No. 08-410

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

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The National Association of Criminal Defense Lawyers ("NACDL") respectfully submits this brief as *amicus curiae* in support of the petition for a writ of certiorari in this case.[1]

INTEREST OF AMICUS CURIAE

NACDL is a non-profit organization with direct national membership of more than 11,000 attorneys, with an additional 28,000 affiliate members in every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice.

In keeping with that stated mission, NACDL is dedicated to the preservation and improvement of a criminal justice system that provides fair notice to

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[1] Pursuant to Rule 37.2(a), NACDL provided timely notice of its intent to file this brief, and the parties have given their written consent to its filing. Pursuant to Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

defendants. NACDL frequently files briefs before this Court in cases implicating NACDL's substantial interest in the constitutionality and proper interpretation of federal criminal statutes.

INTRODUCTION AND SUMMARY OF ARGUMENT

The petition presents several questions of national importance concerning the scope of "honest services" mail fraud. In *McNally v. United States*, 483 U.S. 350 (1987), this Court limited application of the federal mail fraud statute, 18 U.S.C. § 1341, to frauds involving money or property rights. *McNally*, 483 U.S. at 359. "If Congress desires to go further" and prohibit honest services fraud, the Court explained, "it must speak more clearly" than it did in the prior statute. *Id.* at 360.

Congress has since spoken, but far from "clearly." In response to *McNally*, it enacted 18 U.S.C. § 1346, which extends the definition of mail fraud to include "a scheme or artifice to deprive another of the intangible right of honest services." That elliptical phrase was ostensibly intended to codify a body of pre-*McNally* case law applying the mail fraud statute to a wide variety of misconduct by government officials and private parties. *See McNally*, 483 U.S. at 362-64 (Stevens, J., dissenting).

But the evolving, judge-made "honest services" standard was riddled with ambiguity when *McNally* was decided and remains deeply conflicted today. Courts of appeals have divided at every critical step in giving meaning to the statute: in determining whether previous case law sets the outer limits of liability, in determining whether an independent

violation of state law is required, and in determining whether the defendant must seek "private gain." Because the text of § 1346 offers courts no guidance in resolving even these basic questions, it is time again for this Court to intervene and compel genuine clarity in the definition of a criminal act of honest services fraud.

The fractured approaches of courts of appeals are but symptoms of the statute's true, fundamental defect: § 1346 is unconstitutionally vague, in violation of the Fifth Amendment's guarantee of due process of law. For the same reason the statute provides no meaningful guidance to courts, it fails to provide criminal defendants with fair notice of what conduct is prohibited. As this case illustrates, the statute leaves defendants to guess whether they can avoid federal charges by complying with state law, by refraining from actions for "private gain," or by steering clear of the specific acts that previous courts have characterized as violations. The problem is not just that different courts have given different answers, but that *any* court could reach *any* answer, making it impossible for government officials and private parties to know how to conform their conduct to federal law. That uncertainty is inherent in the statute, which on its face simply recites a vague common-law standard and forces courts to—quite literally—make it up as they go along. This Court's review is urgently needed.

ARGUMENT

I. COURTS OF APPEALS ARE HOPELESSLY DIVIDED IN THEIR ATTEMPTS TO GIVE MEANING TO § 1346

The statute criminalizing "honest services" mail fraud, 18 U.S.C. § 1346, was designed to reinstate a body of preexisting case law applying the original statute far beyond its written words. As might be expected in a body of law made by different judges in different jurisdictions, unconstrained by statutory text, the case law at the time of *McNally* was riddled with inconsistencies. Writing that body of law into the statute through a vague descriptor did nothing to solve that problem. To the contrary, the situation has only worsened in subsequent years, as courts of appeals have divided at every critical step in attempting to define the scope of the statute. *See generally United States v. Rybicki*, 354 F.3d 124, 162-63 (2d Cir. 2003) (Jacobs, J., dissenting) (describing the "wide disagreement among the circuits as to the elements of the 'honest services' offense"); Daniel C. Cleveland, Note, *Once Again, It Is Time to "Speak Clearly" About § 1346 and the Intangible Rights of Honest Services Doctrine in Mail and Wire Fraud*, 34 N. Ky. L. Rev. 117, 125-26 (2007) (noting that Congress's enactment of § 1346 only "muddied the waters" and has triggered "a number of circuit splits").

A. Section 1346 Reinstated Pre-*McNally* Case Law Without Resolving Underlying Conflicts As To The Meaning Of "Honest Services" Mail Fraud

This Court in *McNally* considered "a line of decisions from the Courts of Appeals holding that the mail fraud statute proscribes schemes to defraud citizens of their intangible rights to honest and impartial government." 483 U.S. at 355. The general mail fraud statute then prohibited "any scheme or artifice to defraud" using the mails. 18 U.S.C. § 1341. By its terms, the Court observed, the statute did "not refer to the intangible right of the citizenry to good government." *McNally*, 483 U.S. at 356. The Court concluded that construing the mail fraud statute to reach frauds involving intangible rights would be inconsistent with the provision's text, history, and intended scope. *Id.* at 356-59.

Also central to the reasoning of *McNally* was the principle that "when there are two rational readings of a criminal statute, one harsher than the other," courts should "choose the harsher only when Congress has spoken in clear and definite language." *McNally*, 483 U.S. at 359-60. As the Court explained, "[t]here are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." *Id.* at 360 (quoting *Fasulo v. United States*, 272 U.S. 620, 629 (1926)). The Court therefore rejected the government's invitation to construe the mail fraud statute "in a manner that leaves its outer boundaries ambiguous." *Id.* To extend the statute beyond frauds

involving money or property rights, the Court held, Congress "must speak more clearly than it has." *Id.*

In dissent, Justice Stevens argued that nothing in the text of the statute limited it to fraudulent schemes to deprive others of money or property. He noted that questions concerning the scope of the statute had "arisen in a variety of contexts over the past few decades." *McNally*, 483 U.S. at 362 (Stevens, J., dissenting). In some cases, he observed, government officials had been convicted for "defrauding citizens of their right to the honest services of their governmental officials," and in "most of these cases," the defendants had acted "with the objective of benefiting themselves or promoting their own interests." *Id.* at 362-63. Other cases had involved schemes to deprive citizens of their "right to an honest election," schemes that violated "clear fiduciary duties," and schemes to deprive individuals of "their rights to privacy and other nonmonetary rights." *Id.* at 363. Justice Stevens concluded that all of those cases had "something in common"—and involved conduct that qualified as mail fraud—because lower courts had "uniformly and consistently read the statute in the same, sensible way" to reach schemes to deprive others of "what the Court now refers to as "intangible rights." *Id.* at 364.

Congress responded to *McNally* in 1988 by enacting 18 U.S.C. § 1346, which extends the definition of mail fraud to include "a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4508. Section 1346 was intended to reinstate pre-*McNally* "honest ser-

vices" case law. *See Cleveland v. United States*, 531 U.S. 12, 19-20 (2000) (amended statute covers "one of the 'intangible rights' that lower courts had protected under § 1341 prior to *McNally*"); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 114-15 (1991) (Stevens, J., dissenting) (amendment reflected "widely held view of lower courts [pre-*McNally*] about the scope of fraud"); 134 Cong. Rec. S17360 (1988) (statement of Sen. Biden) (Section 1346 "reinstate[s] all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change"); 134 Cong. Rec. H11108 (1988) (statement of Rep. Conyers) ("This amendment restores the mail fraud provision to where that provision was before the McNally decision.... This amendment is intended merely to overturn the *McNally* decision. No other change in the law is intended.").

But the dissent in *McNally* was incorrect in suggesting that lower courts had "uniformly and consistently read the statute in the same, sensible way." *McNally*, 483 U.S. at 364 (Stevens, J., dissenting). In fact, courts of appeals before *McNally* had adopted flatly inconsistent approaches. Some courts held that mail fraud involving intangible rights requires the breach of a state-law fiduciary duty. *See, e.g.*, *United States v. Alexander*, 741 F.2d 962, 964 (7th Cir. 1984) (unlike a scheme to deprive victim of tangible property, an "intangible rights scheme is only cognizable when at least one of the schemers has a fiduciary relationship with the defrauded person or entity"), *overruled on other grounds by United States v. Ginsburg*, 773 F.2d 798, 802 (7th Cir. 1985) (en banc). Other courts of appeals, however, routinely affirmed convictions for intangible-rights mail

fraud in the absence of a breach of fiduciary duty. *See*, *e.g.*, *United States v. States*, 488 F.2d 761, 763 (8th Cir. 1973) (scheme to falsify voter registration affidavits). And even the courts that required a fiduciary relationship superimposed overlapping and inconsistent additional requirements, such as a detriment to the fiduciary, *see United States v. Conner*, 752 F.2d 566, 572-73 (11th Cir. 1985); *United States v. Ballard*, 663 F.2d 534, 540 (5th Cir. 1981), or a duty to disclose material information, *see United States v. Von Barta*, 635 F.2d 999, 1006-07 (2d Cir. 1980).

By consciously seeking to reinstate this pre-*McNally* case law, Congress simply incorporated into the text the original defect of the "honest services" standard. That standard was riddled with conflict and ambiguity, denying both courts and citizens the clear guidance to which they are entitled. Unsurprisingly, judicial conflicts over the meaning and application of the standard have only deepened in recent years.

B. Courts Of Appeals Are Deeply Divided Over § 1346's Limiting Principles

As the court of appeals recognized in this case, the "amorphous and open-ended nature of § 1346" has prompted courts to search for "limiting principles." Pet. App. 8; *see United States v. Murphy*, 323 F.3d 102, 104 (3d Cir. 2003). But the courts of appeals have adopted disparate and conflicting limiting principles to specify the scope of the right of honest services. Three conflicts between the courts of appeals illustrate the statute's general lack of clarity,

and the consequent need for direction from this Court.

1. Courts of appeals have divided on the threshold question whether previously decided case law sets the outer limits of liability under § 1346. The Fifth Circuit determines the scope of the statute by reference to "factual circumstances supporting affirmed convictions, not by negative implication from the few constraints mentioned in disparate cases." *United States v. Brown*, 459 F.3d 509, 520 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 2249 (2007). This approach requires courts first to search their prior case law for patterns of conduct that qualify as "honest services" mail fraud, and then to confirm that the statute extends no farther than the boundaries of those decisions. *See id.* at 521 ("[C]ases upholding convictions arguably falling under the honest services rubric can be generally categorized in terms of either bribery and kickbacks or self-dealing.").

But the First Circuit has pronounced that approach unworkable, at least for the time being. Concluding that its own prior cases provide no coherent limiting principles, that court has expressed "frustrat[ion]" at its inability to "reduce the 'honest services' concept to a simple formula specific enough to give clear cut answers to borderline problems." *United States v. Urciuoli*, 513 F.3d 290, 300 (1st Cir. 2008). Rather than rely on previous case law, the First Circuit has determined that new fact patterns will have "to be settled one at a time until an accretion of concrete precedents forms a pattern that can be usefully articulated." *Id.*

2. Regardless of the role of prior affirmed convictions, courts of appeals are in square conflict as to whether § 1346 requires a breach of fiduciary duty under state law. The Fifth Circuit has held that a violation of state law is an essential element of honest services mail fraud. *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997) (en banc) ("The statute contemplates that there must first be a breach of a state-owed duty."). The Third Circuit has strongly signaled its agreement. *See Murphy*, 323 F.3d at 116-17 & n.5 ("endors[ing]" decisions that emphasize the importance of a state-law duty, but declining to decide whether such a duty is "*required*"). Those courts reason that without state law to define "the specific honest services owed by the defendant in a fiduciary relationship," *id.* at 116 n.5, § 1346 would authorize federal prosecutors "to impose upon states a federal vision of appropriate services" and to establish "an ethical regime for state employees," which would "sorely tax separation of powers and erode our federalist structure," *Brumley*, 116 F.3d at 734.

By contrast, the First, Second, Seventh, and Eleventh Circuits have expressly rejected any requirement of an independent violation of state law. *See United States v. Sawyer*, 239 F.3d 31, 41-42 (1st Cir. 2001) ("Significantly, this framework for establishing honest services mail fraud under § 1341 does not require proof of a violation of any state law."); *United States v. Rybicki*, 38 F. App'x 626, 631 (2d Cir. 2002) (calling it "well settled that a fraudulent scheme need not violate state law in order to support a federal mail or wire fraud conviction"); *United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998); *United*

States v. Walker, 490 F.3d 1282, 1299 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 1649 (2008). Yet these courts, in turn, disagree among themselves as to the reasons why state-law violations are not required. The Seventh Circuit rejects any requirement of a state-law violation because it would make the statute *too broad*. Many actions by state officeholders may violate state ethics rules, and an interpretation grounded in state law would therefore "create[] criminal liability for events that would not have been crimes before *McNally*." *Bloom*, 149 F.3d at 655. The First Circuit, on the other hand, has rejected a state-law principle because it would render the statute *too narrow*, on the theory that the duties of government officials developed in part as judge-made common-law obligations. *See Sawyer*, 239 F.3d at 41-42. And the Eleventh Circuit has taken into account the same federalism concerns as the Fifth Circuit, but reached precisely the opposite conclusion: that requiring a violation of state law would *worsen* federal intrusion into state affairs by criminalizing conduct that states have deemed noncriminal. *Walker*, 490 F.3d at 1299.

3. The courts of appeals are also split as to whether § 1346 requires proof of "private gain." That requirement is the centerpiece of the Seventh Circuit's honest services case law. Seizing on this Court's statement in *McNally* that a public official "owes a fiduciary duty to the public, and misuse of his office *for private gain* is a fraud," 483 U.S. at 355 (emphasis added), the Seventh Circuit has held that private gain is the *sine qua non* of honest services mail fraud: "Misuse 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." *Bloom*, 149 F.3d at 655. The Sixth and Eleventh Circuits have signaled agreement with that principle. *See United States v. Turner*, 465 F.3d 667, 676 (6th Cir. 2006) ("honest services fraud is anchored upon the defendant's misuse of his public office for personal profit") (internal quotation marks omitted); *United States v. DeVegter*, 198 F.3d 1324, 1327-28 (11th Cir. 1999) (explaining that illicit personal gain by government officials deprives the public of its intangible right to honest services).

As the Seventh Circuit acknowledged below, however, the Third and Tenth Circuits have explicitly rejected any requirement of private gain. Pet. App. 9-10; *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). The Tenth Circuit has criticized the private-gain requirement 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." *Welch*, 327 F.3d at 1107. In that court's view, a requirement of private gain would improperly exclude cases in which an official seeks merely to impose harm on another person, without personally gaining from the victim's loss. *Id.* Similarly, the Third Circuit has rejected the personal gain requirement as both over- and under-inclusive, and as adding "little clarity" to the statute. *Panarella*, 277 F.3d at 691-92.

Because § 1346 was intended simply to reinstate a line of pre-*McNally* cases that already lacked coherence and uniformity, the statute's text and his-

tory unsurprisingly offer no guidance in resolving these continuing conflicts. As a result, the scope of federal criminal liability differs widely among the circuits. Neither scrupulously following state law, nor foreswearing private gain, nor avoiding actions deemed criminal in previous cases can insulate defendants from criminal liability. Instead, the fate of state officials charged with honest services mail fraud depends on which set of overlapping and inconsistent principles is chosen by the regional court of appeals. This intolerable lack of uniformity in the understanding and application of what should be a nationwide criminal-law standard can be resolved only by this Court.

II. SECTION 1346 IS UNCONSTITUTIONALLY VAGUE

The conflicting decisions of courts of appeals are problems in their own right, but they are also symptoms of a more fundamental flaw in § 1346. The provision, on its face and as applied to petitioners' conduct in this case, is unconstitutionally vague, in violation of the Fifth Amendment guarantee of due process of law. As this Court has explained, "[v]agueness may invalidate a criminal law for either of two independent reasons. First, it may fail to provide the kind of notice that will enable ordinary people to understand what conduct it prohibits; second, it may authorize and even encourage arbitrary and discriminatory enforcement." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999). Section 1346 flunks both of those tests. It fails to provide fair notice of what conduct is prohibited, making it impossible for officials to know whether their conduct will qualify

as mail fraud. And at the same time, it vests federal investigators and prosecutors with virtually unchecked discretion to decide what unethical conduct by state officials rises to the level of a federal felony. This Court's review is essential.

A. Section 1346 Fails To Provide Constitutionally Sufficient Notice Of The Conduct It Prohibits

1. As the Court has repeatedly recognized, due process requires that a criminal statute provide fair warning of the conduct that it prohibits. *See Rose v. Locke*, 423 U.S. 48, 50 (1975) (criminal laws must provide "sufficient warning that men may conduct themselves so as to avoid that which is forbidden"); *Bouie v. City of Columbia*, 378 U.S. 347, 350-51 (1964) ("The basic principle that a criminal statute must give fair warning of the conduct that it makes a crime has often been recognized by this Court."); *United States v. Reese*, 92 U.S. 214, 220 (1926) ("Every man should be able to know with certainty when he is committing a crime."). That principle animated the Court's conclusion in *McNally* that Congress must "speak more clearly," 483 U.S. 360—a statement "for the benefit of the public, the average citizen, the average mid-level state administrator … who must be forewarned and given notice that certain conduct may subject him to federal prosecution." *Brumley*, 116 F.3d at 746 (Jolly, J., dissenting).

By that measure, § 1346 falls short. Courts of appeals uniformly have acknowledged that § 1346, as written, is "amorphous and open-ended." Pet. App. 8; *see*, *e.g.*, *Urciuoli*, 513 F.3d at 294 ("[T]he

concept of 'honest services' is vague and undefined by the statute."); *Brown*, 459 F.3d at 520 (describing § 1346 as a "facially vague criminal statute"); *Murphy*, 323 F.3d at 116 ("the plain language of § 1346 provides little guidance as to the conduct it prohibits"); *Panarella*, 277 F.3d at 698 ("Deprivation of honest services is perforce an imprecise standard."); *Brumley*, 116 F.3d at 736 (Jolly, J., dissenting) (text of § 1346 is "general, undefined, vague, and ambiguous"). As the Second Circuit has explained, a court would "labor long and with difficulty in seeking a clear and properly limited meaning of 'scheme or artifice to deprive another of the intangible right of honest services'" based on the ordinary meaning of the words of the statute. *Rybicki*, 354 F.3d at 135.

In *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002), *overruled by Rybicki*, 354 F.3d at 135, a panel of the Second Circuit held that § 1346 was unconstitutionally vague as applied to a defendant whose misconduct consisted of the breach of a government contract. *Id.* at 107. "If we were the first panel attempting to discern the meaning of the phrase 'honest services' in § 1346," the panel explained, "we would likely find that part of the statute so vague as to be unconstitutional on its face." *Id.* at 104. That is because "the text of § 1346 simply provides no clue to the public or the courts as to what conduct is prohibited." *Id.* at 105. The panel further held that the statute was unconstitutional as applied because the defendant "would lack any comprehensible notice" that his conduct violated federal law. *Id.* at 107. Other courts have held that the statute is unconstitutionally vague as applied to particular facts. *See United States v. Giffen*, 326 F.

Supp. 2d 497, 506-07 (S.D.N.Y. 2004) (finding § 1346 unconstitutionally vague as applied to bribery of foreign government officials). And numerous scholars have suggested that § 1346 is so vague as to be unconstitutional on its face.[2]

2. The Second Circuit later overruled *Handakas* in part, *see Rybicki*, 354 F.3d at 144, with Judges Jacobs, Walker, Cabranes, and B.D. Parker dissenting, *see id.* at 156. Other courts of appeals have rejected vagueness challenges as well. Pet. App. 18; *see*, *e.g.*, *United States v. Williams*, 441 F.3d 716, 724-25 (9th Cir. 2006); *Welch*, 327 F.3d at 1109 n.29; *United States v. Frost*, 125 F.3d 346, 371 (6th Cir. 1997); *United States v. Gray*, 96 F.3d 769, 776-77 (5th Cir. 1996); *United States v. Waymer*, 55 F.3d 564, 568-69 (11th Cir. 1995). But their reasons are unpersuasive.

Principally, these courts have reasoned that pre- and post-*McNally* case law provides officials with constitutionally sufficient notice of the conduct prohibited by § 1346. *See Brown*, 459 F.3d at 523 (not-

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[2] *See* Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone To Watch Over Us,* 31 Harv. J. on Legis. 153, 188 (1994) ("[Section 1346] is unconstitutionally vague because it fails to provide notice to state and local officials of what conduct is prohibited and, more crucially in the context of political corruption, fails to provide standards of enforcement to federal prosecutors."); Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as a Case Study*, 96 J. Crim. L. & Criminology 643, 664 (2006); Ellen S. Podger, *Mail Fraud: Opening Letters*, 43 S.C. L. Rev. 223, 239 (1992); Craig M. Bradley, *Foreword: Mail Fraud after* McNally *and* Carpenter*: The Essence of Fraud*, 79 J. Crim. L. & Criminology 573, 620-21 (1988).

ing that § 1346 "depends for its constitutionality on the clarity divined from a jumble of disparate cases"); *Rybicki*, 354 F.3d at 138-43; *United States v. Bryan*, 58 F.3d 933, 942-43 (4th Cir. 1995), *abrogated on other grounds by United States v. O'Hagan*, 521 U.S. 642, 650 (1997). As demonstrated above, however, that case law is hopelessly conflicted and thus can provide no genuine notice at all. *See Rybicki*, 354 F.3d at 162-63 (Jacobs, J., dissenting) (noting "wide disagreement among the circuits as to the elements of the 'honest services' offense"); *Brown*, 459 F.3d at 534 (DeMoss, J., concurring in part and dissenting in part) (acknowledging that "circuit courts have … only clouded the meaning of § 1346"). As the panel in *Handakas* recognized, "no one can know what is forbidden by § 1346 without undertaking the 'lawyer-like task'" of parsing case law to answer a series of questions that have divided the courts of appeals. 286 F.3d at 105. The inability of ordinary government officials to discern the line between lawful and unlawful conduct renders the statute unconstitutionally vague on its face. *See Rybicki*, 354 F.3d at 163-64 (Jacobs, J., dissenting) (the conflicting decisions of courts of appeals "attest[] to the constitutional weakness of section 1346 as written"); *Brumley*, 116 F.3d at 743 n.7 (Jolly, J., dissenting) (calling § 1346 "a truly extraordinary statute, in which the substantive force of the statute varie[s] in each judicial circuit").

Some courts have concluded that requiring a showing of a "specific intent to defraud" ensures that defendants have constitutionally sufficient notice. *See* Pet. App. 17; *Waymer*, 55 F.3d at 568. But it is far from clear that a *mens rea* requirement can save

a statute that is vague as to the prohibited *actus reus*. *See Morales*, 527 U.S. at 60-61 (Stevens, J., for the Court) (holding that a statute that "reach[es] a substantial amount of innocent conduct" and fails to "establish minimal guidelines to govern law enforcement" is unconstitutionally vague); *Rybicki*, 354 F.3d at 157 (Jacobs, J., dissenting). In any event, that reasoning begs the question. Only by assuming that a state official's conduct defrauds someone of "the intangible right of honest services" can specific intent to engage in that conduct evince specific intent to defraud.

3. This case powerfully demonstrates that, even with the benefit of judicial construction, § 1346 fails to provide fair warning to (potential) defendants. Prior to the decision below, state officials reading Seventh Circuit case law could reasonably have concluded that a violation of § 1346 requires "private gain" by the defendant himself or a co-conspirator. That is because Seventh Circuit precedents had repeatedly characterized the statute as requiring "personal gain," *see Bloom*, 149 F.3d at 655; *United States v. Hausmann*, 345 F.3d 952, 956 (7th Cir. 2003), or benefit to "other participants" in a fraud, *United States v. Spano*, 421 F.3d 599, 603 (7th Cir. 2005). As the court of appeals acknowledged below, "the defendants' argument that any private gain must go to the defendants themselves *is not without basis*, for we and other courts have not always been consistent with our description of the requirement." Pet. App. 11 (emphasis added).

Nevertheless, the court of appeals affirmed petitioners' convictions absent any allegation that peti-

tioners' conduct benefited themselves or any knowing co-conspirators. The court explained that, although it had repeatedly *said* that the requirement was "personal gain," that phrase was "misleading"; what the court "*mean*[*t*]" was "illegitimate gain, which usually will go to the defendant, but need not." Pet. App. 11-12 (emphasis added). That sort of on-the-fly "clarification," whereby courts "discover" new principles in the law on a case-by-case basis, is unremarkable in traditional common-law reasoning. But it is "utterly anathema" in the criminal context today. *Rogers v. Tennessee*, 532 U.S. 451, 476 (2001) (Scalia, J., dissenting). The Seventh Circuit had never before applied such a broad definition of private gain. Indeed, as Judges Kanne and Posner concluded in dissenting from the denial of rehearing en banc, the decision below "greatly expands the scope of honest-services mail fraud." Pet. App. 99. Retroactively applying a new, more expansive "private gain" standard "violate[s] the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits." *Bouie*, 378 U.S. at 350. Accordingly, § 1346 is unconstitutionally vague as applied to petitioners' conduct.

The court's response to petitioners' due process arguments is telling: "It is hard to take too seriously the contention that [petitioners] did not know that by creating a false hiring scheme that provided thousands of lucrative city jobs to political cronies, falsifying documents, and lying repeatedly about what they were doing, they were perpetrating a fraud." Pet. App. 17. In short, because petitioners' conduct was unethical and possibly contrary to state law, they should not be surprised to learn that it was also

a violation of a particular federal criminal fraud statute. That answer will not do. Notice that certain conduct is unethical or constitutes a *different* and *lesser* offense does not provide notice that the conduct violates a distinct federal criminal statutory prohibition. Federal fraud statutes "do not cover all behavior which strays from the ideal; Congress has not yet criminalized all sharp conduct, manipulative acts, or unethical transactions." *United States v. Brown*, 79 F.3d 1550, 1562 (11th Cir. 1996). Even if objectionable, petitioners' conduct did not clearly violate the hopelessly vague text of § 1346, and thus cannot be the basis for a conviction under that statute. *See id.* ("Construing the evidence at its worst against defendants, it is true that these men behaved badly. We live in a fallen world. But, 'bad men, like good men, are entitled to be tried and sentenced in accordance with law.'" *Id.* (quoting *Green v. United States*, 301, 309 (1961) (Black, J., dissenting)).

B. Section 1346 Invites Arbitrary And Discriminatory Enforcement

Under this Court's cases, a finding that a statute "authorizes or even encourages arbitrary and discriminatory enforcement" is a second and independent ground for invalidating a statute as unconstitutionally vague. *Hill v. Colorado*, 530 U.S. 703, 732 (2000). A lack of statutory guidance as to the scope of a criminal statute "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis," *Grayned v. City of Rockford*, 408 U.S. 104, 108-09 (1972), which "permits and encourages an arbitrary

and discriminatory enforcement of the law" in violation of due process, *Papachristou v. City of Jacksonville*, 405 U.S. 156, 170 (1972).

The principal test for determining whether a law adequately constrains the discretion of law enforcement and prosecutors is its specificity in defining the prohibited conduct. In *Morales*, the Court invalidated an anti-loitering ordinance because it provided no guidelines or factors for police officers to rely on when determining whether to order alleged loiterers to disperse or deciding to arrest them for failure to comply with the order. 527 U.S. at 61-62. Likewise, in *Kolender v. Lawson*, 461 U.S. 352 (1983), the Court struck down an anti-loitering statute that permitted police officers to arrest loiterers who refused to identify themselves in part because it provided no "standards by which the officers may determine whether the suspect has complied with the subsequent identification requirement." *Id.* at 361. And in *Smith v. Goguen*, 415 U.S. 566 (1974), the Court struck down a Massachusetts law that made it a crime to treat the flag "contemptuously" because there was an "absence of any standard for defining contemptuous treatment." *Id.* at 579.

Section 1346 is every bit as standardless as the statutes at issue in *Morales*, *Kolendar*, and *Goguen*. Its reference to the "intangible right of honest services" provides neither examples of prohibited conduct nor an intelligible standard to constrain police and prosecutors. *See Rybicki*, 354 F.3d at 161 (Jacobs, J., dissenting) (noting the "standardless sweep of the statute"). In enacting the statute, Congress has done precisely what this Court has warned

against: "set a net large enough to catch all possible offenders, and le[ft] it to the courts to step inside and say who could be rightfully detained, and who should be set at large." *Kolendar*, 461 U.S. at 358 n.7 (quoting *United States v. Reese*, 92 U.S. 214 (1875)).

The absence of standards to govern police and prosecutors is particularly troublesome in this context. Section 1364 effectively grants federal officials broad license to interfere in state political affairs and state elections, raising serious federalism concerns. *See Brumley*, 116 F.3d at 734 (recognizing that § 1346 poses a serious risk of federal interference with state officials); *cf. Cleveland*, 531 U.S. at 24 (declining to interpret the mail fraud statute to "subject to federal mail fraud prosecution a wide range of conduct traditionally regulated by state and local authorities"). Prosecutors can credibly invoke the statute to pursue a broad range of conduct by political adversaries, including "a regulated company that employs a politic[ian's] spouse" or "an officeholder who has made a decision in order to please a constituent or contributor, or to promote re-election, rather than for the public good (as some prosecutor may see the public good)." *Rybicki*, 354 F.3d at 161 (Jacobs, J., dissenting).[3] Section 1364 thus turns the

[3] *See also* Matthew N. Brown, *Prosecutorial Discretion and Federal Mail Fraud Prosecutions for Honest Services Fraud*, 21 Geo. J. Legal Ethics 667, 672-77 (2008) ("The expansive definition of honest services fraud allows courts and prosecutors to interpret the statute to fit almost any sort of public misuse of office."); Thomas M. DiBiagio, *Politics and the Criminal Process: Federal Public Corruption Prosecutions of Popular Public Officials Under the Honest Services Component of the Mail and Wire Fraud Statutes*, 105 Dick. L. Rev. 57, 57-58 (2000); Gregory Howard Williams, *Good Government by Prosecutorial De-*

federal mail fraud statute into "a catch-all … which has no use but misuse" in the hands of a "corrupt prosecutor [pursuing] a political enemy." *Handakas*, 286 F.3d at 108 (quoting *United States v. Margiotta*, 688 F.2d 108, 144 (2d Cir. 1982) (Winter, J., dissenting)).

The unfortunate history surrounding this Court's decision in *McNally* illustrates the dangers of waiting to address the meaning and constitutionality of the honest services fraud statute. *McNally* repudiated the non-textual honest services fraud theory only after it had produced some 40 years of wrongful convictions—and after many defendants had served years in prison for conduct that this Court later determined was not a federal crime at all. In the two decades since Congress added the opaque concept of honest services fraud to the statute, the courts of appeals have failed to provide public officials and private employees clear and consistent guidance as to what that concept prohibits. This Court again must act to ensure that the obscurity of honest services fraud does not produce another 40 years of wrongful, unjust convictions.

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cree: The Use and Abuse of Mail Fraud, 32 Ariz. L. Rev. 137, 149-53 (1990).

CONCLUSION

For the foregoing reasons, and for the reasons stated by petitioners, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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