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 Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND NEW YORK COUNCIL OF DEFENSE LAWYERS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are nonprofit voluntary professional bar associations that work on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct.

The National Association of Criminal Defense Lawyers (NACDL) was founded in 1958 and has a nationwide membership of more than 12,000 and an affiliate membership of almost 40,000. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the largest professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates. NACDL files numerous *amicus* briefs each year in this Court and other courts, seeking to provide *amicus* assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole. *Amicus* briefs filed by NACDL have been cited by this Court in some of its most important recent criminal-law decisions. *See, e.g., Kennedy v. Louisiana,* 128 S. Ct. 2641, 2663 (2008); *Rothgery v. Gillespie County,* 128 S. Ct. 2578,

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1. All parties have submitted letters to the Court consenting to the filing of *amicus* briefs. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* states that no party's counsel authored this brief in whole or in part and that no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

2587 (2008); *Blakely v. Washington,* 542 U.S. 296, 312 (2004); *Crawford v. Washington,* 541 U.S. 36, 52 (2004).

The New York Council of Defense Lawyers (NYCDL) is a not-for-profit professional association of approximately 235 lawyers, many of whom are former prosecutors, whose principal area of practice is criminal defense in federal and state courts in New York. NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, and promoting the proper administration of criminal justice. As *amicus,* NYCDL offers the Court the perspective of practitioners who regularly handle some of the most complex and significant white collar criminal cases in federal and state courts. NYCDL's *amicus* briefs have been cited by the Court or concurring justices in cases such as *Rita v. United States,* 551 U.S. 338, 373 (2007) (Scalia, J., concurring in the judgment), and *United States v. Booker,* 543 U.S. 220, 266 (2005).

Both NACDL and NYCDL have an interest in ensuring that federal criminal statutes provide fair notice of what conduct is prohibited and that criminal defendants are not penalized for making legitimate trial decisions.

SUMMARY OF ARGUMENT

I. This Court held in *McNally v. United States,* 483 U.S. 350 (1987), that the mail fraud statute did not protect "the intangible right of the citizenry to good government," *id.* at 356, because otherwise the statute would be too vague and would involve the federal government in issues of purely local governance. Congress responded by enacting 18 U.S.C. § 1346, which extends several federal fraud statutes to cover schemes to deprive another of "the intangible right of honest services." In doing so, Congress failed to solve either of the vagueness or federalism problems identified in *McNally*. Section 1346 provides no clear boundaries on what conduct is prohibited, rendering the statute unconstitutionally vague. Moreover, Section 1346 unduly impinges on the ability of the States to shape their own laws in a wide variety of fields traditionally within their province. As a result, Section 1346 has been used to prosecute numerous defendants for conduct that is not otherwise criminal and, if wrong at all, would amount to mere violations of civil duties such as those imposed by professional ethics rules or contracts.

A. Due process requires that a criminal law give fair warning, at the time of the offense, of what conduct is prohibited. *Bouie v. City of Columbia,* 378 U.S. 347 (1964). Accordingly, a statute must be clear and specific enough to inform the public of precisely what conduct is prohibited and to cabin law enforcement's discretion within reasonable limits. *Kolender v. Lawson,* 461 U.S. 352, 357–58 (1983). Section 1346 fails both of these requirements. The "intangible right of honest services" is undefined in Section 1346, has no ordinary and natural meaning, and has no settled meaning in the pre- or post-*McNally* case law.

Indeed, courts have been divided over even the most basic questions presented by Section 1346, such as the source and scope of the "intangible right." And because of Section 1346's "open-ended quality," *United States v. Thompson,* 484 F.3d 877, 884 (7th Cir. 2007) (Easterbrook, C.J.), the statute gives prosecutors unbridled discretion to enforce their own views of "honest services." The result is a largely unconstrained federal right of "honest services" that potentially extends to a vast array of corporate, personal, and professional relationships.

B. Section 1346 also threatens to inject federal oversight into numerous areas of the law traditionally left to the States. Interpreting Section 1346, as most courts of appeals have, to impose a federal-law duty to provide "honest services" irrespective of state law would, in practice, invite federal courts to create a federal common law of honest dealings, an approach which has been anathema for two centuries. *See, e.g., United States v. Bass,* 404 U.S. 336, 348 (1971); *United States v. Hudson,* 11 U.S. (7 Cranch) 32 (1812). Indeed, many courts applying Section 1346 have imposed federal duties of honesty without looking to state law or when no duty otherwise exists. The minority view, which requires an independent violation of law before finding a deprivation of the "intangible right of honest services," would still deprive States of their ability to make numerous independent policy judgments, "effect[ing] a change in the sensitive relation between federal and state criminal jurisdiction." *United States v. Lopez,* 514 U.S. 549, 561 n.3 (1995) (quoting *United States v. Enmons*, 410 U.S. 396, 411–412 (1973)).

II. Courts uniformly acknowledge that "special interrogatories … pose special dangers" in criminal cases, where the Sixth Amendment guarantees the right to a fair trial. *United States v. Edelkind*, 467 F.3d 791, 794 (1st Cir. 2006). Special interrogatories threaten to influence a jury's deliberations and its verdict, often to the detriment of criminal defendants. Yet the Seventh Circuit imposed an unprecedented forfeiture rule on Petitioners—who otherwise properly preserved their objection to the district court's jury instruction on honest-services fraud—merely for objecting to a special verdict form that they regarded as prejudicial.

The Seventh Circuit's new rule is without basis. Whether to propose or consent to special interrogatories is a decision properly left to defense counsel after weighing the potential prejudice to the defendant's constitutional rights. Although special interrogatories can in limited circumstances help guarantee a fair trial, the law's "traditional distaste" for them, *United States v. Coonan*, 839 F.2d 886, 891 (2d Cir. 1988), recognizes their potential prejudicial effects. Defendants should not be penalized for protecting against that clear risk. The Seventh Circuit's forfeiture rule would unfairly compel defendants either to accept prejudicial interrogatories or to forfeit objections to prejudicial instructional error. Such a rule, unjust in any setting, is especially inappropriate in this case, which in no way implicates the policy concerns that motivate forfeiture rules.

ARGUMENT

I. Section 1346 Is Unconstitutional As Applied To Breaches Of Private Duties.

More than two decades ago, in *McNally v. United States,* 483 U.S. 350 (1987), this Court held that the mail fraud statute, 18 U.S.C. § 1341, does not protect "the intangible right of the citizenry to good government." 483 U.S. at 356. The Court reasoned that accepting such a theory would leave the statute too ambiguous to provide notice of what acts were prohibited, *see id.* at 359–60, and would needlessly involve the federal government in issues of purely local governance, *see id.* at 360. Congress responded the following year by enacting 18 U.S.C. § 1346, which expanded several federal fraud statutes to cover deprivations of "the intangible right of honest services"—but which did nothing to explain what exactly that phrase means, or what its boundaries are.

Since then, prosecutors have invoked the statute in cases involving "a staggeringly broad swath of behavior," *Sorich v. United States,* 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari), prosecuting both public officials who violate "the intangible right of the citizenry to good government," *McNally,* 483 U.S. at 356, and private employees and corporate fiduciaries who violate purely private duties.[2] Courts have struggled to define the

2. This brief distinguishes between intangible rights corresponding to "public duties" and "private duties." In the former case, the duty is one owed to a government or to the public as a whole. While this duty is most commonly invoked in prosecutions of government officials or employees, it can also arise, for instance, when a private citizen is prosecuted for bribing or

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limits of Section 1346, asserting that it "does not encompass every instance of official misconduct," *United States v. Sawyer,* 85 F.3d 713, 725 (1st Cir. 1996), and is "not violated by every breach of contract, breach of duty, conflict of interest, or misstatement made in the course of dealing," *United States v. Welch,* 327 F.3d 1081, 1107 (10th Cir. 2003). Although everyone seems to agree that some limiting principles are needed, none of the myriad proposed limitations has gained more than a few adherents among the circuit courts.

The impetus to identify limiting principles stems from the recognition that Section 1346 is extraordinarily vague: "There is a serious argument that § 1346 is nothing more than an invitation for federal courts to develop a common-law crime of unethical conduct." *Sorich,* 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari). As explained below, Section 1346 is unconstitutionally vague because it fails to provide fair notice of what is prohibited and creates an undue risk of arbitrary

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wrongly influencing a public official, *see, e.g., United States v. Boots,* 80 F.3d 580 (1st Cir. 1996), or when a private citizen has a non-employee duty to the government, *see, e.g., United States v. Helmsley,* 941 F.2d 71 (2d Cir. 1991) (duty to pay state income taxes); *United States v. Porcelli,* 865 F.2d 1352 (2d Cir. 1989) (duty to collect state sales taxes). In contrast, private duties are those that arise between private citizens or entities. Professor Coffee draws a similar distinction between "public fiduciary" cases and "private fiduciary" cases, *see* John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction,* 35 Am. Crim. L. Rev. 427, 430 n.15 (1998). We use the "duties" terminology in this brief because fiduciary duties are but one category of duties implicated by Section 1346.

enforcement. Moreover, the statute unduly impinges on the ability of the States to shape their own laws in a wide variety of fields, from fiduciary duties in contract and tort laws to criminal fraud and corporate governance. For both of these reasons, this Court should hold that Section 1346 is unconstitutional as applied to purely private conduct.[3]

A. Section 1346 fails to give private actors fair notice of what conduct is prohibited.

Due process requires that a criminal statute give fair warning at the time of the offense of what conduct is prohibited. *Bouie v. City of Columbia,* 378 U.S. 347 (1964). A statute that fails to "define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited," *Kolender v. Lawson,* 461 U.S. 352, 357 (1983), or fails to "establish minimal guidelines to govern law enforcement," *id.* at 358 (quoting *Smith v. Goguen,* 415 U.S. 566, 574 (1974)), is unconstitutionally vague. Section 1346 fails both of these tests.

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3. *Amici* agree with Petitioners that a scheme to defraud another of the intangible right of honest services requires that the defendant contemplate economic harm to the victim. But that requirement does not cure the vagueness and federalism problems inherent in the undefined phrase "intangible right of honest services" as applied to private duties. This Court may face these same issues, in the public context, in another case to be argued this Term, *Weyhrauch v. United States, cert. granted,* 77 U.S.L.W. 3708 (U.S. June 29, 2009) (No. 08-1196). *Amici* expect to seek consent to file an *amicus* brief in *Weyhrauch* arguing that Section 1346 is unconstitutional as applied to public actors. This brief addresses the statute's constitutional infirmities in the private context.

1. The plain text of Section 1346 "simply provides no clue to the public or the courts as to what conduct is prohibited under the statute." *United States v. Rybicki,* 354 F.3d 124, 158 (2d Cir. 2003) (en banc) (Jacobs, J., dissenting) (quoting *United States v. Handakas,* 286 F.3d 92, 104 (2d Cir. 2002)). Section 1346 states only that "[f]or the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. The section does not define "intangible right of honest services," and it leaves unanswered numerous questions about that concept. There might be no vagueness problem if the phrase "intangible right of honest services" was otherwise well defined—say, if the phrase had an ordinary and natural meaning. But it does not. Likewise, there might be no vagueness problem if Congress had simply borrowed a term of art, but it did not. Instead:

> The term "intangible right" is not defined in the United States Code, is not defined in *Black's Law Dictionary,* and, prior to its use in § 1346, had never been used in any other statute of the United States. The term "honest services" is not defined anywhere in the United States Code, is not defined in *Black's Law Dictionary,* and had never been used in the United States Code prior to its use in § 1346. The phrase "the intangible right of honest services" is, therefore, inherently undefined and ambiguous.

United States v. Brumley, 116 F.3d 728, 742 (5th Cir. 1997) (en banc) (Jolly and DeMoss, JJ., dissenting). Nor is "intangible right" or "honest services" defined in *Webster's Third New International Dictionary* (1993) or *The Oxford English Dictionary* (2d ed.

1989). There accordingly was no commonly understood or well-defined meaning, legal or popular, when Congress passed Section 1346.

Similarly, the phrase "intangible right of honest services" did not have a settled common-law meaning on which Congress could have relied. *McNally* did not define the "intangible rights" theory or "honest services"; indeed, the Court concluded that recognizing such a theory would "leave[] [the mail fraud statute's] outer boundaries ambiguous." 483 U.S. at 360. And before *McNally* the courts of appeals were badly divided on what exactly the "intangible rights" or "honest services" doctrine meant. *See, e.g., Brumley,* 116 F.3d at 733–34 (en banc) (noting that "Congress could not have intended to bless each and every pre-*McNally* lower court 'honest services' opinion," because "before *McNally* the doctrine of honest services was not a unified set of rules" and "the meaning of 'honest services' was uneven").

Nor has the situation improved: "the Courts of Appeals have spent two decades attempting to cabin the breadth of § 1346 through a variety of limiting principles. No consensus has emerged." *Sorich,* 129 S. Ct. at 1309 (Scalia, J., dissenting from denial of certiorari). Instead, the courts of appeals remain divided today on their interpretations of Section 1346, including on issues such as:

- whether a violation of independently applicable law is required or whether, in contrast, the duty to provide honest services is a self-contained federal-law duty imposed implicitly by Section 1346[4];

4. *Compare, e.g., Brumley,* 116 F.3d at 734–35 (5th Cir.) (en banc) (Section 1346 requires violation of an independently ap-

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- whether the defendant must contemplate some personal gain[5] or potential harm to the victim[6]; and

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plicable law), *and United States v. Murphy,* 323 F.3d 102, 116–17 (3d Cir. 2003) (same), *with United States v. Frost,* 125 F.3d 346, 366 (6th Cir. 1997) ("Federal law governs the existence of fiduciary duty under the mail fraud statute."), *United States v. Sorich*, 523 F.3d 702, 712 (7th Cir. 2008) (Section 1346 does not require violation of independently applicable law), *cert. denied,* 129 S. Ct. 1308 (2009), *United States v. Urciuoli*, 513 F.3d 290, 298–99 (1st Cir. 2008) (same), *United States v. Walker*, 490 F.3d 1282, 1299 (11th Cir. 2007) (same), *United States v. Bryan*, 58 F.3d 933, 942 (4th Cir. 1995) (same), *and United States v. Weyhrauch,* 548 F.3d 1237, 1245 (9th Cir. 2008), *cert. granted,* 77 U.S.L.W. 3708 (U.S. June 29, 2009) (No. 08-1196).

5. *Compare, e.g., United States v. Bloom,* 149 F.3d 649, 655 (7th Cir. 1998) (defendant must contemplate some personal gain), *and United States v. Thompson,* 484 F.3d 877, 882 (7th Cir. 2007) (same), *with United States v. Panarella,* 277 F.3d 678, 691–92 (3d Cir. 2002) (criticizing the Seventh Circuit approach and holding no private gain is required), *and Welch,* 327 F.3d at 1107 (10th Cir.) (same).

6. *Compare, e.g., United States v. Vinyard,* 266 F.3d 320 (4th Cir. 2001) (economic harm to victim must be reasonably foreseeable), *Frost,* 125 F.3d at 368 (6th Cir.) (same), *United States v. deVegter,* 198 F.3d 1324, 1328–30 (11th Cir. 1999) (same), *United States v. Sun-Diamond Growers of California,* 138 F.3d 961, 973–74 (D.C. Cir. 1998) (same), *and United States v. Pennington,* 168 F.3d 1060 (8th Cir. 1999) (actual harm to victim must be caused or intended), *with United States v. Brown,* 459 F.3d 509, 519 (5th Cir. 2006) (breach of duty to disclose, with no concrete harm to victim, is sufficient), *Welch,* 327 F.3d at 1107 (10th Cir.) (no contemplated harm is required), *and United States v. Black,* 530 F.3d 596 (7th Cir. 2008) (same), *cert. granted,* 77 U.S.L.W. 3632 (U.S. May 18, 2009) (No. 08-876) (decision under review).

- whether pre-*McNally* "honest services" case law is even relevant today, and if so, what it means.[7]

When this Court said in *McNally* that Congress "must speak more clearly," 483 U.S. at 360, before the mail fraud statute could be used to prosecute more than money or property fraud, it did not mean that Congress needed only to make clear to the *courts* that it intended to protect "intangible rights." Rather, clarity as to the *scope* of those rights was required, because that is the only way for the *public* to know what conduct is prohibited. Congress's clarity on the first point "gets us nowhere in terms of limits on prosecutorial power and notice to the public." *Rybicki,* 354 F.3d at 158 (en banc) (Jacobs, J., dissenting). As Judge Jacobs observed, writing for himself and three other dissenting judges of the Second Circuit:

> No one can know what is forbidden by § 1346 without undertaking the "lawyer-like task" of answering the following questions: [1] Can pre-

7. *Compare, e.g., Frost,* 125 F.3d at 364 (6th Cir.) (Section 1346 restored pre-*McNally* case law), *United States v. Czubinski,* 106 F.3d 1069, 1076 (1st Cir. 1997) (same), *and Rybicki,* 354 F.3d at 145 (2d Cir.) (en banc) (pre-*McNally* case law is relevant to determining Congress's understanding of "intangible right of honest services," but is not "precedent"), *with Brumley,* 116 F.3d at 733–34 (5th Cir.) (en banc) (looking to Section 1346's "plain language" because pre-*McNally* case law "was not a unified set of rules"). This Court has observed in dictum that Section 1346 amends the law to cover "one of the 'intangible rights' that lower courts had protected under [the mail fraud statute] prior to *McNally:* 'the intangible right of honest services,'" *Cleveland v. United States,* 531 U.S. 12, 20 (2000), although that observation does not tell us whether those pre-*McNally* honest-services cases have continued viability.

> *McNally* case law be consulted to illuminate the wording of § 1346? [2] Can any meaning be drawn from the case law, either the uneven pre-*McNally* cases or the few cases decided post-§ 1346? [3] Is one to be guided only by case law within one's own circuit, or by the law of the circuits taken together (if that is possible)?

Id. at 159 (en banc) (Jacobs, J., dissenting) (brackets in original) (quoting *Handakas,* 286 F.3d at 105). Notice is insufficient when it requires lay persons to consider such amorphous factors and "perform[] the lawyer-like task of statutory interpretation by reconciling the text of [] separate documents" simply to determine what acts are crimes. *Rybicki,* 354 F.3d at 158 (en banc) (Jacobs, J., dissenting) (citing and quoting *Chatin v. Coombe,* 186 F.3d 82, 89 (2d Cir. 1999)).[8]

2. Section 1346 also fails the second and "more important" piece of the due process test for criminal

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8. The fair-notice concern is particularly acute when Section 1346 is interpreted to require a violation of independently applicable state law. *See Murphy*, 323 F.3d at 116–17; *Brumley*, 116 F.3d at 734–35. Under that construction, the federal crime of mail fraud would be defined, in part, by myriad sources of state law, civil and criminal, not all necessarily enacted by a legislature or providing the notice required by due process. "[I]t is frightening to contemplate the prospect that the federal mail fraud statute makes it a crime punishable by [twenty] years' imprisonment to misunderstand how a state court in future years will delineate the extent of impermissible conflicts. Then we would have a federal common-law crime, a beastie that many decisions say cannot exist." *Bloom,* 149 F.3d at 654 (Easterbrook, J.) (citing *United States v. Bass,* 404 U.S. 336, 348 (1971); *United States v. Hudson,* 11 U.S. (7 Cranch) 32 (1812)).

statutes: "the requirement that a legislature establish minimal guidelines to govern law enforcement." *Kolender,* 461 U.S. at 358 (quoting *Smith v. Goguen,* 415 U.S. 566, 574 (1974)). The statute at issue in *Kolender* required suspects to provide "credible and reliable" identification to police and to "account for their presence when requested by a peace officer under circumstances that would justify a stop under the standards of *Terry v. Ohio*." 461 U.S. at 353. The Court struck down the statute because it

> contain[ed] no standard for determining what a suspect ha[d] to do in order to satisfy the requirement to provide a "credible and reliable" identification. As such, the statute vest[ed] virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute and must be permitted to go on his way in the absence of probable cause to arrest.

Id. at 358. The statute thus "furnishe[d] a convenient tool for harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Id.* at 360 (quoting *Papachristou v. City of Jacksonville,* 405 U.S. 156, 170 (1972)).

The text of Section 1346 similarly places no limits or standards on when prosecution may be warranted. The absence of any standard to cabin prosecutorial discretion regarding what constitutes a violation of the "intangible right of honest services" is illustrated by cases as disparate as these:

- Officials have been prosecuted for failure to disclose conflicts of interest, even when they do not benefit from those conflicts. *See, e.g., Bryan,* 58 F.3d 933.

- University students and professors were prosecuted for a scheme by which the professors helped the students obtain unearned degrees, in exchange for assistance from the students in obtaining government contracts. *See Frost,* 125 F.3d 346 (affirming some convictions and reversing others as involving mailings too remote from the fraud).
- A sports agent was prosecuted for bribing college athletes to sign representation agreements, in violation of NCAA rules but no federal or state statute. *See United States v. Walters,* 997 F.2d 1219 (7th Cir. 1993) (reversing conviction).

Prosecutors were equally aggressive before *McNally:*

- A lawyer was prosecuted for representing a client while his large law firm represented a competing client seeking a public franchise. *See United States v. Bronston,* 658 F.2d 920 (2d Cir. 1981).
- A private individual was prosecuted for enticing women to engage in sexual conduct with false promises that he could get them acting or modeling jobs. *See United States v. Condolon,* 600 F.2d 7 (4th Cir. 1979).
- Private investigators were prosecuted for obtaining customer telephone records for use in pursuing debtors. *See United States v. Louderman,* 576 F.2d 1383 (9th Cir. 1978).

Because of the "open-ended quality" of Section 1346, *Thompson*, 484 F.3d at 884 (Easterbrook, C.J.), and the lack of a "coherent limiting principle to define what 'the intangible right of honest services' is, whence it derives, and how it is violated," *Sorich,* 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari), the statute, like the provision at issue in

Kolender, invites "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." 461 U.S. at 360.

* * *

Applying Section 1346 to private duties would implicate a broad array of corporate, personal, and professional relationships. Resolving the myriad questions raised by such applications would require accepting Section 1346's "invitation for federal courts to develop a common-law crime of unethical conduct." *Sorich,* 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari). This Court should refuse to do so.

B. Section 1346 impinges on the States' ability to shape their own laws in a wide variety of fields.

Under the Constitution's federalist structure, the regulation of numerous types of conduct is traditionally the province of the States, unless, at a minimum, Congress has expressly spoken to the question. *See, e.g., Virginia Bankshares, Inc. v. Sandberg,* 501 U.S. 1083, 1094 n.6 (1991) (quoting *Cort v. Ash,* 422 U.S. 66, 84 (1975)). Section 1346 threatens to upend this principle and inject federal oversight into numerous areas of the law traditionally left to the States.

1. Section 1346 threatens to replace many state regulations with a new federal law of "honest services." The majority of courts of appeals to consider the question have held that the "intangible right of

honest services" is a right defined by federal law, requiring no discussion of state-law rights and duties.[9] Many of the same kinds of legal rights and duties involved in honest-services cases routinely arise under state law, in a diverse and wide-ranging set of fields. Yet courts applying Section 1346 have imposed their own view of these duties, on top of and unmoored from the state laws that usually govern, and have prosecuted individuals for actions that, if wrong at all, may amount only to a civil violation or potential tort under state law. Courts have thus frequently superimposed a far-reaching and ill-defined federal law of duties on top of preexisting state-law duties of care.[10]

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9. *E.g., Bryan,* 58 F.3d at 940 (4th Cir.); *Frost,* 125 F.3d at 366 (6th Cir.); *Bloom,* 149 F.3d at 653–57 (7th Cir.); *Weyhrauch,* 548 F.3d at 1245 (9th Cir.), *cert. granted* (No. 08-1196); *Walker,* 490 F.3d at 1299 (11th Cir.). *Cf. Urciuoli,* 513 F.3d at 298–99 (1st Cir.) (relevance of state law may depend on "precisely what the government has charged"). *Contra Murphy*, 323 F.3d at 116–17 (3d Cir.); *Brumley*, 116 F.3d at 734–35 (5th Cir.) (en banc). The majority view is consistent with *McNally*'s interpretation of the honest-services doctrine. *See* 483 U.S. at 361 n.9; *id.* at 376 n.10 (Stevens, J., dissenting).

10. This problem is not unique to private duties; the troubling federalism implications of applying Section 1346 to public actors have been frequently noted by commentators and judges. *See, e.g., Sorich,* 129 S. Ct. at 1310 (Scalia, J., dissenting from denial of certiorari); *Panarella,* 277 F.3d at 693 (Becker, C.J.); Coffee, *Modern Mail Fraud: The Restoration of the Public/Private Distinction,* 35 Am. Crim. L. Rev. 427. *Cf. McNally,* 483 U.S. at 360. While the federalism implications of applying Section 1346 to *private* actors have been comparatively unexplored, private applications of Section 1346 would touch a far broader array of corporate, personal, and professional relationships ordinarily left to state regulation.

Examples include:

- *Corporate governance.* Corporate governance is generally the subject of state law, in part because it "is regulation of entities whose very existence and attributes are a product of state law." *CTS Corp. v. Dynamics Corp. of Am.,* 481 U.S. 69, 89 (1987) (citing *Trs. of Dartmouth Coll. v. Woodward,* 17 U.S. (4 Wheat.) 518, 636 (1819)). Corporate managers owe their corporations duties of loyalty and care. *See generally* Robert Charles Clark, *Corporate Law* 126–36, 141–57 (1986); William E. Knepper & Dan A. Bailey, *Liability of Corporate Officers and Directors* §§ 1.01 to 1.18 (2008). Managers' duties under state laws are, however, typically quite limited: absent a showing of fraud, a conflict of interest, or illegality, managers are generally presumed to have acted in good faith and an honest belief that their actions were taken in the best interests of the company. Clark, *Corporate Law* 123–25. Yet defendants have been convicted of honest-services fraud without analysis of whether their actions violated any state-law corporate law duty. *See, e.g., deVegter,* 198 F.3d at 1327–30 (citing cases).
- *Privacy law.* In most States, the common-law tort of invasion of privacy protects individuals from four types of privacy invasions: intrusion upon seclusion; public disclosure of private facts; false light; and misappropriation of the individual's name or likeness. *See* Restatement (Second) of Torts §§ 652A–652E (1977); William L. Prosser, *Privacy,* 48 Cal. L. Rev. 383 (1960) (canvassing the state decisions). The precise details of these duties vary from State to State, and not all States recognize all of them; yet individuals have been

prosecuted for honest-services mail fraud after violating nebulous privacy rights untethered to otherwise-applicable privacy law. *See, e.g., Czubinski,* 106 F.3d 1069 (reversing conviction of IRS employee who examined taxpayer records without authorization); *Condolon,* 600 F.2d 7 (defendant obtained sexual favors on false pretenses); *Louderman,* 576 F.2d 1383 (defendant obtained personal information from telephone company under false pretenses, when state false-pretenses law applied only to tangible property).[11]

- *Professional responsibility.* State laws generally regulate the duties that attorneys, doctors, and other professionals owe to their clients. Because those professionals are indisputably providing "services," Section 1346 could impose an independent federal duty to provide "honest services" that is entirely unrelated to the governing rules of professional conduct. Imposing a federal duty could also lead to penalties far greater than the States have chosen to impose. For example, one lawyer was prosecuted for secretly representing a client with interests adverse to another client of his firm, even though the representation potentially amounted to a mere ethics violation, not a

11. The dissent in *McNally* specifically mentioned previous honest-services cases involving "privacy and other nonmonetary rights." 483 U.S. at 364 (Stevens, J., dissenting). Although at least one court of appeals has concluded that such cases no longer come within the mail fraud statute, *see Rybicki,* 354 F.3d at 138 n.13 (en banc), in other circuits they remain viable as pre-*McNally* honest-services case law revived by Section 1346, *see, e.g., Frost,* 125 F.3d at 364.

criminal offense, under state law. *See Bronston,* 658 F.2d 920.[12]

Similar stories could be told about contract law, tort law, employment law, and most other areas of state law and regulation.

In short, even though Section 1346's reference to "*the* intangible right of honest services" (emphasis added) implies that the mail fraud statute protects preexisting intangible rights and does not create new rights, in numerous cases courts have found violations without analyzing, or even requiring, any such clear preexisting right. They have done so by imposing new federal duties in areas of the law traditionally governed by the States. While those federal duties may be largely consistent with the dominant state-law rules, they amount to little more than a federal judicial gloss on what those duties *should* be, rather than what they *are. Cf. Santa Fe Industries v. Green,* 430 U.S. 462 (1977) (declining to extend the SEC's Rule 10b-5, 17 C.F.R. § 240.10b-5 (2009), to areas traditionally governed by state law). And it is not hard to imagine expanding this approach to other areas in which state law has historically defined rights and duties. To give just two more examples:

- *Insurance.* By federal statute, insurance regulation is left to the States unless a federal statute "specifically relates to the business of insurance." 15 U.S.C. § 1012(b). Under all States' insurance

12. *Bronston* did not involve the misappropriation of any of the "victim" client's confidential information. *Cf. Carpenter v. United States,* 484 U.S. 19 (1987) (affirming conviction of *Wall Street Journal* columnist who sold confidential information about the column's future contents).

laws, insurance contracts contain an implied duty of good faith and fair dealing. The source and scope of that duty, however, vary widely from State to State.[13] Nevertheless, Section 1012(b)'s limitation has been held not to block prosecutions of insurers under the mail fraud statute, *see, e.g., United States v. Blumeyer,* 114 F.3d 758, 768 (8th Cir. 1997); *United States v. Sylvanus,* 192 F.2d 96, 100 (7th Cir. 1951). Indeed, the mail fraud statute is routinely used to prosecute fraud on insurance companies, *see, e.g., United States v. Loder,* 23 F.3d 586 (1st Cir. 1994), and it is not hard to imagine a prosecution for violating the insurer's duty of good faith as an "intangible right of honest services," interpreted without reference to detailed and non-uniform state insurance law.

- *Family law.* Generally, spouses have fiduciary duties to each other, although the precise contents of these duties vary from State to State. *See, e.g.,* Cal. Fam. Code. § 721(b) (Deering 2009); *Christian v. Christian,* 365 N.E.2d 849, 855 (N.Y. 1977). Similarly, parents have duties to provide and care for their children. Although federal law generally leaves such family-law issues to state law, Section 1346 could make a federal crime out

13. For example, the insurer's duty of good faith can arise out of common-law tort, *e.g., Auto Mut. Indem. Co. v. Shaw,* 134 Fla. 815, 184 So. 852 (1938), contract, *e.g., Johnson v. Federal Kemper Ins. Co.,* 74 Md. App. 243, 536 A.2d 1211 (Md. Ct. Spec. App. 1988), or statute, *e.g.,* Conn. Gen. Stat. § 38a-816 (2008). It can apply only to third-party claims, *e.g., Talat Enterprises, Inc. v. Aetna Cas. and Sur. Co.,* 753 So. 2d 1278, 1281 (Fla. 2000), or to first-party claims as well, *e.g., Gruenberg v. Aetna Ins. Co.,* 9 Cal. 3d 566, 573, 510 P.2d 1032, 1037 (1973).

of violating a federal court's idea of a parent's or spouse's duties.

2. Some courts have rejected the majority view and interpreted Section 1346 to apply only when the defendant violates a preexisting state-law "intangible right of honest services" that is separate and independent of Section 1346 itself.[14] But that approach—which finds no support in the text of Section 1346[15] or the pre-*McNally* case law[16]—presents its own federalism concerns.

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14. In the public context, this issue is presented this Term in *Weyhrauch, cert. granted,* No. 08-1196, 77 U.S.L.W. 3708 (U.S. June 29, 2009).

15. Section 1346 gives no indication that it incorporates other sources of law, and although federal law sometimes incorporates state laws, in the criminal law it does so explicitly. *See, e.g.,* 18 U.S.C. § 1961(a) (RICO predicate offenses, including certain acts "chargeable under State law and punishable by imprisonment for more than one year"); 18 U.S.C. § 922(b)(2) (firearm sales by federally licensed dealers when the purchase or possession of the firearm would violate purchaser's state or local law). When a statute is ambiguous, this Court is reluctant to read state law into federal criminal law, because "[w]hen Congress criminalizes conduct already denounced as criminal by the States, it effects a 'change in the sensitive relation between federal and state criminal jurisdiction.'" *United States v. Lopez,* 514 U.S. 549, 561 n.3 (1995) (quoting *United States v. Bass,* 404 U.S. 336, 349 (1971)).

16. The honest-services doctrine before Section 1346 and *McNally* did not rely on independent violations of state law. *See McNally,* 483 U.S. at 361 n.9 (assuming that the defendants had not violated any state law); 483 U.S. at 376 n.10 (Stevens, J., dissenting) ("The mail fraud statute is a self-contained provision, which does not rely on any state enactments for its force."). In enacting Section 1346, Congress did not express any intent to change this approach.

While interpreting Section 1346 to incorporate state law would mitigate concerns about federal law imposing different or additional substantive requirements on individuals, it would still deprive States of their ability to make independent policy decisions on numerous secondary questions, including enforcement mechanisms, appropriate penalties, and the relative priorities of various laws. "It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country," *New State Ice Co. v. Liebmann,* 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting)—and this is as true for remedies as for underlying substantive requirements. This Court has recognized the "fundamental interest in federalism that allows individual States to define crimes, punishments, rules of evidence, and rules of criminal and civil procedure in a variety of different ways." *Danforth v. Minnesota,* 128 S. Ct. 1029, 1041 (2008) (holding that States may give broader effect than federal courts to new constitutional holdings). It substantially undermines that "fundamental interest" to borrow a state rule, potentially not even criminally enforceable, and turn it into a federal felony with a sentence of up to twenty years in prison, 18 U.S.C. § 1341. *Cf.* Wayne A. Logan, *Horizontal Federalism in an Age of Criminal Justice Interconnectedness,* 154 U. Pa. L. Rev. 257, 259 & nn.10–16 (2005) (citing numerous examples of States' "diverse views on criminal law matters").

* * *

These federalism concerns are only exacerbated by Section 1346's extraordinary vagueness, which gives federal prosecutors free rein to police a vast

range of private conduct that is the traditional province of state law. This Court should therefore hold that Section 1346 is unconstitutional as applied to purely private conduct.

II. The Seventh Circuit's Novel Forfeiture Rule Is Harsh And Unwarranted.

Federal courts have long recognized the risk of prejudice posed by special verdict forms and special interrogatories in criminal cases. *See, e.g., Gray v. United States,* 174 F.2d 919, 923 (8th Cir. 1949) (noting that the use of special interrogatories in criminal cases presents "a question of due process [that] is important and far reaching"). Special interrogatories threaten to influence a jury's deliberations and thereby violate a defendant's constitutional right to a fair trial. Petitioners were therefore well within their rights in objecting to them. Yet according to the Seventh Circuit, Petitioners' decision came at the price of forfeiting their objection to the district court's instruction on honest-services fraud. The Seventh Circuit's unprecedented forfeiture rule unfairly compels defendants either to accept prejudicial interrogatories proposed by the government or to forfeit otherwise properly preserved objections to prejudicial instructional error. Imposing such a choice is especially inappropriate because the policy concerns that underlie forfeiture and waiver rules have no application here.[17]

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17. *Amici* agree with Petitioners that there is no basis in the Federal Rules of Criminal Procedure for the Seventh Circuit's forfeiture holding, and that it is therefore unfair to penalize Petitioners for having violated a rule that did not exist at the time of the trial. *Amici* write separately to emphasize the broader

(footnote continued on next page…)

A. Special interrogatories are disfavored because they threaten a defendant's right to a fair trial.

Federal courts generally disfavor special verdict forms and interrogatories.[18] Chief among the relevant concerns is "the subtle, and perhaps open, direct effect that answering special questions may have upon the jury's ultimate conclusion," there being "no easier way to reach, and perhaps force, a verdict of guilty than to approach it step by step." *United States v. Spock,* 416 F.2d 165, 182 (1st Cir. 1969).

There are at least two ways in which special interrogatories may tilt the jury's deliberations toward a guilty verdict. First, "eliciting 'yes' or 'no' answers to questions concerning the elements of an offense may propel a jury toward a logical conclusion of guilt, whereas a more generalized assessment might have yielded an acquittal." *United States v. Ruggiero,* 726 F.2d 913, 927 (2d Cir. 1984) (Newman, J., concurring in part and dissenting in part). Second, "fragmenting

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unfairness that would be caused if this Court accepted the Seventh Circuit's rule.

18. *See, e.g., United States v. Edelkind,* 467 F.3d 791, 794 (1st Cir. 2006) ("[S]pecial interrogatories in criminal cases … pose special dangers."); *United States v. Pforzheimer,* 826 F.2d 200, 205 (2d Cir. 1987) ("[J]ury interrogatories in criminal cases are generally disfavored."); *United States v. Riccobene,* 709 F.2d 214, 228 n.19 (3d Cir. 1983); *United States v. Udeozor,* 515 F.3d 260, 271 (4th Cir. 2008); *United States v. Bosch,* 505 F.2d 78, 82 (5th Cir. 1974); *United States v. Wilson,* 629 F.2d 439, 444 (6th Cir. 1980); *United States v. Pierce,* 479 F.3d 546, 551 (8th Cir. 2007); *United States v. Ramirez,* 537 F.3d 1075, 1083 (9th Cir. 2008).

a single count into the various ways an offense may be committed affords a divided jury an opportunity to resolve its differences to the defendant's disadvantage by saying 'yes' to some means and 'no' to others, although unified consideration of the count might have produced an acquittal or at least a hung jury." *Id.*

Special interrogatories also threaten to confuse the jury, *e.g., Wilson,* 629 F.2d at 444, and to infringe on the jury's authority to apply law to facts and render a verdict without having to articulate reasons, *e.g., United States v. McCracken,* 488 F.2d 406, 418–19 (5th Cir. 1974). Such questions threaten to "restrict [the jury's] historic function, that of tempering rules of law by common sense brought to bear upon the facts of a specific case." *United States v. O'Looney,* 544 F.2d 385, 392 (9th Cir. 1976) (quoting *United States v. Ogull,* 149 F. Supp. 272, 276 (S.D.N.Y. 1957)). Because special interrogatories risk prejudice to the defendant and interfere with the jury's historic authority to render a general verdict, they have long been disfavored.

This is not to say that special interrogatories are never beneficial or may never be used. Courts have approved their use in complex cases involving alleged racketeering or continuing criminal enterprises.[19] In such settings, interrogatories can "decrease the likelihood of juror confusion and … aid the

19. *See, e.g., United States v. Cianci,* 378 F.3d 71, 90–91 (1st Cir. 2004) (endorsing use of special verdict forms in racketeering cases to "allow[] juries to specifically identify the predicates for the general verdict"); *United States v. Ogando,* 968 F.2d 146, 148–49 (2d Cir. 1992) (stating "preference for special interrogatories in particularly complex criminal cases").

jury in concentrating on each specific defendant, and the charges against him, rather than incriminating one potentially innocent defendant solely on the basis of his association with the others." *United States v. Palmeri,* 630 F.2d 192, 202 (3d Cir. 1980). "[N]otwithstanding the law's traditional distaste for special interrogatories," they "allow an assessment of whether the jury's determination of guilt rested on permissible bases" where the charged offense requires proof of specific predicate facts. *Ogando,* 968 F.2d at 148–49 (internal quotation marks omitted). Similarly, after a guilty verdict, courts employ interrogatories to enable the jury to determine facts that bear on a defendant's maximum sentence to vindicate a defendant's Sixth Amendment right to a jury trial. *See, e.g., United States v. Arnold,* 416 F.3d 349, 356 (5th Cir. 2005) (drugs); *United States v. Hedgepeth,* 434 F.3d 609, 613–14 (3d Cir. 2006) (firearms).

Given these competing considerations, whether to propose or consent to special interrogatories can be a difficult decision, requiring defense counsel to weigh numerous factors. The risks of jury confusion inherent in using special verdicts, their coercive nature, the precise wording of the questions, or the timing or manner of their presentation to the jury may prove decisive. On timing, for example, courts have recognized that the "better practice [is] to submit the general verdict and special verdict forms separately"—as Petitioners proposed in the trial court, *see* J.A. 432a–435a—so that the interrogatories pose no risk of influencing the jury's deliberations on the charged offenses. *Udeozor,* 515 F.3d at 271. *See also Riccobene,* 709 F.2d at 228 n.19 (noting that "the dangers usually involved in the use of jury interrogatories in a

criminal case were not present" because the government's questions would have been submitted after the jury returned a verdict). As the Third Circuit has recognized, the "theoretical advantage to a defendant" of a special interrogatory versus a general verdict "must be evaluated by the trial lawyer who is on the scene and can weigh the intangibles of the trial atmosphere far better than [an appellate court can]." *United States v. Desmond,* 670 F.2d 414, 419 (3d Cir. 1982).

B. The Seventh Circuit's unprecedented rule would unfairly compel defendants to choose between two sources of prejudice.

The Seventh Circuit held that Petitioners had "forfeited their objection" to the disputed jury instruction on honest-services fraud by refusing to accept the government's proposed special verdict form. *See* Pet. App. at 9a–12a (discussing *Yates v. United States,* 354 U.S. 298 (1957)). By imposing this forfeiture rule, the Seventh Circuit places defendants in the untenable position of having either to accept prejudicial interrogatories or to forfeit objection to prejudicial instructional error.

This harsh result is without precedent. No other court has imposed the penalty of forfeiture on a criminal defendant simply for declining a special verdict form or interrogatory that defense counsel believes to be prejudicial.

Indeed, the Third Circuit has expressly refused to compel such a choice. In *Riccobene,* the court repudiated the government's argument that the defendants "had waived their right" to appeal an issue by objecting to special interrogatories proposed by the gov-

ernment. 709 F.2d at 227–28. Like the Seventh Circuit, which accused Petitioners of objecting to interrogatories simply "to reserve the right to make" an argument on appeal, Pet. App. 11a, the government argued that the defendants in *Riccobene* had "invited error" because if they "had allowed the special interrogatories, then there would have been no" problem to challenge on appeal, *Riccobene,* 709 F.2d at 228. Given that "[i]t is within the discretion of the district court to permit special interrogatories," the Third Circuit refused to "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.*[20]

Other federal courts of appeals have articulated similar views. In *Spock,* the First Circuit confronted a situation where, as here, it was unclear on which legal theory the jury had relied in reaching a guilty verdict. *See* 416 F.2d at 180–83. The First Circuit explained that the legitimacy of a district court's aim in seeking to avoid a *Yates* problem does not offset or overcome the prejudice caused by special interrogatories:

> If the [special interrogatory] procedure was, as we hold, prejudicial to the rights of the defendants, it is not saved by the propriety of the court's motive, doubtless a strong one in this particular case

20. The Seventh Circuit contended that the Third Circuit later "made clear that it is better to give the jurors the interrogatories on the same form as the verdict." Pet. App. 11a. The Third Circuit, however, made clear only that a trial court, using proper instructions, *may* include interrogatories on the same form, not that doing so is *better* than submitting questions separately. *Hedgepeth,* 434 F.3d at 613–14.

> where difficult legal issues were involved, *cf. Yates v. United States,* supra, of avoiding an appellate court's dilemma due to ignorance of what theory the jury based its verdict upon.

Id. at 183 n.42.

The Second Circuit rejected the government's similar argument in *United States v. Adcock* that the defendant's failure to request a special verdict should suffice to defeat a *Yates* claim. *Adcock*, 447 F.2d 1337, 1338 (2d Cir. 1971).[21] In contrast to *Adcock*, Petitioners *did* request a post-verdict interrogatory that would have identified the legal theory or theories relied upon by the jury in reaching a guilty verdict on mail fraud. J.A. 432a–435a. If forfeiture is inappropriate where, as in *Adcock,* a defendant fails to request an interrogatory, then it must be inappropriate where, as here, Petitioners proposed a post-verdict interrogatory that the district court declined to submit.

C. None of the policy justifications for forfeiture rules applies here.

"In general, the law ministers to the vigilant" by requiring litigants to make contemporaneous objections to perceived errors by a trial court. *United States v. Taylor,* 54 F.3d 967, 972 (1st Cir. 1995). Forfeiture and waiver rules accordingly give trial

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21. The Second Circuit's decision in *United States v. Wilkinson* is not to the contrary because the court, in finding that the defendant had forfeited a sufficiency of the evidence claim, rested primarily on the fact that "[n]o proposed jury instruction on the subject was requested nor was an objection made to [the district court's] instruction." 754 F.2d 1427, 1432 (2d. Cir. 1985).

courts "an opportunity to correct the problem before irreparable harm occurs." *Id.* They also prevent parties from "sandbagging" by "making a tactical decision to refrain from objecting, and subsequently … assigning error (or, even worse, planting an error and nurturing the seed as insurance against an infelicitous result)." *Id.* Because those policy concerns have no application in this case, the Seventh Circuit's novel forfeiture rule is especially unjustified.

The district court had ample notice of Petitioners' objection to the mail fraud instruction. From the bench, the judge ruled that Petitioners' proposed instruction, which would have required proof that "the scheme, if successful, must wrong the alleged victim's property rights in some way," was "not the law in this circuit." Pet. App. 220a. The Seventh Circuit described that jury instruction as "the focus of the appeals," never suggesting that Petitioners had failed to raise the issue before the district court. *Id.* at 4a.

As for sandbagging, Petitioners placed the district court on notice more than once—initially by unsuccessfully proposing an instruction that would have required a finding of economic harm to the victim, and then, after the jury was charged, by renewing their objection. *Id.* at 197a; 248a. A defendant's legitimate refusal to accept a prejudicial special verdict form cannot fairly be impugned as a tactical attempt to plant an error; rather, that decision helps safeguard a defendant's right to a fair trial. In any event, Petitioners themselves proposed a post-verdict interrogatory that would have directed the jury, in the event of a guilty verdict on mail or wire fraud, to identify whether they had engaged in property fraud, or honest services fraud, or both. J.A. 432a–435a.

Recognizing that "the jury's specification of the mail/wire fraud theory might be helpful to appellate review in the event of a guilty verdict," Petitioners offered this counter-proposal to the government's special verdict form "as an accommodation to the competing interests." *Id.* at 432a.

Under these circumstances, there is no plausible rationale for imposing the severe penalty of forfeiture.

CONCLUSION

The judgment of the Seventh Circuit should be reversed.

Respectfully submitted,

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