No. 08-876

In the Supreme Court of the United States

CONRAD M. BLACK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
RITA M. GLAVIN
Acting Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether petitioners are entitled to reversal of their mail fraud convictions because the district court did not instruct the jury that, to find them guilty under an honest-services theory, the jury had to find that their fraudulent scheme "reasonably contemplated identifiable economic harm" to their employer.

2. Whether, by opposing the government's request for a special verdict that would have required separate findings on property-rights and honest-services mail fraud, petitioners forfeited their claim that their mail fraud convictions must be reversed because the honest-services theory was legally invalid.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Cases—Continued: Page

Statutes and rules:

In the Supreme Court of the United States

No. 08-876

CONRAD M. BLACK, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 530 F.3d 596.

JURISDICTION

The judgment of the court of appeals was entered on June 25, 2008. A petition for rehearing was denied on August 13, 2008 (Pet. App. 18a-19a). On October 29, 2008, Justice Stevens extended the time within which to file a petition for a writ of certiorari to and including January 10, 2009, and the petition was filed on January 9, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioners were each convicted on three counts of mail fraud, in violation of 18 U.S.C. 1341 and 1346. In addition, petitioner Black was convicted of obstructing justice, in violation of 18 U.S.C. 1512(c)(1). The district court granted petitioner Kipnis's motion for a judgment of acquittal on one of the mail fraud counts. Black was sentenced to 78 months in prison, petitioner Boultbee to 27 months, and Kipnis to probation with six months of home detention. The court of appeals affirmed. Pet. App. 1a-17a.

1. Petitioners were senior executives of Hollinger International, Inc. (Hollinger), a publicly held company that, through subsidiaries, owns a number of newspapers in the United States and abroad. Hollinger was controlled by a Canadian company called Ravelston. Black controlled Hollinger through his majority stake in Ravelston. Boultbee also owned stock in Ravelston. Because of their holdings in Ravelston, it was in Black's and Boultbee's financial interest to funnel income received by Hollinger to Ravelston by having Hollinger pay Ravelston large management fees. Pet. App. 2a.

Hollinger had a subsidiary called APC, which owned a number of newspapers that it was in the process of selling. When APC had only one newspaper left—a weekly community paper in Mammoth Lake, California—Kipnis prepared and signed on behalf of APC an agreement that paid $5.5 million to Black, Boultbee, and David Radler, another Hollinger executive, purportedly in exchange for their promises not to compete with APC for three years after they stopped working for Hollinger. There was no reasonable possibility, however, that Black and the others would start a newspaper in

Mammoth Lake, which had population of approximately 7000 at that time. The checks representing the $5.5 million payments were backdated to the year in which APC had sold most of its newspapers in order to make the compensation for the non-competition agreements seem less preposterous. Petitioners failed to bring the transaction to the attention of either Hollinger's board of directors or its audit committee, which was required to approve transactions between Hollinger's executives and the company (or its subsidiaries) because of conflict-of-interest concerns. Pet. App. 2a-3a.

Petitioners' defense at trial was that the $5.5 million represented management fees owed to Ravelston and that they had characterized the fees as compensation for non-competition agreements in the hope that Canada might not treat the fees as taxable income. But the evidence showed (1) that no document could be found to indicate that the $5.5 million in payments was ever approved by Hollinger or credited to the management-fees account on its books; (2) that the checks were drawn on APC, from which Ravelston had no right to management fees; and (3) that the payments were made to defendants personally instead of to Ravelston and came from the proceeds of a newspaper sale rather than from a management-fee account. Petitioners failed to disclose the $5.5 million in payments in the 10-K reports that they were required to file with the SEC, and they caused Hollinger to represent falsely to its shareholders that the payments had been made "to satisfy a closing condition" in connection with the sale of a newspaper. Pet. App. 3a-4a.

2. Petitioners were charged with, among other crimes, several counts of mail fraud, in violation of 18 U.S.C. 1341 and 1346. See Pet. App. 24a-121a. Section

1341 criminalizes the use of 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. Section 1346 defines the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

The government proceeded on two overlapping theories on the mail fraud counts at issue here: (1) that petitioners stole $5.5 million from Hollinger by fraudulently paying that sum to themselves in the form of bogus non-competition payments; and (2) that, in making the bogus non-competition payments to themselves, petitioners deprived Hollinger of their honest services as managers of the company. See Pet. App. 26a-30a, 36a, 52a-53a. Accordingly, the district court instructed the jury that it could find petitioners guilty of mail fraud if it found that they participated in a scheme either "to obtain money or property by means of materially false pretenses, representations, or promises," or "to deprive Hollinger International and its shareholders of their intangible right to the honest services of the corporate officers, directors or controlling shareholders." Gov't C.A. Separate App. 18 (Gov't C.A. App.).

The court instructed the jury that, in order to establish petitioners' guilt under the honest-services fraud theory, the government had to prove that petitioners misused their positions "for private gain for [themselves] and/or a co-schemer." Gov't C.A. App. 18. The court further instructed the jury that petitioners would not be guilty of honest-services mail fraud if the transaction on which the government relied to establish their guilt was "entirely fair" to the corporation, and that, in

determining whether the transaction was "entirely fair," the jury should consider whether the transaction involved "fair dealing" and a "fair price." *Id.* at 20. To determine whether a transaction involved a "fair price," the court instructed, the jury should examine "the economic and financial considerations" of the transaction. *Ibid.* In addition, the court instructed the jury that "[m]ateriality" is an element of a mail fraud offense, and that a misrepresentation or omission is material "if it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed." *Id.* at 23.

The government asked the district court to require a special verdict by which the jury would indicate, if the jury found petitioners guilty, on which theory (property-rights fraud, honest-services fraud, or both) the jury had relied. Petitioners opposed the use of a special verdict. Instead, they proposed that the court adopt a "bifurcated" procedure under which the jury, in the event it returned a guilty verdict on any fraud count, would be sent back to the jury room to answer special interrogatories about the basis for the verdict. The district court rejected petitioners' proposal for post-verdict special interrogatories; in light of that rejection, and petitioners' opposition to a special verdict form, the district court used only a general verdict form. Pet. App. 11a, 222a-228a; Gov't C.A. Br. 64-65; Gov't C.A. App. 390-395.

The jury found each petitioner guilty on three mail fraud counts. See C.A. Separate App. 188. The district court subsequently granted Kipnis's post-verdict motion for judgment of acquittal on one of those counts. *Id.* at 221.

3. On appeal, petitioners contended that the district court's instructions on honest-services fraud were defi-

cient because they did not require the jury to find that petitioners' fraudulent scheme contemplated harm to Hollinger. Petitioners argued that, for a defendant to be guilty of mail fraud on an honest-services fraud theory, the defendant's fraudulently obtained private gain must be at the expense of the person or entity to whom the defendant owed his honest services. According to petitioners, their scheme was directed at depriving the government of Canada of tax revenue and not at harming Hollinger. Pet. C.A. Br. 45-50; Pet. C.A. Reply Br. 15-20; see Pet. App. 6a.

The court of appeals rejected what it characterized as petitioners' "no harm-no foul" claim. Pet. App. 6a. The court likened this case to *United States* v. *Holzer*, 816 F.2d 304 (7th Cir.), vacated on other grounds, 484 U.S. 807 (1987), which involved a judge who took bribes from litigants. The court explained that, just as the bribe-taking judge deprived the public of the honest adjudication services it thought it was purchasing in exchange for his salary, petitioners deprived Hollinger of the honest services they owed the company, even if "the inducement was the anticipation of money from a third party (the anticipated tax benefit)." Pet. App. 7a. The court observed that "if [petitioners] were trying to defraud Canada, that augmentation of their wrongdoing would not help their case." *Ibid.* The court explained by analogy that a private employee or judge who accepts a bribe but then defrauds the bribe-giver by refusing to take the action for which the bribe was paid is not materially less culpable for honest-services fraud than if he had performed his side of the bargain. *Id.* at 7a-8a.

The court of appeals also noted that "honest services fraud bleeds into money or property fraud." Pet. App. 8a. The court explained that, if petitioners had "dis-

closed to Hollinger's audit committee and board of directors that the recharacterization of management fees would net [petitioners] a higher after-tax income, the committee or the board might have decided that this increase in the value of the fees to them warranted a reduction in the size of the fees." *Ibid.* The court added that petitioners' conduct, which included causing Hollinger to make false SEC filings to cover up their scheme, was "bound to get [the] corporation into trouble with [Canada] and the SEC." *Id.* at 9a.

The court of appeals further held that, even if the instruction on honest-services mail fraud was incorrect, the error was harmless. The court stated that "[t]here is no doubt that the defendants received money from APC and very little doubt that they deprived Hollinger of their honest services." Pet. App. 9a. The court noted that whether petitioners "also got (or hoped to get) a tax break from the Canadian government was not an issue at trial." *Ibid.* The court observed that the government did not ask the jury to find petitioners guilty of honest services fraud on the basis that their private gain was at Canada's expense; rather, the government's theory was "straightforward"—namely, "that [petitioners] had abused their positions with Hollinger to line their pockets with phony management fees disguised as compensation for covenants not to compete." *Id.* at 10a. Accordingly, the court concluded, if the jury had believed that the payments to petitioners were actually management fees, as petitioners argued, then it would have acquitted them. *Ibid.*

Finally, the court of appeals held, in the alternative, that petitioners had forfeited their challenge to the jury instructions by objecting to the government's request for a special verdict that would have required the jury to

make separate findings on property fraud and on honest-services fraud. Pet. App. 11a. The court explained that, if the jury had been required to make such separate findings, then the challenge to the instructions might be "moot." *Id.* at 10a-11a. The court further held that petitioners' proposal for post-verdict interrogatories did not cure their forfeiture. The court stated that "[q]uestioning the jurors after they have handed down their verdict is not a good procedure and certainly not one that the district court is *required* to employ." *Id.* at 11a.

ARGUMENT

1. Petitioners contend (Pet. 14-15, 16-23) that the district court should have required the jury to find that their honest-services mail fraud scheme "reasonably contemplated identifiable economic harm" to their employer. Pet. 14. Petitioners failed to preserve that claim in the courts below, and it does not warrant this Court's review in any event.

a. As an initial matter, petitioners failed to preserve their claim in the district court. Although they objected to other aspects of the court's instructions on honest-services fraud, they did not object on the ground that the instructions failed to require a jury finding that their scheme "reasonably contemplated identifiable economic harm" to Hollinger. Petitioners state (Pet. 9, 30 n.12) that they adequately preserved their claim through their submission of two proposed instructions. But a proposed instruction is not sufficient to preserve an instructional claim for appeal; rather, the defendant must object to the instruction as actually given before the jury retires to deliberate, *Jones* v. *United States*, 527

U.S. 373, 387-388 (1999); Fed. R. Crim. P. 30(d)—which petitioners failed to do.

In any event, the proposed instructions on which petitioners rely did not preserve their claim. The government had requested an instruction that "[t]he mail or wire fraud statute can be violated whether or not there is any monetary loss or financial damage to the victim of the crime or financial gain to the defendants." Gov't C.A. App. 2. Relying on *United States* v. *Ratcliff*, 488 F.3d 639 (5th Cir. 2007), petitioners suggested adding a sentence to that instruction stating: "However, the scheme, if successful, must wrong the alleged victim's property rights in some way." Pet. App. 197a. Petitioners did not indicate that the proposed addition had anything to do with the proof required under an honest-services fraud theory, and *Ratcliff* was a property-fraud case that did not include an honest-services fraud charge. 488 F.3d at 644. In addition, petitioners' proposed instruction did not state that the fraudulent scheme must *contemplate* an adverse effect on the victim's property rights, the legal proposition for which petitioners contend in this Court. Instead, the instruction stated that, *if successful*, the scheme must *actually* adversely affect the victim's property rights. The two propositions are not equivalent. Accordingly, the proposed instruction did not preserve the claim petitioners assert here.[1]

---

[1] This case is thus unlike *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 707 n.10 (2005), in which the defendant preserved a claim by proposing an instruction that was based on existing case law and objected to the instructions as given, even though in this Court, the defendant advocated a different formulation of a proper instruction. Petitioners here did not object to the instructions as given, and their harm-to-property rights proposed instruction (offered as part of the

Petitioners suggest that they preserved their current claim by submitting a second proposed instruction—that, "[i]n order to prove a scheme to defraud, the government must prove that it was reasonably foreseeable to the defendant that the scheme could result in some economic harm to the victim." Pet. App. 187a. Petitioners offered this instruction as a substitute for the government's proposed instruction that foreseeable economic harm is not an element of honest-services fraud. See *id.* at 193a, 207a. Thereafter, the parties mutually agreed to withdraw their proposed instructions, so neither instruction was given. See *id.* at 207a-208a. Petitioners' withdrawn instruction did not preserve their claim.

In the court of appeals, petitioners went even further and affirmatively disavowed the claim they now ask this Court to endorse. In this Court, petitioners contend (Pet. 14, 19-22) that, in an honest-services-fraud prosecution, the fraudulent scheme must contemplate *economic* harm to the party to whom the defendant owes his honest services. In the court of appeals, however, petitioners insisted that they were *not* "arguing that 'it is error to instruct a jury that an honest-services fraud does not require a contemplated loss of money or property to the victim.'" Pet. C.A. Reply Br. 15 (quoting Gov't C.A. Br. 54). Petitioners expressly stated that economic harm is not required. *Id.* at 15-16 ("Of course, if § 1346 means nothing else, it certainly means that one can commit mail fraud by depriving his victim of 'honest services,' rather than 'money or property.'").

Petitioners' claim in the court of appeals was that the jury instructions incorrectly allowed the jury to find

---

general mail-fraud instructions) addressed a significantly different issue than their current plea for a contemplated-economic-harm instruction (offered as a requirement of honest-services fraud).

them guilty if they harmed the Canadian government rather than Hollinger. See Pet. App. 6a; Pet. C.A. Reply Br. 17-18. Petitioners contended that the instructions should have required the jury to find that their fraud was "at the expense of the party to whom the fiduciary duty was owed." *Id.* at 17 (quoting *United States* v. *Hausmann*, 345 F.3d 952, 956 (7th Cir. 2003), cert. denied, 541 U.S. 1072 (2004)); see *id.* at 18 ("[H]arm to [Hollinger] should be a required element."). But petitioners expressly stated that the harm did not have to be economic. Pet. C.A. Reply Br. 15-16. Accordingly, petitioners waived the claim they now advance in this Court, and the Court should not consider it.

b. Even if petitioners had properly preserved their claim, it would not warrant this Court's review. The mail fraud statute makes it unlawful 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 statute extended to schemes to deprive the public of the intangible right to the honest services of government officials. The courts of appeals also generally agreed that the intangible rights covered by the statute included the right of a private employer or principal to the honest and faithful services of its employees or agents. See, *e.g.*, *United States* v. *Lemire*, 720 F.2d 1327, 1336-1337 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984).

In *McNally*, this Court rejected the intangible rights theory, holding that the mail fraud statute in its then-existing form reached only schemes to deprive victims of money or property. 483 U.S. at 356, 358-360. Shortly

thereafter, Congress enacted 18 U.S.C. 1346 in order 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" to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

Accordingly, Congress's objective in enacting Section 1346 was to make clear that the coverage of the mail fraud statute is not limited to schemes to deprive the victim of money or property. Unlike property-rights fraud, honest services fraud hinges on deprivation of "the intangible right of honest services." For that reason, in an honest-services fraud prosecution, whether of the public- or private-sector variety, the government need not show that the defendant intended to deprive his victim of money or property. See, *e.g.*, *United States* v. *Rybicki*, 354 F.3d 124, 145 (2d Cir. 2003), cert. denied, 543 U.S. 809 (2004); *United States* v. *Sun-Diamond Growers*, 138 F.3d 961, 974 (D.C. Cir. 1998), aff'd on other grounds, 526 U.S. 398 (1999); *United States* v. *Frost*, 125 F.3d 346, 369 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998).

At the same time, a defendant is guilty of honest-services mail fraud, as of mail fraud more generally, only if the fraud is "material." The materiality element operates to constrict the scope of Section 1346 in private-sector cases by distinguishing honest-services frauds that are properly actionable from those that are harmless and therefore do not warrant criminal prosecution. See *United States* v. *Cochran*, 109 F.3d 660, 667 (10th Cir. 1997); *Frost*, 125 F.3d at 368-369.

As petitioners point out (Pet. 19-23), the courts of appeals differ somewhat in their articulation of the ma-

teriality element of honest-services fraud in private-sector cases. Some courts of appeals require a showing that the defendant's misrepresentation or omission had a natural tendency to influence or was capable of influencing the employer to change his conduct. See, *e.g.*, *Rybicki*, 354 F.3d at 145-146; *Cochran*, 109 F.3d at 667-668 & n.3; *United States* v. *Gray*, 96 F.3d 769, 775, 776-777 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997). The district court in this case instructed the jury consistently with that requirement. See Gov't C.A. App. 23 (instructing the jury that "[m]ateriality" is an element of honest-services fraud and that "[a] misrepresentation or omission is material if it has a natural tendency to influence, or is capable of influencing, the decision of the decisionmaking body to which it was addressed"). That test requires that the deprivation of honest services have a reasonable potential for causing the employer harm, though not specifically economic harm. See *Rybicki*, 354 F.3d at 146. Nonetheless, "the implicit assumption" of the test is that, in a business setting, an employer would change his conduct "only if, upon disclosure of the conflict [of interest] and any other relevant information, it saw new opportunities for profit or savings, or danger of economic harm." *Frost*, 125 F.3d at 368-369 (quoting *Lemire*, 720 F.2d at 1338).

Other courts of appeals have adopted a materiality test requiring a showing of "reasonably foreseeable economic harm." See *United States* v. *Vinyard*, 266 F.3d 320, 327-329 (4th Cir. 2001), cert. denied, 536 U.S. 922 (2002); *United States* v. *Martin*, 228 F.3d 1, 17 (1st Cir. 2000); *United States* v. *DeVegter*, 198 F.3d 1324, 1329-1330 (11th Cir. 1999), cert. denied, 530 U.S. 1264 (2000); *Sun-Diamond Growers*, 138 F.3d at 973; *Frost*, 125 F.3d at 367-369; see also *Lemire*, 729 F.2d at 1338. Under

that test, the harm need not be the loss of money or property; it may consist, for example, of harm to the public reputation of a business. See *DeVegter*, 198 F.3d at 1329; *Martin*, 228 F.3d at 17; see also *Lemire*, 729 F.2d at 1336.

As courts have recognized, the "reasonably foreseeable economic harm" test merely makes explicit what is implicit in the "change of conduct" test—that, in a business setting, the harm caused by an employee's deprivation of his employer's right to his honest services will take an economic form. *Frost*, 125 F.3d at 368-369; *Lemire*, 729 F.2d at 1338. Thus, the courts that have adopted the "reasonably foreseeable economic harm" test acknowledge that the difference between the two standards is "slight," *Frost*, 125 F.3d at 368, and that the standards will, "[f]or the most part," produce "identical" results, *Vinyard*, 266 F.3d at 328 n.7. Because the two competing articulations of the materiality requirement do not produce materially different results, the difference in articulation does not warrant the Court's review.[2]

c. Even if the slight difference in how the courts of appeals articulate the materiality standard warranted the Court's review, this case would not be an appropriate vehicle for several reasons.

---

[2] The absence of any substantial difference between the two standards is illustrated by the approach of the Eighth Circuit, which appears to merge them. That court has held that the defendant must contemplate "harm" to the employer, *United States* v. *Jain*, 93 F.3d 436, 441-442 (8th Cir. 1996), cert. denied, 520 U.S. 1273 (1997), and, "in most business contexts, that means financial or economic harm," but the court permits the requisite contemplation of harm to "be inferred from the willful non-disclosure by a fiduciary, such as a corporate officer, of material information he has a duty to disclose." *United States* v. *Pennington*, 168 F.3d 1060, 1065 (8th Cir. 1999).

First, because petitioners do not and could not credibly contend that the evidence was insufficient to establish reasonably foreseeable economic harm, they have raised the issue as a challenge to the jury instructions. Petitioners do not, however, cite a single case in which a court of appeals has reversed a private-sector, honest-services mail fraud conviction because the trial court gave a "change of conduct" materiality instruction instead of a "reasonably foreseeable economic harm" materiality instruction. And reversal on that ground would be particularly unwarranted here. This Court has repeatedly "cautioned that instructions must be evaluated not in isolation but in the context of the entire charge." *Jones*, 527 U.S. at 391. Here, in addition to giving the materiality instruction, the district court also instructed the jury that, to find petitioners guilty under the honest-services theory, it had to find that their conduct was not "entirely fair" to Hollinger, and that, in making that determination, the jury should examine the pertinent "economic and financial considerations." Gov't C.A. App. 20. Viewed together, the materiality and "fairness" instructions effectively required the jury to determine that petitioners' conduct threatened "foreseeable economic harm" to Hollinger.

Second, any error in the honest-services instruction was harmless. As the court of appeals explained, the jury would have acquitted petitioners of mail fraud under both the property theory and the honest-services theory if the jury had believed petitioners' arguments that the $5.5 million they received for the bogus non-competition agreements represented management fees that Hollinger legitimately owed to them. Pet. App. 9a-10a. "It was not the government's theory at trial" that petitioners "'misused' their positions at [Hollinger] for

personal gain in the form of Canadian tax benefits." *Id.* at 9a (brackets in original). Instead, "[t]he government's honest services theory was straightforward. It was that the defendants had abused their positions with Hollinger to line their pockets with phony management fees." *Id.* at 10a. Because the government never argued that the jury could find petitioners guilty of honest-services fraud if the money they received from Hollinger was legitimately owed to them, any error in not requiring an explicit finding that petitioners' fraud reasonably contemplated economic harm to Hollinger was harmless beyond a reasonable doubt.[3]

Third, as discussed above, petitioners failed properly to preserve their claim. Even if they had only forfeited the claim by failing to object to the instructions in the district court (and had not waived the claim entirely by disavowing it in the court of appeals), petitioners would be entitled to relief only if they could satisfy the plain-error standard. Fed. R. Crim. P. 52(b). Petitioners cannot satisfy that standard, which requires that they show an "obvious" error that "affect[ed] their sub-

---

[3] Moreover, even if the $5.5 million had been legitimate management fees disguised, for personal tax reasons, as non-competition payments, it was readily foreseeable that petitioners' failure to disclose the payments to Hollinger's audit committee and board of directors could cause Hollinger economic harm. As the court of appeals explained, if petitioners had disclosed that "the recharacterization of management fees would net [petitioners] a higher after-tax income, the committee or the board might have decided that this increase in the value of the fees to them warranted a reduction in the size of the fees." Pet. App. 8a. In addition, petitioners' failure to disclose the non-competition agreements caused Hollinger to make false filings with the SEC, conduct that was "bound to get [Hollinger] into trouble" and could foreseeably harm its business reputation, see *id.* at 9a, which has obvious economic repercussions.

stantial rights" and "seriously affect[ed] the fairness, integrity, or public reputation" of the proceedings. *United States* v. *Olano*, 507 U.S. 725, 732-737 (1993) (citations omitted). As evident from the discussion above, it is far from obvious that the challenged materiality instruction was erroneous. Moreover, any error in the instruction was harmless and therefore did not affect petitioners' substantial rights or the fairness, integrity, or public reputation of their trial. Thus, petitioners' claim that the jury was incorrectly instructed on the honest-services theory of mail fraud does not warrant this Court's review.

2. The second issue raised by petitioners also does not warrant this Court's review. As described above, the jury was instructed on both a property-rights theory of mail fraud and an honest-services theory. On appeal, petitioners contended that, even if they could properly have been found guilty of mail fraud under the property-rights theory, their mail fraud convictions still had to be reversed because of the purportedly erroneous materiality instruction on the honest-services theory. In making that contention, petitioners relied on *Yates* v. *United States*, 354 U.S. 298 (1957), which held that a conviction based on a general verdict is subject to challenge if the jury was instructed on alternative theories of guilt and may have relied on an invalid one. As an alternative basis for affirming petitioners' convictions, the court of appeals held that petitioners had forfeited their *Yates* claim because they opposed the government's motion for a special verdict, which would have allowed the jury to specify whether it was relying on the property-rights theory, the honest-services theory, or both. Pet. App. 11a. Petitioners contend (Pet. 23-32) that the court of appeals' forfeiture ruling was error.

As explained above, however, the court of appeals correctly rejected petitioners' instructional claim on the merits, concluding both that the challenged honest-services instructions were correct and that, even if the instructions were flawed, the error was harmless. And this Court has recently held that error on an alternative legal theory underlying a general verdict is subject to harmless error review. *Hedgpeth* v. *Pulido*, 129 S. Ct. 530 (2008). Accordingly, the judgment of the court of appeals is supported by two independent grounds in addition to its rejection of the *Yates* claim on forfeiture grounds. Because the court's judgment does not depend on the validity of the forfeiture ruling, this Court has no reason to review that issue.

Nor does that issue warrant review in its own right. The courts of appeals have recognized that a special verdict can eliminate the problem presented in *Yates* by enabling a reviewing court to be certain that "the facts as the jury believed them to be are a legally proper basis for conviction." *Tenner* v. *Gilmore*, 184 F.3d 608, 612 (7th Cir.), cert. denied, 528 U.S. 1052 (1999); see, *e.g.*, *United States* v. *Williams*, 441 F.3d 716, 720 (9th Cir.), cert. denied, 549 U.S. 927 (2006); *United States* v. *Najjar*, 300 F.3d 466, 480 n.3 (4th Cir.), cert. denied, 537 U.S. 1094 (2002); *United States* v. *Boots*, 80 F.3d 580, 589 (1st Cir.), cert. denied, 519 U.S. 905 (1996); *United States* v. *McNutt*, 908 F.2d 561, 565 (10th Cir. 1990), cert. denied, 598 U.S. 1084 (1991); *United States* v. *Wilkinson*, 754 F.2d 1427, 1432 (2d Cir.), cert. denied, 472 U.S. 1019 (1985). The Second Circuit, as well as the Seventh Circuit in the decision below, has indicated that a defendant therefore may forfeit a *Yates* argument if he opposes a government request for a special verdict. *Id.* at 1432. No court of appeals has held to the contrary.

Relying on decisions of the First, Second, Fifth, and Sixth Circuits, petitioners argue that special verdicts are "generally disfavored." Pet. 26 (citing, *e.g.*, *United States* v. *Ellis*, 168 F.3d 558, 562 (1st Cir. 1999); *United States* v. *Pforzheimer*, 826 F.2d 200, 205 (2d Cir. 1987); *United States* v. *McCracken*, 488 F.2d 406, 418 (5th Cir. 1974); *United States* v. *Blackwell*, 459 F.3d 739, 766 (6th Cir. 2006), cert. denied, 549 U.S. 1211 (2007)). The First and Second Circuits, however, have approved the use of special verdicts as a means of avoiding automatic retrials where the government relies on multiple theories to support a particular charge and one of those theories later proves to be defective. See *United States* v. *Cianci*, 378 F.3d 71, 91 (1st Cir. 2004), cert. denied, 546 U.S. 935 (2005); *United States* v. *Ruggiero*, 726 F.2d 913, 922-923 (2d Cir.), cert. denied, 469 U.S. 831 (1984); *id.* at 925-928 (Newman, J., concurring in part and dissenting in part). And the Fifth and Sixth Circuits have relied on special verdicts indicating that convictions rested on valid theories in rejecting claims that reversal was required because the convictions might have rested on defective theories. See, *e.g.*, *United States* v. *Edwards*, 303 F.3d 606, 642 (5th Cir. 2002), cert. denied, 537 U.S. 1192, and 537 U.S. 1240 (2003); *United States* v. *Salvatore*, No. 01-30376, 2002 WL 663764, at *3 (5th Cir. Apr. 2, 2002) (34 Fed. Appx. 963 (Table)); *United States* v. *Peacock*, 654 F.2d 339, 348 (5th Cir. 1981), vacated in part on other grounds on reh'g, 686 F.2d 356 (5th Cir. 1982), cert. denied, 464 U.S. 965 (1983); *United States* v. *Cook*, 124 Fed. Appx. 367, 372, 375 (6th Cir. 2005); *United States* v. *Upshaw*, 114 Fed. Appx. 692, 699, 709 (6th Cir. 2004), vacated on other grounds, 545 U.S. 1136 (2005). See also *United States* v. *Giovanelli*, 945 F.2d 479, 489 (2d Cir. 1991) (same).

The primary concerns that courts have expressed about special verdicts are that they may lead the jury in a step-by-step progression to a guilty verdict and that they restrict the jury's "romantic power of nullification." See *Ruggiero*, 726 F.2d at 927 (Newman, J., concurring in part and dissenting in part). To the extent that those concerns have any validity, however, they are most strongly implicated when a special verdict form requires the jury to make specific findings on each element of an offense or makes resolution of a single factual issue determinative of guilt or innocence without regard to the offense elements. *Ibid.* Here, by contrast, the special verdict form would only have required the jury, in the event it reached a guilty verdict on a mail fraud count, to indicate on which of the two theories of mail fraud it had relied. The concerns about special verdicts are "either totally lacking or at best insignificant" in that situation. *Id.* at 928; see *United States* v. *Palmeri*, 630 F.2d 192, 202-203 (3d Cir. 1980), cert. denied, 450 U.S. 967, and 450 U.S. 983 (1981).[4]

Petitioners incorrectly contend (Pet. 27-28) that the court of appeals' forfeiture holding conflicts with the

---

[4] Petitioners argue (Pet. 31) that a special verdict would have been unworkable here because the jury could properly have found them guilty of mail fraud if some jurors relied on the property-rights theory and the remainder relied on the honest-services theory. But nothing in the court of appeals' decision suggests that the court believed that the jury could have found petitioners guilty of mail fraud if they disagreed on the theory supporting their verdict. And the district court did not instruct the jurors that they could return a guilty verdict under those circumstances. Instead, the court gave the jury a general unanimity instruction. 05 CR 727 Docket entry No. 771, at 75 (N.D. Ill. June 27, 2007). Moreover, the special verdict form proposed by the government would have required the jury to indicate unanimity as to each of the theories. See Pet. App. 228a.

Third Circuit's decision in *United States* v. *Riccobene*, 709 F.2d 214, cert. denied, 464 U.S. 849 (1983). In *Riccobene*, the court rejected the argument that the defendant's opposition to the government's request for *post-verdict* special interrogatories constituted a forfeiture of their *Yates*-type claim. See *id.* at 228 & n.19. *Riccobene*, however, noted that the government had not argued that the district court had abused its discretion in denying the request, 709 F.3d at 228, and the Third Circuit later disallowed the use of post-verdict special interrogatories for the purpose of clarifying an ambiguous general verdict, see *United States* v. *Barrett*, 870 F.2d 953, 955 (1989). Consistent with the Third Circuit, the court of appeals here held that the district court correctly denied petitioners' request that it use post-verdict interrogatories for that purpose. Pet. App. 11a. And, consistent with the decision below, the Third Circuit has allowed the use of special interrogatories *on the verdict form itself* in order to secure particularized fact-finding. See, *e.g.*, *Barrett*, 870 F.2d at 954-955; *Palmeri*, 630 F.2d at 202-203. The Third Circuit has not addressed the question whether a defendant forfeits a *Yates* claim by opposing a government request for special interrogatories on the verdict form.

The decision below also does not conflict with the Second Circuit's decision in *United States* v. *Adcock*, 447 F.2d 1337 (2d Cir.), cert. denied, 404 U.S. 939 (1971). *Adcock* held that a defendant's failure to himself request a special verdict does not constitute a forfeiture. *Id.* at 1338-1339. The case for finding a forfeiture is much stronger where a defendant opposes a government effort to avoid the *Yates* situation by means of a special verdict than where the defendant fails to request a special verdict himself. Moreover, *Adcock* rested on the

Second Circuit's position at the time that special verdicts are *per se* improper, see *ibid.*, a position that court has since abandoned, see *Pforzheime*r, 826 F.2d at 205. Indeed, as noted above, since *Adcock*, the Second Circuit has held that a defendant's opposition to a government request for a special verdict may constitute a forfeiture. *Wilkinson*, 754 F.2d at 1432.

In any event, the *Yates* forfeiture issue has not recurred with sufficient frequency to justify this Court's intervention. Apart from the decision below, no federal appellate court has addressed the issue since the Second Circuit did so in *Wilkinson* in 1985. Before that, the issue had been addressed only by the Third Circuit in *Riccobene*, and then only in the distinguishable context of post-verdict interrogatories.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
RITA M. GLAVIN
Acting Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

APRIL 2009