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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

PETITION FOR A WRIT OF CERTIORARI

DONALD B. AYER
(Counsel of Record)
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3900

JOHN CLINE
NATHANIEL GARRETT
JONES DAY
555 California Street
26th Floor
San Francisco, CA 94104
(415) 626-3939

DOUGLAS POPE
POPE & KATCHER
421 W. First Avenue
Suite 220
Anchorage, AK 99501
(907) 272-8577

SAMUEL ESTREICHER
MEIR FEDER
NYU SCHOOL OF LAW
SUPREME COURT
CLINIC
40 Washington Sq. South
New York, NY 10012
(212) 998-6226

Counsel for Petitioner

March 25, 2009

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Whether 18 U.S.C. § 1346, by criminalizing denials of "the intangible right of honest services," mandates the creation by the federal courts of a federal common law defining the disclosure obligations of state government officials.

PARTIES TO THE PROCEEDING

The parties to the proceeding in the Court of Appeals for the Ninth Circuit were Petitioner Bruce Weyhrauch and Respondent United States.

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INTRODUCTION

Petitioner seeks review of a Ninth Circuit decision that deepens a split in the circuits over the proper interpretation of the honest services fraud statute, 18 U.S.C. § 1346, in prosecutions of state and local officials. Contrary to the holdings of two other circuits, the Ninth Circuit ruled that the vague language of § 1346 is a mandate to create a federal common law of disclosure obligations of state officials, untethered to any existing, defined disclosure requirements. The Court should take this opportunity to resolve the split in the circuits and clarify the limits of § 1346.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 548 F.3d 1237. The district court's order granting Petitioner's motion to exclude evidence (*id.* at 22a-36a) is unreported.

JURISDICTION

The Court of Appeals issued its decision on November 26, 2008. The Petition for Rehearing *En Banc* was denied on January 7, 2009 (Pet. App. 37a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 1341 of Title 18, United States Code, provides in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . for the purpose of executing such scheme or

> artifice or attempting so to do [uses the mails] shall be fined under this title or imprisoned not more than 20 years or both.

Section 1346 of Title 18, United States Code, provides:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

STATEMENT

A. Background Law

Beginning in the 1970s, federal prosecutors began to prosecute state and local officials, such as Maryland Governor Marvin Mandel, under the theory that the mail and wire fraud statutes proscribed schemes to defraud citizens of their intangible right to honest services. *See United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979). The so-called "intangible rights doctrine" "quickly overgrew the legal landscape in the manner of the kudzu vine until by the mid-1980s few ethical or fiduciary breaches seemed beyond its potential reach." John C. Coffee, Jr., *Modern Mail Fraud*, 35 AM. CRIM. L. REV. 427, 427 (1998). By and large, the courts of appeals upheld the Government's right to prosecute state and local officials for their involvement in schemes to defraud citizens for their right to honest and impartial government. *McNally v. United States*, 483 U.S. 350, 355 (1987). But the meaning of "honest services" given by Courts of Appeals "was uneven." *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir. 1997) (en banc).

In *McNally v. United States*, 483 U.S. 350 (1987), this Court rejected the view held by the majority of circuits. "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," it read "§ 1341 as limited in scope to the protection of property rights." *Id.* at 360. In order to criminalize defrauding the public of honest services, the Court concluded, a much clearer statement of purpose would be required from Congress. *Id.*

In response to *McNally*, Congress enacted the text of what is now 18 U.S.C. § 1346 on the last day of the 100th Congress as one of some thirty unrelated provisions attached to the Anti-Drug Abuse Act of 1988. *See* Pub. L. No. 100-690, § 7603(a), 102 Stat. 4508 (1988). Section 1346 reads in its entirety: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346.

The text of § 1346 was inserted into the Omnibus Drug Bill for the first time on the very day that the Drug Bill was passed by both the House and the Senate. The language was never included in any bill as filed in either the House of Representatives or the Senate. As a result, the text of § 1346 was never referred to any committee of either chamber, nor was it the subject of any committee report, nor any floor debate reported in the Congressional Record. *Brumley*, 116 F.3d at 739 (Jolly & DeMoss, JJ., dissenting).

There are only two items of legislative history pertinent to the text of § 1346 as actually passed. First, Representative Conyers made remarks on the floor of the House regarding various provisions in the Omnibus Drug Bill, including the section that added § 1346 to Title 18. After describing the Supreme Court decision in *McNally* and its effect on various prior federal circuit court opinions, Representative Conyers stated:

> This amendment restores the mail fraud provision to where that provision was before the *McNally* decision. The amendment also applies to the wire fraud provision and precludes the *McNally* result with regard to that provision.
>
> The amendment adds a new section to 18 U.S.C. 63 that defines the term "scheme or artifice to defraud to include a scheme or artifice to defraud another of the intangible right of honest services." Thus, it is no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property. This amendment is intended merely to overturn the *McNally* decision. No other change in the law is intended.

134 Cong. Rec. H11108-01 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers).

Second, several weeks after final passage of the Omnibus Drug Bill, the Senate Judiciary Committee entered a report into the Congressional Record stating: "This section overturns the decision in *McNally v. United States* in which the Supreme

Court held that the mail and wire fraud statutes protect property but not intangible rights. Under the amendment, those statutes will protect any person's intangible right to the honest services of another, including the right of the public to the honest services of public officials. The intent is to reinstate all of the pre-*McNally* case law pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17360-02 (daily ed. Nov. 10, 1988) (statement of Sen. Biden).

B. Background Facts

Petitioner Bruce Weyhrauch, a licensed attorney, represented Juneau in the Alaska House of Representatives in 2006 while the House was considering legislation that would alter how the state taxed oil production. Pet. App. 2a. Five days before the legislature's scheduled adjournment, Petitioner—who had concluded that he would not run for reelection—authored a letter to Bill J. Allen, CEO of VECO Corp., an oil field services company, informing Allen that Petitioner had "practiced law and government relations since 1996," and requesting "a further conversation with you about my law office representing VECO." Appellee's Supplemental Excerpts of Record (SER) 19. Consistent with the Alaska Rules of Professional Conduct governing the advertisement of legal services, the letter included a header stating "Advertising Materials." *Id.*

When it appeared that the legislature would adjourn without acting on the taxation legislation, the governor called a 30-day "special joint session." *See* ALASKA CONST. Art. II, § 9. The indictment alleges that before termination of the special session,

Petitioner met with Allen and discussed Petitioner's "request for employment" with VECO and Petitioner's "support of the [oil tax] legislation" sought by Allen and VECO. Appellant's Excerpts of Record (ER) 16. It is further alleged that Petitioner then sought an early adjournment of the special session "before a vote could be taken on an amendment" that Allen and VECO opposed. ER 17.

C. Procedural History

Although Petitioner received no compensation or benefits from VECO—and was never offered and never accepted employment with the company—the Government charged Petitioner with, among other things, devising "a scheme and artifice to defraud and deprive the State of Alaska of its intangible right to honest services . . . performed free from deceit, self-dealing, bias, and concealment," in violation of 18 U.S.C. §§ 1341 and 1346. ER 25.

Prior to trial, the Government proposed to introduce various pieces of evidence to establish that Petitioner violated § 1346 by knowingly concealing a conflict of interest—the fact of his employment discussions with Allen on behalf of VECO. Pet. App. 3a. The proposed evidence included: (1) legislative "ethics publications . . . that contain verbatim excerpts of various Alaska State statutes addressing conflicts of interest and disclosure requirements as well as hypothetical factual scenarios"; (2) evidence that "members of the Alaska State Legislature customarily acknowledge the existence of conflicts of interests on the floor of the Legislature" and "the clerk of each house is required to record such conflict declarations"; (3) descriptions of the "ethics training"

that Petitioner underwent; and (4) evidence that Petitioner served on the Select Committee on Ethics in the Alaska State Legislature. SER 8.

Petitioner moved to exclude the Government's evidence for lack of relevance, on the ground that Alaska law does not require that state legislators disclose ongoing negotiations for employment. SER 24-28. Alaska's Ethics Code, which supersedes the provisions of the common law relating to legislative conflict of interest, requires that a state legislator disclose when he receives more than $1,000 in compensation for "personal services." ALASKA STAT. § 24.60.020(b); ALASKA STAT. § 24.60.200(a)(2). But no companion provision mandates disclosure of employment negotiations or *potential* conflicts of interest.[1] The Government argued that the evidence was nonetheless admissible under the theory that a state legislator commits honest services fraud by knowingly concealing a potential conflict of interest contrary to federal standards of good government.

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[1] Alaska's ethics code reflects the State's allegiance to the model of governance by citizen-legislators. Alaska's constitution limits the length of the legislative session to 120 calendar days to permit "citizens who undertake public service" to have "employment outside the legislature" and enable public officials "to return to private sector jobs and families." ALASKA STATE GOVERNMENT AND POLITICS 243 (Gerald A. McBeath & Thomas A. Morehouse eds., 1987). Because the Alaska citizenry's "commitment to a part-time citizen legislature implies that legislators are expected and permitted to earn outside income," the statutes establishing standards of conduct for state legislators do "not impose unreasonable or unnecessary burdens that will discourage citizens from entering or staying in government service." ALASKA STAT. § 24.60.010(4).

The district court recognized that "the issue . . . turns on whether federal common law may be used to provide the requisite duty to disclose." Pet. App. 30a. It answered that question in the negative, and granted Petitioner's motion to exclude. *Id.* at 36a. Relying on *Brumley*, 116 F.3d 728, the court held that to prosecute Petitioner under §§ 1341 and 1346 for knowingly concealing a conflict of interest, the Government would need to prove that Petitioner violated a duty imposed by state law. *Id.* at 35a-36a. Because Alaska law "does not include a duty to disclose which could have been breached under the circumstances of this case," the court precluded the Government from predicating its honest services charge on a disclosure theory. *Id.* at 36a. Deeming the excluded evidence of "critical relevance" to their case against Petitioner, the Government filed an interlocutory appeal under 18 U.S.C. § 3731. *Id.* at 40a.

The court of appeals reversed and remanded. The court noted that Congress "creat[ed] some confusion over the reach of the mail fraud statute," and that the "circuits have expressed divergent views on the proper meaning of 'honest services' for public officials," Pet. App. 11a, 12a. The Ninth Circuit nonetheless held that § 1346 "establishes a uniform standard for 'honest services' that governs *every* public official and . . . 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). The court acknowledged that "a literal reading of § 1346 might give federal prosecutors *unwarranted influence* over state and local public ethics standards," *id.* at 13a (emphasis in

original), and that an interpretation "requir[ing] the government to prove that a public official violated an independent state law" would address federalism concerns, but nevertheless declined to adopt the state law limiting principle. *Id.* at 12a, 14a.

In rejecting a state law limiting principle, the court found it unlikely that Congress intended the reach of § 1346 to vary state-by-state. Pet. App. 16a-17a. Additionally, the court dismissed the district court's federalism concerns as unpersuasive, holding that the federal government has both the power to regulate use of the mails, and a legitimate "interest in establishing a uniform standard of conduct for public officials" and "in ensuring that state action affecting federal priorities is not improperly influenced by personal motivations of state policymakers and regulators." *Id.* at 21a. The Ninth Circuit concluded further that the application of the federal fraud statutes should not vary with "the happenstance of whether state law prohibits particular conduct." *Id.*

Without defining the outer boundaries of the federal standard, the court held that Congress intended, at the least, to proscribe "(1) taking a bribe or otherwise being paid for a decision while purporting to [exercise] independent discretion and (2) nondisclosure of material information." Pet. App. 19a. The court concluded that Petitioner's "alleged conduct falls comfortably within the two categories" and reversed. *Id.* at 20a. Petitioner filed a timely Petition for Rehearing *En Banc*, which was denied. *Id.* at 37a. This petition followed.

REASONS FOR GRANTING THE WRIT

I. THE COURTS OF APPEALS ARE IN CONFLICT AS TO WHETHER THE DISCLOSURE OBLIGATIONS OF STATE OFFICIALS ENFORCEABLE UNDER 18 U.S.C. § 1346 AS DEPRIVATIONS OF "THE INTANGIBLE RIGHT OF HONEST SERVICES" ARE TO BE DEFINED BY A BODY OF FEDERAL COMMON LAW

The courts of appeals are sharply and increasingly divided on the question whether 18 U.S.C. § 1346 provides a mandate for the creation of a federal common law of disclosure obligations of state and local public officials concerning claimed conflicts of interest.[2]

Three circuits, now including the Ninth, have held that disclosure duties whose breach may be a predicate for a federal "honest services" prosecution of state and local government officials are to be determined as a matter of federal common law. *See* Coffee, *Modern Mail Fraud*, 35 AM. CRIM. L. REV. at 431 ("[S]everal cases have already held that the term ['right of honest services'] is to be defined by federal common law."); Ben Rosenberg, *The Growth of Federal Criminal Common Law*, 29 AM. J. CRIM. L. 193, 204 (2002) (noting that "[t]he Seventh Circuit"

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[2] There is no dispute that *quid pro quo* bribery, or other affirmative frauds for personal gain, in which a public official compromises the performance of his public duties, constitute a deprivation of "honest services" within the meaning of § 1346. The question presented by this case is whether the failure to disclose perceived or potential conflicts of interest, standing alone, can amount to a deprivation of "honest services" where no law apart from § 1346 requires their disclosure.

"held that the 'intangible right to [sic] honest services' is defined by federal common law" and that "[t]he Eleventh Circuit took the same position"). These courts have expressly and necessarily held that, since the legal standard at issue is federal, criminal non-disclosures may occur without any violation of state law or any other statute or regulation. Two other circuits have rejected this view, and held that a public official's non-disclosures cannot constitute a denial of honest services under § 1346 unless the official violates a duty independently imposed on the official, usually by state law.

a. Taking the second group of cases first, in *Brumley*, the Fifth Circuit, sitting *en banc*, categorically rejected the notion that § 1346 announced "a common law crime," 116 F.3d at 732, and instead held that the Government must "prove that conduct of a state official breached a duty" to provide services "owed under state law" to support a prosecution for honest services fraud. *Id.* at 734. The court reasoned that in § 1346, Congress failed to use clear language demonstrating an intent "to garner to the federal government the right to impose upon states a federal vision of appropriate services—to establish, in other words, an ethical regime for state employees." *Id.* The court affirmed the conviction, however, on the basis of ample evidence that the defendant engaged in a scheme to defraud that violated Texas penal law. *Id.* at 735.

The Third Circuit has also "endorse[d] . . . a state law limiting principle for honest services fraud," like the one enunciated in *Brumley*. *United States v. Murphy*, 323 F.3d 102, 116 (3d Cir. 2003) (citing

Brumley). In *Murphy*, the court reversed the § 1346-based conviction of a county political party chairman because the government failed to identify "any clearly established fiduciary relationship or legal duty in either federal or state law" that had been violated. *Id.* at 117. This "clearly established" rule rejects the federal common law approach and its inherent risks. *See United States v. Panarella*, 277 F.3d 678, 693 (3d Cir. 2002) ("[T]he clarity of Pennsylvania's disclosure statute criminalizing a public official's nondisclosure ... addresses rule of lenity concerns . . . [and] mitigates the federalism concerns that arise from federal prosecutions of local public officials.").

b. The Ninth Circuit now joins at least two other circuits in taking the contrary view that the honest services whose intentional denial can be the basis for a mail or wire fraud prosecution covers an extremely broad scope of conduct to be defined by the federal courts. Following that approach, these courts have expressly rejected the position that a violation of state law is required for a state official to be prosecuted for a criminal non-disclosure.

In *United States v. Walker*, 490 F.3d 1282 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 1649 (2008), the Eleventh Circuit upheld the honest services mail fraud conviction of a state legislator, based in part on his failure to disclose a scheme to secure employment for workers of a staffing company that he owned. The court of appeals observed that the "scope of conduct covered by the honest services mail fraud statute is extremely broad," *id.* at 1297, and specifically noted that the "claims against Walker were not predicated on any violation of state law" and that "an honest services mail fraud ... conviction does not require

proof of a state law violation." *Id.* at 1299. *See also United States v. deVegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) ("A public official's undisclosed conflict of interest . . . does by itself harm the constituents' interest in the end for which the official serves—honest government in the public's best interest.").

Finally, the Seventh Circuit has also recognized that § 1346's "unelaborated reference" to "the intangible right of honest services" invites courts to invent "a federal common-law crime, a beastie that many decisions say cannot exist." *United States v. Bloom*, 149 F.3d 649, 654-55 (7th Cir. 1998). In response, it has adopted its own "private gain" requirement, which it acknowledges is a "judicial gloss" on the statute, but one it deems appropriate so that doubts are "resolved against criminalizing conduct." *Id.* at 656-57 (upholding dismissal of § 1346 charge against alderman for failure to allege misuse of office for personal gain). *See also 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*, --- S. Ct. ---, 2009 WL 425807 (Feb. 23, 2009).[3] At the same time, the Seventh Circuit has considered and rejected any "state law limiting principle." *Id.*; *United States v. Martin*, 195 F.3d 961, 966 (7th Cir. 1999) ("The fear that motivated the *Brumley* decision is that if federal courts are free to devise fiduciary duties the breach of which violates

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[3] The "private gain" requirement is satisfied with evidence that someone—even if not the defendant—"illegitimate[ly] gain[ed]" from the defendant's fraudulent conduct. *See Sorich*, 523 F.3d at 709.

the mail fraud statute, the result will be the creation in effect of a class of federal common law crimes. . . . *Brumley*, however, is contrary to the law in this circuit[.]").

Accordingly, amidst the great confusion in the circuits on a variety of issues surrounding the reach of the honest services fraud statutes, there is a sharp and well-defined circuit split on one seminal issue: whether the non-disclosures by state officials constituting a denial of the right of honest services under § 1346 are to be defined as a matter of judge-made, federal common law, or rather by reference to the body of law that otherwise governs the conduct and obligations of those officials.

II. CONSTRUING 18 U.S.C. § 1346 TO MANDATE DEVELOPMENT OF FEDERAL COMMON LAW DEFINING THE DUTIES OF STATE OFFICIALS TO DISCLOSE CONFLICTS OF INTEREST IS IMPROPER FOR SEVERAL REASONS

Congress enacted 18 U.S.C. § 1346 in direct response to this Court's holding in *McNally v. United States*, which limited § 1341 to "the protection of property rights." 483 U.S. at 360. In a single sentence, with no meaningful legislative history, § 1346 broadened "scheme or artifice to defraud" to include depriving "another of the intangible right of honest services."

On its face, § 1346's reference to a "right" of "services" relates to an obligation of one party to one or more others, arising from some independent source in law. It may arise from a private contract of employment, *see, e.g.*, *United States v. Frost*, 125

F.3d 346, 367-69 (6th Cir. 1997), but more often, in prosecutions under § 1346, arises in the context of employment of a public official. *See, e.g.*, *United States v. Vinyard*, 266 F.3d 320, 326 (4th Cir. 2001) ("honest services theory . . . is directed primarily at the deterrence and punishment of corruption among public officials").

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. A legislator who sells his vote, or a procurement officer who assigns government contracts based on bribes received rather than the public interest rules governing contractor selection, has plainly acted dishonestly and failed to provide the service required of him. Such conduct amounts to a fraudulent denial of the services at issue.

This case concerns the distinct situation where the prosecution charges that services rendered were dishonest because information material to the performance of official duties was not properly disclosed. When does a public official's nondisclosure of arguably material information by itself prove that "services" rendered were not "honest," not because a bribe was paid or other fraud proven, but simply because certain information was not disclosed?

Without further clarification of the intended meaning of the statute, we are left with the dictionary definition of the word "honest," as "free from fraud or deception." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1086 (1986); *see also* 7 OXFORD ENGLISH DICTIONARY 349 (2d ed. 1989) (defining "honest" as "free from fraud"); BALLANTINE'S

LAW DICTIONARY 566 (3d ed. 1969) (defining "honest" as "descriptive of one who does not lie or cheat").

The question presented in this case is how the federal courts, in construing the "right of honest services," are to determine whether a state official's failure to disclose certain information is "deceptive," a "lie" or "cheating," and thus not "honest." When the "right" of "services" relates to the obligations of a state official, it is reasonable to expect that state law will prescribe the extent and character of such services to be provided. *See* George D. Brown, *Should Federalism Shield Corruption?*, 82 CORNELL L. REV. 225, 283 n.491 (1996) ("Section 1346 is phrased in terms of the 'right' to honest services. State law governing public officials' conduct can be viewed as creating the correlative duty that establishes the right.").

The court below, however, held unequivocally that the disclosure obligations of state officials whose breach is actionable as a criminal violation of the "right of honest services" should be established by a "uniform" body of federal common law. There are four fundamental reasons why this is wrong.

A. This Court's Cases on Recognition of Areas of Federal Common Law Weigh Heavily Against Its Application in This Context

Under this Court's cases, "[t]he instances where" federal courts properly "create[] federal common law are few and restricted." *Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963). The Ninth Circuit's decision here that the disclosure obligations of state officials subject to prosecution under § 1346 will be

determined as a matter of federal common law cannot be justified under these decisions.

Most obviously, the decision below is at odds with this Court's repeated statements that "there is no federal common law of crimes," *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994), and that "federal crimes are defined by statute rather than by common law." *United States v. Oakland Cannabis Buyer's Co-op.*, 532 U.S. 483, 490 (2001); *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997) ("Federal crimes are defined by Congress, not the courts."); *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 33 (1812) (holding that no federal court may exercise common law jurisdiction in criminal cases). By concluding that federal courts are charged with defining a uniform law of disclosures by governmental officials whose violation will trigger application of federal felony statutes, the Ninth Circuit ruling directs federal courts to define a critical element of a major federal crime.

Beyond that simple rule against common law crimes, the Court has recognized the appropriateness of federal common law only when one or both of two conditions is satisfied: (1) when Congress has invited federal courts "to develop substantive law," and (2) when federal common law "is necessary to protect uniquely federal interests." *Tex. Indus., Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981). Here, neither condition supports the Ninth Circuit's recognition of a federal common law of disclosure obligations, through 18 U.S.C. § 1346, that "governs *every* public official" in every state. Pet. App. 21a (emphasis in original).

Congress has not invited the federal courts to craft a federal common law regulating the ethics of state officials. Section 1346 is a single sentence. There is neither any language nor any legislative history suggesting any such broad purpose.

Nor is there any "federal interest" in creating a federal common law of the disclosure duties of state officials. *See Tex. Indus.*, 451 U.S. at 640. This Court has found such interests only in a limited number of instances. For example, in *Banco Nacional de Cuba v. Sabatino*, 376 U.S. 398, 407 (1964), the Court found a sufficient federal interest where the Court was asked to determine the effect of a foreign government's expropriation of American owned assets, which determination could have substantial impact "on the conduct of the [United States'] foreign relations and . . . on the proper role of the Judicial Branch in this sensitive area." Likewise, in *Illinois v. City of Milwaukee*, 406 U.S. 91, 103 (1972), this Court found a sufficient federal interest to conclude that federal common law should govern a dispute between two states over pollution of interstate waters. Similarly, in *Clearfield Trust Co. v. United States*, 318 U.S. 363, 366-67 (1943), this Court found a sufficient federal interest justifying federal common law defining the federal government's responsibilities to notify guarantors of federal checks about forged checks. And in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 512 (1988), this Court formulated a common law government contractor defense, based on the federal interest in protecting the military's equipment procurement process from state tort liability.

Section 1346 raises no federal interest remotely comparable to any of these. Instead, this case much more closely resembles those where this Court has declined to recognize federal common law. In *Miree v. DeKalb County*, 433 U.S. 25, 29 (1977), this Court found no sufficient interest justifying application of federal common law in construing a contract between the FAA and the county owner of an airport, implicating the county's liability to plaintiff air crash survivors. The Court noted that "the litigation before us raises no question regarding the liability . . . or the responsibilities of the United States." *Id.*

In *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 87 (1994), the Court asked whether there was "a significant conflict between some federal policy . . . and the use of state law," and on that basis rejected federal common law and applied state law principles to determine a variety of issues, even though they affected whether the FDIC could recover from legal counsel representing a savings and loan that had engaged in misconduct.

And in *Atherton v. FDIC*, 519 U.S. 213, 219 (1997), this Court refused to create a national standard of the duty of care owed by officers of federally-insured financial institutions, and instead held that the state law duty of care should apply. The purported federal interest in the present case—defining a federal standard of disclosures by state legislators—falls far short of the asserted federal interest in *Atherton* in regulating conduct by officers at federally-insured banks.

In this case, the Ninth Circuit invoked uniformity, the "most generic (and lightly invoked)"

federal interest, to justify creating federal common law. *See O'Melveny & Myers*, 512 U.S. at 88. But the court never explained the need for such a nationwide standard. For centuries, the nation has survived without a uniform federal law regulating the disclosures of state officials. *Cf. Atherton*, 519 U.S. at 220 ("our Nation's banking system has thrived despite disparities in matters of corporate governance"). Nor does the convenience of federal agencies, such as the United States Attorneys who enforce § 1346, justify creating federal common law. As this Court has noted, if avoiding "state-by-state research" were an "identifiable federal interest, we would be awash in federal common law." *O'Melveny & Myers*, 512 U.S. at 88.

An appropriate "solicitude for state interests" demands that, in the absence of an express congressional mandate, federal common law be recognized only when the application of state law would inflict "major damage" on the "clear and substantial interests" of the federal government. *United States v. Yazell*, 382 U.S. 341, 352 (1966). No such federal interests are remotely implicated in this case.

B. Defining State Officials' Disclosure Obligations As A Matter Of Federal Common Law Would Raise Serious Constitutional Concerns About The Statute's Vagueness

A further compelling reason for not viewing "honest services" as governed by federal common law is that to do so would raise a substantial question of unconstitutional vagueness. "[W]hen a statute is susceptible of two constructions, by one of which

grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." *Harris v. United States*, 536 U.S. 545, 555 (2002) (quotation and citation omitted). A statute is void for vagueness if the statute either "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008) (citations omitted). Allowing federal common law to define disclosures required to avoid prosecution for denial of "honest services" would fail both prongs of this Court's vagueness test.

First, such a common law approach would not "enable ordinary people to understand what conduct [the statute] prohibits." *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion). A state official who adheres to all state law disclosure requirements will be unsure if he or she must make certain further disclosures in order to avoid violating § 1346. The statute would thus violate the first prong of the vagueness test. *Williams*, 128 S. Ct. at 1845.

Second, a common law definition of disclosure obligations would also "encourage[] seriously discriminatory enforcement." *Id.* at 1835. It might well "permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender v. Lawsun*, 461 U.S. 352, 358 (1983) (citation omitted) (finding state criminal statute unconstitutionally vague because "it encourage[d] arbitrary enforcement by failing to describe with sufficient particularity what a suspect

must do in order to" comply with the statute). Without some coherent limiting principle, § 1346 "invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs." *Sorich v. United States*, --- S. Ct. ---, 2009 WL 425807, at *2 (Feb. 23, 2009) (Scalia, J., dissenting from denial of certiorari).

C. It Does Not Comport With The Clear Statement Rule

When an interpretation of a federal statute would "upset the usual constitutional balance" between the federal government and the states, the Court has required "unmistakably clear" statutory language before it adopts that interpretation. *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 243 (1985)). This clear statement rule protects the states' "substantial sovereign powers" in our federal system, *id.* at 461, and "assures" that Congress "faced, and intended to bring into issue," the relative powers of the federal government and the states. *United States v. Bass*, 404 U.S. 336, 349 (1971). This rule constrains the legislation Congress can enact by demanding that it be clear in stating its intention.

The clear statement rule applies across the range of federal legislation, including in criminal cases. *See Jones v. United States*, 529 U.S. 848, 858 (2000); *Cleveland v. United States*, 531 U.S. 12, 24 (2000). *Jones* involved a statute criminalizing arson of buildings "used in . . . or affecting commerce," and the Court invoked the clear statement rule in holding that the statute should not be read to cover private owner-occupied residences not used in commerce.

529 U.S. at 858. In *Cleveland*, the Court was faced with the question whether state gaming licenses constituted property within the coverage of the federal mail fraud statute. Because such a conclusion would have involved the federal government in regulating a broad range of conduct formerly regulated by the states, the Court invoked the clear statement rule and found no such statement to exist. 531 U.S. at 24. The clear statement rule has also been applied to federal statutes "prescrib[ing] the qualifications" of state officers. *Gregory*, 501 U.S. at 460 (quoting *Taylor v. Beckham*, 178 U.S. 548, 570 (1900)). In *Gregory*, the Court's reliance on the rule led it to construe the Age Discrimination in Employment Act as inapplicable to state judges.

State governments have primary responsibility to set the performance standards and ethical responsibilities of their own officials. The clear statement rule thus is clearly triggered by any suggestion that Congress has given to the federal courts the task of defining the disclosure obligations of state and local officials that will be subject to federal prosecution.

Certainly § 1346 contains no clear statement of an intention to define state officials' disclosure as a matter of federal common law. The statute is only a sentence long and makes no mention of government officials or their disclosure duties. To the contrary, courts have noted that the scope of § 1346 is "vague and undefined," *United States v. Urciuoli*, 513 F.3d 290, 294 (1st Cir. 2008), and that its "plain language is inconclusive." Pet. App. 12a.

In sum, the statute's prompt enactment and sparse language manifest a clear intention to reverse the holding in *McNally*, and extend the mail and wire fraud statutes beyond crimes involving property to reach those involving intangible rights to honest services. That fact says nothing, however, about the extent or derivation of the intangible rights thus made enforceable. Certainly it does not amount to a clear statement that the federal courts should develop a common law of the disclosure obligations owed by state officials, to be enforced through federal prosecutions.

D. It Is Contrary To The Rule Of Lenity

Finally, this Court has made clear that ambiguities in criminal statutes should be resolved in "favor of lenity." *See Jones,* 529 U.S. at 858. In *McNally*, this Court applied the rule of lenity to the mail fraud statutes, noting that "before one can be punished, it must be shown that his case is plainly within the statute," and refusing to federalize disclosure and "good government" standards of state officials without a clear statement that Congress intended to do exactly that. 483 U.S. at 360 (quotation and citation omitted).

Yet when faced with two rational interpretations of § 1346, the Ninth Circuit improperly chose the one that leaves the statute's outer boundaries indefinite and requires the federal courts to establish a case law defining disclosure obligations of state legislators and other employees. Since the statute is at most ambiguous in not expressly foreclosing the creation of common law disclosure obligation, this Court should reject the interpretation of § 1346 adopted by the

Ninth Circuit and invite Congress to speak more clearly on this point if it desires to go further.

III. THIS CASE IS AN EXCELLENT VEHICLE FOR RESOLVING AN ISSUE OF GREAT AND GROWING IMPORTANCE TO THE FEDERAL SYSTEM

As was true prior to this Court's grant of review in *McNally*, the prosecution of "honest services" fraud in the federal courts has again begun to resemble the spread of a "kudzu vine." Coffee, *supra*, at 427. Since the enactment of § 1346 in 1988, there has been a steady increase in its utilization by federal prosecutors, and in recent years the expansion has been particularly dramatic. By the Government's own count, federal public corruption indictments rose more than forty percent between 2005 and 2007. U.S. Dep't of Justice, *Stewards of the American Dream: The Department of Justice Strategic Plan FY 2007-2012* at 7 (2007), *available at* http://www.usdoj.gov/jmd/mps/strategic2007-2012/index.html. By Petitioner's count, cases generating reported decisions grew in number from nine in 1998 to twenty-two in 2006.[4]

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[4] Reported cases during 2006 were: *United States v. Kalaycioglu*, 210 Fed. App'x 825 (11th Cir. 2006), *cert. denied*, 128 S. Ct. 48 (2007); *United States v. Turner*, 465 F.3d 667 (6th Cir. 2006); *United States v. Woodard*, 459 F.3d 1078 (11th Cir. 2006); *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006), *cert. denied*, 127 S. Ct. 2249 (2007); *United States v. Gotti*, 459 F.3d 296 (2d Cir. 2006); *United States v. Skelly*, 442 F.3d 94 (2d Cir. 2006); *United States v. Williams*, 441 F.3d 716 (9th Cir. 2006); *United States v. McDonald*, 178 Fed. App'x 643 (9th Cir. 2006), *cert. denied*, 549 U.S. 1179 (2007); *United States v.*

Such cases are highly consequential in a number of respects. They often involve proof by circumstantial evidence following extensive grand jury investigations, and thus consume great quantities of investigative, prosecutorial and judicial resources. *See* Henry M. Greenberg, *Public Corruption Cases: A Prosecutorial Perspective* 1 (American Bar Association 2005), *available at* http://www.abanet.org/rol/publications/asia_raca_mr_greenberg_public_corruption.pdf (public corruption cases are often "complex" and "high-profile," and "require considerable [prosecutorial] resources and careful planning"). Not infrequently, they culminate in lengthy trials and appeals, and command a substantial amount of public attention. *See, e.g.*, *United States v. Black*, 530 F.3d 596, 598, 606 (7th

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Bosarino, 437 F.3d 634 (7th Cir. 2006), *cert. denied*, 127 S. Ct. 3041 (2007); *United States v. Black*, 469 F. Supp. 2d 513 (N.D. Ill. 2006); *United States v. Siegelman*, 467 F. Supp. 2d 1253 (M.D. Ala. 2006); *United States v. Skilling*, No. CRIM H-04-025-02, 2006 WL 3030721 (S.D. Tex. Oct. 23, 2006); *United States v. Geddings*, No. 5:06-CR-136-ID, 2006 WL 4877548 (E.D.N.C. Sept. 6, 2006); *United States v. Wecht*, No. CRIM 06-0026, 2006 WL 1835818 (W.D. Pa. June 29, 2006); *United States v. Thompson*, No. 06-CR-020, 2006 WL 1518968 (E.D. Wis. May 30, 2006); *United States v. Safavian*, 435 F. Supp. 2d 36 (D.D.C. 2006); *United States v. Lexin*, 434 F. Supp. 2d 836 (S.D. Cal. 2006); *United States v. Caldwell*, No. C.W.A. 303CV796WN, 2006 WL 1195623 (S.D. Miss. Apr. 28, 2006); *United States v. Hamrick*, No. 2:05-CR-119-MEF, 2006 WL 902272 (M.D. Ala. Apr. 5, 2006); *United States v. Wittig*, 425 F. Supp. 2d 1196 (D. Kan. 2006); *United States v. Bradley*, 428 F. Supp. 2d 1365 (S.D. Ga. 2006); *United States v. Scrushy*, 237 F.R.D. 464 (M.D. Ala. 2006).

Cir. 2008) (four-month trial of Hollinger CEO followed by appeal involving 161 pages of briefing by defendants). And they are of course serious crimes, carrying large potential penalties.[5] The statute's vagueness and the inconsistency of its application are thus matters of great consequence to the personal rights of all prospective defendants.[6]

Beyond these considerations, this case presents squarely the sensitive federalism issues that pervade prosecutions of state officials under a broadly-construed honest services fraud statute. Indeed, it is difficult to imagine a more direct assault on comity and the benefits that flow from our federal structure,

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[5] Section 1346 expands all "scheme to defraud" offenses in Chapter 63 of the United States Code to encompass denials of honest services. The maximum penalties for those offenses—Section 1341 Mail Fraud; Section 1342 Fictitious Name or Address; Section 1343 Fraud by Wire; Section 1344 Bank Fraud; Section 1348 Securities Fraud—range from five years to thirty years and a $1,000,000 fine per count.

[6] Not surprisingly, inconsistencies have emerged in the application of the honest services provision to private defendants as well as to government officials. Significantly, there is a recognized split between at least five circuits which define breaches of honest services by private actors under a "materiality test," and at least three other circuits which apply a "reasonably foreseeable harm test." *See Vinyard,* 266 F.3d at 327-28 (listing cases). The Seventh Circuit also applies its "private gain" test in the private context. *See, e.g., United States v. Black,* 530 F.3d 596 (7th Cir. 2008), *pet. for cert. filed,* 77 U.S.L.W. 3432 (U.S. Jan. 9, 2009) (No. 08-876). Like public officials, private defendants continue to actively seek clarification of the scope of § 1346. *See id.*; *see also United States v. Skilling,* 554 F.3d 529 (5th Cir. 2009).

than a prosecution predicated on the theory that a state official, though complying with state law, has failed to live up to the ethereal standards of good government established and evolving over time as a matter of federal common law.

Moreover, this case presents an excellent vehicle by which to address the problems posed by the statute, which stem from the "vague and undefined" character of the language used in the statute, *Urciuoli*, 513 F.3d at 294, and the varying approaches courts have taken to its construction.

The decision below embodies a definitive holding that the meaning of "honest services" as applied to disclosures required of state government officials is not limited by state law, but turns on a "uniform" body of federal common law to be developed by the federal courts. Pet. App 21a. Indeed, the decision below has already been recognized as standing for precisely that legal rule. *See United States v. Kincaid-Chauncey*, --- F.3d ---, 2009 WL 415567, at *20-21 (9th Cir. Feb. 20, 2009) (Berzon, J., concurring) (recognizing *Weyhrauch*'s holding that the disclosures required by the right of honest services are to be determined as a matter of federal common law).

In opening the door to federal common law-making, the circuits which have taken that approach have invited the development of a range of legal rules and limiting principles, and the present chaos in the circuits is the predictable result. By resolving the fundamental question squarely and unambiguously presented by this case—whether federal common law governs the disclosure obligations of state officials

under the honest services fraud statute—the Court could do much to clarify the broader confusion surrounding the statute.

CONCLUSION

For the reasons set forth above, the petition should be granted.

Respectfully submitted,

DONALD B. AYER
(Counsel of Record)
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3900

DOUGLAS POPE
POPE & KATCHER
421 W. First Avenue
Suite 220
Anchorage, AK 99501
(907) 272-8577

JOHN CLINE
NATHANIEL GARRETT
JONES DAY
555 California Street
26th Floor
San Francisco, CA 94104
(415) 626-3939

SAMUEL ESTREICHER
MEIR FEDER
NYU SCHOOL OF LAW
SUPREME COURT CLINIC
40 Washington Sq. South
New York, NY 10012
(212) 998-6226

Counsel for Petitioner

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