No. 08-876

IN THE

Supreme Court of the United States

CONRAD M. BLACK, JOHN A. BOULTBEE, AND MARK S. KIPNIS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONERS

RICHARD A. GREENBERG
GUSTAVE H. NEWMAN
STEVEN Y. YUROWITZ
NEWMAN & GREENBERG
950 Third Avenue
New York, NY 10022
(212) 308-7900
Counsel for Petitioner Boultbee

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500
Counsel for Petitioner Black

RONALD S. SAFER
PATRICIA BROWN HOLMES
NEIL LLOYD
SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, IL 60606
(312) 258-5500
Counsel for Petitioner Kipnis

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Pages(s)

Cases

REPLY BRIEF FOR PETITIONERS

The government's brief is more notable for what it omits than what it says. It never disputes that the circuits are divided on the meaning of "honest services" fraud in private-sector cases, contending instead—in the face of multiple published opinions expounding on the sharp divide among the circuits—that the split generates only "slight" differences. Similarly, the government never *mentions* its star witness, David Radler, who testified unequivocally that the payments at issue were fully authorized by Hollinger, and thus could not possibly be "theft." Nor does it mention that the case went to the jury on *uncontradicted* proof that the tax benefits petitioners sought were *lawful*, rather than a "fraud on Canada" as the government originally alleged. Finally, the government nowhere acknowledges that the jury *acquitted* on every count that depended on its "fraud-by-theft" theory. Indeed, it is a virtual certainty that the jury convicted on the three remaining fraud counts, under a malleable and indeterminate honest-services provision, only because the *lawful* Canadian tax benefits petitioners pursued were not disclosed to Hollinger—apparently in violation of principles of "fairness" under Delaware's corporation law (Opp. 15) and, more grievously and relevantly, in a manner that offended the ethical sensibilities of a federal prosecutor.

To divert attention, the government clings to two waiver theories—one manifestly frivolous and the other creating a circuit split *also* worthy of review. It needs the diversion because the alternative is to try to reconcile a substantial circuit split over Section

1346 with its theory of "materiality"—which appears *nowhere* in the decision below and, in any event, cannot disguise serious problems with the statute. As Justice Scalia recently noted, Section 1346's "plain text" purports to criminalize all manner of "dishonest" services. *Sorich v. United States*, No. 08-410 (Feb. 23, 2009), slip op. at 3 (Scalia, J. dissenting from denial of certiorari). "To avoid some of these extreme results," and in an effort to give the statute *some* pretense of passing constitutional muster, "the Courts of Appeals have spent two decades attempting to cabin the breadth of § 1346 through a variety of limiting principles." *Id.* Their attempt to maintain a semblance of consistency during this process has proven a resounding failure: Indeed, "[n]o consensus has emerged." *Id*.

It is bad enough this problem persists in public corruption cases, such as *Sorich*, lying at the core of honest-services fraud. But in the *private* sector—where pre-*McNally* honest-services-fraud prosecutions were few and far between—the risks of overreaching, federalizing state-law fiduciary duties, and criminalizing otherwise clearly *lawful* conduct, simply because it violates corporate governance rules, are most acute.

This case plainly exposes the fault lines in current Section 1346 jurisprudence. Because, as the government's key witness unmistakably averred, the money at issue legitimately belonged to petitioners—and because they therefore contemplated no economic harm to Hollinger—their "crime" came down to giving the approved management fee a different label in pursuit of a lawful tax advantage. In at least

five circuits, petitioners would be free.[1] But not in the Seventh Circuit. After more than twenty years, the meaning of this pliable statute continues to bewilder judges and lawyers alike. It is therefore still fair to ask: "How can the public be expected to know what the statute means when the judges and prosecutors themselves do not know, or must make it up as they go along?" *United States v. Rybicki*, 354 F.3d 124, 160 (2d Cir. 2003) (Jacobs, J. dissenting). It is high time to replace free-wheeling prosecutorial creativity with consistent, sensible limits on honest services fraud prosecutions.

I. Petitioners Preserved Their Section 1346 Argument.

The government asks this Court to ignore a clear circuit split because petitioners purportedly "failed" to press the district judge hard enough to disobey the law of her circuit. But petitioners were unusually diligent in preserving their jury instruction claim for review. The government's argument to the contrary was utterly unpersuasive to the Seventh Circuit, and it has not improved with age.

This petition relies on the *same* cases petitioners cited to the trial court for their argument that the jury must find "it was reasonably foreseeable to the defendant that the scheme [to defraud] could result in some economic harm to the victim." Pet. App. 187a; Pet. 20 n.8. Petitioners explained that "the circuits are split on this issue of whether the mail fraud statutes include a 'reasonably foreseeable harm'

[1] It is undisputed that prejudicial spillover dooms Black's obstruction conviction. Pet. 11 n.7.

test," (Pet. App. 194a (citing cases)), candidly informed the district judge that the Seventh Circuit had already *declined* to adopt their requested test, noted that this Court "has not resolved [the] conflict," and argued that if petitioners' position prevailed before this Court, the government's approach would be "error." *Id.* The judge, not surprisingly, agreed with the government that she was bound by Seventh Circuit law and rejected petitioners' request. Pet. App. 207a.

The government now says the parties "mutually agreed" to withdraw their proposed instructions. Opp. 10. This is false, as is clear from the passage the government cites for its claim. Pet. App. 207a-208a. There the government proposed its *own* instruction to foreclose petitioners from even "suggest[ing]" to the jury that it must find "reasonably foreseeable harm" to Hollinger. In marked contrast to its position *here*, the government acknowledged that "the law in other circuits" was "contrary" to its position, but asserted that under Seventh Circuit precedent "we don't have to show foreseeable harm." Pet. App. 208a. The government stated *it* was willing to "withdraw" *its own* proposed instruction if petitioners' foreseeable harm instruction "is not given." *Id.* Because the judge concluded that petitioners' proposed instruction could *not* be "given" under circuit law, she accepted the government's withdrawal of its (now unnecessary) instruction. Nowhere is there *one* word from any defense attorney, much less a "mutual" agreement, to withdraw the request. Nothing more was required to preserve petitioners' claim; indeed, the government has succeeded in obtaining review on much less. *Cf. United States v. Williams*, 504 U.S. 36, 43-44 (1992).

Finally, the government's assertion that petitioners failed to renew their objection before jury deliberations is just plain wrong. Opp. 8-9. Immediately after the jury was instructed, petitioners advised the court: "for the record, we would renew our objections to all instructions that were given over objection, and all instructions that we tendered and that you refused." Pet. App. 248a. The judge responded: "I will consider that renewed." *Id*. Petitioners complied with Rule 30(d).

No wonder the court of appeals rejected this argument. Pet. 30 n.12. In fact, the panel *instead* strained for a different, novel forfeiture rule (the second question presented) that applies only when an objection *has* otherwise been preserved. Pet. App. 11a (by seeking general verdicts, defendants forfeited "their objection to the instruction"; special verdicts would have rendered "the challenge to the instruction" moot). Petitioners preserved their objection.[2]

---

[2] The contention that petitioners "affirmatively disavowed" their objection is even farther afield. Opp. 10. Petitioners' reply brief below (at 16) made a *different* point: if the government's deprivation-of-honest-services theory truly rested entirely on money "theft," it never should have *sought* an honest-services instruction. Petitioners added that this was *not* how the government tried the case, and not how the jury was instructed. *Id*. That *remains* petitioners' position, as is plainly apparent from our petition.

II. The Circuit Split On The Scope Of Section 1346 In Private-Sector Cases Involves A Recurring Issue Of Great Importance.

The government attempts to disguise the significant circuit split over private-sector honest-services fraud, calling it merely a "slight difference" in how courts articulate "materiality." Opp. 14-15. That explanation completely ignores the Seventh Circuit's reason for affirming, and bears no relationship to how the case was tried or decided. In any event, the government badly mischaracterizes the extent of the split, proving just how confused the law has become, and reinforcing the urgent need for review.

The instructions here allowed the jury to convict petitioners for pursuing a private gain in less than an "honest" manner, even though petitioners contemplated no economic or other property harm to their employer. The government cannot—and does not—deny that this is *not* a crime in at least five other circuits.

Instead, the government insists that the circuits merely diverge "slight[ly]" in their "articulation of the materiality element of honest-services fraud in private-sector cases." Opp. 12-13. But the opinion below cannot be defended on this manufactured basis—the court did not rely on a materiality requirement to affirm. In fact, that part of the opinion did not even *mention* materiality. Pet. App. 5a-6a ("[A]ll [the jury] had to find to support a conviction for honest services fraud was that the defendants had deliberately failed to render honest services to Hollinger and had done so to obtain a private gain.").

Moreover, other courts in the minority that *do* rely on the "materiality test" still diverge *significantly* from the rest of the circuits. "Materiality," in

private-sector cases, means the "misrepresentation or omission" had a "natural tendency to influence" or was "capable of influencing" the victim's "decision." Pet. App. 237a-238a. The circuits in the majority do not simply apply a *different* materiality standard; instead, they outright *reject* a materiality test precisely because it places *no* appropriate limit on Section 1346's reach. As the Fourth Circuit explains, because under "the materiality test * * * even trivial frauds might provoke a change in business practices, bringing such a situation within the scope of § 1346 would potentially criminalize any breach of a duty of loyalty in the private employment context." *United States v. Vinyard*, 266 F.3d 320, 328 (4th Cir. 2001). The Sixth Circuit likewise has warned why materiality does *not* cabin Section 1346: if "a business alters its behavior merely to avoid the *appearance* of impropriety, rather than a potential economic loss, the intangible right to honest services doctrine *may lack substantive limits* in the private sector." *United States v. Frost*, 125 F.3d 346, 369 (6th Cir. 1997) (second emphasis added). These stark differences in outcomes cannot possibly be described as "slight."

This case perfectly demonstrates why the government's position renders the statute "nothing more than an invitation for federal courts to develop a common-law crime of unethical conduct." *Sorich*, slip op. at 3. The government repeatedly encouraged the jury to treat Section 1346 as a *different* type of mail fraud—sufficient by itself for conviction—not one harmlessly "overlapping" with the government's separate simple-theft theory. Opp. 4; *e.g.,* Pet. App. 173a ("[T]his is partly about the theft of money * * *. But there's the other part of it, too. That loyalty, that honest services that all five of these men owed to the company.").

The government confidently declares the verdicts taint-free because it supposedly "never argued that the jury could" convict petitioners "if the money they received from Hollinger was legitimately owed to them." Opp. 16; *contra* Pet. 8-9. But everyone knows the jury *did not* convict based on what the government *argued*—it acquitted petitioners of 90% of the $60 million alleged fraud. And the most significant thing distinguishing the APC transaction from those on which the jury acquitted was not the government's "personal piggy bank" theory; it was the unwavering testimony of Radler, the *government's* star witness, that (without notice to Hollinger) he recharacterized legitimately earned management fees as non-competition payments to take advantage of a Canadian tax ruling. Pet. 7-8.[3] Thus, there can be little doubt the jurors convicted petitioners, not for stealing from Hollinger, but for failing to inform its board how they went about seeking a *legitimate* "private gain" in Canada.[4]

---

[3] This *government*-sponsored testimony was more than sufficient to negate proof of petitioners' *intent* to steal. And the government flat out ignores that the non-competition agreements prevented petitioners from competing, post-departure, with *any* of APC's "affiliates" (hundreds of publications), not just its remaining California newspaper. Pet. 7 & n.5; Pet. App. 159a.

[4] If jurors rejecting the theft theory really "would have acquitted petitioners" under honest-services fraud *too*, Opp. 15, the government surely could offer *some* legitimate reason for foisting an honest-services theory on them. That theory manifestly was submitted to give the jury a reason to convict *apart from* theft, not merely to attach another label to theft. Af-

[Footnote continued on next page]

It is preposterous to claim now that the instructions "effectively required the jury to determine that petitioners' conduct threatened 'foreseeable economic harm' to Hollinger" through a required finding that petitioners were "not 'entirely fair' to Hollinger." Opp. 15 (quoting jury charge). To deem the transaction "entirely fair," the jury needed to find *both* a "fair price" ("the economic and financial considerations") *and* "fair dealing." "[F]air dealing," in turn, includes "disclos[ing]" the transaction to the directors and "obtain[ing]" their "approvals." Pet. App. 236a-237a. Thus, the failure to "disclose[]" the recharacterization of the management fee—*by itself*—kept the APC transaction from being *entirely* fair. Without petitioners' requested instruction, the jury was "effectively required" to *convict* petitioners for obtaining a *lawful* tax benefit in Canada.

The government is left to respond to this clear (indeed, plain) instructional error by treating it as something different: a sufficiency-of-the-evidence problem. It ventures that an audit committee aware that Black and Boultbee stood to pay lower Canadian taxes might have imposed a retroactive reduction in the management fees that Ravelston had *already* earned and the committee had *already* approved. Opp. 15-16 & n.3. Of course, the government—like the court below—can only *speculate* that such collat-

---

[Footnote continued from previous page]

ter all, asking jurors to decide separately whether someone who supposedly stole his employer blind was "disloyal" to boot makes as much sense as asking them to consider separately whether such conduct exhibited rather poor manners.

eral consequences *might* have come to pass, because its new theory was never presented to the jury, and the jury was not *asked* to make such findings. One-sided, self-serving speculation about how the jury *might* have viewed evidence and arguments the government *might* have presented had it been required to comply with the majority rule does not remotely meet the government's burden of demonstrating that the *Yates* error was harmless beyond a reasonable doubt.

The circuit split on the scope of honest-services fraud is substantial—so much so that it is arguably "irresponsible to let the current chaos prevail." *Sorich*, slip op. at 6. This case is the ideal vehicle for resolving the split.

III. The Validity Of Judicial Amendments To Rule 30(d) Is Of Surpassing Importance To This Court's Review Function.

The government's answer to the second question yet again suffers from a glaring omission. *Nowhere* does it mention Rule 30(d)'s text, or *any* of this Court's cases holding that judges may not inject additional requirements into procedural rules. Pet. 25-31. This flaw is fatal. Rule 30(d)—which *the government* invokes as the source of requirements for preserving instructional error (Opp. 8-9)—does not even *mention* special verdicts. Small wonder that no court—until now—has enforced the government's forfeiture rule.

Nobody denies that courts occasionally have "relied on" special interrogatories to identify the theory behind a verdict. Opp. 19. The question, though, is whether any *rule* allows a court to *penalize a* defendant with loss of appellate rights merely for *asking*

the trial judge to exercise her discretion to reject the government's request for a special verdict. The cases the government cites do not address *that* question, because until now the courts have *refused* to impose this unauthorized sanction. *See, e.g., United States v. Riccobene*, 709 F.2d 214 (3d Cir. 1983); *United States v. Adcock*, 447 F.2d 1337 (2d Cir. 1971).

Try as it might, the government cannot explain this conflict away. First, it matters not that *Riccobene* dealt with post-verdict interrogatories. Opp. 21. *Pre*-verdict interrogatories pose a heightened risk of improperly influencing the verdict precisely because they are used *before* the verdict. Pet. 25-26. Yet the Third Circuit rejected the government's forfeiture argument even when only the *less* prejudicial version was proposed and resisted. The Third Circuit's ruling plainly also protects petitioners, who objected only to the more prejudicial type of special verdict. The government also notes that in *Riccobene* the prosecution "had not argued that the district court had abused its discretion in denying the [special interrogatories] request." Opp. 21. That does not distinguish this case, because the government affirmatively *withdrew* its special verdict request *before* the court ruled (Pet. App. 228a), rendering *both* of the government's "forfeiture" arguments ironic to say the least.

The conflict with the Second Circuit also persists. As we noted, that court rejects "[a] prosecution's effort to salvage an invalid conviction by faulting the defendant for failing to request interrogatories." Pet. 27 (quoting *Adcock*). The government cites two cases that purportedly change Second Circuit law (Opp. 22), but neither does anything of the sort. In the first, *United States v. Wilkinson*, 754 F.2d 1427 (2d

Cir. 1985), the defendant never asserted *instructional* error—only a (forfeited) sufficiency-of-evidence challenge. *Id.* at 1432. And the more recent decision the government cites specifically *reaffirmed* the relevant aspect of *Adcock*. *United States v. Pforzheimer*, 826 F.3d 200, 206 (2d Cir. 1987) (distinguishing the *Adcock* forfeiture ruling from an unpreserved challenge to *the use* of special verdicts).

Finally, the government's assertion that the issue "has not recurred with sufficient frequency" instills little comfort. Other defendants—though not petitioners—might find it somewhat reassuring that courts outside the Seventh Circuit have read both Rule 30(d) and this Court's cases prohibiting additional, atextual preservation requirements. But, regardless, there *is* a conflict *now*. And in view of the government's unabashed defense of the legality of coercing forfeiture of appellate rights through special verdict requests, there is little reason to believe prosecutors will be any more willing to give up *this* new tool than they have to surrender their vast powers under Section 1346. This Court has a unique institutional interest in heading off the expanded use of this unauthorized forfeiture rule, which greatly enhances the government's prospects for evading review of significant circuit conflicts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

RICHARD A. GREENBERG
GUSTAVE H. NEWMAN
STEVEN Y. YUROWITZ
NEWMAN & GREENBERG
950 Third Avenue
New York, NY 10022
(212) 308-7900
Counsel for Petitioner Boultbee

MIGUEL A. ESTRADA
Counsel of Record
DAVID DEBOLD
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, NW
Washington, D.C. 20036
(202) 955-8500
Counsel for Petitioner Black

RONALD S. SAFER
PATRICIA BROWN HOLMES
NEIL LLOYD
SCHIFF HARDIN LLP
6600 Sears Tower
Chicago, IL 60606
(312) 258-5500
Counsel for Petitioner Kipnis

April 27, 2009