 (1988) (Rep. Conyers) (statute "overturn[s]" *McNally* and "[n]o other change in the law is intended").

In any event, the government concedes that specific intent is an essential element of any "scheme to defraud." The contemplated-harm requirement is part of the intent required to violate the mail-fraud statute in private cases. The precise contours of the specific intent requirement (in *any* setting) were not remotely at issue in *McNally;* they must be drawn from the pre-existing case law. Those cases—particularly *United States v. Lemire*, 720 F.2d 1327 (D.C. Cir. 1983)—make clear that the contemplated-economic-harm requirement is an essential component of the required intent. In fact, virtually *every* conviction from the small group of private-sector honest-services mail and wire fraud prosecutions that predated *McNally* was supported by proof of contemplated or foreseeable economic harm, and a number of pre-*McNally* prosecutions were turned back precisely because such proof was lacking. *E.g. United States v. Ballard*, 663 F.2d 534, 541-42 (5th Cir. 1981); *Epstein v. United States*, 174 F.2d 754, 766-68 (6th Cir. 1949).

The government concedes that *Lemire* expressly required the government to prove that the defendant contemplated economic or business harm to the victim. It also concedes that a number of *other* courts required a showing that "some actual harm or injury" was "at least contemplated" without *explicitly* requiring it to be "economic." *Id.* at 30-31 (discussing *von Barta*, *supra*; *Ballard*, *supra*; and *United States*

v. Feldman, 711 F.2d 758 (7th Cir. 1983)). Nonetheless, it dismisses *Lemire* as an "outlier" and *von Barta*, *Feldman* and *Ballard* as cases that "naturally focused on economic harm" because they *just happened* to "involve[] fraudulent conduct in a commercial or financial setting." GB 30-31.

Thus, in a mere twenty years *Lemire* has evolved from a "thoughtful opinion" that the Solicitor General could readily commend to this Court as exemplifying the "uniformly held" view of the lower courts (Pet. Br. 31-32) to an errant ruling that Congress could not possibly "be deemed to have implicitly adopted." GB 31. And if *some* pre-*McNally* private-sector cases "naturally focused on economic harm" merely because of fortuity, then perhaps the Solicitor General could now muster some *other* pre-*McNally*, private-sector examples of convictions that were affirmed even though the defendant clearly did *not* contemplate any economic harm to his victim (to say nothing of evidence that anyone in Congress knew of such a case in 1988).[1] By the government's own tell-

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[1] The government claims that some pre-*McNally* private-sector cases, unlike *Lemire*, "indicated" that "the harm contemplated by honest-services schemes need not be economic." GB 32. None of the cases it cites affirmed a conviction in the absence of contemplated economic harm, and several in fact involved such harm. *E.g. United States v. Newman*, 664 F.2d 12, 20 (2d Cir. 1981) ("the indictment fairly informed appellee" that "part of the charge against which he must defend" was "proof of direct, tangible, economic loss to the victim, actual or contemplated"); *United States v. Castor*, 558 F.2d 379, 383 (7th Cir. 1977) (assuming *arguendo* contemplated-economic-harm requirement, because of potential "pecuniary loss"); *United States v. Venneri*, 736 F.2d 995, 996 & n.** (4th Cir. 1984) (no plain

[Footnote continued on next page]

ing, after all, Congress merely restored the government's power to prosecute private-sector "honest services" cases as it had *successfully* done before *McNally*.

The government warns, however, that a contemplated-*economic*-harm requirement would "curtail the coverage of Section 1346" beyond "commercial settings," because "fiduciary or employer-employee relationships also exist * * * for example, in medical, educational, charitable, or public-interest contexts." GB 25. But as should be obvious from well-known charities and university endowments, among others, non-profit organizations do not forswear any link to money solely because they are not primarily devoted to making it. And fiduciaries at non-profits who self-deal or take bribes or pilfer by deception cause no less risk of economic harm than their counterparts in the for-profit world. Prosecutors can therefore use the mail fraud statute to pursue them too. *E.g., United States v. Aramony*, 88 F.3d 1369, 1373 (4th Cir. 1996) (mail fraud prosecution of United Way's CEO); *United States v. Jacobson*, 4 F.3d 987 (4th Cir. 1993) (table) (fertility doctor who deceived patients); *United States v. Frost*, 125 F.3d 346, 369 (6th Cir. 1997) (plagiarism fraudulently deprived university of complicit professors' honest services).

If, on the other hand, there are species of dishonesty or disloyalty *without* any nexus to commerce

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[Footnote continued from previous page]

error because jury instructions referred to material nondisclosure "as well as the need to find that the defendant contemplated injury to" his employer).

that federal prosecutors have been improperly deterred from pursuing under the contemplated-economic-harm rule, the government does not say what they are. More importantly, it points to no pre-*McNally* case involving *this* theory of honest-services fraud that Congress "likely" intended to reach when it reacted to *McNally*. GB 25. Before this Court endorses a wholesale expansion of the mail fraud statute to punish harm lacking *any* economic nexus that arises in, for example, doctor-patient, priest-parishioner, or teacher-student relationships, there should be a strong indication that Congress intended, contemplated or at least reasonably foresaw such an outcome.[2]

3. Far from relieving the government of the duty to prove that the defendant contemplated economic harm, the legislative sponsors of Section 1346 were keenly aware of this important proof requirement in honest-services-fraud prosecutions and cited *Lemire*, *Feldman*, and *Ballard* as the key to "foreclos[ing] the abuse of the statute to prosecute trivial, noncriminal matters." 134 Cong. Rec. S15999-01 (1988) (Sen. Biden).

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[2] The government's only example—a psychologist who received kickbacks for referring patients to a hospital—comes from a case decided after *McNally*. The court reversed because the government could prove *neither* intent to defraud *nor* materiality. *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996). The doctor's conviction under a different federal statute that independently outlawed the kickbacks was affirmed. The government's complaint, then, is that it was foiled in its attempt to pile on additional felonies based on state-licensing-board ethical rules. *Id*. at 442 n.3.

The government dismisses these parts of the legislative record because it views the pre-*McNally* law, except where it helps prosecutors, as a dog's breakfast of cases that "had announced conflicting rules and in some contexts had failed to clarify the scope of the doctrine." GB 29, n.11. The government prefers its own self-serving *ipse dixit* about "paradigm cases of deceptive breaches" (*id.* at 30 n.11), where the "paradigm" can be discerned only by prosecutors operating at improbably high levels of generality. Indeed, the government purports to "confirm[]" *its* view of Congress's purpose by quoting Senator Biden's description of an honest-services-fraud bill that failed to pass, while rejecting a second statement from him about the bill that did pass as something "Congress could not have intended." GB 29 n.11.

As the record stands, at least four circuit court decisions concededly had adopted a contemplation-of-harm requirement before 1988, and a key sponsor of what became Section 1346 affirmatively embraced them. *Lemire*, the last and most thorough of those decisions, also concededly had surveyed those cases and clearly had held that the contemplated harm must be *economic*. And shortly before Congress enacted Section 1346 the Justice Department itself told this Court that *Lemire* was a "thoughtful opinion." On this record, any notion that Congress "restored" the bulk of pre-*McNally* law but somehow intended to *exclude* Lemire is improbable in the extreme. But if there were any ambiguity on this point it would have to favor petitioners, because such ambiguities must be interpreted "in favor of defendants, not prosecutors." *United States v. Santos*, 128 S. Ct. 2020, 2028 (2008) (plurality opinion of Scalia, Souter, Ginsburg and Thomas, JJ.).

4. The government nonetheless says that Congress relied solely on the "materiality" requirement to "embod[y] a related concept to contemplated harm." GB 34. Materiality assuredly is an essential element of all mail fraud prosecutions, but the government does not adequately explain why this (nontextual) element somehow forecloses inquiry into specific intent, including whether the defendant subjectively contemplated economic harm.

Moreover, the notion that Congress relied solely or even primarily on materiality to assure a properly limited scope for Section 1346 is implausible. A decade *after* Section 1346 became law the government argued to this Court that Congress never even *intended* to make materiality an element of mail or wire fraud, and that lower court cases either did "not hold that materiality is required," or were "ambiguous at best." Respondent's Brief, *Neder*, at 34, 42. The fact that the government lost *Neder* does not help its current argument. In holding that materiality *is* an element of mail fraud, the Court resolved a circuit split that had long "persisted and show[ed] no signs of abating." Respondent's Certiorari Brief, *Neder*, at 6, 8 (Sept. 1998). Needless to say, Congress could not be deemed to have clearly and unambiguously chosen materiality as an element that replaces proof of contemplated-economic-harm unless materiality clearly *was* an element of mail fraud.

The government's materiality-only approach would dramatically change the DNA of the mail fraud statute, turning large categories of conduct from specific-intent to general-intent offenses. The jury in this case, for example, was instructed to find an "intent to defraud" if petitioners intended "to deceive" Hollinger "in order to * * * deprive the corpo-

ration and its shareholders of their right to the honest services of their corporate officers." J.A. 338a. "Honest services" meant the "fiduciary duty of loyalty" they owed to Hollinger "under Delaware law." J.A. 336a. Because that state-law duty has a disclosure component (J.A. 336-37a), a finding that petitioners deprived Hollinger of honest services also satisfied the need to prove "deception." Hence, if the breach was "intentional"—*i.e.*, petitioners "knew" they had failed to disclose a recharacterization of the management fees—the government's burden was met.[3]

Thus, as Professor Coffee has noted, "[i]n private fiduciary cases" it is essential that "'actual harm' to the principal or fiduciary should have been intended (or at least reasonably foreseeable)" so that "civil law prophylactic rules are not automatically converted into a federal felony." John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 Am. Crim. L. Rev. 427, 460-61 (1998). Conversely, "[i]f the mens rea for honest services fraud does not include a foresight of harm but is characterized rather as merely the intention to commit the breach of fiduciary duty, it hardly constrains the offense at all." Andrew B. Matheson, *A Critique of United States v. Rybicki*, 28 Am. J. Trial Advoc. 355 (2004); *see also* Geraldine Szott Moohr, *Mail*

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[3] And if this meager level of intent is too onerous for the government in a particular case, the jury can always "infer" that the defendant "intend[ed] the natural and probable results of [his] actions." GB 24. Or, as here, it could find that he "knew" what he avoided knowing. Tr 15187-88 (willful blindness jury instruction).

Fraud Meets Criminal Theory, 67 U. Cin. L. Rev. 1, 44-45 (1998).

The government's conflation of specific intent and fiduciary duty distinguishes its position here from the misappropriation theory the Court approved in *United States v. O'Hagan*, 521 U.S. 642 (1997). GB 35. *O'Hagan* held that a fiduciary's "undisclosed, self-serving use of a principal's information to purchase or sell securities, in breach of a duty of loyalty and confidentiality, defrauds the principal of the exclusive use of that information"—a thing of value that itself "qualifies as property." 521 U.S. at 653-54. Here, by contrast, it sufficed to show that petitioners, "in breach of a duty of loyalty" to Hollinger, knowingly failed to act in conformity with that *same* duty.

O'Hagan itself "emphasize[d]" it was "[v]ital" to the Court's decision upholding "criminal liability" in that case that the defendant enjoyed the "sturdy safeguard" of strict specific-intent requirements. *Id.* at 665. That same safeguard is precisely what the government would now deny criminal defendants. Yet nowhere is this protection more vital than in a prosecution where the only barrier between the prosecutor and convictions on counts punishable by 20 years' imprisonment (and predicates under RICO) was proof that (1) petitioners' non-disclosure was "capable" of "influencing" a "decision" by a "decision-making body" (*i.e.,* Hollinger or its shareholders) (J.A. 338a), and (2) it "could reasonably have been foreseen" that *someone* would make relevant use of the U.S. mails or a private mail delivery service (J.A. 339a-340a).

5. The government asserts that the contemplated-economic-harm requirement cannot be the

law in private-sphere cases, because such a rule makes no sense in public corruption cases and the two contexts must be treated identically. GB 19-20. This, too, is a surprising contention because the Solicitor General has repeatedly opposed review on the ground that the contexts *are* different. *E.g.*, Brief in Opposition, *Mattison v. United States*, No. 99-141 (Sept. 1999) at 14-15; Brief in Opposition, *Rise v. United States*, No. 03-1088 (Apr. 2004) at 13 n.3. This objection is also trivial, because the government itself contends that the key phrase in Section 1346 is a "term of art" that must take its meaning from the pre-*McNally* "doctrine" that Congress intended to restore. GB 29. Because honest-services fraud has always been understood to mean something quite different in the public and private settings, there can be no "textual anomaly" (*id*. at 19) in recognizing that Congress' supposed "term of art" is context-sensitive.[4]

Moreover, even when the Court construes the unvarnished text of a statute, it routinely applies canons of construction that are themselves context-sensitive, such as clear-statement rules and the rule of lenity. Here, for example, as Professor Coffee has noted, there is a "critical distinction" between the public and private contexts: while the legislative record "may well constitute a clear statement that public officials are to remain subject to federal anticorruption legislation, relatively little is said about the

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[4] As the amicus brief supporting the government explains: "Courts developed the 'reasonably foreseeable harm' test to address unique features of the private sector employer-employee relationship." CREW Br. 6-9.

private fiduciary context." Coffee, *supra*, at 455-56. In particular, "no intent to override state corporate law is expressed anywhere in that legislative history" even though this Court has "presumptively allocated corporate governance to the states." *Id.*[5]

Those differences in the clarity of the legislative record, and the significant disparity in the pre-*McNally* development of public- and private-sector caselaw, also are obviously crucial to the rule of lenity and to due process concerns that uniquely require a narrower construction of the doctrine in the private sphere. The government's approach—arguing that material disloyalty by fiduciaries is unlawful, details to follow—not only fails to give notice of what is criminal but also creates an intolerable danger of discriminatory enforcement by permitting prosecutors to fill in those "details" as needed to fit a previously selected quarry. Rudimentary principles of due process prohibit a law that vests federal prosecutors with such unbridled discretion.

In the end, it is not clear that the government is even willing to commit itself to a readily identifiable source for the "duty of loyalty" it now advocates. After trying this case on the basis that the duty petitioners allegedly breached derives from Delaware corporate law, the government now eschews any defense of that theory, relying instead on a seemingly

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[5] The fact that Congress relied on different sources of constitutional authority for private- and public-sphere cases similarly requires that courts be attentive to the *applicable* source of authority. *See* Pet. Br. 39-41 & n.12. The government does not refute the unique Commerce Clause hazards that its theory poses for intrastate conduct such as that in Count 7. *Id.*

federal duty derived from *McNally* itself and some as-yet-undetermined federal common law of fiduciary obligations. Indeed, in *Weyhrauch* the government goes so far as to affirmatively disclaim the state-law basis that it employed *here*, contending that "[m]aking state law an ingredient of mail fraud would fragment federal criminal law in a way harmful to federal policy interests" and would infringe state sovereignty by "attach[ing] to a set of state-law duties federal consequences that the States did not contemplate and may not desire." WB 43-44.

The government thus continues its uninterrupted 20-year spree of honest-services opportunism, in which prosecutors argue seemingly anything to secure convictions, including repudiation of the very position the Solicitor General now takes. Just a fortnight ago, the Third Circuit rejected the *government's* argument that "the breach of a fiduciary duty is not a necessary element of 1346." GB in *United States v. McGeehan*, No. 05-1954 at 37 (citation omitted); opinion reported at 2009 WL 3380678 (3d Cir. Oct. 22, 2009). The government assured *that* court that "a variety of tests" *other than* requiring proof of a fiduciary duty have "limit[ed] the scope of § 1346," including the foreseeable-economic-harm requirement (not yet adopted in that circuit). *Id*. at 39. And even under a fiduciary-duty requirement, the government leaves open the possibility that virtually *any* agent-principal relationship will do. WB 27 n.10 (deriving fiduciary obligations from a "'universal' rule for principals and agents, both public and private" (citations omitted)); *see also United States v. Middlemiss*, 217 F.3d 112, 120 (2d Cir. 2000) (noting that Section 1346 "does not require an actual fiduciary relationship" to convict one who "violated his

employer's rules regarding conflicts of interest and financial disclosures").

Thus, the only thing clear is that unless this Court stakes out unambiguous limits on the reach of such a malleable statute, including retention of the contemplated-economic-harm requirement, prosecutors will simply continue to make it up as they go along.

II. THE FAILURE TO INSTRUCT ON THE NEED TO FIND CONTEMPLATED ECONOMIC HARM SERIOUSLY PREJUDICED PETITIONERS

The error here was far from harmless. Neither side developed or had *reason* to develop a trial record bearing on either theory of contemplated-economic-harm that the government now proffers; the government successfully insisted such evidence was completely irrelevant. Pet. App. 207a-08a. Even so, the government's arguments are flatly contradicted by the record, which shows that petitioners sought and followed legal advice on whether to disclose non-compete payments and, in any event, disclosed their receipt both as management fees (as they were originally approved) and non-compete payments (as they had been recharacterized). There was no economic harm for petitioners to contemplate or foresee.

1. As a preliminary matter, the government's requested remand should be denied, because the Seventh Circuit already "*did* conduct harmless analysis." GB 40 (emphasis added). The government's principal ground for seeking a do-over is to allow that court to apply this Court's recent decision clarifying that "submission of an erroneous, alternative legal theory to the jury could be harmless error" under *Neder*. *Id*. (citing *Hedgpeth v. Pulido*, 129 S. Ct. 530 (2008) (per curiam)). But as the government

no doubt recognized at the certiorari stage, where it opposed review outright rather than suggesting remand, the Seventh Circuit already conducted harmless-error review on the strength of the government's *unopposed* claim that *Neder* provides the proper framework. Pet. App. 10a; Govt. C.A. Br. 59 n.10. The only *relevant* new development is the government's shift on how the error might be harmless, but that is reason to refuse considering these new arguments altogether, not to grant another bite at the apple below.[6]

2. The government now recognizes it cannot rest harmlessness on supposed proof of money-fraud, presumably because the lack of a unanimity-of-theory requirement for the fraud counts means it has the insurmountable burden of showing that *not one* juror convicted for honest-services fraud alone. Pet. Br. 55-56; Pet. 31. Likewise, the government knows it is fact—not argument (GB 4 n.1)—that the agreements at issue barred Hollinger's officers from competing post-termination with "any Publication" owned by APC or "any of its affiliates" (Pet. App. 159a)—a hundred or more publications at the time (Pet. Br. 9 n.4). A government witness's mistaken testimony about a document's wording cannot change the operative language that Kipnis drafted to legally bind the other two petitioners.

Additionally, the fact that the $5.5 million had previously been approved as management fees is not

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[6] Moreover, by taking this case for review, the Court *already* necessarily rejected the government's harmless-error gambit. *See United States v. Williams*, 504 U.S. 36, 40 (1992).

something that "some defendants at times suggested" (GB 4); the star witness consistently testified as such. The government's primary harmlessness argument in the court of appeals (*i.e.*, honest-services fraud was simply "dishonest" theft of money (Pet. App. 10a)) was doomed if petitioners and Radler were simply "mistaken" in believing the money was theirs. GB 4. Therefore, the government needed to peddle to the Seventh Circuit a "theory" that Radler had perjured himself: that despite Radler's testimony, "[petitioners] and Radler *knew* this money belonged to [Hollinger] and that they were stealing it disguised as non-compete payments." Govt. C.A. Br. 36 (emphasis added).

But the government's recently unsealed district court filing shows it did not think Radler a liar on this point.[7] Thus, it is no longer possible for the government to press the claim that petitioners dishonestly characterized *stolen* money. Rather, it must show that any rational juror convicting on the honest-services theory would have found that "the undisclosed recharacterization of management fees as non-competition payments *itself* exposed Hollinger to

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[7] The filing (*see* GB 5 n.2) instead shows that the government "ultimately determined that the information provided by Radler was accurate and complete," (Govt. Radler Sentencing Submission 5 (refiled Oct. 23, 2009)), meaning he repudiated the government's theory that he and the others intended to steal Hollinger's money. Indeed, the AUSAs even proclaimed (under seal) that Radler's testimony on counts 1 and 6 was one of "defendants' strongest arguments concerning Radler," because it was "inconsistent with the government's theory of the case." *Id.* at 16.

foreseeable economic harm." GB 42 (emphasis added).

3. Because the government won a ruling that it need not prove "foreseeable harm" (Pet. App. 208a), and since its constant refrain—until reaching this Court—was that honest-services fraud was just theft-without-the-hassle-of-proving-theft, not surprisingly the trial record falls well short of "overwhelming" proof that establishes "beyond a reasonable doubt that the jury verdict would have been the same absent the error." *Neder*, 527 U.S. at 16, 19.

The government's first post-trial theory posits a requisite harm three steps removed from the scheme: [1] petitioners "risk[ed] undermining public confidence in the integrity and competence" of management by "self-dealing" to obtain their lawful foreign-tax reduction, [2] such risks can "injur[e] the company's reputation," and [3] "reputational injury can have economic repercussions by affecting the willingness of others to do business with, work for, or invest in the company." GB 42-43. *No* juror was compelled to proceed past step one, because it is not "self-dealing" when previously approved payments are reclassified to benefit the employer by creating binding non-compete covenants. Moreover, nowhere did the government show that "others" would lose confidence in a corporation whose officers did so while lowering their personal taxes in full compliance with the tax laws.

Second, the government asserts "significant litigation risk" because "Hollinger did not disclose the payments in its SEC filings until April 2002" when it "falsely" described them. GB 43. But these allegedly false disclosures came a year *after* the scheme alleged in the counts 1, 6 and 7 ended. Pet. App. 35a

(scheme lasted until "at least in or about May 2001"). The jury *acquitted* petitioners of a different scheme that *did* include the 2002 filings. Pet. App. 60a (count 8), 75a, 78a (count 9). Moreover, there was no realistic risk of litigation because in March 2001 petitioners had already disclosed the *full* management fee approved for Ravelston *and* Ravelston's affiliation with petitioners. Govt Filing Exh. 9E(1) at 19-20 (2001 Proxy disclosing all management fees approved for 2000); J.A. 393a (same in 2002 10-K). And outside counsel had initially advised there was no obligation to disclose any non-compete payments. J.A. 79a-81a, 414a, 417a-22a.

Finally, the only way error on Count 7 could be harmless is if a juror acquitting outright on 90% of the alleged fraud (because unpersuaded by the key prosecution witnesses), and then convicting on the next 9% only after finding something *other than* an intent to defraud, nonetheless would have been "overwhelmed" by the same theft theory, based on the same type of testimony, from some of the very same witnesses, on the last 1%. That is highly unlikely. What distinguished Count 7 from the acquitted counts was Kipnis's oversight in not drawing up the approved non-compete agreements. Pet. Br. 10-11. As is clear from the court's entry of judgment of acquittal on count 7 as to *him*, that oversight was simply incongruent with intent to defraud. Nothing shows that Black or Boultbee contemplated economic harm to Hollinger either; their payments were duly authorized, as evidenced by a different director's approval and the board's unanimous vote to confirm and ratify it. J.A. 362a, 364a, 367a-68a, 380a-87a. A rational, *properly* instructed juror again would have been far from overwhelmed on the critical intent element.

4. The instructional error prejudiced petitioners on *all* counts, including obstruction. The government *now* disagrees, citing "overwhelming proof of Black's motive to undermine an inquiry into his mischaracterized payments, regardless whether that mischaracterization constitutes fraud." GB 45. But the government waived its intent-focused argument by not joining the issue when raised at the certiorari stage. The central point we argued then was that a jury assessing Black's state of mind—obstruction requires a *corrupt* intent—would have been far from "overwhelmed" if it knew that Black was really *innocent* of *every* "offense" under investigation.

This was all set forth in the petition. Once the voluminous prejudicial evidence spilling over from weeks of efforts to prove several other fraud, tax and RICO counts is wiped away, and after a jury, properly instructed, concludes that Black really committed *no* offense at all, nothing (certainly nothing overwhelming) remains to document an intent to "subvert or undermine" (J.A. 342a-343a) the government's misguided investigation. Pet. 11-12 n.7. The government is left with a man who helped his assistant move materials from a Toronto office to a Toronto residence mere days ahead of his eviction.

Rule 15.2 requires the respondent to point out "any perceived misstatement" of fact or law in the petition that "bears on what issues properly would be before the Court if certiorari were granted." The petition squarely raised the scope of *relief* available if the Court rules for petitioners on the questions presented: reversal of both the fraud and the obstruction convictions. And the government argued harmless error in opposing certiorari, plainly recognizing that the level of prejudice resulting from the error—

measured through consideration of the evidence, the jury instructions and the remainder of the trial record—was within the scope of the questions presented. The government cannot now artificially limit that prejudice inquiry to the counts it chooses. Because the government failed to abide by its "obligation to the Court to point out in the brief in opposition, and not later, any perceived misstatement" in the petition, its belated arguments for affirming the obstruction conviction must be "deemed waived." Sup. Ct. R. 15.2; *see also Carcieri v. Salazar*, 129 S. Ct. 1058, 1068 (2009).

Even belatedly, the government points to nothing "overwhelming" for its position, much less any *permissible* proof of "motive." It never denies that Black lacked *all* knowledge that the SEC was about to issue a *sixth* document on the eve of his eviction or that he had already let his lawyers copy *every* document in his office. JA 202a-03a. Nor is there proof that the boxes of personal effects and papers contained a single pertinent, unproduced document or that Black even knew what his secretary chose to pack up. The case was so tenuous on corrupt intent to impede a *U.S.* proceeding that the government instead repeatedly injected references to an irrelevant Canadian document preservation order (*e.g.* Tr 882, 14998-99), which Black was not accused, much less convicted, of violating.

The only thing "overwhelming" is the government's quest to salvage something—anything—from its disastrous prosecution. Because turning state-law duties into federal crimes apparently was not ambitious enough, the government manufactured an obstruction charge based entirely on conduct in a *foreign* country. The government desperately seeks to

keep Black in federal prison a few more years based on the movement of personal belongings taking place wholly in downtown Toronto, even though Black was unaware of the SEC document request that he supposedly evaded. The Court should also reject *that* absurd consequence of the lower court's willingness to let federal prosecutors make up the meaning of honest-services fraud as they go along.

III. THE LOWER COURT ERRED IN IMPOSING AN EXTRA-TEXTUAL APPELLATE SANCTION FOR DECLINING THE GOVERNMENT'S SUGGESTED FORM OF VERDICT

The government's brief extols the occasional "virtue of special verdicts," while acknowledging they are historically "viewed with disfavor." GB 47. The district judge no doubt would have considered these points had the government not *withdrawn* its suggestion for special verdicts. The government also presses *policy* arguments for curtailing a defendant's appellate rights if he opposes special verdicts. *Id.* at 48. No doubt, the Criminal Rules Committee would consider *those* arguments too if the government ever proposes a Rules amendment. But what the government proposed in this case deserves *no* consideration: a post hoc, non-textual sanction imposed, without notice, for suggesting *post*-verdict interrogatories rather than acquiescing in the government's suggestion to use "disfavored" *pre*-verdict interrogatories.

Nobody denies that courts occasionally employ special verdicts in criminal cases (especially where defendants agree to them), despite the lack of any textual authority in the rules. The Court might one day choose to review whether *that* is appropriate. The issue here, however, is whether federal rules permit *sanctions* when a defendant declines the gov-

ernment's suggestion to forgo a general verdict. The written rules plainly forbid this. *See* Fed. R. Crim. P. 57(b) ("No sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator was furnished with actual notice of the requirement before the noncompliance.").

There are at least two compelling reasons the Court should not use this case to depart from the normal process for creating punitive rules. First, the government's proposed sanction has no place in a case where the parties merely disagreed on *when*—not *whether*—special interrogatories should be used. Until this case, no court penalized a defendant for disagreeing about the *timing* of special interrogatories.

Petitioners' proposed *post*-verdict interrogatories would have just as effectively revealed whether any juror relied on the government's unlawful honest-services-fraud theory—*without* imposing heavy burdens on petitioners' jury-trial rights.[8] If there is any risk that special interrogatories would improperly encourage jurors to revisit their verdict (and the government argues there is not (GB 50)), *post*-verdict forms provide the only assurance that the jury's decision *is* final *before* it records its reasoning.

The agreement to *post*-verdict interrogatories also readily distinguishes petitioners from defendants who complain on appeal about errors (such as

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[8] Interrogatories posed *after* the verdict is returned are incapable of improperly influencing that verdict.

improper summation) that curative or limiting instructions might have mitigated. GB 47-48. The government cites no case holding that a defendant forfeits his right to such an appeal merely because he and the government disagreed over *when* a curative instruction should be given.[9]

The second reason to bar the government's bypass of the rulemaking process is that its ad-hoc sanction is deeply at odds with the most basic principles of fair notice. The Seventh Circuit is among the many courts that have long disfavored special verdicts, and petitioners cited and relied on authority to that effect. J.A. 430a-32a. There was no reason for petitioners to believe the rule had changed. Indeed, shortly before their trial, in another high-profile prosecution charging both types of mail fraud, obstruction and RICO, the same Office argued that the trial judge properly rejected the *defendant's* request for a special verdict to ensure juror unanimity, because such verdicts lack express authorization in "the Criminal Rules," are "'disfavored' in this Circuit," and are "never required in criminal cases." *United States v. Warner*, No. 02-506 (N.D. Ill.), D.E.

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[9] Moreover, nothing in our jurisprudence "generally disfavors" the practice of a judge using curative or limiting instructions to mitigate prejudice. Indeed, limiting instructions (unlike special verdicts) are expressly *authorized*. Fed. R. Evid. 105. And when a defendant turns down such an instruction it simply means that the court will consider the forgone benefit as *one* factor in assessing prejudice. *E.g.*, *United States v. Wheeler*, 540 F.3d 683, 693 (7th Cir. 2008). Under the Seventh Circuit's ruling, though, petitioners "forfeited their objection to the [jury] instruction" altogether. Pet. App. 11a.

832 at 72; opinion reported at 2006 WL 2583722 *34 (Sept. 7, 2006).

Our system of justice demands at least a modicum of notice before a defendant can be stripped of his right to prove that he sits in prison for conduct that is *not* a crime.[10] In denying petitioners that right, the lower court cited a "rule" that it first announced *after* petitioners supposedly violated it. Regardless whether that rule has any merit, it cannot properly be applied to them.

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[10] The government says petitioners "did not forfeit their claim that the jury instructions were erroneous." GB 52. Rather, petitioners were barred from relying on the rule (established in *Yates*) that such instructional error "requires reversal." *Id.* In other words, petitioners could still "claim" they were wrongly convicted, they just could not ask a court to do anything about it.

CONCLUSION

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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