No. _____

In The Supreme Court of the United States

ROBERT SORICH, TIMOTHY McCARTHY, and PATRICK SLATTERY,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. To establish honest services mail fraud under 18 U.S.C. §§ 1341 and 1346 by a state or local public official, must the government prove that the official breached a fiduciary duty rooted in state law?

2. To establish honest services mail fraud under 18 U.S.C. §§ 1341 and 1346 by a state or local public official, must the government prove that the official intended private gain to himself or a co-schemer?

3. If 18 U.S.C. § 1346 cannot be interpreted to include either a state law or a private gain limiting principle, should the statute be held unconstitutionally vague?

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PETITION FOR A WRIT OF CERTIORARI

Robert Sorich, Timothy McCarthy, and Patrick Slattery petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-33) is reported at 523 F.3d 702. The court of appeals' order denying petitioners' petition for rehearing (App. 96-102) is reported at 531 F.3d 501. The district court's order denying petitioners' pretrial motion to dismiss the indictment (App. 58-95) is reported at 427 F. Supp. 2d 820. The district court's order denying petitioners' post-trial motions (App. 34-57), its jury instructions (App. 135-43), and its oral rulings on jury instructions (App. 127-34) are unreported.

JURISDICTION

The court of appeals entered judgment on April 15, 2008. App. 1. The court denied a timely petition for rehearing on July 1, 2008. App. 96. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person

shall be . . . deprived of life, liberty, or property, without due process of law."

Section 1341 of Title 18, United States Code, provides in relevant part: "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 . . . for the purpose of executing such scheme or artifice or attempting so to do [uses the mails] shall be fined under this title or imprisoned not more than 20 years or both."

Section 1346 of Title 18, United States Code, provides: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

STATEMENT OF THE CASE

This case squarely raises a three-way split in the circuits over the proper interpretation of the honest services fraud statute (18 U.S.C. § 1346) in prosecutions of state and local officials for mail fraud. The case highlights the extraordinary elasticity of the statutory language ("honest services") and the corresponding power it confers on unelected federal prosecutors to impose their own codes of ethics on state and local officials. The Court should take the opportunity to resolve the split in the circuits and impose clear limits on § 1346.

The charges arise from petitioners' role in a long-established patronage hiring system in the City

of Chicago. The indictment charged petitioners with mail fraud, based on an alleged scheme to defraud the people of the City of Chicago and the City of Chicago of "money, property and the intangible right to the honest services of [petitioners, alleged co-conspirators,] and other City employees participating in the hiring and promotion process, and to obtain money and property by means of materially false and fraudulent pretenses, representations, promises and material omissions." App. 109-10.[1] The indictment alleged that petitioners and others "engaged in a systematic effort to provide financial benefits, in the form of City jobs and promotions, in exchange for campaign work," App. 111, and implemented that effort through sham interviews and falsified ratings of politically active job candidates, App. 112-19.

According to the indictment, the fiduciary duties underlying the honest services mail fraud theory arose from provisions of state and local law and from the so-called federal *Shakman* decree. The indictment alleged that, under consent orders and decrees entered by the United States District Court for the Northern District of Illinois in *Shakman v. Democratic Organization of Cook County*, 69 C 2145, City of Chicago employees were permanently enjoined from "directly or indirectly, in whole or in part," conditioning the hiring or promotion of city employees (other than for certain policymaking positions) on political work or affiliation. App. 108-

[1] Although the indictment alleged both the "money or property" and "honest services" theories of mail fraud, in light of the jury's general verdict, a legal defect in either of these theories requires a new trial. *See, e.g., Griffin v. United States*, 502 U.S. 46, 59 (1991).

09. The district court denied petitioners' pretrial motion challenging the honest services mail fraud theory. App. 58-95.

Trial began May 10, 2006. The government alleged in opening that the defendants had violated the federal *Shakman* decree. Tr. 34, 60. As its first exhibit it introduced the *Shakman* compliance manual. GX Personnel 1; Tr. 252-54. It presented extensive evidence concerning the *Shakman* decree and witnesses' understanding of its meaning. *E.g.*, Tr. 266-73, 1102, 1313-18, 2759, 4358. And it argued in closing that defendants violated the decree. *E.g.*, Tr. 4928, 4931-32, 4944, 5179-80, 5187-88.

Viewed in the light most favorable to the government, the evidence established that petitioners helped administer a political patronage system that affected hiring and promotion for positions such as motor truck driver, house drain inspector, and foreman in several of Chicago's 47 operating departments, including the Department of Streets and Sanitation, the Department of Sewers, the Department of Water, and the Department of Aviation. Under that system, political campaign coordinators and others, including aldermen and community leaders, submitted names to the Mayor's Office of Intergovernmental Affairs ("IGA") of campaign workers for whom they sought city jobs or promotions. Sorich--Assistant Director of IGA--compiled these requests into lists of job candidates, which he provided to the personnel directors of the

operating departments.[2] In most instances, persons on the IGA lists received jobs or promotions, usually along with other qualified candidates.

The evidence showed that the hiring and promotion process worked generally as follows. After Sorich provided the IGA list to the operating department personnel director, the director selected the persons on the list (along with other persons) for interviews by the operating department. The director made these screening selections from lists of qualified job candidates maintained by the Department of Personnel. *E.g.*, Tr. 2797-2812, 3721-23. The personnel director then ensured that the persons on IGA's list were among those receiving the highest scores on post-interview rating forms, which guaranteed that they would be hired or promoted. And the personnel director or another operating department employee falsely certified, under the federal *Shakman* decree, that political considerations had played no role in the hiring and promotion process.

It was undisputed at trial that the patronage hiring system had been in place long before petitioners obtained their roles in it and that Sorich took direction from higher-ups at the IGA. Tr. 1210-11, 1622, 2466-67, 2691, 4858. It was similarly undisputed that petitioners received no bribes, kickbacks, or other improper financial benefits for their role in administering that system. Tr. 867-68, 2107, 2628, 2632. The government conceded in

[2] McCarthy was Sorich's deputy at IGA from 2001 to 2005. Slattery held a position in the Department of Streets and Sanitation. App. 4.

closing argument that petitioners and their co-schemers did not receive any personal gain, Tr. 4786, and the court of appeals premised its ruling on the absence of personal gain by defendants, App. 10-16, 102. Although the government offered anecdotal evidence that in a few instances the patronage system resulted in the hiring of unqualified workers, the candidates involved in nearly all of the hiring sequences were qualified for the positions they received. Tr. 1030, 1046, 1063, 1263, 1294, 2159, 2549-50. Neither petitioners nor anyone else ever lost his job or was threatened with job loss for refusing to participate in the patronage system. Tr. 1111-12. And, although performing political work offered an advantage in obtaining jobs and promotions, the government presented no evidence that anyone was coerced to perform such work or fired, demoted, or otherwise punished for refusing to do so. Tr. 928, 1019, 1189, 1191, 1266, 1280, 1959-60, 2148, 2614, 2691, 2780, 3746.

The district court instructed the jury that the federal *Shakman* decree formed one of several sources of defendants' fiduciary duty owed to the City and its people. App. 137-41. It also instructed that, to convict for honest services mail fraud, the jury had to find that defendants "intended to deprive a governmental entity of the honest services of its employees for personal gain to a member of the scheme or another." App. 137; *see* App. 141 (jury must find that defendants "intended to misuse their positions for private gain for themselves or others"). Petitioners objected that the intended gain should be limited to the defendants or their co-schemers.

The jury convicted each of the petitioners on one or more mail fraud counts. Petitioners filed a motion for a new trial, in which they renewed their motion to dismiss and made related challenges to the government's mail fraud theory and to the court's instructions. The district court denied the motion. App. 34-57.

The court of appeals affirmed. App. 1-33. Acknowledging "the amorphous and open-ended nature of § 1346," the court observed that "courts have felt the need to find limiting principles." App. 8. The Seventh Circuit's "limiting principle," the court continued, "has been that the '[m]isuse of office (more broadly, misuse of position) *for private gain* is the line that separates run-of-the-mill violations of state-law fiduciary duty . . . from federal crime.'" App. 8-9 (quoting *United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998)) (emphasis added by panel). The court observed that the "private gain" limiting principle "not only cabins zealous prosecutors by insuring that not every violation of a fiduciary duty becomes a federal crime, but also reduces the risk of creating federal common law crimes, which are not permitted." App. 9.

The court of appeals conceded that the Seventh Circuit's "private gain" limiting principle for § 1346 "has come in for its share of criticism." App. 9. It noted that "[t]he Tenth Circuit, in rejecting the limitation, characterized it as an effort 'to judicially legislate by adding an element to honest services fraud which the text and structure of the fraud statutes do not justify.'" App. 9-10 (quoting *United States v. Welch*, 327 F.3d 1081, 1107 (10th Cir.

2003)). And, the court noted, the Third Circuit "stated that the [private gain] requirement 'adds little clarity to the scope of § 1346' and is, among other things 'under-inclusive' because it would not cover a situation--such as an undisclosed conflict of interest--that does not actually yield a benefit." App. 10 (quoting *United States v. Panarella*, 277 F.3d 678, 691-92 (3d Cir. 2002)).

Despite these criticisms, the court of appeals adhered to the "private gain" limiting principle. The court held, moreover, that private gain means gain to *anyone*, not merely gain to the defendant and his co-schemers, as petitioners contended. App. 10-16. In accordance with this interpretation of § 1346, the court found the gain to the persons who obtained jobs through patronage--none of whom were alleged or proven to be participants in the scheme--sufficient to satisfy the "private gain" requirement. App. 11.

The court of appeals rejected a different limiting principle adopted by the Third and Fifth Circuits in honest services fraud prosecutions of state and local public officials: that the government prove the defendant official violated a fiduciary duty arising under state law. App. 20 (citing *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997) (en banc), and *United States v. Murphy*, 323 F.3d 102, 116-17 (3d Cir. 2003)); *see* App. 9 (discussing state law limiting principle). And the court declined to find § 1346 unconstitutionally vague. App. 16-18.

Petitioners sought rehearing en banc. The court of appeals denied the petition. App. 96.

Dissenting from the denial, Judge Kanne, joined by Judge Posner, observed:

> Without explicitly saying so, we have left the impression that the use of political patronage in personnel hiring by the City of Chicago is a crime. Although no legislatively defined criminal offense outlaws patronage hiring by government entities in Illinois, such hiring is now seen as a crime because it violates the *Shakman* decrees--never mind that *Shakman* is simply a series of civil consent decrees subject only to civil penalties, and imposition of contempt if wilfully violated. Now, by judicial fiat, the *Shakman* decrees can operate to create a fiduciary duty which, if violated, deprives the public of "honest services," and thus is a basis for a federal crime under the mail-fraud statute, 18 U.S.C. § 1346.

App. 97.

Judge Kanne added that, by interpreting the "private gain" limiting principle to include gain to anyone, including a non-schemer, "the panel view greatly expands the scope of honest-services mail fraud." App. 99. The dissent declared that it would have been "prudent" for the Seventh Circuit to "revisit *en banc* whether we should follow the Third and Fifth Circuits and adopt the state-law limiting principle." App. 101. Judge Kanne expressed "substantial

concern about taking the position--absent *en banc* review--that a person can be prosecuted under § 1346 where (1) neither the defendant nor his co-schemers benefited from the fraud, and (2) the source of the fiduciary duty is a federal civil consent decree between two unrelated parties, which does not carry the force of state law." App. 102.

REASONS FOR GRANTING THE WRIT

1. The Court should grant the writ to resolve the entrenched and growing split in the circuits over the proper interpretation of 18 U.S.C. § 1346 in prosecutions of state and local officials under the mail fraud statute. The Seventh Circuit has rejected the "state law" limiting principle adopted by the Third and Fifth Circuits in favor of a "private gain" limiting principle. The Third and Tenth Circuits, in turn, have rejected the "private gain" limiting principle. The remaining circuits have taken varying (and often inconsistent) positions on the proper scope of § 1346. As a result of this disarray among the circuits, the federal government's preferred statute for prosecuting state and local corruption receives substantially different interpretations in different regions of the country.[3]

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[3] Between 1987 and 2006, there were federal corruption prosecutions of 7,033 state and local officials and another 5,706 private citizens charged in public corruption offenses involving state, local and federal officials. Public Integrity Section, Criminal Justice Division, United States Department of Justice, Report to Congress on the Activities and Operations of the Public Integrity Section for 2006, 45-46 (2006). Although the Report does not give a specific breakdown for honest services fraud prosecutions of state and local officials, the descriptions of state and local government prosecutions in 2006 suggest the

This split in the circuits over the proper interpretation of § 1346 has its roots in this Court's decision in *McNally v. United States*, 483 U.S. 350 (1987). Before *McNally*, the courts of appeals interpreted the mail fraud statute as criminalizing schemes to deprive the public of the honest services of public officials. *McNally* rejected that interpretation. The Court declared that "[r]ather 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." 483 U.S. at 360.

The next year, in response to *McNally*, Congress enacted § 1346. *See* Pub. L. 100-690, Title VII, § 7603(a), 102 Stat. 4181, 4508 (Nov. 18, 1988). The statute provides that "[f]or 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." 18 U.S.C. § 1346. "[T]he text of § 1346 was never referred to any committee of either the House or the Senate, was never the subject of any committee report from either the House or the Senate, and was never the subject of any floor debate reported in the Congressional Record." *Brumley*, 116 F.3d at 742 (Jolly, J., dissenting). The sparse legislative history of § 1346

(continued...)

bulk of the defendants were charged with mail or wire fraud. *Id.* at 33-39.

does not illuminate the meaning of the key phrase "honest services."

2. Because Congress did not speak clearly in 1988 when it expanded the federal fraud statutes to include the "intangible right of honest services," the courts of appeals have been left to devise their own limiting principles to define the outer boundaries of § 1346. As the First Circuit recently observed, "The 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 a legislative vote), difficult questions arise in giving coherent content to the phrase through judicial glosses." *United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008). The court added: "Closely related concerns are assuring fair notice to those governed by the statute . . . and cabining the statute--a serious crime with severe penalties--lest it embrace every kind of legal or ethical abuse remotely connected to the holding of a governmental position." *Id.* Courts also have recognized that the statute's "amorphous and open-ended nature"[4] may violate the prohibition on federal common law crimes, "a beastie that many decisions say cannot exist." *United States v. Bloom*, 149 F.3d at 654; *see, e.g., United States v. Brown*, 459 F.3d 509, 522 n.13 (5th Cir. 2006) (noting danger of "defining an ever-expanding and ever-evolving federal common-law crime" through judicial interpretation of § 1346).

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[4] App. 8; *see United States v. Brown*, 459 F.3d 509, 523 (5th Cir. 2006).

Federalism concerns as well have shaped the courts' interpretation of § 1346 in prosecutions of state and local officials. As the en banc Fifth Circuit observed, "We find nothing to suggest that Congress was attempting in § 1346 to garner to the federal government the right to impose upon states a federal vision of appropriate services--to establish, in other words, an ethical regime for state employees. Such a taking of power would sorely tax separation of powers and erode our federalist structure." *Brumley*, 116 F.3d at 734; *see, e.g., United States v. Turner*, 465 F.3d 667, 683 (6th Cir. 2006) (interpreting § 1346 narrowly in light of the "requirement that Congress speak clearly when enacting criminal statutes and, to an even greater degree, when altering the federal-state balance in the prosecutions of crimes"); *Panarella*, 277 F.3d at 693 ("We are mindful that the prosecution of state public officials for honest services fraud raises federalism concerns about the appropriateness of the federal government's interference with the operation of state and local governments."); *cf. Cleveland v. United States*, 531 U.S. 12, 24 (2000) (declining to "approve a sweeping expansion of federal criminal jurisdiction [under the mail fraud statute] in the absence of a clear statement by Congress"); *McNally*, 483 U.S. at 360 (declining to read mail the mail fraud statute in a way that would "involve[] the Federal Government in setting standards of disclosure and good government for local and state officials").

Driven by these federalism, vagueness, and fair notice concerns, the courts of appeals have developed two markedly different limiting principles for inter-

preting § 1346 in prosecutions of state and local officials. The en banc Fifth Circuit held in *Brumley* that the government must prove that the defendant official violated a fiduciary duty arising under state law. *Brumley*, 116 F.3d at 734. The Seventh Circuit rejected the *Brumley* state law limiting principle[5] and devised instead the "private gain" principle that the panel applied (and expanded) in this case.[6] The Third Circuit, in turn, found that the "private gain" standard "adds little clarity to the scope of § 1346" and "risks being both over-inclusive and under-inclusive as a limiting principle." *Panarella*, 277 F.3d at 691-92. That court has since aligned itself with the Fifth Circuit's state law limiting principle.[7]

The remaining circuits have yet to take a clear position on § 1346. The Tenth Circuit has rejected the "private gain" principle, at least at the pleading stage, as "judicial[] legislat[ion]," *Welch*, 327 F.3d at 1107, but it has not yet addressed the state law principle. On the other hand, the Fourth and Eleventh Circuits appear to reject the state law limiting principle, but those courts have not addressed the *Bloom* private gain principle.[8] The First Circuit has declined to treat a state law

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[5] *See* App. 20; *United States v. Martin*, 195 F.3d 961, 967 (7th Cir. 1999); *Bloom*, 149 F.3d at 654-55.

[6] *See, e.g.*, App. 10-16; *United States v. Thompson*, 484 F.3d 877, 882 (7th Cir. 2007); *Bloom*, 149 F.3d at 654-55.

[7] *See, e.g., United States v. Kemp*, 500 F.3d 257, 283 (3d Cir. 2007), *cert. denied*, 128 S. Ct. 1329 (2008); *Murphy*, 323 F.3d at 116-17.

[8] *See, e.g., United States v. DeVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999); *United States v. Bryan*, 58 F.3d 933, 940 (4th Cir. 1995).

fiduciary duty as an essential predicate for an honest services prosecution, but the court recently acknowledged that "[t]he relationship between state law and the federal honest services statute is unsettled."[9] The Second, Sixth, Eighth, Ninth, and District of Columbia Circuits have not squarely addressed the application of either limiting principle,[10] although the Ninth Circuit appears poised to do so.[11]

It is remarkable that, two decades after Congress enacted § 1346, such confusion surrounds the interpretation of one of the federal government's most frequently used statutes in prosecuting state and local public corruption.[12] No purpose is served by letting the proper construction of § 1346 percolate any longer in the lower courts; if anything, the split will simply become more pronounced as the undecided circuits choose one limiting principle or

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[9] *Urciuoli*, 513 F.3d at 298.

[10] *See, e.g., United States v. Jennings*, 487 F.3d 564, 578 (8th Cir. 2007) ("[W]e save our discussion of the limits of § 1346 for a future case.").

[11] *See United States v. Weyhrauch*, Case No. 07-30339 (9th Cir., argued Aug. 4, 2008) (state law limiting principle).

[12] The honest services statute has generated substantial scholarly commentary. For a discussion of the development of the honest services theory, see Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 Harv. J. on Legis. 153, 158-70 (1994). For scholarship supporting the *Brumley* state law approach, see George D. Brown, *Should Federalism Shield Corruption?--Mail Fraud, State Law and Post-Lopez Analysis*, 82 Cornell L. Rev. 225 (1997; Roderick M. Hills, Jr., *The Role and Limits of Legal Regulation of Conflicts of Interest (Part I): Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?*, 6 Theoretical Inquiry L. 113 (2005.

another (or reject both). This Court should step in, as it has in *McNally*, *Cleveland*, and other mail fraud cases, to ensure that the honest services statute receives a uniform interpretation nationwide.[13]

3. For the reasons set out in *Brumley* and *Panarella*, the Court should adopt the state law limiting principle over the private gain principle. The state law principle "mitigates the federalism concerns that arise from federal prosecutions of local public officials . . . in a way that 'misuse of office for personal gain' does not." *Panarella*, 277 F.3d at 693. The federalism concern is particularly acute here, where federal prosecutors premised petitioners' fiduciary duty on violation of a federal consent decree to which petitioners are not parties and which their alleged victim--the City of Chicago--has no standing to enforce and has opposed in court for years.[14] In addition to reducing federal intrusion into state and

[13] Given the uncertainty of the law under § 1346, it is understandable that the Attorney General recently justified the decision not to prosecute the Department of Justice officials implicated in improper political hiring by noting that "not every wrong, or even every violation of the law, is a crime." Prepared Remarks of Attorney General Michael B. Mukasey Before the American Bar Association, Aug. 12, 2008, available at http://www.usdoj.gov/ag/speeches/2008/ag-speech-0808121.html. The Attorney General's remarks, however, highlight a problem with a statute that lacks clear meaning: conduct deemed criminal in one part of the country may be viewed as a mere violation of the civil service rules in another part.

[14] *See, e.g., Shakman v. City of Chicago*, 426 F.3d 925 (7th Cir. 2005). The indictment charged that petitioners' fiduciary duty arose under various provisions of state and local law, as well as under the federal *Shakman* decree. App. 107-09. But the prosecution emphasized the *Shakman* decree heavily throughout the trial, and it is impossible to tell from the general verdict whether the jury relied exclusively on the decree or on other sources of law as well.

local government affairs, the state law limiting principle ensures that state and local officials have fair notice that their conduct is criminal. *See, e.g., id.* at 698.

The Seventh Circuit's decision in this case highlights the inadequacies of the private gain limiting principle. The court of appeals expanded the private gain requirement to include private gain to *anyone*--not merely to the official and his co-schemers, as previous Seventh Circuit cases had suggested. App. 10-16. Under the court of appeals' standard, the government can obtain an honest services mail fraud conviction if it shows that the defendant official intended his breach of fiduciary duty to produce *any* gain of *any* kind to *anyone*--a standard that can almost always be met. The court's decision thus runs counter to *Bloom*'s central point that "[n]ot every breach of every fiduciary duty works a criminal fraud." 149 F.3d at 654 (quotation omitted). To place any meaningful limit on the scope of § 1346, the private gain principle must require proof that the defendant intended gain to himself or his co-schemers.

The court of appeals further expanded the scope of § 1346 in rejecting petitioners' contention that the fiduciary duty must arise under state law. The court of appeals not only rejected the state law limiting principle; it observed that state or local officials' fiduciary duty might exist "inherently," "merely by virtue of being public officials." App. 20 (citing *United States v. DeVegter*, 198 F.3d at 1328).[15]

[15] The court of appeals also cited with apparent approval several cases suggesting that a fiduciary duty under § 1346 could arise

It is an extraordinary proposition that state and local officials owe a fiduciary duty to the citizens they serve under *federal* common law--or, for that matter, under a *federal* consent decree--enforceable upon breach by a *federal* mail fraud prosecution, rather than a prosecution by state or local authorities under state or local law (or, under appropriate circumstances, a contempt prosecution for willful violation of the federal consent decree). *Brumley* underscores the flaw in this approach: To recognize a federal common law duty of honest services independent of state law "would offer § 1346 as an enforcer of federal preferences of 'good government' with attendant potential for large federal inroads into state matters and genuine difficulties of vagueness." 116 F.3d at 735

4. The search for an interpretive principle to cabin the "amorphous and open-ended" language of § 1346 raises two further questions: whether a court may properly read into the statute either of the limiting principles the courts of appeals have adopted and, if not, whether the statute must be held unconstitutionally vague.

This Court has held that "[l]egislatures and not courts should define criminal activity." *United States v. Bass*, 404 U.S. 336, 348 (1971). It is at least arguable, therefore, that it is for Congress, and not

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(continued...)

from such disparate sources as an employee handbook and a power of attorney agreement. App. 20 (citing *United States v. George*, 477 F.2d 508, 514 n.7 (7th Cir. 1973), and *United States v. Williams*, 441 F.3d 716, 723-24 (9th Cir. 2006)).

the courts, to set limits on the vague language of § 1346. As Judge Jacobs put it in dissent, "[T]he splintering among the circuits demonstrates [that] section 1346 effectively imposes upon courts a role they cannot perform. When courts undertake to engage in legislative drafting, the process takes decades and the work is performed by unelected officials without the requisite skills or expertise; and as the statutory meaning is invented and accreted, prosecutors are unconstrained and people go to jail for inchoate offenses." *United States v. Rybicki*, 354 F.3d 124, 164 (2d at Cir. 2003) (en banc) (Jacobs, J., dissenting); *see, e.g., Brumley*, 116 F.3d at 736 (Jolly, J., dissenting) (accusing the majority of "assum[ing] a role somewhere between a philosopher king and a legislator to create its own definitions of the terms of a criminal statute").

If the Court agrees with Judges Jacobs and Jolly that interpreting § 1346 to include a limiting principle amounts to impermissible judicial legislation, it should consider whether the statute, shorn of judicially created limits, is unconstitutionally vague under the Fifth Amendment Due Process Clause. "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." *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008).

Section 1346 without a limiting principle violates due process under the *Williams* standard. Courts have recognized that the statute "is vague and

amorphous on its face and depends for its constitutionality on the clarity divined from a jumble of disparate cases." *Brown*, 459 F.3d at 523; *see, e.g., Rybicki*, 354 F.3d at 135-38 (looking to case law to determine the meaning of § 1346 because neither its language nor the "sparse" legislative history provides adequate guidance). But the "disparate cases" that give the statute "clarity" reflect the limiting principles that courts have read into the opaque language of § 1346. If those limiting principles may not be engrafted on the statutory language, then § 1346 surely "fail[s] to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits" and "authorize[s] and even encourage[s] arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion); *see, e.g., Williams*, 128 S. Ct. at 1845; *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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