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 CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This brief addresses the following, which is an antecedent question to the first question presented in the petition, see, *e.g. United States* v. *Grubbs*, 547 U.S. 90, 94 & n.1 (2006):

> Whether 18 U.S.C. § 1346 is unconstitutionally vague.

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation and represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

This is such a case. Since its enactment in 1988, the "honest services" statute, 18 U.S.C. § 1346, although unintelligible, has been used to target "a staggeringly broad swath of behavior," *Sorich* v. *United States,* 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari). The existence of the statute, and the unpredictability of prosecutions based on it, impose an unwarranted burden on American companies and executives, who are entitled to fair notice of what conduct is and is not prohibited. Accordingly, the Chamber and its members have a strong interest in this Court's invalidating section 1346, or at least cabining its otherwise "standardless

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party has authored this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus curiae* or its counsel has made a monetary contribution to this brief's preparation or submission.

sweep," *United States* v. *Rybicki*, 354 F.3d 124, 161 (2d Cir. 2003) (en banc) (Jacobs, J., dissenting).

INTRODUCTION AND SUMMARY OF ARGUMENT

The petitioners are former executives of the newspaper company Hollinger International, Inc. They were accused of looting Hollinger through, among other things, payments made under non-competition agreements that the government claimed petitioners had not properly disclosed. Following a four-month trial, the jury acquitted on most charges, rejecting the principal prosecution theory that petitioners stole from the company by diverting Hollinger's money to themselves. Instead, the jury convicted on three charges of mail fraud, for which the instructions permitted conviction on the theory that petitioners deprived the company or its shareholders of the "intangible right of honest services." These instructions did not require a finding – and there is no reason to believe that the jury found – that petitioners threatened or caused any economic harm to the company.

The basis for the "honest services" charge is 18 U.S.C. § 1346. Section 1346 was enacted in 1988 in response to *McNally* v. *United States*, 483 U.S. 350 (1987), which held that the mail-fraud statute, 18 U.S.C. § 1341, was "limited in scope to the protection of property rights," and said that "[i]f Congress desires to go further, it must speak more clearly than it has." *Id.* at 360. Congress spoke, but not clearly. Section 1346 provides in its entirety: "For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services."

In an effort to impose reasonable limits on the scope of an otherwise sweeping and amorphous statute, petitioners explain why section 1346 does not apply to a private individual whose alleged scheme did not contemplate economic harm to its target. The Chamber agrees with petitioners on this point but submits that there is "an issue 'antecedent to . . . and ultimately dispositive of'" the question presented, *U.S. Nat'l Bank of Or.* v. *Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993) – namely, whether section 1346 is unconstitutionally vague. For if the statute is not sufficiently intelligible to pass constitutional muster, "[i]t makes little sense to address" what elements constitute a violation of it. *United States* v. *Grubbs*, 547 U.S. 90, 94 n.1 (2006). Accordingly, the Court should address whether 18 U.S.C. § 1346 is a constitutional enactment. Cf. *Kolstad* v. *Am. Dental Ass'n*, 527 U.S. 526, 540-541 (1999) (*amicus* brief of Chamber was one basis for deciding issue not addressed by parties but "easily subsumed within the question on which we granted certiorari").

We submit that Section 1346 fails both prongs of the void-for-vagueness inquiry. First, its unintelligible language fails to give ordinary citizens fair notice of what is prohibited. The courts of appeals have struggled to give shape, limits, and meaning to the phrase "intangible right of honest service," but their efforts ultimately amount to forbidden judicial definition of federal crimes. Second, the statute's capacious language invites arbitrary and unpredictable enforcement. As real-life examples show, the statute is a catch-all that can be used to target almost any imaginable form of dishonesty in government or

(of particularly grave concern to the Chamber) business.

The prospect of prosecution under section 1346, moreover, deters legitimate business dealings. These burdens are magnified by the federal Racketeer Influenced and Corrupt Organizations Act (RICO), which converts supposed deprivations of "honest services" into predicates for severe criminal penalties as well as for treble-damages liability in civil suits. The costs and burdens associated with potentially erratic prosecutions under section 1346, as well as with the defense of civil and criminal RICO suits predicated on honest-services fraud, are inevitable byproducts of an unconstitutionally vague statute.

ARGUMENT

I. Section 1346 Is Unconstitutionally Vague

The Fifth Amendment guarantee of due process forbids enforcement of a statute that "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States* v. *Williams*, 128 S. Ct. 1830, 1845 (2008) (citing *Hill* v. *Colorado*, 530 U.S. 703, 732 (2000), and *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972)); accord *City of Chicago* v. *Morales*, 527 U.S. 41, 56, 64-66 (1999). Section 1346 is just such a statute. It "imposes insufficient constraint on prosecutors, gives insufficient guidance to judges, and affords insufficient notice to defendants." *United States* v. *Rybicki*, 354 F.3d 124, 157 (2d Cir. 2003) (en banc) (Jacobs, J., dissenting).

A. Section 1346 Does Not Give Fair Notice of What It Prohibits

It is a basic tenet of due process that "'fair warning should be given to the world in language *that the common world will understand*, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible *the line should be clear*.'" *United States* v. *Bass*, 404 U.S. 336, 348 (1971) (quoting *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931) (Holmes, J.) (emphasis added)); cf. *Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605, 2627 (2008) ("[E]ven Justice Holmes's 'bad man'" should be able to "look ahead with some ability to know what the stakes are in choosing one course of action or another."). If two decades of experience have taught us anything about 18 U.S.C. § 1346, it is that its language is incomprehensible, and it fails to draw any line at all, much less a clear one.

The text of the statute is opaque to an almost bizarre degree. The terms "intangible right" and "honest services" are individually indeterminate and in combination incoherent. What kind of services are we talking about? (Could an insincere sermon at Sunday religious services come within the statute?) Rendered by whom to whom? How much candor separates honest services from dishonest ones? And what does "intangible" contribute? The phrase "intangible right of honest services," moreover, is not defined in any legal code or dictionary, had no settled meaning when Congress enacted the statute, and has acquired no settled meaning since.

Small wonder, then, that the courts of appeals have by and large all acknowledged (with varying degrees of "frustrati[on]," *United States* v. *Urciuoli*,

513 F.3d 290, 300 (1st Cir. 2008)) that the text of section 1346 is "amorphous and open-ended," *United States* v. *Sorich*, 523 F.3d 702, 707 (7th Cir. 2008); accord, *e.g.*, *United States* v. *Brown*, 459 F.3d 509, 520 (5th Cir. 2006) (describing § 1346 as a "facially vague criminal statute"); *United States* v. *Weyhrauch*, 548 F.3d 1237, 1243 (9th Cir. 2008), cert. granted, 77 U.S.L.W. 3708 (U.S. June 29, 2009) (No. 08-1196). In fact, one of the few points they all seem to agree on is that the statute must mean something other than what it says.

In 2003, the en banc Second Circuit upheld the facial constitutionality of the statute by only two votes. Speaking for the four dissenters, Judge Jacobs commented that his court's troubled history with section 1346 was "telling evidence that most lawyers and judges, not to speak of ordinary laymen or prospective defendants, cannot be expected to understand the statute." *Rybicki*, 354 F.3d at 158; see also *Brown*, 459 F.3d at 534 (DeMoss, J., concurring and dissenting) (agreeing with the *Rybicki* dissenters based on "[y]ears of review of the application of § 1346 to varied facts").

Faced with unacceptably opaque language, the circuits have felt compelled "to undertake a rescue operation by fashioning something that (if enacted) would withstand a vagueness challenge." *Rybicki*, 354 F.3d at 163 (Jacobs, J.). But that well-intentioned effort has been a failure. See, *e.g.*, *Sorich* v. *United States*, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari). To take perhaps the most heroic example, the en banc Second Circuit redrafted section 1346 so that "in the private sector context" it criminalizes:

> a scheme or artifice to use the mails or wires to enable an officer or employee of a private entity (or a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers) purporting to act for and in the interests of his or her employer (or of the other person to whom the duty of loyalty is owed) secretly to act in his or her or the defendant's own interests instead, accompanied by a material misrepresentation made or omission of information disclosed to the employer or other person.

Rybicki, 354 F.3d at 146-147. Even assuming that notice problems are reduced rather than enhanced through the use of a gloss specific to the private sector, it is not at all clear that the statute written by the Second Circuit – which criminalizes a fraud scheme by anyone owing fiduciary-style duties – captures anything that the ordinary mail and wire fraud statutes (which are not limited to fiduciaries) do not. And if the former is indeed swallowed by the latter, it is even less clear why section 1346 is needed at all.

In any event, any "rescue operation" rests on a flawed premise regarding the proper role of the federal courts. "Judicial invention cannot save a statute from unconstitutional vagueness; courts should not try to fill out a statute that makes it an offense to 'intentionally cause harm to another,' or to 'stray from the straight and narrow,' or to fail to render 'honest services.'" *Rybicki*, 354 F.3d at 164 (Jacobs, J.). It is axiomatic that "[l]egislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348; accord *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 490 (2001). The

circuits' tortured attempts to cabin section 1346 demonstrate that the statute "imposes upon courts a role they cannot perform. . . . [T]he process takes decades and the work is performed by unelected officials without the requisite skills or expertise." *Rybicki*, 354 F.3d at 164 (Jacobs, J.); see also *Brown*, 459 F.3d at 534 (DeMoss, J.) ("Rather than address the larger constitutional problem with this statute, . . . [o]ur Court and our sister circuits end up doing precisely what most would say we lack the constitutional power to do, that is, define what constitutes criminal conduct on an ex post facto and ad hoc basis.").

B. Section 1346 Invites Unpredictable, Arbitrary, and Discriminatory Enforcement

Section 1346 is also unconstitutionally vague for the separate but related reason that it "impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108-109 (1972). The statute's capacious language gives prosecutors nearly unbounded discretion, authorizing them to convert almost any imaginable ethical lapse into a federal criminal case. As Justice Scalia recently observed:

> Without some coherent limiting principle to define what 'the intangible right of honest services' is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct.

Sorich, 129 S. Ct. at 1310.

The statute's "standardless sweep," *Rybicki*, 354 F.3d at 161 (Jacobs, J.), is illustrated by the prosecutions and convictions in such cases as:

- *United States* v. *Thompson*, 484 F.3d 877 (7th Cir. 2007). A state procurement official departed from the rules governing an elaborate process for awarding a contract to a travel agency. There were no kickbacks or bribes. "The prosecution's theory was that any politically motivated departure from state administrative rules is a federal crime, when either the mails or federal funds are involved." *Id*. at 878. The court of appeals reversed the conviction immediately after hearing oral argument, *see id*. at 877-878, and Judge Easterbrook commented that this prosecution "may well induce Congress to take another look at the wisdom of enacting ambulatory criminal prohibitions. Haziness designed to avoid loopholes through which bad persons can wriggle can impose high costs on people the statute was not designed to catch." *Id*. at 884.

- *United States* v. *Brown*, 459 F.3d 509 (5th Cir. 2006). Officials at an investment bank who approved a transaction with now-defunct Enron that was alleged to be in substance a loan but that Enron accounted for as a sale were convicted of conspiring to deprive Enron of *its* employees' honest services. *Id.* at 514-516. The government's use of the honest-services theory prompted the court of appeals (which reversed the convictions) to comment on "the danger we face of defining an ever-

expanding and ever-evolving federal common-law crime." *Id.* at 522 n.13.

- *United States* v. *Gray*, 96 F.3d 769 (5th Cir. 1996). Basketball coaches at Baylor College who helped students cheat on academic course-work in order to establish eligibility to play basketball at the college were convicted of "defraud[ing] Baylor of their honest services," *id.* at 777.

As these examples suggest, section 1346 is malleable enough to reach nearly "any self-dealing by a corporate officer," *Sorich*, 129 S. Ct. at 1309 (Scalia, J.) or "any private employee who has an undisclosed conflict of interest or who otherwise breached their duties to their employers (as defined by those employers)," Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes As Case Study*, 96 J. CRIM. L. & CRIMINOL. 643, 662 (2006). Section 1346 thus co-opts a multitude of state-law provisions regulating business and non-profit organizations and transforms them into federal criminal prohibitions.

Relatedly, section 1346 typically muddies the waters for jurors facing the already daunting task of applying intricate legal instructions to complex evidence of white-collar misdealings. And this confusion is often entirely gratuitous given the existence of other, clearer federal anti-fraud provisions. Examples of cases in which section 1346 served no apparent purpose include:

- *United States* v. *Williams*, 441 F.3d 716, 724 (9th Cir. 2006). A financial advisor and estate planner used his elderly client's trust and power of attorney (along with the mails and

wires) to steal hundreds of thousands of dollars from the client. *Id.* at 724. This was prosecuted as theft of the client's "honest services," *id.* at 720, but it is also straight-up – indeed, classic – mail and wire fraud involving tangible property rights. See, *e.g.*, *SEC* v. *Zandford*, 535 U.S. 813, 815-816 (2002).

- *United States* v. *Royer*, 549 F.3d 886 (2d Cir. 2008). The administrator of a web site that provided stock-trading advice (with a promise that the defendant would not trade ahead of or against his own advice) was prosecuted for a scheme in which he obtained inside information, traded on it, directed his subscribers to trade on it, and then released it to the public. The court of appeals agreed with the government that the defendant "cheated his [web] site subscribers of the honest services he owed them," *id.* at 900-901, but this rabbinic inquiry would seem to have been entirely avoidable given that the federal securities laws (under which the defendant was also charged and convicted) have long prohibited just this sort of manipulation. See, *e.g.*, *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 199 (1976).

- *Brown*. The Fifth Circuit correctly recognized that the government's approach "would expand honest-services fraud to reach all manner of accounting fraud and securities fraud, which . . . are heavily regulated under other statutes." 459 F.3d at 522 n.13.

Admittedly, many of the defendants in the cases discussed above may "have acted improperly. But '[b]ad men, like good men, are entitled to be tried and

sentenced in accordance with law.'" *Sorich*, 129 S. Ct. at 1311 (Scalia, J.) (quoting *Green* v. *United States*, 365 U.S. 301, 309 (1961) (Black, J., dissenting)). Section 1346 – whose meaning prosecutors have been allowed to "make . . . up as they go along," *Rybicki*, 354 F.3d at 160 (Jacobs, J.) – fails to deliver on that guarantee.

II. Section 1346 Imposes Intolerable Burdens on Private-Sector Dealings

Vague laws have harmful practical consequences. "Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109 (internal quotation marks omitted). The existence of section 1346, and the potential for prosecution under it, deters legitimate dealings and constitutes a major "threat . . . to legitimate and lawful business relationships and the negotiations necessary to the creation of such relationships." *Brown*, 459 F.3d at 535 (DeMoss, J.).

These burdens are compounded by the fact that every supposed deprivation of honest services is a potential predicate offense under the Racketeer Influenced and Corrupt Organizations Act (RICO). (Section 1346 says that 18 U.S.C. §§ 1341 and 1343 cover schemes to interfere with the intangible right of honest services, and under RICO, every act indictable under sections 1341 and 1343 can form part of an actionable "pattern of racketeering activity," 18 U.S.C. §§ 1961(1), (5), 1962 – itself a troublingly vague concept, as four Justices noted in *H.J. Inc.* v. *Northwestern Bell Telephone Co.*, 492 U.S. 229, 255-256 (1989) (Scalia, J., concurring in the judgment)). Indeed, this Court has already cautioned against

broadening the reach of the mail-fraud statute precisely because of its potential to generate draconian penalties under the umbrella of RICO. *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000). The combination of RICO and "honest-services fraud" exemplifies the alchemy of amorphousness through which modern federal prosecutors pursue nebulous but far-reaching theories of liability. See, *e.g.*, *United States* v. *Gray*, 521 F.3d 514, 521 (6th Cir. 2008) (racketeering-conspiracy convictions apparently based partly on honest-services fraud).

This mischief, moreover, extends to *civil* RICO suits. "[T]here is no such thing as prosecutorial discretion to limit the use of civil RICO by plaintiffs' attorneys." William H. Rehnquist, *Remarks of the Chief Justice*, 21 ST. MARY'S L.J. 5, 10 (1989). Sure enough, plaintiffs' lawyers have figured out how to use section 1346 in conjunction with RICO to threaten businesses with treble damages and attorneys' fees under 18 U.S.C. § 1964(c). In one recent case, for example, the plaintiff alleged that one of its employees and its outside licensing agent had double-dealt in negotiations with other parties over the plaintiff's intellectual-property rights. *World Wide Wrestling Entm't, Inc.* v. *Jakks Pac., Inc.*, 530 F. Supp. 2d 486, 492-494 (S.D.N.Y. 2007). Rather than limit itself to traditional causes of action in tort, the plaintiff asserted civil RICO claims. The court concluded that the complaint sufficiently alleged a "pattern of racketeering activity" insofar as the employee's and outside agent's undisclosed dealings had deprived the plaintiff of its intangible right to their honest services in violation of section 1346. *Id.*

at 495, 498, 507, 514.[2] Allegations like these – which are by no means unique, see, *e.g.*, *TransFirst Holdings, Inc.* v. *Phillips*, 2007 WL 631276, at *12 (N.D. Tex. Mar. 1, 2007); *Hexagon Packaging Corp.* v. *Manny Gutterman & Assocs.*, 1997 WL 323501, at *10 (N.D. Ill. June 9, 1997) – only magnify the unwarranted burdens that section 1346 imposes on American business.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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[2] The court dismissed the RICO claims for other reasons. See *id.* at 524, 530.