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No. 08-1196

In the Supreme Court of the United States

BRUCE WEYHRAUCH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, to convict a state official for depriving the public of its right to the defendant's honest services through the non-disclosure of material information, in violation of the mail-fraud statute (18 U.S.C. 1341 and 1346), the government must prove that the defendant violated a disclosure duty imposed by state law.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 548 F.3d 1237. The order and opinion of the district court (Pet. App. 22a-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 26, 2008. A petition for rehearing was denied on January 7, 2009 (Pet. App. 37a). The petition for a writ of certiorari was filed on March 25, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A grand jury sitting in the United States District Court for the District of Alaska returned an indictment charging petitioner with attempted extortion under color of official right, in violation of 18 U.S.C. 1951(a);

bribery concerning programs receiving federal funds, in violation of 18 U.S.C. 666(a)(1)(B); honest-services mail fraud, in violation of 18 U.S.C. 1341 and 1346; and conspiracy to commit extortion, bribery, mail fraud and wire fraud, in violation of 18 U.S.C. 371. See Pet. App. 22a-23a. Before trial, petitioner moved to bar the introduction of evidence bearing on the existence of a duty of public officials to disclose conflicts of interest, and the government filed a motion seeking to permit introduction of the evidence. *Id.* at 23a-24a. The district court granted petitioner's motion and denied the government's motion. *Id.* at 22a-36a. The government took an interlocutory appeal, and the court of appeals reversed the district court's ruling and remanded the case for further proceedings. *Id.* at 1a-21a.

1. Petitioner, a lawyer, was a member of the Alaska House of Representatives during 2006, when the state legislature was considering legislation to alter how the State taxes oil production. According to the indictment, two executives of VECO Corp., an oil field services company, had a series of contacts with petitioner about the pending legislation. The indictment alleges that, by mail, telephone, and personal contact, petitioner solicited future legal work from VECO in exchange for voting on the oil tax legislation as VECO instructed. The indictment also alleges that petitioner offered, in his official capacity, to take other actions favorable to VECO in exchange for the legal work, such as maneuvering the legislation and reporting information about proposed changes in the legislation to the VECO executives. In May, June, and August 2006, petitioner introduced and voted on amendments to the oil tax legislation, as well as voted on the legislation itself. Petitioner never disclosed to the public or to other members of the

Alaska legislature that he was soliciting work from VECO while he was voting on legislation that affected the company. Pet. App. 2a-3a; Gov't C.A. Br. 6-12.

2. Based on his alleged misconduct, petitioner was charged with, among other crimes, mail fraud, in violation of 18 U.S.C. 1341 and 1346. Indictment paras. 87, 88, 90; Pet. App. 3a. Section 1341 prohibits the use of the mail to execute or to further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. 1341. After the Supreme Court held in *McNally* v. *United States*, 483 U.S. 350 (1987), that Section 1341 did not reach frauds involving deprivation of the intangible right of honest services, Congress enacted Section 1346, which defines the term "scheme or artifice to defraud" in Section 1341 to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346. In this case, the honest-services mail fraud count alleges that petitioner devised "a scheme and artifice to defraud and deprive the State of Alaska of its intangible right to [petitioner's] honest services * * * performed free from deceit, self-dealing, bias, and concealment," and that he attempted to execute the scheme by mailing his resume to VECO together with a cover letter soliciting employment. See Indictment paras. 87, 90; Pet. App. 3a.

3. Before trial, the government indicated that it anticipated introducing at trial evidence that petitioner had a duty under Alaska law to disclose his dealings with VECO. Pet. App. 23a. Petitioner filed a motion to exclude that evidence, and the government filed a cross-motion to admit it. *Ibid.* The district court concluded that, although state law created a duty to avoid conflicts of interest and the appearance of conflicts, it did not

require the disclosure of conflicts. *Id.* at 29a. The court then considered the government's argument that, even if Alaska law did not include a duty to disclose, the government could prove that petitioner committed honest-services mail fraud by proving that he violated a disclosure duty imposed by federal law. *Id.* at 30a-36a. The district court rejected that argument, stating that "any duty to disclose sufficient to support the mail * * * fraud charges here must be a duty imposed by state law." *Id.* at 35a-36a. Accordingly, the court granted petitioner's motion to exclude evidence of a state-law duty of disclosure and denied the government's motion to admit that evidence. *Id.* at 36a. Under the court's decision, the government was limited to proving the honest-services fraud charges against petitioner "based [on] violations of the law other than a duty to disclose [petitioner's] dealings with VECO." *Ibid.*

4. The government took an interlocutory appeal from the district court's pretrial ruling. The court of appeals rejected the district court's holding that conviction of a state official for "honest services mail fraud under 18 U.S.C. §§ 1341 and 1346 requires proof that the conduct at issue also violated an applicable state law." Pet. App. 1a. In support of its holding, the court of appeals first observed that, before *McNally*, it had construed the mail fraud statute to reach schemes involving the deprivation of the public's intangible right to a government official's honest services "without reference to any underlying state law duty." *Id.* at 15a (citing *United States* v. *Louderman*, 576 F.2d 1383, 1387 (9th Cir.), cert. denied, 439 U.S. 896 (1978), and *United States* v. *Bohonus*, 628 F.2d 1167, 1171 (9th Cir.), cert. denied, 447 U.S. 928 (1980)). Next, the court of appeals noted that it could not "find any basis in the text or legislative

history of § 1346 revealing that Congress intended to condition the meaning of 'honest services' on state law." *Id.* at 16a. The court reasoned that "conditioning mail fraud convictions on state law means that conduct in one state might violate the mail fraud statute, whereas identical conduct in a neighboring state would not." *Ibid.* The court determined that "Congress has given no indication it intended the criminality of official conduct under federal law to depend on geography." *Id.* at 16a-17a. Further, the court reasoned that, in enacting Section 1346, "Congress demonstrated a clear intent to reinstate the line of pre-*McNally* honest services cases," and that those cases "generally did not require state law to create the duty of honesty that public officials owe the public." *Id.* at 17a.

The court of appeals went on to observe that "federal action based on a valid constitutional grant of authority is not improper simply because it intrudes on state interests." Pet. App. 17a. The court explained that "Congress has a legitimate interest in ensuring that state action affecting federal priorities is not improperly influenced by personal motivations of state policymakers and regulators, and the happenstance of whether state law prohibits particular conduct should not control Congress' ability to protect federal interests through the federal fraud statutes, which are predicated on valid federal constitutional authority to regulate the mails." *Id.* at 18a (footnote omitted).

The court of appeals observed that traditionally two categories of conduct by public officials have been understood to support a conviction for honest-services fraud without reference to state law: "(1) taking a bribe or otherwise being paid for a decision while purporting to be exercising independent discretion; and (2) nondis-

closure of material information." Pet. App. 19a. The court noted that those two categories of honest-services fraud liability "ensure transparency, without which the public cannot determine whether public officials are living up to their duty of honesty." *Id.* at 20a. The court concluded that the allegations against petitioner "describe an undisclosed conflict of interest and could also support an inference of a quid pro quo arrangement to vote for the oil tax legislation in exchange for future remuneration in the form of legal work." *Ibid.* Because petitioner's alleged misconduct thus "falls comfortably within the two categories long recognized as the core of honest services fraud," the court determined that it "need not define the outer limits of public honest services fraud in this case." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 10-25) that a state official's non-disclosure of information does not amount to a scheme "to deprive another of the intangible right of honest services," in violation of 18 U.S.C. 1341 and 1346, absent a duty to disclose established by state law, and that this Court's review is warranted to resolve a conflict among the courts of appeals on that issue. The court of appeals, however, correctly rejected engrafting a state-law limiting principle onto the federal crime of honest-services mail fraud, and petitioner overstates any conflict among the circuits. In any event, this interlocutory appeal presents an inappropriate vehicle for resolving the question.

1. Section 1341 makes it a crime to use the mail to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."

18 U.S.C. 1341. Before this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), the courts of appeals generally agreed that the mail fraud statute extended to schemes to deprive the public of the intangible right to the honest services of government officials. In *McNally*, the Court rejected the "intangible rights" theory of mail fraud, holding that the mail fraud statute in its then-existing form reached only schemes to deprive victims of money or property. *Id.* at 356, 358-359. The Court stated: "If Congress desires to go further, it must speak more clearly than it has." *Id.* at 360. In direct response, Congress enacted 18 U.S.C. 1346 to restore the pre-*McNally* understanding of the scope of the mail fraud statute. See *Cleveland* v. *United States*, 531 U.S. 12, 19-20 (2000). Section 1346 defines the term "scheme or artifice to defraud" in that statute to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

Contrary to petitioner's contention (Pet. 14-25), the court of appeals correctly rejected the district court's conclusion that conviction of a state official in "a federal honest services mail fraud prosecution under §§ 1341 and 1346 requires proof that the [official's] conduct * * * also violated an applicable state law." Pet. App. 1a. As the court of appeals explained, nothing in the text or legislative history of those provisions suggests that Congress intended to limit the federal prohibition against schemes that use the mail to deprive others of "honest services" to situations in which the defendant violates state law. *Id.* at 16a. Indeed, petitioner concedes that honest-services violations involving bribery or fraud do not require proof of a state-law violation, Pet. 15, and no greater textual basis exists for imposing

state-law limits on honest-services violations based on nondisclosure.

Nor is there any evidence that Congress intended the uniform federal honest-services prohibition to turn on separate state-law requirements, with the consequence that "conduct in one state might violate the mail fraud statute, whereas identical conduct in another state would not." Pet. App. 16a. Congress proscribed schemes to deprive others of "*the* intangible right of honest services," 18 U.S.C. 1346 (emphasis added), not a multiplicity of rights. "[T]he happenstance of whether state law prohibits particular conduct should not control Congress' ability to protect federal interests through the federal fraud statutes, which are predicated on valid federal constitutional authority to regulate the mails." Pet. App. 18a (footnote omitted).

The state-law duty theory is also inconsistent with the statutory origins of the honest-services prohibition. Contrary to petitioner's view (Pet. 10) that the court of appeals applied "federal common law" to determine the duties of state and local officials, "Congress demonstrated a clear intent to reinstate the line of pre-*McNally* honest services cases when it enacted § 1346." Pet. App. 17a. Section 1346 thus adopted those decisions as a matter of statutory law. And the pre-*McNally* courts were "uniformly of [the] opinion that the fact that a scheme to defraud may or may not violate state law does not determine whether the scheme is within the proscription of the mail fraud statute." *United States* v. *Mandel*, 591 F.2d 1347, 1361 (4th Cir. 1979), cert. denied, 445 U.S. 961 (1980). See, *e.g.*, *United States* v. *Margiotta*, 688 F.2d 108, 124 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983); *United States* v. *McNeive*, 536 F.2d 1245, 1247

n.2 (8th Cir. 1976); *United States* v. *Bush*, 522 F.2d 641, 646 n.6 (7th Cir. 1975), cert. denied, 424 U.S. 977 (1976).

2. At least three courts of appeals, in addition to the Ninth Circuit in this case, have squarely rejected any requirement that an honest-services defendant have violated state law. The First Circuit has held that "there is no need to base [an honest-services] prosecution under § 1341 on allegations that the defendants violated state law." *United States* v. *Sawyer*, 239 F.3d 31, 41-42 (2001) (citation omitted). The Eleventh Circuit has also held that the duty to provide honest services may arise from sources other than state law, including the defendant's inherent fiduciary duty as a public official or the employment relationship itself. See *United States* v. *deVegter*, 198 F.3d 1324, 1328 (1999), cert. denied, 530 U.S. 1264 (2000); *United States* v. *Waymer*, 55 F.3d 564, 571 (1995), cert. denied, 517 U.S. 1119 (1996). And the Seventh Circuit as well recently rejected any requirement that the defendant have violated state law. See *United States* v. *Sorich*, 523 F.3d 702, 712 (2008), cert. denied, 129 S. Ct. 1308 (2009). See also *United States* v. *Bryan*, 58 F.3d 933, 940-941 (4th Cir. 1995), abrogated on other grounds by *United States* v. *O'Hagan*, 521 U.S. 642 (1997).

Contrary to petitioner's assertion (Pet. 11-12), the Third Circuit has not adopted a state-law limiting principle. In *United States* v. *Panarella*, 277 F.3d 678, cert. denied, 537 U.S. 819 (2002), the Third Circuit held that a public official's act of concealing a financial conflict of interest, "in violation of a [state] criminal disclosure statute," was sufficient to support an honest-services fraud conviction. *Id.* at 698-699. In a footnote, however, the court expressly reserved the question whether a violation of state law is necessary to establish a federal

honest-services fraud violation. *Id.* at 699 n.9. Subsequently, in *United States* v. *Murphy*, 323 F.3d 102 (3d Cir. 2003), the defendant urged the court to "address the issue [it had] reserved in [footnote 9] in *Panarella*," *id.* at 117, but the court found no need to do so, *ibid.* Thus, the Third Circuit has yet to resolve the issue.[1]

As petitioner notes (Pet. 11), the Fifth Circuit has interpreted Section 1346 to require the government, in an honest-services fraud prosecution of a state official, to prove that the defendant violated a duty "rooted in state law." *United States* v. *Brumley*, 116 F.3d 728, 734 (en banc), cert. denied, 522 U.S. 1028 (1997). But the isolated decision in *Brumley* does not justify this Court's review in this case. *Brumley* does not directly support petitioner's claim (Pet. 15-16) that an honest services violation predicated on non-disclosure requires proof a state-law duty of *disclosure*. The state-law violation in *Brumley* was not a disclosure violation, but was instead a prohibition against certain conduct that created a conflict of interest. See 116 F.3d at 735-736 (finding that Brumley violated a Texas criminal law, Tex. Penal Code § 36.08(e), making it a misdemeanor for a public official with judicial authority to accept a benefit from a person interested in a matter before the official or his tribunal). Petitioner does not insist on that sort of a requirement here. Indeed, petitioner concedes that no

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[1] In a more recent Third Circuit case, *United States* v. *Kemp*, 500 F.3d 257 (2007), cert. denied, 128 S. Ct. 1329 (2008), the defendants argued that the district court had erred in not instructing the jury that it had to find a violation of state criminal law. *Id.* at 283. The court of appeals rejected that claim because the district court had in fact so instructed the jury. *Ibid.* Because the defendants' actions violated state criminal law, the court did not decide whether a state-law violation was necessary.

such positive state-law prohibition is necessary to establish at least some categories of honest-services fraud. Pet. 15 ("Section 1346's criminalization of the denial of honest services obviously reaches those situations where an official, by fraud or bribery, fails to provide the required services."). Instead, petitioner seemingly limits his requirement of a state-law duty to "the distinct situation where the prosecution charges that the services rendered were dishonest because information material to the performance of official duties was not properly disclosed." *Ibid.* *Brumley* does not seem to be such a case, and, to the extent that it was, the court did not impose the requirement of a state-law *disclosure* duty that petitioner seeks. Accordingly, given the agreement of the majority of the courts that have addressed the issue that no state-law duty is required for an honest-services prosecution, and the distinguishable facts of *Brumley*, this Court's intervention is not warranted.[2]

3. In any event, the interlocutory posture of this case makes it an unsuitable vehicle for the Court to resolve the disagreement between the Fifth Circuit and the other courts of appeals. This Court generally declines to review interlocutory decisions. See *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *American Constr. Co.* v. *Jacksonville, Tampa & Key W. Ry.*, 148 U.S. 372, 384 (1893); see also *VMI* v.

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[2] In *United States* v. *Caldwell*, 302 F.3d 399, 409 (2002), the Fifth Circuit restated the holding of *Brumley* in a case involving a challenge to an indictment that alleged honest-services fraud based on a failure to disclose. The court had no occasion to apply the *Brumley* holding in that case, however, because the court held that violation of a state-law duty need not be alleged in the indictment. *Ibid.*

United States, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting the denial of certiorari).

That course of action is particularly appropriate here. The court of appeals did not rule definitively on the admissibility of the evidence that petitioner challenged, but instead remanded to the district court for it to address that issue under the standard announced in the court of appeals' opinion. Pet. App. 21a. The court of appeals "express[ed] no opinion on whether the professed evidence is relevant to proving the government's case under the standard we have announced." *Ibid.* In addition, petitioner has yet to face trial, and, if he is acquitted of the honest-services mail fraud charges, his present claim will be moot. Even if petitioner is convicted of mail fraud, his conviction may turn out to be based on conduct that violates Alaska law. The court of appeals recognized that the allegations in the indictment "could * * * support an inference of a quid pro quo arrangement to vote for the oil tax legislation in exchange for future remuneration in the form of legal work." *Id.* at 20a. Such conduct would violate Alaska Stat. § 11.56.110 (2008), which makes it a crime for a public official to solicit or to agree to accept a benefit in exchange for his vote or exercise of discretion. Also, petitioner may be convicted of mail fraud on the basis that he took official action that could have benefitted a person from whom he was seeking employment, conduct that is expressly prohibited by Alaska Statutes § 24.60.030(e)(3) (2008). Under either of those circumstances, his current claim (even if valid) would not entitle him to relief.

If, on the other hand, petitioner is convicted at trial on the basis of conduct that does not violate state law, and his conviction is affirmed by the court of appeals, he

will be free to renew his current claim in a fresh petition for a writ of certiorari at that time. The reversal by the court of appeals of the district court's pretrial ruling places petitioner in the same position that he would have occupied if the district court had ruled against him in the first instance—a ruling that would not have been subject to interlocutory review. See *Cobbledick* v. *United States*, 309 U.S. 323 (1940). In these circumstances, the Court should deny his petition at this time.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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