No.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court held in *McNally v. United States*, 483 U.S. 350 (1987), a public corruption case, that the mail fraud statute could not be used to prosecute schemes to deprive the citizenry of the intangible right to good government. Congress responded in 1988 by enacting 18 U.S.C. § 1346, which expands the definition of a "scheme or artifice to defraud" under the mail and wire fraud statutes to encompass schemes that "deprive another of the intangible right of honest services."

Twenty years later, the courts of appeals are hopelessly divided on the application of Section 1346 to purely private conduct. In this case, the Seventh Circuit disagreed with at least five other circuits and held that Section 1346 may be applied in a purely private setting irrespective of whether the defendant's conduct risked any foreseeable economic harm to the putative victim. In the alternative, the Seventh Circuit ruled that the defendants forfeited their objection to the improper instructions by opposing the government's bid to have the jury return a "special verdict," a procedure not contemplated by the criminal rules and universally disfavored by other circuits as prejudicial to a defendant's Sixth Amendment rights.

1. Whether 18 U.S.C. § 1346 applies to the conduct of a private individual whose alleged "scheme to defraud" did not contemplate economic or other property harm to the private party to whom honest services were owed.

2. Whether a court of appeals may avoid review of prejudicial instructional error by retroactively imposing an onerous preservation requirement not found in the federal rules.

PARTIES TO THE PROCEEDING

The three petitioners were defendants in the district court. Co-defendant Peter Y. Atkinson, who was also an appellant in the Seventh Circuit, is not seeking certiorari. F. David Radler and The Ravelston Corporation Limited—a privately held Canadian corporation—were defendants in the district court but entered into plea agreements with the government before trial. They were not parties in the Seventh Circuit and are not parties before this Court.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Conrad M. Black, John A. Boultbee, and Mark S. Kipnis respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (Pet. App. 1a-17a) is published at 530 F.3d 596.

JURISDICTION

The judgment of the court of appeals was entered June 25, 2008. A petition for rehearing was denied August 13, 2008. On October 29, 2008, Justice Stevens extended the time within which to file a petition for a writ of certiorari until January 10, 2009 (a Saturday). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. § 1341 provides, in relevant part:

"Whoever, having devised or intending to devise any scheme or artifice to defraud * * * places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or deposits or causes to be deposited any matter or thing whatever to be sent or delivered by any private or commercial interstate carrier, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail or such carrier according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any

such matter or thing, shall be fined under this title or imprisoned not more than 20 years, or both."

18 U.S.C. § 1346 provides that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

STATEMENT

In a sweeping and over-reaching 17-count indictment, the government accused petitioners of treating the public company of which they were officers as their personal piggy bank, siphoning off money to support undeserved, lavish lifestyles, principally through payments made under allegedly bogus non-competition agreements reached in transactions between the company and third parties. After a four-month trial, the jury acquitted petitioners on nearly all counts, soundly rejecting this principal theory of prosecution. Petitioners were convicted on three counts of mail fraud, based on an instruction that permitted the jury to find a "scheme to defraud"—a hotly contested element of the offense—by determining that petitioners *either* (1) stole the company's money, *or* (2) deprived the company or its shareholders of their "right" to petitioners' "honest services."

The first theory would have required jurors to find that petitioners were guilty of theft pure and simple. But the second theory permitted convictions even if the jurors believed that the money was rightly petitioners' and that they therefore inflicted no pecuniary or other economic injury on their employer—so long as the jurors believed that petitioners did not honor Delaware's business corporation law in structuring the payments and, as a result, obtained a lawful tax "benefit" in Canada. The Seventh

Circuit upheld the convictions, even though the government could not remotely meet its burden of proving harmlessness beyond a reasonable doubt given the virtual certainty that the jury relied on a seriously flawed instruction that would have been instructional error in at least five other circuits.

1. Petitioners were executives of Hollinger International, Inc. (Hollinger), a publicly held Delaware media company. Petitioner Conrad M. Black was Hollinger's Chairman and CEO. Petitioner John A. Boultbee was Hollinger's Executive Vice President, and, for a time, its Chief Financial Officer. Petitioner Mark S. Kipnis, a Chicago lawyer, was Hollinger's Corporate Counsel and Secretary.[1]

Hollinger's roots were in Black's and David Radler's acquisition in 1969 of a single Canadian newspaper, the Sherbrooke Daily Record.[2] Tr 7476-77. Under their successful management, Hollinger ultimately purchased hundreds of community newspapers, as well as several national and other large newspapers. These included the *Jerusalem Post* and *The Chicago Sun Times*, as well as, on Black's personal initiative, the purchase of the *Daily Telegraph* of London and the launching of the *National Post* in Canada. Tr 8125, 8131, 8142, 8159-76. Black's management, over nearly two decades, of the *Telegraph* alone resulted in profit to Hollinger and its shareholders of hundreds of millions of dollars. Tr

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[1] Peter Y. Atkinson, a co-defendant below but not a petitioner here, was Vice President of Hollinger.

[2] Radler, a co-defendant and President and Chief Operating Officer of Hollinger, agreed to testify for the government in exchange for leniency.

8159-64. Black built Hollinger's international newspaper empire from a mere $20,000 in equity to market capitalization exceeding $1 billion. Tr 8178.

Black and Radler managed the business through Ravelston Corp. Ltd. (Ravelston), a private Canadian company in which their combined ownership interest was nearly 80%. Ravelston, in turn, owned a controlling interest in Hollinger, Inc., a holding company that controlled Hollinger through a super-majority of voting shares.[3] In fact, Hollinger typically paid petitioners and Radler no salary or other monetary compensation directly; they were usually compensated by Ravelston, which in turn received substantial management fees from Hollinger on account of petitioners' services.

Beginning in the late 1990s, Hollinger's board of directors approved Black's prescient proposal to divest the company of most of its smaller newspapers based on his accurate prediction of the deleterious effects that the Internet would have on print media. Although Black's strategy proved to be a financial success for Hollinger and its shareholders, generating very large capital gains, it also was the genesis of federal criminal charges against petitioners. According to the government, petitioners had simultaneously engaged in a scheme to steal from Hollinger and its subsidiaries by causing those companies to pay petitioners and others for entering into purport-

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[3] In the district court, Hollinger International was often referred to as "International," and the holding company—Hollinger Inc.—was referred to as "Inc." This petition follows the shorthand used by the court of appeals, referring to Hollinger International as "Hollinger."

edly unnecessary and bogus covenants not to compete.[4]

Petitioners' defense to these charges was straightforward: the non-competition agreements were not bogus. Some had been expressly sought by the would-be purchasers of Hollinger's newspaper properties, who understandably were not keen to risk competition from the executive team that had successfully built Hollinger into an international media empire. As relevant here, one set of agreements—which restricted Black, Boultbee, and others from competing with Hollinger and its affiliates after they left Hollinger—was a straightforward mechanism to minimize the tax burden of the Canadian defendants. Under then-applicable Canadian law, payments received pursuant to non-competition agreements were not taxable. This was so regardless of whether the payments were in lieu of other income that the payees might have received, so long as the payees were in fact legally bound by an agreement not to compete. Here, the management fees that otherwise would have been paid by Hollinger to Ravelston, and in due course by Ravelston to various Canadian defendants, were re-characterized as non-compete payments to the individuals to take advantage of the Canadian tax ruling.

The indictment attempted to anticipate petitioners' defense by alleging that they had schemed to defraud not only Hollinger, but also the Canadian fisc. Before trial, however, the government abandoned

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[4] Kipnis was not party to, nor was he paid under, the covenants; he was instead accused of aiding and abetting his co-defendants.

any attempt to prove that petitioners' position on Canadian tax law was erroneous—much less that it was so unsupportable that it was a "fraud" on the Canadian fisc. To reflect its abandonment of that theory, the government filed a 17-count superseding information that restated the alleged fraud on Hollinger, but removed the allegations of fraud on Canada. Pet. App. 24a-121a.

Notably, the information, like the preceding indictment, did not stop at alleging a scheme to steal money from Hollinger. Lacking enough confidence in its "looting" allegations to rely on them alone, the government further alleged that petitioners' supposed scheme *also* "fraudulently deprived [Hollinger] International of its right to receive their honest services." *Id*. at 36a-37a. According to the government, petitioners breached "the fiduciary duty" that each owed to Hollinger under Delaware corporate law "because," in issuing checks and preparing and signing "fraudulent non-competition agreements," petitioners were "benefitting themselves to the detriment of [Hollinger]." *Id*. at 52a.

2. Petitioners interposed a vigorous defense at trial, including *uncontradicted* expert testimony that established that re-characterizing management fees as non-compete payments was entirely proper under Canadian law, so long as the non-competition agreements did, in fact, bind the payees not to compete (as was the case here). Pet. App. 142a-148a.

Significant parts of the government's own case bolstered petitioners' defense. For example, of the three fraud counts on which petitioners were ultimately convicted, the two that involved the most substantial transactions accused petitioners of improperly taking $5.5 million, under the guise of bo-

gus non-compete agreements, from American Publishing Company (APC)—a Hollinger subsidiary that had owned most of Hollinger's U.S. newspapers, but by the time of the agreement in question held a single small newspaper in California. Petitioners responded that the Hollinger board had approved the $5.5 million as payment by APC for services received under the management agreements with Ravelston. APC and dozens of other Hollinger subsidiaries routinely paid such management fees to Ravelston, on Hollinger's behalf and in proportionate shares, with the express approval of Hollinger's audit committee. Radler—the government's star witness, President of APC, and the man who devised the APC transaction—*agreed with petitioners on this point*.

Indeed, Radler testified unequivocally in the grand jury, on direct examination for the government as its main witness at trial, and again on cross examination, that he believed the $5.5 million *was* included within the overall annual management fee amount that the board had previously approved. Pet. App. 129a-33a, 139a. Radler also testified that he tied payment of the $5.5 million to non-compete agreements, signed by Black, Boultbee, Radler and Atkinson—agreements that prevented them from competing with publications owned by any affiliate of APC (including Hollinger itself) for three years after their departure from Hollinger. *Id.* at 123a, 127a; *id.* at 156a-163a (Noncompetition Agreement).[5] And he specifically acknowledged doing so in order that he

[5] Hollinger at the time owned approximately 100 newspapers in the greater Chicago area alone. Tr 9356-57; DX JB Newspapers 1.

and the Canadian defendants, including Black and Boultbee, could take advantage of the Canadian ruling that exempted the proceeds of non-compete agreements like petitioners' from Canadian income tax. *Id*. at 127a, 133a. The government was reduced to arguing to the jury that its own star witness—and the man presumably in the best position to know—was simply wrong.[6]

3. From the outset of its summation, the government emphasized that its theories of fraud—fraud by theft and "honest services" fraud—were independent of each other. The prosecutor reminded the jurors that while "one of the theories behind this fraud" was that petitioners "stole money and property from the company," "[t]here's also a second theory" that "has to do with something called honest services." Pet. App. 171a (explaining honest services as an officer's "fiduciary duty of loyalty to the corpo-

[6] The government vainly attempted to undermine its own proofs with evidence that the audit committee members did not remember approving a $5.5 million payment from APC, and that these payments were not handled in the same manner as other management fees. But the government—which abruptly changed course on appeal to argue that its own key witness had *perjured* himself (Govt. Appeal Brief at 36)—did not even attempt at trial to impeach Radler's testimony that the $5.5 million was part of a *larger* amount *previously* approved by the committee. Pet. App. 132a. Nor is it surprising that *these* payments were handled unlike *other* management fee payments; they needed to be characterized otherwise to satisfy the Canadian tax rules. Similarly, because the payments were owed and approved as management fees—and did not originate as compensation for the non-compete agreements—it was of no legal significance whether the board would have agreed to pay $5.5 million (or any other amount) for the APC non-compete covenants.

ration and its public shareholders," and "mention[ing] it * * * right at the outset" of summation "because it is a common thread that runs through what we're going to be talking about today"). The prosecutor added that "[s]tealing money and property is one kind of intent to defraud, and that is serious. Depriving the company and the shareholders of honest services, breaching this duty of loyalty, is just as serious; and, it's part of the fraud that is alleged in this case." *Id.* at 172a. In making its case for conviction under this second theory, the government elicited—and then emphasized in summation—testimony that petitioners purportedly violated state-law fiduciary duties arising from their positions as officers of a Delaware public company. *See, e.g.*, *id.* at 150a-152a, 154a-155a, 165a-166a, 173a-182a.

Consistent with the language of the information and the case law in several circuits, petitioners sought an instruction that would have precluded the jury from convicting of "honest services" fraud unless it found that the alleged scheme contemplated gain to petitioners *at the expense of* the purported victims. In particular, in response to the government's proposed instruction that the statutes "can be violated whether or not there is any monetary loss or financial damage to the victim of the crime," petitioners argued for the following addition: "However, the scheme, if successful, must wrong the alleged victim's property rights in some way." Pet. App. 198a (proposed change to Government's Revised Instruction 32); *see also id.* at 187a (Defendants' Instruction No. 34-A: "In 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."); *id.* at 185a-186a; *id.* at 208a-209a.

The district court rejected these and related requests, explaining that a requirement that the scheme, if successful, must wrong the alleged victim's property rights is "not the law in this circuit." *Id.* at 220a. Thus, in instructing the jury on the elements of mail fraud, the court advised the jury that the "scheme to defraud" element could be proven *either* by a theft of money or property *or* by petitioners' failure to render "honest services" to Hollinger, and to convict on the latter theory the jury could ignore the allegations of theft and instead find that the petitioner "misused his position for private gain for himself and/or a co-schemer" and that he "knowingly and intentionally breached his duty of loyalty." *Id.* at 235a-236a.

As a result of the court's ruling, the jury was permitted to return guilty verdicts on the fraud counts even if it rejected the government's main theory—that petitioners stole money from Hollinger. On the APC counts, for example, the instructions permitted the jury to convict even if some jurors accepted the testimony of Radler, the *government's* principal witness, and therefore concluded that Hollinger suffered *no* pecuniary harm because the money was to be paid as approved management fees in any event, and if those jurors further agreed with the defense that the payees only "benefited" to the extent of paying lower Canadian taxes, a benefit that was *not* at Hollinger's expense. As the prosecution presented the case, these facts would not stand in the way of conviction if the jury believed that petitioners failed to obey duties of "loyalty" imposed under Delaware corporate law when they recharacterized the payments to obtain favorable tax treatment in Canada.

The prosecution proposed a "special verdict" form that would have required the jury to identify, in the event of conviction, the theory of fraud it had accepted. In light of petitioners' argument that special verdicts would be both prejudicial and incompatible with the lack of a unanimity requirement on the theory of fraud, however, the prosecution advised the court that it had no objection to a general verdict. Pet. App. 228a. The court, which had already declined petitioners' offer to use post-verdict interrogatories instead of special verdicts, responded to the government's concession: "General form. Okay." *Id.*

The jury acquitted petitioners on all but three of the twelve fraud counts it considered—necessarily rejecting the government's sweeping claims that petitioners had embarked on a massive scheme to loot Hollinger.[7]

[7] The court granted Kipnis's post-verdict motion for judgment of acquittal on one of those counts. The jury also acquitted Black of racketeering and tax charges. It convicted him of the remaining submitted charge—a single count of concealing documents from an official proceeding—on evidence that he had his assistant move personal papers and effects from his office for safekeeping, during regular business hours, on the eve of his eviction by new management. Included in those materials were copies of documents that, while of potential interest to others, had already been reviewed extensively by the company's outside investigators. The key issue was whether Black merely proceeded as any tenant would at the end of his tenancy or, instead, acted "corruptly"—with the "improper purpose" of "subvert[ing] or undermin[ing] the fact-finding ability of an official proceeding." Pet. App. 242a-243a. A jury knowing that Black had not committed mail fraud would have been much more likely to conclude that he acted with a clean conscience rather than a corrupt intent. Moreover, there was a serious risk of prejudicial spillover from the mountains of highly inflammatory

[Footnote continued on next page]

4. The court of appeals affirmed. Although petitioners challenged the legal adequacy of the "honest services" instruction, the court premised much of its analysis on the assumption that the jury was entitled to find, and therefore could be assumed to have found, guilt on the government's *alternative* theory—that petitioners wrongfully took Hollinger's money. Thus, the court repeatedly alluded to "facts" that the jury "was entitled to find" (Pet. App. 3a-5a), and it ultimately asserted that "[h]ad the jury believed that the payments for the covenants not to compete were actually management fees owed the defendants, as the defendants argued, it would have acquitted them." *Id*. at 10a.

The court acknowledged that the "honest services" charge "did not require that the jury find that the defendants had taken any money or property from Hollinger," Pet. App. 5a-6a, but it rejected petitioners' argument "that for the statute to be violated, the private gain must be at the expense of the persons (or other entities) to whom the defendants owed their honest services." *Id*. at 6a. The court emphasized that "[t]he defendants do not deny that they sought a private gain" in the form of lower Canadian taxes, and on that basis dismissed their position as a

[Footnote continued from previous page]

evidence introduced on the fraud counts. *See, e.g., United States v. Rooney*, 37 F.3d 847, 856 (2d Cir. 1994) (reversing false statements convictions due to risk of prejudicial spillover from evidence that the government introduced on another count for which its theory of guilt was legally flawed). Thus, while the questions presented do not directly address this count, reversal of the fraud convictions at issue in this petition—counts 1, 6 & 7—would require reversal of that verdict as well.

"no harm-no foul argument." *Id*. at 6a. The court went on at length to analogize the lawful tax "benefit" that the Canadian defendants had obtained to the receipt of bribes by judges and other public officials. *Id.* at 6a-8a. And although the court disclaimed any intention to impose on "every corporate employee" a duty "to advise his employer of his tax status," the court also speculated that Hollinger's audit committee might have renegotiated the management fees owed to Ravelston if only the committee knew the extent to which petitioners could reduce their Canadian tax burdens as a result of the recent Canadian tax ruling. This demonstrated, in the court's view, "how honest services fraud bleeds into money or property fraud." *Id.* at 8a-9a.

Finally, the court ruled that "[e]ven if our analysis of honest services fraud is wrong, the defendants cannot prevail." *Id.* at 9a. The court noted that "[a]n error in jury instructions is subject to the harmless error doctrine," and that a special verdict might have eliminated doubt as to the basis for the jury's verdict. Because petitioners had opposed a special verdict in this case, however, the court ruled that their objections to the "honest services" charge were "forfeited." *Id.* at 10a-11a. The court imposed this new forfeiture theory of harmless error without citation to authority, and without acknowledging the overwhelming body of law from other circuits that condemns or disfavors "special verdicts" in criminal cases.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to resolve a severe and broad division in the circuits on the question whether a mail fraud charge based on a private individual's alleged scheme to defraud a private entity of "honest services" can be sustained without a

finding that the defendant's alleged scheme reasonably contemplated identifiable economic harm to the party to whom honest services are owed. The Seventh Circuit's decision that petitioners' convictions could stand in the absence of any such findings—merely because they obtained a lawful tax benefit in another country—sharply conflicts with the decisions of at least five courts of appeals. It permits an unduly expansive reach of the mail fraud statute that is inconsistent with this Court's precedents, the text and history of Section 1346, or any conceivably appropriate conception of the federal-state balance.

Nowhere is the need for clarity and restraint in the application of Section 1346 greater than where, as here, the government is prosecuting private conduct that has no connection to the type of honest services fraud that prompted the 1988 expansion of the mail fraud statute in the first place—public corruption by government servants. Courts have widely recognized that use of Section 1346 to subject private individuals to federal criminal liability poses "special risks" not present in the public sector, *United States v. Sun-Diamond Growers*, 138 F.3d 961, 973 (D.C. Cir. 1998), *aff'd*, 526 U.S. 398 (1999); *United States v. Frost*, 125 F.3d 346, 365 (6th Cir. 1997), and many have cabined the reach of the statute in accordance with this recognition. *See, e.g., United States v. Vinyard*, 266 F.3d 320, 327 (4th Cir. 2001) (collecting cases).

Indeed, absent such limitations the honest services provision could be violated "by every breach of contract or every misstatement made in the course of dealing." *United States v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997). In particular, at least five courts of appeals would preclude conviction on an

"honest services" theory unless the defendant contemplated, or reasonably should have foreseen, some substantial risk of economic harm to the party who was owed the "honest services." If left unreviewed, the Seventh Circuit's departure from this requirement portends an unprecedented federalization of wholly private conduct that is properly the concern of state, not federal, law.

The Seventh Circuit's purported "harmless error" analysis is also cert-worthy in its own right. This Court recently reaffirmed in *Hedgpeth v. Pulido*, 129 S. Ct. 530 (2008), 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 *Pulido* makes clear, this type of "*Yates* error" (*see Yates v. United States*, 354 U.S. 298 (1957)) may be found "harmless" only if a court can declare confidently that the error had no effect on the verdict, which in cases of this type—where the jury has been improperly instructed on an element of the offense—requires that *the prosecution* affirmatively negate the possibility of prejudice beyond a reasonable doubt. *Neder v. United States*, 527 U.S. 1, 15 (1999).

Rather than apply this conventional analysis, the Seventh Circuit penalized *the defense* by imposing a new and perverse rule of forfeiture that permits the government to retain a tainted conviction precisely *because* the government cannot meet its burden. For good measure, the Seventh Circuit's new rule requires that criminal defendants pay a heavy price to avoid forfeiture of their rights: they must accept a special verdict form, a device that other circuits overwhelmingly view as "a disfavored procedure" that invades the defendant's basic right to a fair

trial. 26 MOORE'S FEDERAL PRACTICE: CRIMINAL § 631.03[1] (2008) (noting that "the use of special questions and verdicts in any criminal proceeding, state or federal, is suspect not only as a matter of sound judicial policy [but] raises due-process concerns as well"). And regardless of whether that procedure might appropriately be used by *trial* courts in *some* cases (such as where the defendant requests or consents to it), nothing in the federal rules—or in this Court's cases construing them—permits an *appellate* court retroactively to declare that opposition to such a procedure requires forfeiture of an otherwise valid objection. To the contrary, at least two circuits have soundly rejected that view.

I. The Circuits Are Deeply Divided On The Application Of The "Honest Services" Statute To Private Conduct

1. At the time *McNally* was decided, the decisional law on "intangible rights" or "honest services" fraud dealt overwhelmingly with public corruption by government servants—what *McNally* described as a deprivation of the "intangible right of the citizenry to good government." 483 U.S. at 356. Only a small smattering of courts believed the theory was relevant to cases involving purely private conduct. *See McNally*, 483 U.S. at 362-64 & nn. 3, 4 (Stevens, J., dissenting) (listing cases of employees who accepted kickbacks, sold confidential information, or defrauded the victim of a right to privacy). Indeed, the Sixth Circuit decision that this Court reviewed in *McNally—i.e.*, the decision that this Court reversed because it construed fraud too *broadly*—had held that "misconduct of a fiduciary in the administration of exclusively private matters in his capacity as a private individual * * * is not actionable as a viola-

tion of the mail fraud statute under an intangible rights theory." *United States v. Gray*, 790 F.2d 1290, 1295 (6th Cir. 1986).

This Court rejected the "intangible rights" theory because of its indeterminacy and inherent ambiguity, which could not be squared with constitutional requirements of notice or the rule of lenity. 483 U.S. 359-60 (citing *United States v. Bass*, 404 U.S. 336 (1971), and other rule of lenity authorities); *cf. Kolender v. Lawson*, 461 U.S, 352, 357-60 (1983). "[T]here are no constructive offenses" under federal law, this Court explained. The Court therefore declined to "construe the statute in a manner that leaves its outer boundaries ambiguous * * * . If Congress desires to go further, it must speak more clearly than it has." 483 U.S. at 360.

Congress's response—Section 1346—scarcely can be said to cure the obvious problems of vagueness and indeterminacy that underlay *McNally*; it is a single sentence that enjoins against "depriving another" of the "intangible right of honest services." As the en banc Second Circuit observed, one would have to "labor long and with difficulty in seeking a clear and properly limited meaning of 'scheme or artifice to deprive another of the intangible right of honest services' simply by consulting a dictionary for the literal, 'plain' meaning of the phrase." *Rybicki*, 354 F.3d at 135. The only thing that is clear is that the phrase has no established commonly understood or recognized meaning.

Courts attempting to construe Section 1346 have therefore fallen back on its sparse legislative history, which described the statute as "intended merely to overturn the *McNally* decision." 134 Cong. Rec. H11,251 (daily ed. Oct. 21, 1988) (Rep. Conyers).

Under this view, Section 1346 simply "restored the mail fraud statute to its pre-*McNally* scope, *according to previous opinions interpreting the intangible right to honest services.*" *Frost,* 125 F.3d at 364 (emphasis added); 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988) (post-enactment Senate Report to the same effect).

This judicial search for "a clear and properly limited meaning" has proven a two-decade-long Sisyphean task. As the en banc Fifth Circuit has noted, "Congress could not have intended to bless each and every pre-*McNally* lower court 'honest services' opinion," because the doctrine never was a "unified set of rules," even in public corruption cases. *United States v. Brumley*, 116 F.3d 728, 733 (5th Cir. 1997) (en banc). But this task is especially difficult and indeterminate in private cases. As Judge Jacobs, joined by three colleagues of the Second Circuit, observed, "even assuming that a term of art can be distilled from the body of case law that was overruled in *McNally*, surely no unambiguous meaning can be assigned to a phrase that has no meaning except what can be distilled from *some* pre-*McNally* cases provided that other pre-*McNally* cases are ignored[.]" *Rybicki*, 354 F.3d at 160 (en banc) (Jacobs, J, joined by Walker, Cabranes, and Parker, JJ, dissenting). This is "particularly" so, "since the designation of overruled cases that are in and those that are out is itself essentially arbitrary. Ordinary people cannot be expected to undertake such an analysis; rare is the lawyer who could do it; and no two lawyers could be expected to agree independently on the elements of an offense that must be defined by such a project." *Id.*

If this endeavor has not actually created a scheme of federal common law crimes in violation of longstanding authority, *United States v. Hudson*, 11 U.S. 32 (1812), it certainly has come perilously close to doing so. But even if one accepts the legitimacy of the exercise, no court has gone as far as the Seventh Circuit did in this case. Other circuits at least recognize that the private sector cases differ in nature from public corruption, since private individuals, unlike public servants, ordinarily work for money, not out of a pristine desire to advance the public weal. *See, e.g.*, *United States v. DeVegter*, 198 F.3d 1324, 1328-29 (11th Cir. 1999); *Frost*, 125 F.3d at 365; *Jain*, 93 F.3d at 441-42. For this reason, courts attempting to construe Section 1346 in private sector cases at least limit themselves to "pre-*McNally* decisions involving or purportedly involving 'honest services' fraud in the private sector." *Rybicki*, 354 F.3d at 138-39. According to the decision below, however, in the Seventh Circuit a private individual who receives a *lawful* tax benefit but fails to disclose it to his employer may safely be compared with a state judge who takes bribes. Pet App. 6a-8a.

2. Apart from authorizing federal courts to fashion—at the government's urging—private sector "crimes" that no reasonable person could anticipate, the decision below further entrenches a deep and persistent circuit split that calls out for this Court's intervention. Nearly half of the federal courts of appeals that have addressed Section 1346 in the private sector context have concluded that the statute requires proof that the defendant intended, or at least reasonably could have foreseen that the scheme would cause, economic or property harm to the victim. The result is an intractable circuit split, with at least five courts of appeals (the Fourth, Sixth,

Eighth, Eleventh, and District of Columbia Circuits) requiring some showing of economic or pecuniary harm,[8] and three circuits, the Fifth, Seventh, and Tenth Circuits, holding that no showing of economic harm is necessary.[9]

The majority view requires the government to prove (at least) that economic harm was reasonably foreseeable. *Vinyard*, 266 F.3d at 327-28; *Frost*, 125 F.3d at 367-69; *DeVegter*, 198 F.3d at 1328-30; *Sun-Diamond Growers*, 138 F.3d at 973-74. Under this test, "[t]he crucial determination must be whether

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[8] *Vinyard*, 266 F.3d at 320 (4th Cir.); *Frost*, 125 F.3d at 368 (6th Cir.); *United States v. Pennington*, 168 F.3d 1060 (8th Cir. 1999); *DeVegter*, 198 F.3d at 1329 (11th Cir.); *Sun-Diamond Growers*, 138 F.3d 973 (D.C. Cir.). The First Circuit appears to take a similar position. *See United States v. Martin*, 228 F.3d 1, 17-18 & n.22 (1st Cir. 2000) (noting the requirement that a defendant know or contemplate that his conduct "'poses an independent business risk'" or creates "'reasonably foreseeable economic harm'" to his employer, and affirming conviction because the government's evidence established that this test was satisfied) (quoting *Sun-Diamond*, 138 F.3d at 973); *United States v. Serafino*, 281 F.3d 327, 332 (1st Cir. 2002) (affirming conviction because the government's proof "plainly sufficed to establish the requisite cognizable financial harm to MBC under section 1346") (citing *United States v. Jain*, 93 F.3d 436, 441-42 (8th Cir. 1996)). The Second Circuit appears to apply a similar rule in "self-dealing" cases of the type that the prosecution charged here, *see Rybicki*, 354 F.3d at 141 (en banc) ("In the self-dealing context, * * * the defendant's behavior must thus cause, or at least be capable of causing, some detriment – perhaps some economic or pecuniary detriment – to the employer."), but it otherwise generally relies on a "materiality" test, *id*. at 146.

[9] *United States v. Black*, 530 F.3d 596 (7th Cir. 2008); *United States v. Brown*, 459 F.3d 509 (5th Cir. 2006); *United States v. Welch*, 327 F.3d 1081 (10th Cir. 2003).

the jury could infer that the defendant might reasonably have contemplated some concrete business harm *to his employer* * * * ." *United States v. Lemire*, 720 F.2d 1327, 1337 (D.C. Cir. 1983) (emphasis added); *Sun-Diamond Growers*, 138 F.3d at 973-74 (reaffirming *Lemire*); *see also Pennington*, 168 F.3d at 1065 (defendant must "cause or intend to cause actual harm or injury, and in most business contexts, that means financial or economic harm").

In other words, the majority rule "construe[s] the intangible right to honest services in the private sector as ultimately dependent upon the property rights of the victim." *Frost*, 125 F.3d at 369; *Vinyard*, 266 F.3d at 328 (adopting *Frost*); *DeVegter*, 198 F.3d at 1328-29 (adopting "well-reasoned standards" of *Frost* and *Lemire*). "Absent reasonably foreseeable economic harm, '[p]roof that the employer simply suffered only the loss of the loyalty and fidelity of the [employee] is insufficient to convict.'" *Sun-Diamond Growers*, 138 F.3d at 973 (quoting *Frost*, 125 F.3d at 368); *see also Jain*, 93 F.3d at 442 ("When there is no tangible harm to the victim of a private scheme, it is hard to discern what intangible 'rights' have been violated.").

By contrast, the courts that have rejected the majority rule have not successfully advanced any limiting principle that squares the statute with pre-*McNally* precedent or that saves it from almost certain unconstitutionality. The Fifth Circuit, for example, agrees that Section 1346 does not apply absent "some detriment" to the private employer, but also holds that "breach of the duty to disclose material information is a sufficient detriment to the employer"—a formulation that would seem to convert nearly any breach of state corporate governance law

or internal company rules into a federal crime. *See Brown*, 459 F.3d at 519. The Tenth Circuit evidently believes that any restriction on the outermost conceivable sweep of the statutory language constitutes "judicial legislation." *United States v. Welch*, 327 F.3d 1081, 1107 (10th Cir. 2003).

The Seventh Circuit has explained that its "limiting principle" is the requirement that the defendant's conduct result in "personal gain." *United States v. Hausmann*, 345 F.3d 952, 956 (7th Cir. 2003). As this case demonstrates, however, the government need not prove that this "gain" comes *at the expense* of the party to whom honest services are owed, and thus it is difficult to find a link between the supposed "dishonesty" and any conceivable injury to the "victim." The only obstacle to converting every violation of corporate governance or company rules into federal crimes would seem to be the moment-to-moment whims of federal prosecutors.

Application of the majority rule in this case would clearly lead to a reversal. If the jury concluded—as it quite likely did given Radler's exculpatory testimony—that petitioners lawfully received the $5.5 million, but violated duties imposed under Delaware business law by failing to advise the board that the payments had been recharacterized for tax reasons, there is no reason to believe the jury would have found that this behavior caused, or even risked causing, detriment to Hollinger. The instructions thus permitted conviction in the absence of any finding—or indeed, of any evidence—that petitioners' conduct deprived Hollinger of "honest services" within the meaning of Section 1346.

3. As is evident from the sheer number and scope of the reported decisions, the dispute over the mean-

ing of the honest services provision in the private sector is supported by decisions from most circuits. The split has ripened over the 20 years since the statute was enacted, and the time has come for this Court to guide the lower courts for the first time on the proper scope of the provision. This case offers a particularly good vehicle for such guidance, given the clear risk that petitioners were in fact convicted on the basis of jury findings that would have been insufficient to convict in at least five circuits.

II. The Seventh Circuit Improperly Avoided The Prejudicial Error Analysis Required Under *Yates v. United States* Through Its Retroactive Ad Hoc Amendment Of The Rules Governing Objections To Instructional Error

1. Earlier this Term, the Court reaffirmed that when a count is submitted to a jury on two alternative theories, one of which is flawed as a matter of law, a resulting conviction must be reversed unless the reviewing court can determine that the erroneous instruction was harmless. *See Yates*, 354 U.S. at 312; *Pulido*, 129 S. Ct. at 534-35. Under the test for constitutional violations, *see Neder*, 527 U.S. at 15 (applying the harmless constitutional error test where the jury was permitted to convict without a proper finding on each element), "the court must be able to declare a belief that [the error] was harmless beyond a reasonable doubt." *Chapman v. California*, 386 U.S. 18, 24 (1967).

The government insisted *on appeal* that the jury convicted petitioners of mail fraud on counts 1, 6 and 7 because it concluded that they schemed to steal Hollinger's *money*. But *at trial* the prosecutors were unwilling to rest their case on "money" fraud alone,

and instead insisted on presenting an "independent" theory on which the jury could convict petitioners *even if* it concluded they stole nothing. These avowedly "independent" honest services allegations, based on disclosure duties supposedly imposed by Delaware corporate law, permitted the jury to convict petitioners of something that is not a crime. They were insurance for the prosecutors in the event the jury did not believe the government's case for theft—as indeed turned out to be the case. The court of appeals, however, spared the government the trouble of establishing that the error was harmless beyond a reasonable doubt. Instead, the court held that *petitioners*, who followed to the letter the written rules of criminal procedure—by making timely and contemporaneous objections to the jury charge—forfeited their right to reversal. The court improperly ruled that petitioners should have paid a substantial price for the government's insurance policy—waiver of their right to the important protections of a general verdict—if they wanted the court to engage in the prejudice analysis required by *Yates* and reaffirmed in *Pulido*.[10]

[10] The problem with the jury charge here is that, unlike in several other circuits, the jury was *not required* to acquit under the second theory, even if it disbelieved the theft theory. To the contrary, the instructions relieved the government of the burden of proving that petitioners' gain was at the expense of Hollinger, and the government argued that honest services fraud and fraud by theft were *independent* theories. *E.g.* Pet. App. 183a. The Seventh Circuit therefore erred in suggesting that a harmless error analysis would not have changed the outcome. Pet. App. 10a (speculating that the jury would have acquitted had it believed the payments were owed to the defendants as management fees). At a minimum, therefore, the case should

[Footnote continued on next page]

2. The federal *civil* rules provide for special verdicts in appropriate circumstances. *See* Rule 49. But, for good reason, the *criminal* rules do not. "In such trials the practice has been settled time out of mind to charge but one crime in one count, to accept but one general plea to it and to call upon the jury to make but one general response, guilty or not guilty." *Gray v. United States*, 174 F.2d 919, 923 (8th Cir. 1949). That is because the right to a general verdict in a criminal case is "one of the most essential features of the right of trial by jury * * * and the removal of this safeguard would violate its design and destroy its spirit." *United States v. Spock*, 416 F.2d 165, 181 (1st Cir. 1969) (internal quotation marks omitted). A number of other courts similarly have cautioned against the use of special verdicts in criminal cases because they risk infringement on the right to trial by jury. *See, e.g., United States v. McCracken*, 488 F.2d 406, 418 (5th Cir. 1974) (use of special verdicts in criminal cases converts "the sacred right to trial by jury [into] a mere empty formalism"; collecting cases) (superseded by statute on other grounds); *United States v. Blackwell*, 459 F.3d 739, 766 (6th Cir. 2006); *see also Mathews v. United States*, 485 U.S. 58, 73 n.3 (1988) (White, J., dissenting) ("as a general rule special verdicts are disfavored in criminal cases") (internal quotation marks omitted).

Special verdicts undermine the jury system in at least four ways. First, by outlining a "step by step

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be returned to the Seventh Circuit for a proper harmless error analysis in light of *Pulido*.

* * * progression of questions[,] each of which seems to require an answer unfavorable to the defendant," special verdicts can pressure "a reluctant juror" to vote for a conviction. *Spock*, 416 F.2d at 182; *see McCracken*, 488 F.2d at 419 (special verdicts provide a "step by step approach to a guilty verdict, [thus] formal[ly] catechizing * * * a juror wishing to acquit"). Second, special verdicts "infringe on [the jury's] * * * power to arrive at a general verdict without having to support it by reasons or by a report of its deliberations." *McCracken*, 488 F.2d at 418; *Spock*, 416 F.2d at 181. Third, special verdicts "partly restrict [the jury's] historic function * * * of tempering rules of law by common sense brought to bear upon the facts of a specific case." *McCracken*, 488 F.2d at 418; *Spock*, 416 F.2d at 181. Fourth, special verdicts run the risk of confusing juries. *E.g.*, *Blackwell*, 459 F.3d at 766.

Although several circuits no longer adhere to the view that special verdicts *always* "are improper and in and of themselves erroneous," *United States v. Adcock*, 447 F.2d 1337, 1339 (2d Cir. 1971), it remains the case that they are "generally disfavored," *United States v. Pforzheimer*, 826 F.2d 200, 205 (2d Cir. 1987), *United States v. Ellis*, 168 F.3d 558, 562 (1st Cir. 1999) (same), unless *the defendant* requests one. *United States v. Margiotta*, 646 F.2d 729, 733 (2d Cir. 1981) (noting that the "prohibition is for the benefit of the defendant"). As a result, their use has been carefully reserved for special circumstances, such as where further inquiry of the jury is needed to establish the maximum punishment allowed. *See, e.g., United States v. FanFan*, 468 F.3d 7, 13 (1st Cir. 2006) (special interrogatory that was used to determine whether the drug amount authorized imposi-

tion of a higher prison term did not pose the risks associated with special verdicts).

Even circuits that occasionally *allow* the use of special verdicts in some circumstances, though, have "reject[ed] the prosecution's effort to salvage an invalid conviction by faulting the defendant for failing to request interrogatories." *United States v. Ruggiero*, 726 F.2d 913, 926 (2d Cir. 1984) (Newman, J., concurring in part and dissenting in part) (describing the decision in *Adcock*, *supra*). The Second Circuit rejected such a forfeiture rule in *Adcock*, *supra*, and has reaffirmed that aspect of *Adcock*. *See, e.g., Pforzheimer*, 826 F.2d at 206 (same). That outcome also follows from this Court's line of cases holding that criminal defendants may not be compelled to cede one right in order to enforce another. *See, e.g., Simmons v. United States*, 390 U.S. 377, 391-92 (1968) (a defendant may not be forced into the "dilemma" of either forfeiting the opportunity to raise a Fourth Amendment claim or "assuming the risk that the testimony" from the suppression hearing "would later be admitted against him at trial").

The Seventh Circuit's new forfeiture doctrine also creates a direct conflict with a second court of appeals. In *United States v. Riccobene*, 709 F.2d 214, 228 (3d Cir. 1983), the Third Circuit rejected the government's argument that the defense "invited error" by refusing the government's request for special interrogatories that would identify the RICO predicates on which the jury agreed. "[W]e will not impose upon the defendants the harsh penalty of waiver merely for requesting that the district court exercise its discretion in a manner contrary to the

government's preferences." *Id.*[11] That conflict alone is reason enough for the Court to grant review.

3. Even if the ruling below did not force criminal defendants to pay a heavy price for failing to submit to the use of a verdict form that seriously impairs their Sixth Amendment right to trial by jury, the Seventh Circuit's decision still would warrant review and reversal. The court created out of whole cloth an extra-textual requirement for preserving instructional error and then imposed the consequences of it on petitioners without proper notice. Federal Rule of Criminal Procedure 30(d) "clarifies what, *if anything*, counsel must do to preserve a claim of error regarding an instruction or failure to instruct." *Id.* (advisory committee notes) (emphasis added). Those requirements are simply stated: the objecting party must "inform the court of the specific objection and the ground for the objection before the jury retires to deliberate." Rule 30(d). "Failure to object in accordance with this rule precludes appellate review except" under the rule governing "plain error." *Id.* That rule is the beginning and the end of the re-

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[11] The rule that the government successfully pressed below also directly contradicts the position it took in the Third Circuit. In *Riccobene*, the government argued that the defendants would have *preserved* their appellate rights had they agreed to *the government's* suggestion to use *post*-verdict interrogatories. *Id.* Petitioners here *did* agree to the use of post-verdict interrogatories, but the district court declined to use them. Pet. App. 224a-225a. The rule that the government now urges—and that the Seventh Circuit has now adopted—is the opposite of the rule that the government previously proposed. Under this newly minted rule, a defendant *forfeits* his appellate rights *even though* he consents to post-verdict interrogatories. No other court has even hinted at such a draconian rule.

quirements for appellate review of instructional error. No court is free to add that "failure to agree to a special verdict"—or that failure to agree to the next creative suggestion served up by a prosecutor "in an abundance of caution," Pet. App. 228a, *also* "precludes appellate review." And certainly not in the absence of notice that such a rule will be adopted and enforced.

This Court has clearly stated that when a rule conditions outcomes on the satisfaction of certain requirements, courts may not change those requirements. *See, e.g., Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993) (invoking the rule of "*[e]xpressio unius est exclusio alterius*," to hold that because Fed. R. Civ. P. 9(b) "impose[s] a particularity requirement in two specific instances," courts may not impose other particularity requirements). Federal courts lack "the power to develop rules that circumvent or are inconsistent with the Federal Rules of Criminal Procedure"—even when the conflict is only implicit, and regardless of whether the new "rules" would restrict or expand a party's rights. *Carlisle v. United States*, 517 U.S. 416, 420-21, 426 (1996); *Libretti v. United States*, 516 U.S. 29, 50 (1995) (under former criminal Rule 31(e)—which, until rescinded, was the *only* authority for special verdicts in criminal cases—there was no need to notify defendants of the right to a special verdict in forfeiture cases because, *inter alia*, such notification "is not among the * * * safeguards" specifically listed in the Rule).

New procedural requirements are imposed by rule—not on an ad hoc, case-by-case basis—so that a clear, knowable, and consistently applied set of obligations will govern and guide the conduct of litigants

and the courts. Rule 30(d), an integral part of that scheme, puts litigants on notice of the requirements for preserving claims of instructional error. Courts "are not at liberty to ignore the mandate of [the federal rules] in order to obtain 'optimal' policy results." *Carlisle*, 517 U.S. at 430; *Bank of Nova Scotia v. United States*, 487 U.S. 250, 254-55 (1988) (judges do not have "discretion to disregard" the rules' text).[12]

Ad hoc amendments of federal procedural rules—rules carefully crafted through a process of notice, comment and review—are especially problematic when the penalty for non-compliance is imposed without proper notice that the rules have changed. Petitioners received no notice—none at all—that the rules would force them to serve several years in prison for engaging in non-criminal conduct simply because they declined a *suggestion* from the *government* that a disfavored and prejudicial type of verdict form be used. Even requirements *consistent* with federal procedural rules can only be imposed with notice and an opportunity to comment. *See, e.g.,* Fed. R. Crim. P. 57(a)(1) (governing district court local rules); Fed. R. App. P. 47(a)(1) (governing appellate court local rules). The Seventh Circuit plainly vio-

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[12] The government also argued in the court of appeals that petitioners forfeited their challenge to the honest services instruction by not complying with Rule 30(d). But, as noted above, petitioners objected to the government's proposed instruction; submitted their own written instructions to correct the error; and reiterated those objections and requests in open court after the jury was instructed. *See also* Pet. App. 248a. Not surprisingly, the court of appeals gave no credence to the government's conventional, but baseless, forfeiture argument; the court did not even mention it.

lated Rule 57(b)'s command that "no sanction or other disadvantage may be imposed for noncompliance with any requirement not in federal law, federal rules, or the local district rules unless the alleged violator was furnished with actual notice of the requirement before the noncompliance." *See also* Fed. R. Crim. P. 47(b); *Thomas v. Arn*, 474 U.S. 140 (1985).

Finally, this case is the least defensible context for the Seventh Circuit's rule because it makes no sense. According to the Seventh Circuit, a special verdict would have rendered the *Yates* challenge "moot" if the jury "had indicated on the verdict that the defendants were not guilty of an honest services fraud." Pet. App. 10a-11a. But, as petitioners pointed out in arguing for a general verdict—and as the district judge recognized in her instructions to the jury—the law did not *require* the jury's unanimity on *that* question. In fact the judge had already *rejected* one defendant's argument for a requirement of juror unanimity on the particular theory that underlay each mail fraud count, explaining that the jury only needed to be "unanimous that the defendant engaged in a scheme to defraud." *Id*. at 217a (citing *United States v. Lyons*, 472 F.3d 1055, 1069 (9th Cir. 2007)). Because the jury could convict with *some* jurors finding a scheme to obtain money, *other* jurors finding a scheme to deprive of honest services, and the *remainder* finding *both*, the government's proposed special verdict would have been unworkable, unenlightening, an invasion of the jurors' thought processes during their deliberations, and a source of unnecessary confusion. No defendant can fairly be penalized for failing to succumb to such an outcome.

Despite the "formidable array of objections" to special verdicts (*Spock*, 416 F.2d at 180), and the lack of authority within the federal rules (or elsewhere) for a court to amend the prerequisites for preserving claims of instructional error, the Seventh Circuit penalized petitioners—without fair notice—because they were unwilling to assume one risk of improper conviction as the price for avoiding another. The court of appeals' novel re-writing of Rule 30(d), rejected by two other circuits, warrants this Court's review.

III. The Petition Raises Issues That Are Recurring And Important

As the extensive body of appellate decisional law alone attests, mail and wire fraud cases invoking Section 1346 have not only been routine, but they also continue to spark significant disagreement on core issues of federal criminal law: the balance between matters of state and federal concern; the rule against a common law of federal crimes; and the threat to due process posed by broadly and vaguely worded criminal statutes. With the government's recent, renewed emphasis on white collar crime prosecutions, there is every reason to expect that the need for clarity on this significant aspect of federal criminal law will only increase.

Even before *McNally*, no consensus had emerged in the lower courts over how—or even whether—to apply to purely private conduct a prohibition on schemes that deprive others of "the right to honest services." The enactment of Section 1346 has failed to lessen the need for this Court's review. Just the opposite. The discordant results of Congress's failure to heed the instruction to "speak more clearly," *McNally*, 483 U.S. at 360, are evident for all to see.

Twenty years later the split in the lower courts over the scope of this vaguely worded criminal prohibition has only deepened and become more entrenched, especially with respect to the prosecution of conduct in the private sphere. Nearly every circuit has now had the chance to decide whether the government must allege and prove any foreseeable economic or property harm to the putative victim. The resulting split in approaches could not be more deep-rooted. As a result, it is the district of prosecution—rather than the text of the statute—that now dictates whether persons can be deprived of their liberty. The time has come for this Court to clarify the meaning of Section 1346.

The second issue, itself the subject of a circuit conflict, is also of surpassing importance. Although the Seventh Circuit's novel waiver rule applies to any count where the jury is given a choice of two or more theories on which to convict (such as a multi-object conspiracy), the application of its rule in the Section 1346 context is itself worthy of review. The Seventh Circuit's de facto amendment of Rule 30(d) not only is erroneous, but it would also allow the government to evade review of the merits in criminal appeals on the basis of its tortured position. This case squarely presents the conflict between the Seventh Circuit, on the one hand, and the Second and Third Circuits, on the other. Review is warranted to shield defendants in other circuits from the risk of being forced to accept one unacceptable risk of improper conviction in order to preserve their right to challenge another.

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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