No. 01-1736

In the Supreme Court of the United States

NICHOLAS PANARELLA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether a public official defrauds the public of his honest services, in violation of 18 U.S.C. 1343 and 1346, when he conceals a financial interest in violation of state criminal law and then takes discretionary action that he knows will directly benefit that interest.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-48) is reported at 277 F.3d 678.

JURISDICTION

The judgment of the court of appeals was entered on January 11, 2002. A petition for rehearing was denied on February 25, 2002. The petition for a writ of certiorari was filed on May 24, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a plea of guilty in the United States District Court for the Eastern District of Pennsylvania, petitioner was convicted of being an accessory after the

fact, in violation of 18 U.S.C. 3, to wire fraud in violation of 18 U.S.C. 1343 and 1346. Pet. App. 49. The court of appeals affirmed petitioner's conviction. *Id.* at 1-48.

1. Between 1993 and 1997, petitioner paid the then-majority leader of the Pennsylvania Senate, Senator F. Joseph Loeper, Jr., more than $330,000 for consulting services that Loeper allegedly performed for petitioner's tax collection business. Petitioner and Loeper concealed their business relationship while Loeper undertook legislative action that directly benefitted their business interests. Pet. App. 4-6; Superseding Information paras. 5-9.

More specifically, in 1993, petitioner and Loeper entered into an agreement under which petitioner paid Loeper a monthly consulting fee. Superseding Information para. 5. Loeper failed to disclose the payments on state disclosure forms that were intended to inform Pennsylvania voters of possible biases held by their legislative representatives. *Id.* at paras. 7, 31-32. Petitioner directed third persons to pay Loeper's consulting fees, and did not report his payments to Loeper on federal tax forms. *Id.* at paras. 26-29. Loeper also lied to a *Philadelphia Inquirer* reporter in August 1997 concerning the nature of his business relationship with petitioner, *id.* at para. 33, and both Loeper and petitioner asked third parties to confirm Loeper's misrepresentations to the reporter, *id.* at paras. 34-38.

During that time, Loeper engaged in legislative action beneficial to petitioner's business. Superseding Information paras. 9, 24-25. Petitioner specialized in collecting Pennsylvania's "business privilege tax" for local governments. *Id.* at paras. 1-2, 21-22. Petitioner's tax collection techniques eventually became controversial, and state legislative proposals in 1994 and 1995 sought to prohibit them. *Id.* at paras. 23-25. When the

proposed legislation came before the Pennsylvania Senate, Loeper outspokenly opposed it and introduced an amendment to strike the provisions aimed at eliminating petitioner's collection techniques. *Ibid.* At the time Loeper was taking legislative action that benefitted petitioner's business, petitioner owed Loeper over $37,000. Within days of Loeper's actions on the Senate floor, he received hidden payments—including a secret $5000 cash payment—at petitioner's direction. Gov't C.A. Br. 12.

Loeper also promoted petitioner's efforts to obtain no-bid state tax collection work. For example, at Loeper's request, the chief of a state agency from which petitioner hoped to obtain no-bid contracts attended a meeting in Loeper's office with Loeper and petitioner. At the meeting, Loeper vouched for petitioner's abilities without disclosing their business relationship. Superseding Information para. 30; Gov't C.A. Br. 13.

2. The grand jury returned a seven-count indictment charging petitioner with aiding and abetting a mail and wire fraud scheme in violation of 18 U.S.C. 2, 1341 (mail fraud), 1343 (wire fraud), and 1346 (honest services fraud).[1] Pet. App. 6. Petitioner moved to dismiss the indictment for failure to state a crime, but the district court denied the motion. *Ibid.* On December 12, 2000, the government filed a single-count superseding information charging petitioner with violating 18 U.S.C. 3 by being an accessory after the fact to a wire fraud scheme in violation of 18 U.S.C. 1343 and 1346.[2] Superseding

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[1] Section 1346 provides that, as used in the mail, wire, and bank fraud statutes, "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.

[2] Section 3 provides in relevant part:

Information para. 39. Petitioner pleaded guilty to the charge in the superseding information without objecting to the information or reserving the right to challenge its sufficiency on appeal. Pet. App. 6. The district court sentenced petitioner to six months of imprisonment, to be followed by one year of supervised release, and a $20,000 fine. *Id.* at 7.

3. The court of appeals affirmed petitioner's conviction. Pet. App. 1-48. The court first held that Federal Rule of Criminal Procedure 12(b)(2) permitted petitioner to challenge the sufficiency of the information on appeal despite his unconditional guilty plea. Pet. App. 7-23. The court then rejected petitioner's challenge to the information and his related argument that his guilty plea lacked an adequate factual basis. *Id.* at 23-48.

The court explained that petitioner "appears to concede that, on the facts alleged in the superseding information, if Loeper is guilty of committing honest services wire fraud in violation of §§ 1343 and 1346, then [petitioner] is guilty of being an accessory after the fact under 18 U.S.C. § 3. Thus, although Loeper is not a defendant in this case, the critical question is whether the facts alleged in the superseding information establish that Loeper committed honest services wire fraud." Pet. App. 23. Petitioner contended that the facts alleged in the information were insufficient absent "an additional allegation that Loeper's discretionary action was influenced by [petitioner's] payments." *Id.*

> Whoever, knowing that an offense against the United States has been committed, receives, relieves, comforts or assists the offender in order to hinder or prevent his apprehension, trial or punishment, is an accessory after the fact.

18 U.S.C. 3.

at 27. The court rejected that contention and held that "where a public official takes discretionary action that the official knows will directly benefit a financial interest that the official has concealed in violation of a state criminal law, that official has deprived the public of his honest services." *Ibid.*

In so holding, the court rejected petitioner's reliance upon *United States* v. *Bloom*, 149 F.3d 649 (1998), in which the Seventh Circuit reversed the honest services fraud conviction of a Chicago alderman who, in his independent capacity as a private attorney, allegedly deprived Chicago of tax revenues by advising a client to use a proxy to bid at a tax scavenger sale at which the client's property was being auctioned.[3] The court explained that *Bloom* did not assist petitioner because the charges in *Bloom* did not involve any actions taken in the defendant's official capacity whereas "Loeper took discretionary action in his official capacity that directly benefitted an unlawfully concealed financial interest." Pet. App. 28.

The court went on to reject petitioner's suggestion that it adopt the *Bloom* court's limiting principle for Section 1346 liability under which "[a]n employee deprives his employer of his honest services only if he misuses his position (or the information he obtained from it) for personal gain." Pet. App. 28 (quoting *Bloom*, 149 F.3d at 656-657). Noting that whether the misuse of office for personal gain includes or excludes the conduct at issue in this case was subject to dispute, the court reasoned that such a limiting principle would add little clarity to the scope of Section 1346 liability

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[3] As the Seventh Circuit noted, "[a]ldermanic positions in Chicago are part-time jobs * * * [and,] [i]n his private life, [defendant] is a lawyer." *Bloom*, 149 F.3d at 650.

and would risk being both under- and over-inclusive. *Id.* at 28-30. The court also observed that the result in *Bloom* would have been the same under the analysis that the court adopted in this case. *Id.* at 32.

The court expressly refrained from deciding whether a violation of state law is always necessary for non-disclosure of a conflict of interest to constitute honest services fraud. Pet. App. 31; see *id.* at 44 n.9. The court reasoned, however, that the federalism and state autonomy concerns sometimes raised by honest services cases are significantly muted here because Loeper's conduct did violate state criminal law. See *id.* at 33-34. The court also noted that a public official's non-disclosure of a financial interest in violation of state law while taking discretionary action that directly benefits that interest falls squarely within the classical definition of fraud, because it involves the deliberate concealment of material information in violation of a duty to disclose. *Id.* at 37-39. In addition, the court observed, its holding was supported as a matter of policy because disclosure is critical to "the voters' ability to judge whether their representatives are acting to further their own financial self-interest instead of the public interest," *id.* at 39, a conclusion affirmed by Pennsylvania's decision to back up its disclosure requirement with criminal penalties, *id.* at 40.

Finally, the court of appeals rejected petitioner's rule of lenity argument that he and Loeper had inadequate notice that Loeper's actions were criminal. Pet. App. 41-43. The court noted that it did not strain the language of Section 1346 to conclude that a public official who lies about his income sources while taking action that directly benefits an income source that he has concealed "deprives [the public] of the intangible right

of honest services." *Id.* at 42. The court also noted that petitioner and Loeper had "unambiguous notice that Loeper's nondisclosure was criminal" under Pennsylvania law, and that the fact that petitioner and Loeper endeavored to conceal Loeper's misrepresentations undermined any plausible claim of inadequate notice. *Id.* at 43.

ARGUMENT

1. Petitioner contends (Pet. 9-18) that this Court should grant certiorari to resolve a conflict among the courts of appeals over the appropriate scope of honest services fraud under 18 U.S.C. 1346. Petitioner, however, overstates the differences among the courts of appeals on the scope of Section 1346 and fails to identify any decision of another court of appeals that conflicts with the decision in this case. This Court's review is therefore not warranted.[4]

Petitioner contends that divergences in circuit authority concerning the interpretation of Section 1346 "have subjected state and local officials and * * * private individuals * * * to unprecedented and unpredictable criminal prosecutions based largely on

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[4] Even if there were a conflict on the scope of honest services fraud that was presented by the facts of this case, the case would be a poor vehicle to resolve that conflict. Petitioner did not challenge the sufficiency of the information before the district court, so any review by this Court would be at most for plain error. See *United States* v. *Cotton*, 122 S. Ct. 1781, 1785 (2002); *United States* v. *Olano*, 507 U.S. 725, 731 (1993). Petitioner has not shown plain error because he has not contended that he would not have pleaded guilty if the superseding information contained the additional allegations that he contends were necessary. See *id.* at 735-736 (reversal for plain error appropriate only when error "affect[s] substantial rights" and "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.").

the predilections of federal prosecutors." Pet. 9. He similarly asserts that "an individual may be convicted of honest services mail or wire fraud in one circuit based on conduct that would require an acquittal or dismissal of an indictment in another." Pet. 17. He fails to support those assertions, however, with any cases that have reached conflicting results on comparable facts. Even more fundamentally, he fails to identify any disagreement among the courts of appeals that this case presents an opportunity to resolve.

For example, as petitioner notes (Pet. 13), the Fifth Circuit appears to require that the government prove that the defendant violated a duty "rooted in state law." *United States* v. *Brumley*, 116 F.3d 728, 734 (en banc), cert. denied, 522 U.S. 1028 (1997). Other courts of appeals have stated that a violation of state law is not always a necessary element of honest services fraud. See *United States* v. *Sawyer*, 239 F.3d 31, 41-42 (1st Cir. 2001); *United States* v. *Bryan*, 58 F.3d 933, 940-941 (4th Cir. 1995), abrogated on other grounds by *United States* v. *O'Hagan*, 521 U.S. 642 (1997); see also *United States* v. *Bloom*, 149 F.3d 649, 654 (7th Cir. 1998) (declining to adopt requirement that defendant have violated "some other rule of law"). This case, however, does not present an opportunity for the Court to resolve any disagreement on that question. The court of appeals expressly refrained from deciding the issue, see Pet. App. 31, 44 n.9, and Loeper's conduct violated state law, so petitioner would not benefit even from the approach more favorable to defendants.[5]

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[5] Relying upon *United States* v. *Cochran*, 109 F.3d 660, 667-668 & n.3 (10th Cir. 1997), petitioner suggests that some but not all circuits require a showing of materiality to support a conviction for honest services fraud. It is well settled, however, that proof of

Petitioner does not point to any case in which a court of appeals has rejected the holding of the court of appeals here—that a public official commits honest services fraud when he conceals a financial interest in violation of state criminal law and then takes discretionary action that he knows will directly benefit that interest. In fact, the case law from other circuits that have discussed the issue suggests that they would reach the same result as the court of appeals here. See *Sawyer*, 239 F.3d at 40 (stating that a public official commits honest services fraud if he "fail[s] to disclose a conflict of interest, resulting in personal gain"); *United States* v. *Devegter*, 198 F.3d 1324, 1328 (11th Cir. 1999) ("benefitting from an undisclosed conflict of interest will support the conviction of a public official for depriving his or her constituents of the official's honest services"), cert. denied, 530 U.S. 1264 (2000); *United States* v. *DeFries*, 129 F.3d 1293, 1306 (D.C. Cir. 1997) ("misrepresentation or intentional non-disclosure—two inherently dishonest acts—converted the employee's breach of duty into a deprivation of his honest services"); *United States* v. *Frost*, 125 F.3d 346, 369 (6th Cir. 1997) (upholding honest services fraud conviction of a private citizen based on non-disclosure of a conflict of interest that created a reasonably foreseeable risk of economic harm and implying that risk of harm may not be required in a case against a public official because "conflicts of interest may harm the public merely by giving the illusion of unfairness"), cert. denied, 525 U.S. 810 (1998); *Bryan*, 58 F.3d at 942 (citing with approval

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materiality is required under all three statutes (mail, wire, and bank fraud) that could form the basis for a conviction for honest services fraud. See *Neder* v. *United States*, 527 U.S. 1, 25 (1999).

cases finding violations based on failure to disclose conflicts of interests).

Petitioner incorrectly asserts (Pet. 17) that his case "likely would" have been decided differently in the Seventh Circuit under *Bloom*. As the court of appeals explained (Pet. App. 28), *Bloom* does not assist petitioner because the charges that were reversed in that case were based on actions that the defendant undertook in his private, non-official capacity. *Bloom* did not involve the situation confronting the court of appeals here—one in which a public officer acting in his official capacity violated his disclosure obligations under state law while simultaneously taking legislative action that benefitted his concealed financial interests.

Moreover, Loeper's conduct satisfies the test articulated in *Bloom* for when a public official violates Section 1346. The court stated in *Bloom* that a public official would violate Section 1346 if he "misused his office for private gain." See 149 F.3d at 655. Here, the government charged that Loeper actively pursued legislative ends directly benefitting his and petitioner's business interests while he concealed those interests in violation of a state law disclosure requirement. Superseding Information paras. 5-38. That conduct constituted the misuse of Loeper's office for his private gain. See *United States* v. *Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) (suggesting that "a political official uses his office for personal gain" when he "personally benefits from an undisclosed conflict of interest."). Thus, although the information does not *in terms* allege that Loeper "misused his office for private gain," the facts it alleges establish that Loeper did just that, and the information satisfies the standard articulated in *Bloom*.

Petitioner likewise asserts that his case "might well" have been decided differently by the Fifth Circuit

under *Brumley*, "because the superseding information contained no explicit allegation of state law violation and, to the extent it did, the state statute at issue primarily prohibits the *appearance* of impropriety or corruption." Pet. 17. Contrary to petitioner's assertion, the superseding information *did* contain express allegations of Loeper's violations of Pennsylvania state law. Superseding Information paras. 31-32. Moreover, the Pennsylvania law at issue does not prohibit the "appearance of impropriety" but requires state legislators to disclose their financial interests, including their outside sources of income. See 65 Pa. Cons. Stat. Ann. §§ 1104(a), 1105, 1109(b) (West 2000).

There is no conflict between the decision in this case and the decision in *Brumley*, which upheld the conviction under Section 1346 of a state adjudicative officer who accepted payments from attorneys who practiced before him and acted in his official capacity on behalf of those attorneys. Although the *Brumley* court stated in dicta that "a violation of state law that prohibits only appearances of corruption will not alone support a violation of §§ 1343 and 1346," 116 F.3d at 734, as noted, the state disclosure law here is not a prohibition of appearances of corruption. And the court upheld the conviction in *Brumley* based on a state law that prohibited the same kind of conduct that occurred here—a public official's acceptance of a benefit from a person interested in a matter on which the official took action in performing his job. See *id.* at 736 (discussing Tex. Penal Code Ann. § 36.08(e) (West 1994)).

Petitioner also contends that his conviction would have been reversed under the Second Circuit's decision in *United States* v. *Rybicki*, 287 F.3d 257 (2002), because "it was not reasonably foreseeable that [petitioner's and Loeper's] purported scheme would [have]

depriv[ed] the 'victim' of any economic benefit." Pet. 17. Even if there were a conflict between the decision in this case and *Rybicki*, that conflict would not warrant this Court's review at this time because the Second Circuit recently voted to rehear *Rybicki* en banc to consider whether Section 1346 is unconstitutionally vague on its face. 7/3/02 Order, *United States* v. *Rybicki*, Nos. 00-1043, 00-1044, 00-1052, 00-1055.

There is, however, no conflict between this case and *Rybicki*. The court in *Rybicki* affirmed the convictions in that case, just as the court of appeals did here. Moreover, *Rybicki* did not involve a breach of a duty by a public official acting in his official capacity, but rather an allegation of honest services fraud in the private sector. The Second Circuit might well not require a showing that economic harm is reasonably foreseeable in a case involving honest services fraud by a government official. See *Frost*, 125 F.3d at 368-369 (adopting requirement of reasonably foreseeable risk of economic harm in a private sector case but suggesting that risk of harm may not be required in a case against a public official because "conflicts of interest may harm the public merely by giving the illusion of unfairness"). In any event, the fraudulent scheme in this case entailed the risk of economic harm because it involved a state legislator's failure to disclose his economic interest in tax legislation on which he took vocal and instrumental official action.[6]

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[6] Petitioner suggests that economic harm was not a foreseeable result because Pennsylvania voters received an economic benefit from Loeper's actions. The *Rybicki* court expressly rejected the similar argument that the government could not demonstrate economic harm because kickbacks to insurance adjusters did not result in claim settlements that were outside of the "reasonable range." 287 F.3d at 267. The court explained that the argument

2. Petitioner argues (Pet. 19-22) that the decision of the court of appeals violates principles of federalism because it ties the existence of honest services fraud to the presence of a violation of state law. The premise of petitioner's argument is mistaken, however, because the court of appeals expressly refrained from deciding whether a violation of state law is required to establish honest services fraud. See Pet. App. 31, 44 n.9. Moreover, as the court of appeals noted, the presence of a state law violation reduces rather than increases any potential federalism concerns that may be presented by honest services fraud. See *id.* at 33, 44. See also *Brumley*, 116 F.3d at 735.

Petitioner contends (Pet. 20-21) that reliance on state law trenches on federalism because the federal offense of honest services fraud may involve penalties that are significantly harsher than the penalties that would be imposed based solely on the violation of state law. But the six-month term of imprisonment imposed on petitioner for aiding Loeper's violation of Section 1346 was not out of step with the one-year maximum prison term that Pennsylvania provides for violations of the disclosure laws. See 65 Pa. Cons. Stat. Ann. 1109 (West 2000). In any event, as the court of appeals explained, such disparities in punishment can occur whenever federal criminal law defines predicate offenses by reference to state law, which is not an infrequent occurrence. See Pet. App. 33 (citing 16 U.S.C. 3372(a)(2), 3373(d) and 18 U.S.C. 1955).

The courts of appeals have uniformly rejected federalism challenges to Section 1346. See, *e.g.*, *United*

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conflates reasonably foreseeable harm with actual or intended harm, neither of which is required to sustain an honest services fraud conviction. *Ibid.*

States v. *Antico*, 275 F.3d 245, 262 n.18 (3d Cir. 2001); *United States* v. *Sawyer*, 239 F.3d 31, 43 n.13 (1st Cir. 2001); *Brumley*, 116 F.3d at 735; *United States* v. *Castro*, 89 F.3d 1443, 1456 (11th Cir. 1996), cert. denied, 519 U.S. 1118 (1997). There is no reason for this Court to review petitioner's federalism challenge here.

3. a. Petitioner also contends (Pet. 18-19, 22-23) that the court of appeals' interpretation of Section 1346 violates due process because it does not give defendants fair notice of the actions proscribed by the statute. That contention lacks merit.

Due process requires only that "the statute, either standing alone or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *United States* v. *Lanier*, 520 U.S. 259, 267 (1997). As described above, there was ample precedent from other circuits indicating that a public official who personally benefits from an undisclosed conflict of interest violates Section 1346. See p. 9, *supra* (citing cases). That interpretation of the statute is, as the court of appeals explained (Pet. App. 37-38), consistent with the classical definition of fraud, which includes the deliberate concealment of material information in a setting of fiduciary obligation. See, *e.g.*, *United States* v. *O'Hagan*, 521 U.S. 642, 654-655 (1997). And it is consistent with the scope of honest services fraud before this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), which Congress sought to overturn when it enacted Section 1346. See Pet. App. 36 (citing pre-*McNally* cases). Moreover, as the court of appeals noted, both petitioner and Loeper had "unambiguous notice that Loeper's nondisclosure was criminal" under Pennsylvania law. *Id.* at 43. In addition, Loeper, with petitioner's assistance, engaged in extensive efforts to hide his activities—action that evidences that peti-

tioner and Loeper knew Loeper's actions were improper. See *United States* v. *Woodward*, 149 F.3d 46, 62-63 (1st Cir. 1998), cert. denied, 525 U.S. 1138 (1999); *Bryan*, 58 F.3d at 942-943; *United States* v. *McDonough*, 56 F.3d 381, 389-390 (2d Cir. 1995); *United States* v. *Holzer*, 816 F.2d 304, 309 (7th Cir. 1987), cert. denied, 486 U.S. 1035 (1988).[7]

b. Relying upon *United States* v. *Handakas*, 286 F.3d 92 (2d Cir. 2002), petitioner argues (Pet. 27-30) that Section 1346 would have been unconstitutionally vague as applied to Loeper. *Handakas*, however, does not assist petitioner. As noted above, the Second Circuit has recently ordered the en banc rehearing of *United States* v. *Rybicki*, 287 F.3d 257 (2002), to consider whether Section 1346 is unconstitutionally vague on its face. 7/3/02 Order, *United States* v. *Rybicki*, *supra*. In the rehearing order, the court expressly ordered the parties to address *Handakas*. Accordingly,

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[7] Petitioner's contention (Pet. 26) that the court of appeals' interpretation of Section 1346 contravenes the rule of lenity fails for similar reasons. The rule of lenity "applies only if, after seizing everything from which aid can be derived, [the court] can make no more than a guess as to what Congress intended." *United States* v. *Wells*, 519 U.S. 482, 499 (1997) (citations and internal quotation marks omitted). The rule of lenity is not applicable here because, as explained in the text above, petitioner has not shown that "there is a grievous ambiguity or uncertainty in the statute." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (quoting *Staples* v. *United States*, 511 U.S. 600, 619 n.17 (1994) (internal quotation marks omitted)). Cf. *Colten* v. *Kentucky*, 407 U.S. 104, 110 (1972) (due process requirements are not "designed to convert into a constitutional dilemma the practical difficulties in drawing criminal statutes both general enough to take into account a variety of human conduct and sufficiently specific to provide fair warning that certain kinds of conduct are prohibited.").

the Second Circuit's position on the vagueness of Section 1346 has yet to be fully articulated.

Moreover, *Handakas* is the only case in which a court of appeals has sustained a vagueness challenge to Section 1346, and the court did so in a context that bears no similarity to the facts of this case. The court in *Handakas* held that Section 1346 was unconstitutionally vague as applied to a private defendant's breach of his contractual obligations to a local government corporation. This case, in contrast, involves a public official's deceptive breach of his fiduciary duty and simultaneous violation of state criminal law.

Outside of the narrow circumstances involved in *Handakas*, the courts of appeals (including the Second Circuit) have uniformly rejected claims that Section 1346 is void for vagueness. See *United States* v. *Szur*, 289 F.3d 200, 209 n.5 (2d Cir. 2002); *Rybicki*, 287 F.3d at 264; *United States* v. *Frega*, 179 F.3d 793, 803 (9th Cir. 1999), cert. denied, 528 U.S. 1191 (2000); *United States* v. *Gray*, 96 F.3d 769, 776-777 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997); *United States* v. *Paradies*, 98 F.3d 1266, 1282-1283 (11th Cir. 1996), cert. denied, 522 U.S. 1014 (1997); *Castro*, 89 F.3d at 1455; *United States* v. *Waymer*, 55 F.3d 564, 568-569 (11th Cir. 1995), cert. denied, 517 U.S. 1119 (1996).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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