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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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1. Since the petition was filed in September, the circuit split over the honest services fraud statute has deepened. On November 26, the Ninth Circuit rejected the state law limiting principle that the Fifth Circuit adopted in *United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997) (en banc). The Ninth Circuit rejected the state law limit even though it acknowledged that the *Brumley* approach addresses the fair notice, federalism, and vagueness concerns that 18 U.S.C. § 1346 presents in prosecutions of state and local public officials. *United States v. Weyhrauch*, 2008 U.S. App. LEXIS 24248, at *18-*21 (9th Cir. Nov. 26, 2008). *Weyhrauch* alluded to the Seventh Circuit's "private gain" limiting principle for § 1346, *see id.* at *17-*18, but it did not adopt that approach either.

Rather than adopt any clear limiting principle for § 1346, the Ninth Circuit identified "two core categories of conduct by public officials"—bribery and nondisclosure of conflicts of interest—that "lie[] at the heart of public honest services fraud." *Id.* at *27-*29. But the court expressly declined to limit § 1346 to this "core" conduct,[1] thus leaving the scope

[1] *See Weyhrauch*, 2008 U.S. App. LEXIS 24248, at *28-*29 ("We are persuaded that Congress' intent in reinstating the honest services doctrine after *McNally* was to bring *at least* the two core categories of official misconduct within the reach of § 1346.") (emphasis added); *id.* at *29 ("Because Weyhrauch's alleged conduct falls comfortably within the two categories long recognized as the core of honest services fraud, we need not

of the duties the statute imposes on state and local officials undefined.[2]

Weyhrauch highlights the urgent need for this Court's intervention. The Ninth Circuit declared that § 1346 "establishes a uniform standard for 'honest services' that governs *every* public official," *id.* at *30 (emphasis in original), and it cited the need for national uniformity as a basis for its holding, *see id.* at *23-*24. But the Ninth Circuit's decision, far from promoting uniformity, actually deepens the disarray in the interpretation of § 1346. As the Ninth Circuit observed, after surveying the varying approaches to the honest services statute, "[i]n essence, our sister circuits have construed the meaning of 'honest services' in ways that limit, *to differing degrees*, the reach of § 1346 into state and local public affairs." *Id.* at *18 (emphasis added).

The "differing degrees" to which the circuits have "limit[ed] the reach of § 1346 into state and local public affairs" have substantial practical impact. State and local officials in the Third and Fifth Circuits perform their duties confident that if they comply with state law, they cannot be prosecuted for honest services fraud under § 1346.

(continued...)

define the outer limits of public honest services fraud in this case.").

[2] Petitioners' conduct does not fall within either of the "core categories of conduct" that *Weyhrauch* identified. Petitioners were not alleged to have accepted bribes or to have failed to disclose conflicts of interest. Cases such as this one, outside the "core" of 18 U.S.C. § 1346, highlight the need for clear limiting principles.

Officials in other circuits have no such certainty. Those officials may be subject to federal prosecution even if they comply in every respect with their state law duties. In the Seventh Circuit, officials once found some clarity in the "private gain" limiting principle, but the decision in this case rendered that limit ephemeral. *See* App. 98-100 (Kanne, J., dissenting from denial of rehearing en banc) (noting that the panel interpretation of the "private gain" principle "greatly expands the scope of honest-services mail fraud"). And in the remaining circuits (now including the Ninth), a state and local public official may be prosecuted for honest services fraud, despite scrupulous compliance with state law, if an unelected federal prosecutor concludes that his conduct does not square with an amorphous federal standard of "honest services."

Such disparate standards are arbitrary and unacceptable, particularly when they arise solely from federal judges' differing interpretations of a federal statute. When such different interpretations exist—as they plainly do with § 1346—and when Congress fails to resolve them—as it has failed to do in the twenty years since it enacted § 1346—it falls to this Court to give the statute a uniform construction.

2. The government insists that this case "is not a suitable vehicle" to resolve the different interpretations of § 1346 "because, even if petitioners were correct, they would not be entitled to reversal of their convictions."[3] The government rests this

[3] Brief for the United States in Opposition ["G. Opp."] at 9. The petition will be cited as "Pet."

argument on the fact that the indictment charged both honest services fraud under § 1346 and "money or property" mail fraud under 18 U.S.C. § 1341. G. Opp. 9-10. The government does not dispute the court of appeals' conclusion that, in light of the general verdict, a legal error in either theory may undermine the conviction. App. 6; Pet. 3 n.1; *see, e.g.*, *Griffin v. United States*, 502 U.S. 46, 59 (1991). Instead, citing *Hedgpeth v. Pulido*, 129 S. Ct. 530 (2008) (per curiam), it argues that any error in the honest services theory is harmless because of the "overwhelming evidence supporting petitioners' guilt" under the "money or property" theory. G. Opp. 10.

The government is wrong. For three reasons, the harmless error issue does not diminish the value of this case as a vehicle to address the scope of § 1346. First, the government never argued below that any errors concerning the honest services theory were harmless in light of the alternative "money or property" theory. It offered a different harmless error argument that it does not repeat here. Gov't C.A. Brief at 46-47; Sorich C.A. Reply Brief at 4-6. The government has thus forfeited the *Pulido* harmless error issue that it raises for the first time here. Second, given the emphasis the government placed at trial on the honest services theory and the absence of evidence that the City of Chicago lost any money or property (the defendants did not profit from the patronage hiring system, and the positions at issue would have been filled, and the workers paid, with or without the system), the government cannot establish harmlessness beyond a reasonable doubt, as *Neder v. United States*, 527

U.S. 1 (1999), requires. *See id.* at 17. Third, to the extent the *Pulido* harmless error argument requires further consideration, the Court should decide the questions presented concerning the scope of § 1346 and then remand to the court of appeals to consider that argument. *See, e.g., Pulido*, 129 S. Ct. at 533 (remanding to apply harmless error standard); *California v. Roy*, 519 U.S. 2, 6 (1996) (per curiam) (same). Remand is particularly appropriate where, as here, the court of appeals had no opportunity to consider the harmless error argument in the first instance.

3. In a similar vein, the government—echoing the court of appeals, App. 19-20—notes that the district court instructed the jury on several state law sources of fiduciary duty, as well as the federal *Shakman* decree. Opp. 13-14. Given the general verdict—and thus the impossibility of knowing whether the jury relied on the *Shakman* decree as the source of petitioners' fiduciary duty—the government's argument amounts to another harmless error claim under *Pulido*. That claim is particularly weak. The government emphasized petitioners' alleged violations of the *Shakman* decree throughout the trial, from opening to closing and at many points between; it rarely mentioned the other sources of fiduciary duty; and it is thus a near certainty that the jury relied on the prohibitions set forth in the *Shakman* decree in finding that petitioners breached a duty owed to the City of Chicago and its citizens. Pet. 4.

The government asserts that "[p]etitioners have not contested that they violated [the state and local laws cited in the indictment], either in this

court or the court of appeals." G. Opp. 14. But petitioners entered pleas of not guilty. They have always maintained that they did not breach any duty they owed to the City of Chicago and its citizens.[4] No petitioner conceded that he violated the state and local laws cited in the indictment and instructions. In any event, to the extent the government contends that the inclusion of *Shakman* was harmless error under *Pulido*, it can make that argument to the court of appeals on remand from this Court.[5]

4. The government labors to minimize the split in the circuits over the proper interpretation of 18 U.S.C. § 1346. G. Opp. 11-15. *Weyhrauch* refutes the government's position, as does the panel opinion itself. *See* 2008 U.S. App. LEXIS 24248, at *16-*18 (describing the circuits' varying positions on the scope of § 1346); App. 9-10 (describing criticism of the Seventh Circuit's "private gain" requirement), 20 (describing the "minority 'state law limiting principle' shared by the Third and Fifth Circuits").

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[4] In addition, petitioner Slattery contested the sufficiency of the evidence in the Seventh Circuit.

[5] The government also suggests—again echoing the court of appeals, App. 20—that petitioners failed adequately to raise the state law issue below. G. Opp. 13. The government never made this argument in the court of appeals, and for good reason. As Judge Kanne observed, "Sorich raised the issue, discussed both the Third and Fifth Circuits' positions, and asked us to 'reexamine' our position regarding the adoption of the state-law limiting principle." App. 101 (Kanne, J., dissenting from denial of rehearing en banc); *see* Sorich C.A. Brief at 1, 8, 19-20; Sorich C.A. Reply Brief at 8-9; C.A. Petition for Panel Rehearing and for Rehearing En Banc at 1, 8-11. The government as well specifically addressed the state law issue. Gov't C.A. Brief at 54-55. Nothing more was required to present the issue to the court of appeals.

A survey of cases interpreting § 1346 in the context of prosecutions of state and local officials reveals an astonishing level of confusion and disagreement. *E.g.*, Pet. 13-15. This confusion is especially troublesome in a statute that federal prosecutors frequently use (Pet. 10 n.3) to convict (and thus remove from office) state and local elected officials or persons appointed by those officials to serve in positions of public responsibility.

Two of the government's points require a further response. First, the government asserts that "the Third Circuit has yet to resolve the question" of whether to adopt the state law limiting principle. G. Opp. 12. Although the government points to language in *United States v. Murphy*, 323 F.3d 102 (3d Cir. 2003), purporting to leave the question open, it ignores the court's declaration, following a discussion of fair notice and federalism concerns, that "[w]e thus endorse (and are supported by) the decisions of other Courts of Appeals that have interpreted § 1346 more stringently and required a state law limiting principle for honest services fraud, as set forth in the margin." *Id.* at 116 (citing *Brumley*); *see also United States v. Kemp*, 500 F.3d 257, 279 n.11, 280, 283 & n.13 (3d Cir. 2007) (discussing state law in honest services prosecution of local official), *cert. denied*, 128 S. Ct. 1329 (2008). *Murphy* leaves no doubt that the Third Circuit has aligned itself with the Fifth Circuit's state law limiting principle.

Second, the government asserts that "there is no conflict in the circuits" on "whether proof that the defendant sought a 'private gain' for himself and his co-schemers is necessary to establish a violation of

Section 1346." G. Opp. 14. In the wake of the court of appeals' decision broadening the Seventh Circuit's "private gain" requirement to include gain to *anyone*, App. 12-15, the government accurately describes the law. But the government misses the point that the Third and Tenth Circuits have rejected *any* "private gain" requirement under § 1346.[6] And it ignores entirely the fundamental problem that requires this Court's attention: that after twenty years of judicial analysis, scholarly inquiry, and congressional inaction, the lower courts are increasingly divided and confused over the scope of one of the most important and frequently used federal criminal statutes.

5. The government asserts that "[t]his Court has previously denied a number of petitions for writs of certiorari presenting the precise challenges raised by petitioners or close variants . . . and there is no reason for a different result here." G. Opp. 9 (citing *Colino v. United States*, 128 S. Ct. 1733 (2008); *Rybicki v. United States*, 543 U.S. 809 (2004); *Rise v. United States*, 541 U.S. 1072 (2004); *Panarella v. United States*, 537 U.S. 819 (2002)).

We readily acknowledge that many past petitioners have asked this Court to resolve the deepening split in the circuits over the meaning of 18 U.S.C. § 1346.[7] The frequency of these applications

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[6] *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); App. 9-10.

[7] *See also, e.g., Geddings v. United States*, 129 S. Ct. 435 (2008) (No. 08-318); *Walker v. United States*, 128 S. Ct. 1649 (2008) (No. 07-749); *Segal v. United States*, 128 S. Ct. 2069 (2008) (No. 07-1196).

underscores the need for this Court's intervention. It is by now evident that the lower courts cannot agree on a uniform interpretation of § 1346. It is equally evident that Congress has no intention of clarifying the vague statutory language. Just as the Court, after denying countless petitions seeking to challenge the "intangible rights" theory under 18 U.S.C. § 1341, ultimately intervened in *McNally v. United States*, 483 U.S. 350 (1987), it should intervene here to address the scope (and, if necessary, the constitutionality) of § 1346.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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