



No. 08-1196

IN THE
Supreme Court of the United States

BRUCE WEYHRAUCH,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

*On Petition for a Writ of Certiorari to the United
States Court of Appeals for the Ninth Circuit*

REPLY FOR PETITIONER

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ARGUMENT

Petitioner seeks certiorari on the question, squarely presented by a decision of the Ninth Circuit, whether 18 U.S.C. § 1346's extension of the federal fraud statutes to schemes to deny "the intangible right of honest services" mandates the creation of a federal common law defining the disclosure obligations of state government officials. There is a sharp split in the circuits on this issue, Pet. 10-14, and a substantial and growing volume of cases in the federal courts that turn upon it, *id.* at 25-26.

The decision below to derive criminally enforceable substantive disclosure obligations of state officials as a matter of federal common law flies in the face of this Court's extensive jurisprudence addressing the circumstances that justify federal common law making; the impropriety of unduly vague constructions of criminal statutes; the requirement of an unmistakably clear legislative statement to support judicial constructions impinging on sovereign state powers; and the rule of lenity dictating a narrow construction of ambiguous criminal statutes. Pet. 14-25.

Other than a single half-hearted assertion that the court below did not in fact require the meaning of "honest services" to be determined as a matter of federal common law, Opp. 8, the government does not directly address any of these points. Instead, it rewrites the question presented to avoid any reference to the court's clear holding that the nature of disclosures required by "honest services" is a matter of federal common law.

The government thus focuses only on the conclusion to which the Ninth Circuit's holding leads—that violation of a state law disclosure

requirement is not necessary in order to establish honest services fraud on the basis of a state official's nondisclosure. Addressing that issue rather than the one presented in the petition, the government seeks to minimize the conflict presented and argues that an interlocutory ruling to that effect does not merit this Court's attention. Opp. 6.

The notion that duties encompassed within the concept of "honest services" are to be determined as a matter of federal common law, rather than by reference to existing requirements found elsewhere in the law, is implicit, if not explicit, in most of the circuit court decisions interpreting § 1346. It is also at the root of much of the confusion and inconsistency that marks present jurisprudence construing that provision. Reviewing the Ninth Circuit's fully articulated holding on this point, including its express rejection of arguments to the contrary, would provide a unique opportunity to address the statute's confused state at a fundamental level. The Court should thus grant review of the question presented in the petition.

I. The Ninth Circuit Clearly Held That The Disclosure Obligations Of State Officials Are To Be Governed By A Uniform Body Of Federal Common Law

The decision below contains a definitive and unambiguous holding that the disclosure obligations of state officials whose breach may be subject to prosecution under 18 U.S.C. § 1346 are determined by a uniform body of federal common law. The district court examined the government's proffered evidence of Alaska state ethics provisions and practices, and concluded that "Alaska law imposes no [duty to disclose] with respect to the facts here." Pet.

App. 30a. Observing that “[n]o federal statute is cited,” the court thus concluded that the government’s ability to proceed with its non-disclosure evidence “turns on whether federal common law may be used to provide the requisite duty to disclose.” *Id.* After extensive discussion of the case law bearing on that point, the district court announced that it would “follow [*United States v. Brumley*,” and answer that question in the negative. *Id.* at 35a.

Without questioning the district court’s conclusions that no Alaska disclosure obligation was implicated by the alleged facts and that no federal provision had been invoked—issues not even raised on appeal by the government—the Ninth Circuit reversed. The court noted the approaches taken by the Fifth and Third Circuits, requiring a showing of “specific duties established by . . . law,” *id.* at 12a, and also observed that the “majority of circuits . . . have held [to the contrary] that the meaning of ‘honest services’ is governed by a uniform federal standard inherent in 1346. . . .” *Id.* The court discussed at length the federalism and other concerns advanced by the Fifth and Third Circuits in rejecting a uniform federal rule independent of pre-existing legal requirements, but ultimately found them unpersuasive. *Id.* at 13a-15a.

The Ninth Circuit thus reversed the district court’s refusal to rely on federal common law, holding “that 18 U.S.C. § 1346 establishes a uniform standard for ‘honest services’ that governs *every* public official and that the government does not need to prove an independent violation of state law to sustain an honest services fraud conviction.” *Id.* at 21a (emphasis in original).

II. There Is A Clear Split In The Circuits On This Question

As the court below noted, Pet. App. 12a, most courts of appeals have proceeded on a clear, if often unstated, premise that the requirement of honest services is a directive to the federal courts to expound a uniform body of federal law. But, contrary to the government's suggestion that no circuit court has yet rejected the Ninth Circuit's position that a public official's disclosure duties are to be defined under federal common law, Opp. 9-11, both the Third and Fifth Circuits have squarely rejected the common law approach.

The government contends that the Fifth Circuit's opinion in *United States v. Brumley*, 116 F.3d 728 (1997) (en banc), "does not directly support" the petition because *Brumley* did not involve a violation of a public official's duty to disclose. The government gets the facts of *Brumley* correct, but misconstrues the opinion's significance. The defendant in *Brumley*, a judicial officer, was convicted under § 1346 for accepting benefits from persons who appeared before him. *See id.* at 731. In reviewing the conviction, the en banc Fifth Circuit categorically foreclosed the government from "impos[ing] upon states a federal vision of appropriate services—to establish, in other words, an ethical regime for state employees." *Id.* at 734. The court expressly rejected the notion that § 1346 announced "a common law crime." *Id.* at 732.

The government suggests that *Brumley*, limited to its facts, allows for the prosecution of public officials under § 1346 for violating *disclosure* duties mandated by federal common law. But such a distinction is directly at odds with the en banc

Brumley court's express rejection of a federal common law "ethical regime for state employees."

The government also argues that the Third Circuit has not yet rejected the common law approach. Opp. 9-10. The government points to language in *United States v. Murphy*, 323 F.3d 102 (3d Cir. 2002), purporting to leave the question open, but ignores the court's declaration, following a discussion of the fair notice and federalism concerns triggered by an open-ended reading of § 1346, that "[w]e thus endorse (and are supported by)" *Brumley*'s "stringent[]" interpretation of § 1346. *Id.* at 116. *Murphy* leaves no doubt that the Third Circuit requires evidence that the public official violated a "clearly established fiduciary relationship or legal duty in either federal or state law" to support a conviction under § 1346. *Id.* at 117.

III. The Interlocutory Posture Of This Case Offers No Reason To Decline Review Of The Ninth Circuit's Fully Articulated Holding

The government argues that the interlocutory posture of this case makes it an unsuitable vehicle for resolving this split in the circuits. But this Court not infrequently reviews non-final federal court decisions where, notwithstanding their interlocutory posture, the decision embodies a clear and fully articulated holding on an issue that otherwise merits the Court's attention.

The Court has undertaken interlocutory review in criminal cases where, as here, a ruling on a certworthy issue has cleared the way for a prosecution to proceed. *See, e.g., Bates v. United States*, 522 U.S. 23, 28-29 (1997) (granting review and affirming interlocutory decision that reversed dismissal of indictment and ruled that prosecution

under 20 U.S.C. § 1097(a) could proceed without an allegation of “intent to injure or defraud the United States”); *Oliver v. United States*, 466 U.S. 170, 174 (1984) (granting review and affirming interlocutory decision that prosecution could proceed based on discovery of marijuana located in field behind locked gate and no trespassing sign because the search was permissible under the open fields doctrine).

It has also done so in a broad array of civil cases. *See, e.g., Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 22 (2004) (granting review and reversing interlocutory decision allowing property loss suit to proceed unconstrained by liability limitations in bills of lading, contrary to applicable principles of federal maritime law); *Breuer v. Jim’s Concrete of Brevard, Inc.*, 538 U.S. 691, 694 (2003) (granting review and affirming interlocutory decision that an employee’s FLSA action can be removed to federal court by the employer under 28 U.S.C. § 1441(a)).

The decision below embodies a thoroughly considered and fully articulated holding adopting a federal common law approach to interpretation of the honest services doctrine, and specifically addressing the arguments that have been offered for rejecting that position. The decision is recognized as the settled law of the circuit, *see United States v. Kincaid-Chauncey*, 556 F.3d 923, 947 (9th Cir. 2009) (Berzon, J., concurring); *United States v. Harris*, Nos. 06-50194, 06-50200, 06-50225, 2009 WL 497272, at *1 (9th Cir. Feb. 27, 2009) (unpublished), and will be binding on courts throughout the circuit to require application of a common law approach to cases brought under § 1346.

In addition to having consequences that are “fundamental to the further conduct of [this] case,”

United States v. Gen. Motors Corp., 323 U.S. 373, 377 (1945), the Ninth Circuit’s decision has already “produced immediate consequences” with much broader significance. *Mazurek v. Armstrong*, 520 U.S. 968, 975 (1997). By sanctioning the prosecution of omissions to disclose that are fully consistent with Alaska law, the decision below “forecloses [Alaska] from experimenting and exercising [its] own judgment in an area to which States lay claim by right of history and expertise.” *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring). The federal government’s prosecution of petitioner for nondisclosure, which rides roughshod over Alaska’s legislative ethics framework, is itself an intrusion on Alaska’s sovereignty, whether or not a conviction is obtained ultimately on that count.

IV. This Case Is Made More Certworthy By The Court’s Grant Of Review In *Black v. United States*, No. 08-876

An additional compelling reason to grant review at this time is the Court’s recent decision to grant review in *Black v. United States*, 530 F.3d 596 (7th Cir. 2008), *cert. granted*, 2009 WL 62169 (U.S. May 18, 2009) (No. 08-876). In *Black*, this Court has before it an application of the deprivation of honest services doctrine arising from the conduct of private parties alleged to have improperly secured a private gain. Because the Court’s decision in *Black* will likely have consequences in the cases more commonly brought against public officials—including those where no private gain is alleged—the Court’s deliberations would be aided by simultaneous consideration of such a case.

At trial, the petitioners in *Black* sought an instruction that, for the government to prevail on its

honest services charge, the defendants' fraudulently obtained private gain must be at the expense of the party to whom the defendant owed his honest services—in that case, Hollinger International, of which they were senior executives. The *Black* petitioners argued that a denial of honest services cannot arise simply from their mischaracterization of money they received from Hollinger as payments for a bogus non-compete agreement, if the payments were otherwise proper. Specifically, they argued that the money was properly paid as compensation for management services rendered, so that Hollinger suffered no financial loss. Brief in Opposition of United States at 6, *Black v. United States*, No. 08-876 (U.S. Apr. 13, 2009), 2009 WL 1021542.

The Seventh Circuit rejected this contention, ruling that it would be no defense that the mischaracterized payments might arguably be justifiable as compensation for other services, and affirmed the conviction. See *Black*, 530 F.3d at 601.

It is notable that the Seventh Circuit is one of the handful of circuits which, like the Ninth Circuit, have overtly recognized that § 1346's honest services provision is a mandate for federal common law making. See Pet. 13. It is notable, too, that the doctrinal premise in *Black*—the Seventh Circuit's rule that private gain must be shown to establish honest services fraud—is itself acknowledged by that court to be an instance of federal common law making. See *United States v. Sorich*, 523 F.3d 702, 708 (7th Cir. 2008) (reaffirming private gain test while acknowledging criticism that it amounts to “judicial[] legislat[ion]”), *cert. denied*, 129 S. Ct. 1308 (2009). This premise that private gain must be proven to establish a denial of honest services has been explicitly rejected by several courts of appeals,

see *United States v. Welch*, 327 F.3d 1081, 1107 (10th Cir. 2003); *United States v. Panarella*, 277 F.3d 678, 691-92 (3d Cir. 2002), and the Seventh Circuit itself has noted that its “private gain limitation has not been adopted by other circuits.” *Sorich*, 523 F.3d at 708.

Accordingly, the specific question presented in *Black* arises only after the resolution of two antecedent and more fundamental questions: Is the meaning of honest services a matter of federal common law, as the Ninth and Seventh Circuits have held? And if so, is the Seventh Circuit’s private gain test a proper exercise of that power?

A grant of review in the present case would focus this Court’s attention on the ultimate premise that § 1346 is a mandate for open-ended federal common law making. By addressing this premise directly, this Court will go a long way toward clarifying the meaning of “honest services” and the sources from which its meaning is to be derived. Attention to these issues will be illuminating for the Court’s consideration of *Black*, where the question presented focuses on one narrow doctrinal question and presupposes the correctness of a federal common law approach.

In addition, while the narrow doctrinal question presented in *Black* about private gain and loss arises directly in a relatively small proportion of honest services cases confronted by the federal courts, the implications of the Court’s holding will likely be felt far more broadly.

It is of course essential to “interpret a statute consistently” across all areas of its application. *Leocal v. Ashcroft*, 543 U.S. 1, 11-12 n.8 (2005). To give the same statutory terms “a different meaning

for each category [of application] would be to invent a statute rather than interpret one.” *Clark v. Martinez*, 543 U.S. 371, 378 (2005); see *United States v. Santos*, 128 S. Ct. 2020, 2030 (2008) (plurality opinion). Accordingly, the Court’s consideration of the narrow question presented in *Black* must be undertaken with awareness of the possible consequences the decision may have in other contexts. This is especially true of the statute’s more common application to honest services fraud by public officials, including prosecutions, like the present one, based on nondisclosures but no private gain.

In particular, cases like the present one—a prosecution of a state legislator for failure to disclose conversations with a private party with an interest in pending legislation—should be borne in mind because of the unique federalism considerations they present. Prosecutions of state officials for denial of the right of honest services raise the question of just what obligations of honesty those officials owe to their governments and citizens. An open-ended power of the federal courts to define those obligations as a matter of federal common law, rather than looking to existing legal requirements and especially duties under state law, raises a serious question of invading the “substantial sovereign powers” of the states. *Gregory v. Ashcroft*, 501 U.S. 452, 461 (1991); Pet. 22.

More specifically, Alaska has made an express policy decision in favor of a model of governance by a part-time, citizen-legislature, and has intentionally adopted rules to facilitate the ability of such legislators to earn outside income, and to avoid imposing burdens that would discourage citizens from seeking government service. See Pet. 7 n.1. In that choice, Alaska acts on sound footing, well within the prerogatives allowed it under our federal

structure. See Roderick M. Hills, Jr., *Corruption and Federalism: (When) Do Federal Criminal Prosecutions Improve Non-Federal Democracy?*, 6 THEORETICAL INQ. L. 113, 120-22 (2005). The decision below that the federal courts, not the sovereign states, will define the disclosure obligations of state officials whose violation may be punished as a federal felony, is thus a severe affront to our federal structure.

In sum, this Court's first encounter with the problems presented by § 1346's "honest services" provision will be greatly aided by dealing at the outset with the fundamental, conceptual wrong turn taken by most courts at the beginning of the inquiry. A decision to hear this case thus will be especially beneficial in the context of the Court's review of *Black*, where the Seventh Circuit's candid invocation of common law, in creating a private gain test and rejecting any state law limiting principle, see *Sorich*, 523 F.3d at 708, is an aspect of the holding below that the petitioners in *Black* do not even challenge.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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