No. 08-410

# In the Supreme Court of the United States

ROBERT SORICH, TIMOTHY MCCARTHY, AND PATRICK SLATTERY, PETITIONERS

*v.*

UNITED STATES OF AMERICA

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

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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## QUESTIONS PRESENTED

1. Whether, to convict a state or local official for mail fraud that deprives the public of its right to the defendant's honest services, in violation of 18 U.S.C. 1341 and 1346, the government must prove that the defendant breached a fiduciary duty rooted in state law.

2. Whether, to convict a state or local official for mail fraud that deprives the public of its right to the defendant's honest services, in violation of 18 U.S.C. 1341 and 1346, the government must prove that the defendant intended some private gain to himself or his co-schemers.

3. Whether 18 U.S.C. 1346 is unconstitutionally vague.

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-33) is reported at 523 F.3d 702. The opinion of the district court denying petitioners' pretrial motion to dismiss the indictment (Pet. App. 58-95) is reported at 427 F. Supp. 2d 820. The opinion of the district court denying petitioners' post-trial motions for judgments of acquittal or new trials (Pet. App. 34-57) is unreported.

### JURISDICTION

The judgment of the court of appeals was entered on April 15, 2008. A petition for rehearing was denied on July 1, 2008 (Pet. App. 96-102). The petition for a writ of certiorari was filed on September 26, 2008. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

**STATEMENT**

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioners were convicted of mail fraud, in violation of 18 U.S.C. 1341 and 1346. Petitioner Sorich was sentenced to 46 months of imprisonment, petitioner McCarthy was sentenced to 19 months of imprisonment, and petitioner Slattery was sentenced to 27 months of imprisonment. The court of appeals affirmed. Pet. App. 1-33.

1. Between 1993 and 2005, the City of Chicago had a policy requiring that hiring and promotion to non-policymaking city jobs be made on a non-political basis, with candidates evaluated according to their qualifications. The city's procedures were set forth in various documents, including the city's municipal code, union contracts, and personnel manuals. Gov't C.A. Br. 5; see Pet. App. 138-139. The city's hiring policies were also subject to federal consent decrees entered in *Shakman* v. *City of Chicago*, No. 69 C 2145 (N.D. Ill.). The decrees, entered in 1972 and 1983, prohibited promotions and hiring for non-policymaking jobs based on "any political reason or factor." Pet. App. 139; see *id.* at 19. These measures were designed "to bring more transparency and legitimacy to the City of Chicago's civil service hiring," but "patronage appointments have continued to flourish." *Id.* at 1.

This case involves one such patronage scheme, which operated out of the mayor's Office of Intergovernmental Affairs (IGA). Formally, that office has no role in filling any of the city's approximately 37,000 civil service jobs. Informally, however, the office coordinated a sizeable portion of the city's civil service hiring, dispensing jobs to members of the mayor's campaign organization and other favored applicants. Control of most hiring deci-

sions was centralized under the day-to-day direction of petitioner Sorich, who, from 1993 to 2005, served as the Assistant to the Director of IGA and the mayor's "patronage chief." From 2001 through 2005, Sorich was assisted by petitioner McCarthy, who served as his deputy. Pet. App. 3-4; Gov't C.A. Br. 5-6.

Sorich routinely met with political "coordinators," who headed groups working for the organization that supported the mayor. The "coordinators" gave Sorich the names of political workers who were looking for jobs or promotions. Sorich relayed the names to personnel directors and managers at the city's various departments, one of which was Streets and Sanitation, where petitioner Slattery and John Sullivan held high-level positions. The personnel directors and managers, in turn, ignored city procedures and ensured that applicants favored by IGA received job interviews. Working together with IGA, the personnel directors and managers ensured that interviewers conducted sham interviews and falsified rating sheets by grading the preselected applicants higher than other applicants regardless of their actual qualifications. The interview forms were often filled out weeks after the interviews, with one pile for the preferred applicants (who were given high scores) and another pile for all other applicants (who were given low scores). Some positions required merit tests, but the results of the tests were frequently ignored. Sorich sometimes pressured departmental managers to hire applicants with drinking problems for positions that involved workplace safety oversight. The personnel directors and managers falsified documents certifying that no political consideration had entered into hiring and promotion decisions. In addition, Sorich concealed the true nature of the hiring process by ordering

the destruction of documents and computer records. Dozens of different job titles and well over one hundred different job sequences were filled as a direct consequence of the scheme. Pet. App. 3-5; Gov't C.A Br. 6-7.

2. On April 27, 2006, a federal grand jury in the Northern District of Illinois returned an eight-count second superseding indictment against petitioners and Sullivan. Pet. App. 103-126. Count 1 described the city's hiring practices, and the laws and duties applicable to city employees, and alleged that petitioners and Sullivan engaged in a scheme to "defraud the people of the City, and the City, of money, property and the intangible right to the honest services of [Sorich, McCarthy, Sullivan, Slattery] * * * and other City employees participating in the hiring and promotion process, and to obtain money and property by means of materially false and fraudulent pretenses, representations, promises and material omissions," in violation of 18 U.S.C. 2, 1341, and 1346. Pet. App. 109-110; see *id.* at 103-119. Count 1 relied on an alleged mailing in furtherance of the scheme on or about July 15, 2004. *Id.* at 119. Counts 2 through 6 charged Sorich and McCarthy (Counts 2 and 5), Sorich (Counts 3 and 4), and Slattery (Count 6) with additional violations of 18 U.S.C. 2, 1341, and 1346, based on other mailings. Pet. App. 119-123. Counts 7 and 8 charged Sullivan with false-statement offenses, in violation of 18 U.S.C. 1001(a)(2). Pet. App. 123-126.

Before trial, petitioners filed a motion to dismiss the indictment. As relevant here, petitioners argued that, to the extent the mail fraud charges were based on an alleged scheme to deprive the city of their honest services, the charges were "non-starters," because the indictment did not allege that petitioners obtained a personal gain from the scheme; the charges incorrectly relied on a

breach of the *Shakman* consent decrees; and Section 1346, which states that mail fraud includes fraudulent schemes to deprive others of the intangible right of honest services, is unconstitutionally vague. See Pet. App. 71. The district court denied the motion. *Id.* at 58-95.

The jury found Sorich guilty on Counts 2 and 3 and acquitted him on Counts 4 and 5. The jury found McCarthy guilty on Counts 2 and 5 and Slattery guilty on Count 6. The jury found Sullivan guilty on Count 8, but it acquitted him on Count 7. Gov't C.A. Br. 33.[1]

In various post-verdict filings, petitioners argued, as relevant here, that the jury instructions on the Section 1346 charges were flawed because they did not require either proof of "personal gain" or a violation of state law. In addition, petitioners renewed their vagueness challenge to Section 1346. The district court denied the motions. Pet. App. 34-57.

3. The court of appeals affirmed petitioners' convictions. Pet. App. 1-33. As relevant here, the court rejected their challenges to their convictions under Sections 1341 and 1346. *Id.* at 1-27. The court explained that petitioners were charged with mail fraud based on two different theories: (1) that they defrauded the city of the intangible right to their honest services as city officials and (2) that they defrauded the city of money or property. The court noted that the jury had returned a general verdict without specifying the theory on which it had relied to find petitioners guilty and that petition-

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[1] At the close of the government's case in chief, the government moved to dismiss Count 1 due to a defect in the proof of the mailing, and petitioners' filed a motion for a judgment of acquittal. The court granted petitioners' motion for an acquittal on that charge. Pet. App. 5; 05 CR 644 Docket entry 242 (N.D. Ill. June 20, 2006); Gov't C.A. Br. 33.

ers challenged both theories. *Id.* at 6. The court then considered and rejected all of petitioners' challenges. *Id.* at 6-27.

a. The court first rejected petitioners' contention that the jury instructions on honest-services fraud were defective because they did not require the jury to find that petitioners sought gain for themselves or their co-schemers. Pet. App. 6-16. After tracing the history of the honest-services statute, the court noted that "most honest services cases" against public officials involve breaches of fiduciary duties in return for money, but not all cases follow that pattern. *Id.* at 8.

The court acknowledged that, in *United States* v. *Bloom*, 149 F.3d 649 (7th Cir. 1998), a prior panel of the court had declared that "[m]isuse of office (more broadly, misuse of position) *for private gain* is the line that separates run-of-the-mill violations of state-law fiduciary duty . . . from federal crime." Pet. App. 8-9 (brackets in original) (quoting *Bloom*, 149 F.3d at 655). The court observed that the "private gain" limitation has been criticized and has not been adopted by other circuits. *Id.* at 9-10. The court indicated that some of the criticism was based on a misunderstanding of the requirement, which, the court stressed, requires only "*an intent* to reap private gain," not actual gain. *Id.* at 10. In addition, the court concluded, private gain "simply mean[s] illegitimate gain, which usually will go to the defendant" or his co-schemers, "but need not" and can instead go to a third party. *Id.* at 12. The court observed that, in *United States* v. *Spano*, 421 F.3d 599 (7th Cir. 2005), cert. denied, 546 U.S. 1095 and 546 U.S. 1122 (2006) it had stated that, "[i]n the case of a successful scheme, the public [or client] is deprived of its servants' [or attorneys'] honest services no matter who receives

the proceeds." Pet. App. 14 (quoting *Spano*, 421 F.3d at 603) (brackets in original). Accordingly, the court held that the district court had correctly refused to instruct the jury that it could find petitioners guilty only if they intended to enrich themselves or their co-schemers. See *id.* at 10-16.

b. The court also rejected petitioners' argument that the indictment and jury instructions impermissibly allowed the *Shakman* consent decrees to serve as a source of petitioner's alleged fiduciary duties. Pet. App. 18-20. The court explained that both the indictment and the jury instructions cited not just the *Shakman* decrees but also state and local laws as sources of those duties. *Id.* at 19. Those other laws, the court noted, included a state law criminalizing false entries by public officials and two local ordinances, one criminalizing the same type of false entries and one mandating the selection of civil servants on the basis of merit. *Ibid.* The court stressed that petitioners "do not contest that they violated these legal provisions. *Ibid.*

The court observed that it had "never held that only state law can supply a fiduciary duty between public official and public or between employee and employer, in honest services cases." Pet. App. 20. Instead, the court stated, its case law, and "the case law of the vast majority of circuits, shows that other sources can create a fiduciary obligation." *Ibid.* The court declined to accept petitioners' invitation to adopt the minority "state law limiting principle." *Ibid.* The court noted that, in *United States* v. *Martin*, 195 F.3d 961 (7th Cir. 1999), cert. denied, 530 U.S. 1263 (2000), it had stated that it "remained open to an argument on this front in the future." Pet. App. 20 (quoting *Martin*, 195 F.3d at 967). Nonetheless, the court "decline[d] to overturn [petition-

ers'] verdict on [that] basis" because of the cursory nature of petitioners' argument on the issue "and the other sources of a fiduciary duty," *ibid.*

c. The court also rejected petitioners' argument that Section 1346 is unconstitutionally vague "as applied to their case." Pet. App. 16. The court found petitioners' contention that they lacked notice that their behavior was illegal "hard to take too seriously." *Id.* at 17. The court explained that petitioners' actions in falsifying records and lying repeatedly about their actions were obviously illegal, and the court noted that the jury had found that petitioners acted with specific intent to defraud. *Ibid.* Furthermore, the court stated, "several cases on the books provided [petitioners] ample warning" that they risked a criminal prosecution for engaging in a patronage scheme of the sort at issue. *Ibid.* (citing *United States* v. *Dvorak*, 115 F.3d 1339, 1341 (7th Cir. 1997), and *United States* v. *Fernandez*, 282 F.3d 500, 503-505 (7th Cir.), cert. denied, 537 U.S. 1028 (2002)). Observing that "[a]n en banc panel of the Second Circuit recently stated that '[n]o circuit has ever held . . . that section 1346 is unconstitutionally vague,'" *id.* at 18 (quoting *United States* v. *Rybicki*, 354 F.3d 124, 143 (2d Cir. 2003) (en banc), cert. denied, 543 U.S. 809 (2004)), the court declined to so hold here.

d. The court also rejected petitioners' various challenges to the government's "alternate theory that they committed what might be called traditional mail fraud." Pet. App. 21. The court held that the indictment properly alleged a scheme to deprive the city of money or property and that the evidence was sufficient to support petitioners' convictions. *Id.* at 21-27.

4. Petitioners filed a petition for rehearing en banc, which was denied. Pet. App. 96-102. Judge Kanne,

joined by Judge Posner, dissented from the denial on the ground that the private-gain and state-law limiting principles under Section 1346 merited further review. *Id.* at 97-102.

**ARGUMENT**

Petitioners contend (Pet. 10-18) that this Court's review is warranted to resolve conflicts among the courts of appeals on two questions—(1) whether conviction of a state or local official under 18 U.S.C. 1341 and 1346 requires proof that the defendant violated state law and (2) whether such a conviction requires proof that the defendant sought gain for himself or his co-schemers. Petitioners also contend (Pet. 18-20) that Section 1346 is unconstitutionally vague. This case is not a suitable vehicle to address those issues because, even if petitioners were correct, they would not be entitled to reversal of their convictions. In addition, petitioners overstate the differences among the courts of appeals on the scope of Section 1346, and they have not identified any decision of another court of appeals that conflicts with the decision below. This Court has previously denied a number of petitions for writs of certiorari presenting the precise challenges raised by petitioners or close variants, see *Colino* v. *United States*, 128 S. Ct. 1733 (2008) (No. 07-7685); *Rybicki* v. *United States*, 543 U.S. 809 (2004) (No. 03-1375); *Rise* v. *United States*, 541 U.S. 1072 (2004) (No. 03-1088); *Panarella* v. *United States*, 537 U.S. 819 (2002) (No. 01-1736), and there is no reason for a different result here. Further review is therefore not warranted.

1. As an initial matter, this case is not a suitable vehicle for considering petitioners' claims. As the court of appeals explained (Pet. App. 6), the mail fraud charges

against petitioners were based on two independent theories of criminality: (1) a traditional money-or-property theory under 18 U.S.C. 1341 and (2) an honest-services theory under 18 U.S.C. 1341 and 1346. The jury returned a general verdict of guilty. The court of appeals upheld the validity of and the sufficiency of the evidence supporting both theories. In this court, petitioners have challenged only the validity of the honest-services theory.

Even if petitioners were correct that the honest-services theory is invalid, that error would be subject to harmless-error review. See *Hedgpeth* v. *Pulido*, 129 S. Ct. 530 (2008) (per curiam). In view of petitioners' decision not to challenge the money-and-property theory, and the overwhelming evidence supporting petitioners' guilt under that theory, any error in submitting the honest-services theory to the jury was harmless beyond a reasonable doubt. See *Neder* v. *United States*, 527 U.S. 1, 17 (1999). Accordingly, petitioners could not obtain reversal of their convictions even if they prevailed on the claims presented in their petition for a writ of certiorari. The Court should deny the petition for that reason alone.

2. In any event, petitioners' claims do not otherwise warrant review. Contrary to petitioners' contentions (Pet. 10-18), this case does not present a suitable opportunity to resolve the narrow disagreements that exist among the courts of appeals on the scope of liability for honest-services fraud.

a. Section 1341 makes it unlawful to use the mail to execute or further "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations or promises." 18 U.S.C. 1341. Before 1987, the courts of appeals had in-

terpreted that statute to encompass schemes to defraud another, not only of money or property, but also of "intangible rights," including the right of citizens to the honest discharge of public duties by public officials. In *McNally* v. *United States*, 483 U.S. 350 (1987), however, this Court concluded that Section 1341 was limited in scope "to the protection of property rights," and the Court stated that, "[i]f Congress desires to go further" and reach intangible-rights schemes, then it "must speak more clearly than it has." *Id.* at 360. The following year, Congress enacted 18 U.S.C. 1346. Section 1346 defines the term "scheme or artifice to defraud" as used in Section 1341 to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

As petitioners note (Pet. 13-14), the Fifth Circuit requires the government in an honest-services fraud prosecution to 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). No other circuit, however, has accepted that position.

Contrary to petitioners' assertions (Pet. 10, 14), the Third Circuit has not "aligned itself with the Fifth Circuit's state law limiting principle." Pet. 14 (citing *United States* v. *Kemp*, 500 F.3d 257, 283 (3d Cir. 2007), cert. denied, 128 S. Ct. 1329 (2008), and *United States* v. *Murphy*, 323 F.3d 102, 116-117 (3d Cir. 2003)). In *United States* v. *Panarella*, 277 F.3d 678, cert. denied, 537 U.S. 819 (2002), the Third Circuit held that a public official's act of concealing a financial conflict of interest, "in violation of a criminal disclosure statute" established by Pennsylvania law, was sufficient to support an honest-services conviction. *Id.* at 698-699. In a footnote,

however, the court expressly reserved the question whether a violation of state law is necessary. *Id.* at 699 n.9. In *Murphy*, the defendant urged the court to "address the issue [it had] reserved in [footnote 9] in *Panarella*," 323 F.3d at 117, but the court found no need to do so. *Ibid.* In *Kemp*, the defendant also made a nondisclosure in contravention of state law, but he argued that the district court had erred in not instructing the jury that it had to find a violation of state *criminal* law. 500 F.3d at 283. The court of appeals rejected that claim because the district court had in fact so instructed the jury. *Ibid.* Because the defendant's actions violated state criminal law, the court did not decide whether such a violation was necessary. Thus, the Third Circuit has yet to resolve the question.

Other courts of appeals have squarely rejected any requirement that an honest-services defendant have violated state law. For example, the Ninth Circuit has held that "limit[ing] the reach of the federal fraud statutes only to conduct that violates state law" would be inconsistent with the text and legislative history of Section 1346, pre-*McNally* case law, and the federal interest in a standard of conduct for public officials that is "uniform rather than variable by state." *United States* v. *Weyhrauch*, No. 07-30339, 2008 WL 5003366, at *7 (Nov. 26, 2008). The Eleventh Circuit has also held that the duty to provide honest services may arise from sources other than state law, including the defendant's inherent fiduciary duty as a public official or the employment relationship itself. See *United States* v. *DeVegter*, 198 F.3d 1324, 1328 (1999), cert. denied, 530 U.S. 1264 (2000); *United States* v. *Waymer*, 55 F.3d 564, 571 (1995), cert. denied, 517 U.S. 1119 (1996)). Other courts of appeals have likewise stated that a violation of state

law is not 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).

The Seventh Circuit also has rejected a state-law requirement. In *United States* v. *Bloom*, 149 F.3d 649 (1998), the court declined to adopt a requirement that defendant have violated "some other rule of law." *Id.* at 654; see *United States* v. *Keane*, 522 F.2d 534, 544 (7th Cir. 1975) (pre-*McNally* decision holding that"[a] specific violation of state law, although covered by the statute, is not necessary to obtain a conviction") (citations omitted), cert. denied, 424 U.S. 976 (1976). More recently, the Seventh Circuit noted that it was willing to reexamine its position "without preconceptions should a full argument against it be mounted in a future case," but the court declined to decide the question in that case because the defendant had made only an abbreviated argument. *United States* v. *Martin*, 195 F.3d 961, 967 (1999), cert. denied, 530 U.S. 1263 (2000). The court of appeals followed the same course in this case, both because petitioners failed to mount the full argument demanded in *Martin* and because "the indictment and jury instructions" included "local and state law as potential sources" of petitioners' fiduciary duties. Pet. App. 19-20.

For similar reasons, this case is not an appropriate vehicle for this Court to resolve the disagreement among the circuits over whether the government must demonstrate a violation of state or local law in an honest-services fraud prosecution. As the court of appeals observed (Pet. App. 19), the indictment and jury instructions specifically identified state and local laws,

in addition to the *Shakman* decrees, as potential sources of petitioners' fiduciary duties under Section 1346. Those laws include a state law and a local ordinance that criminalize false entries made by local government officials with the intent to defraud, see 720 Ill. Comp. Stat. Ann. 5/33E-15 (West 2003); Chicago, Ill. Municipal Code § 2-74-090(B) (2008), and a local ordinance that mandates the selection of civil servants based on merit, see *id.* § 2-74-050(3). Petitioners have not contested that they violated those state and local laws, either in this Court or in the court of appeals. See Pet. App. 19. As the court of appeals recognized, because a rule requiring a state-law violation would thus not affect the outcome of this case, it is not a suitable case in which to decide whether such a rule exists. See *id.* at 20.

b. Petitioners also contend (Pet. 14-18) that the Court should grant review to resolve a purported conflict among the courts of appeals on whether proof that the defendant sought a "private gain" for himself or his co-schemers is necessary to establish a violation of Section 1346. Contrary to petitioners' contention, there is no conflict among the circuits on that issue. The court below held that Section 1346 does not require proof that the defendant sought to benefit either himself or his co-schemers. See Pet. App. 10-16. No court of appeals has held to the contrary. Indeed, those other courts of appeals that have addressed the issue have rejected any "private gain" requirement. See *United States* v. *Panarella*, 277 F.3d at 692 ("misuse of office for personal gain" not an element of Section 1346); *United States* v. *Welch*, 327 F.3d 1081, 1106 (10th Cir. 2003) ("intent to achieve personal gain * * *, like the intent to harm, is not an element of the mail or wire fraud statute"); see also *United States* v. *Silvano*, 812 F.2d 754, 760 (1st Cir.

1987) (pre-*McNally* decision stating that "[i]t is immaterial whether [the public official] personally profited from the scheme or whether the City suffered a financial loss from it").

The court below suggested that Section 1346 requires proof that the defendant sought to confer an "illegitimate gain" on someone (even though that person need not have been involved in the fraud). See Pet. App. 12-15. But this case does not present an opportunity for this Court to decide whether the court of appeals was correct, because the court also held that petitioners' conduct involved such a conferral. As the court explained, petitioners conferred a gain on the campaign workers who were hired illegally. See *id.* at 11.

3. Petitioners also contend (Pet. 18-20) that, absent some limiting construction, Section 1346 is unconstitutionally vague. The court of appeals correctly rejected that claim, and its decision does not conflict with any decision of this Court or of any other court of appeals. Accordingly, and in view of the fact that this Court has previously denied certiorari on this precise issue, see *Rybicki* v. *United States*, *supra* (No. 03-1375), further review is not warranted.

The "touchstone" of vagueness analysis "is whether 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). Under this Court's precedents, petitioners may not attack Section 1346 as unconstitutionally vague simply by showing that hypothetical situations may exist in which the statute might be ambiguous. Rather, they can prevail only by showing that the statute failed to provide clear warning that their own conduct was proscribed. See *Chapman* v. *United States*,

500 U.S. 453, 467 (1991) ("First Amendment freedoms are not infringed * * *, so the vagueness claim must be evaluated as the statute is applied to the facts of this case."); *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975) ("[V]agueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand."); *Parker* v. *Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.").[2]

As the court of appeals observed, "[i]t is hard to take too seriously" petitioners' contention that they lacked fair notice of the illegality of their conduct, which involved "creating a false hiring scheme that provided thousands of lucrative city jobs to political cronies, falsifying documents, and lying repeatedly about what they were doing." Pet. App. 17. Indeed, as the court of appeals noted, "several cases on the books provided [petitioners] ample warning that they risked prosecution" for engaging in that type of patronage scheme. *Ibid.* (discussing *United States* v. *Dvorak*, 115 F.3d 1339, 1341

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[2] In *City of Chicago* v. *Morales*, 527 U.S. 41 (1999), a plurality of this Court recognized an exception to the general rule against facial challenges "[w]hen vagueness permeates the text" of "a criminal law that contains no *mens rea* requirement" and "infringes on constitutionally protected rights." *Id.* at 55 (opinion of Stevens, J.). This Court has never adopted the exception proposed by the *Morales* plurality, and Section 1346 does not qualify for the exception in any event. Vagueness does not "permeate" the text of Section 1346; rather, Section 1346 contains a "clear prohibition," albeit one that "applies to a wide swath of behavior." *United States* v. *Rybicki*, 354 F.3d 124, 127 (2d Cir. 2003), cert. denied, 543 U.S. 809 (2004). Moreover, unlike the anti-loitering ordinance in *Morales*, the federal mail fraud statute contains an explicit scienter requirement. See 18 U.S.C. 1341. And Sections 1341 and 1346 do not infringe on any constitutionally protected rights.

(7th Cir. 1997), and *United States* v. *Fernandez*, 282 F.3d 500, 503-505 (7th Cir.), cert. denied, 537 U.S. 1028 2002)). Moreover, the jury found that petitioners acted with specific intent to defraud, see Pet. App. 136 (jury instructions), and this Court has made clear that scienter requirements alleviate vagueness concerns. See *Gonzales* v. *Carhart*, 127 S. Ct. 1610, 1628 (2007); see also Pet. App. 17 (noting that the scienter requirement for honest-services fraud "seriously undercuts any claim to a lack of notice that [petitioners' conduct] was criminal").

Petitioners suggest (Pet. 19-20) that Section 1346 is unconstitutionally vague because the courts of appeals have reached differing conclusions on the meaning of the statute. As discussed above, petitioners overstate the disagreements among the courts of appeals. In any event, as the en banc Second Circuit explained in rejecting a similar argument, "divergence in panel or circuit views of a statute, criminal or otherwise, is inherent—and common—in our multi-circuit system. Disparity does not establish vagueness." *United States* v. *Rybicki*, 354 F.3d 124, 143 (2d Cir. 2003), cert. denied, 543 U.S. 809 (2004). Whatever differences may exist among the courts of appeals on how to interpret Section 1346, "[n]o circuit has ever held * * * that section 1346 is unconstitutionally vague." *Ibid.*; see Pet. App. 18. In any event, the circuit divisions alleged by petitioners did not render Section 1346 vague as applied to their conduct, which would violate Section 1346 under the law of any circuit. Having engaged in "conduct that is clearly proscribed," petitioners "cannot complain of the vagueness of the law as applied to the conduct of others." *United States* v. *Williams*, 128 S. Ct. 1830, 1845 (2008) (quoting

*Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982)).

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2008