No. 03-1375

In the Supreme Court of the United States

THOMAS RYBICKI, FREDERIC GRAE, AND GRAE, RYBICKI & PARTNERS, P.C., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
CHRISTOPHER A. WRAY
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1346, which defines the term "scheme or artifice to defraud" for purposes of the mail and wire fraud statutes to include "a scheme or artifice to deprive another of the intangible right of honest services," is unconstitutionally vague.

2. Whether 18 U.S.C. 1346 violates principles of federalism.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. A1-A79) is reported at 354 F.3d 124. The opinion of the court of appeals panel (Pet. App. A81-A98) is reported at 287 F.3d 257. The summary order of the court of appeals panel (Pet. App. A99-A110) is not published in the *Federal Reporter*, but it is available at 38 Fed. Appx. 626.

JURISDICTION

The judgment of the en banc court of appeals was entered on December 29, 2003. The petition for a writ of certiorari was filed on March 29, 2003 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Eastern District of New York, petitioners were convicted on 20 counts of mail fraud, in violation of 18 U.S.C. 1341; two counts of wire fraud, in violation of 18 U.S.C. 1343; and one count of conspiracy, in violation of 18 U.S.C. 371. Petitioners Thomas Rybicki and Frederic Grae were each sentenced to a term of imprisonment of one year and one day, to be followed by three years of supervised release, and each was subjected to a fine of $20,000 and a $1150 special assessment. Petitioner Grae, Rybicki & Partners, P.C., was sentenced to three years of probation and was subjected to a fine of $80,000 and a $4600 special assessment. Pet. App. A32. A panel of the court of appeals affirmed, addressing some issues in a published opinion (*id.* at A81-A98) and others by unpublished summary order (*id.* at A99-A110). The court subsequently granted rehearing en banc and affirmed the convictions, with four judges dissenting. *Id.* at A1-A79.

1. Petitioners Rybicki and Grae are lawyers specializing in personal injury cases. Petitioner Grae, Rybicki & Partners, P.C., is the law firm at which they practice. Acting through intermediaries, petitioners arranged for payments to be made to claims adjusters employed by insurance companies that had insured against injuries sustained by petitioners' clients The payments, which typically were computed as a percentage of the total settlement amount, were intended to induce the adjusters either to settle the clients' claims more quickly or to offer larger settlement amounts. Although each of the insurance companies had a written policy prohibiting adjusters from accepting gifts or fees and requiring them to report the offer

of any such payments, the adjusters accepted the payments and did not disclose them to their employers. Between 1991 and 1994, petitioners caused payments to be made to adjusters in at least 20 cases that settled for an aggregate of $3 million. Petitioners and other participants in the scheme took considerable steps to disguise and conceal the payments. Pet. App. A4-A5, A84.

2. The indictment in this case charged petitioners with mail and wire fraud offenses and with conspiracy to commit mail fraud. See Pet. App. A5. The federal mail and wire fraud statutes prohibit the use of mail or wire communications 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, 1343. The term "scheme or artifice to defraud" is defined to include "a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. 1346.

3. A panel of the court of appeals affirmed petitioners' mail and wire fraud convictions. Pet. App. A81-A110.

a. Petitioners contended that 18 U.S.C. 1346 requires proof of actual or intended economic or pecuniary harm to the victim. The court of appeals rejected that claim, holding that such a requirement "would contravene Congress's clear intent to bring within the scope of the mail and wire fraud provisions fraudulent conduct that did not have as its object the deprivation of money or property of another." Pet. App. A87.

b. Petitioners contended that Section 1346's expansion of the definition of "scheme or artifice to defraud" to include a scheme or artifice to deprive another of "the intangible right of honest services" is unconstitutionally vague. Pet. App. A89. The court of appeals found "no basis" for finding Section 1346 vague as

applied to petitioners' conduct in this case. *Id.* at A91. The court explained that petitioners must have known that their conduct was unlawful in light of their status as "sophisticated attorneys" (*id.* at A91) and the steps they took to avoid detection (*id.* at A91-A92).

c. Petitioners contended that the evidence of honest services fraud was insufficient to support their convictions. The court of appeals concluded that the jury could reasonably have found that petitioners, by their payment of bribes, intended to obtain favorable treatment from the adjusters at the expense of the insurance companies' intangible right to the adjusters' honest services. Pet. App. A96. The court also found that it was "reasonably foreseeable" to petitioners that the bribes provided the adjusters with an incentive not to seek the lowest settlement amount or not to delay settlements, "thereby depriving the insurance companies of the difference between the most favorable settlement the adjusters could have otherwise obtained and the settlement actually agreed upon or the time value of money lost by expediting the settlement and disrupting the normal patterns of case disposition." *Ibid.*

d. Petitioners contended that their prosecution violated principles of federalism. Characterizing that claim as "frivolous," the court of appeals stated that "this case rests squarely within the group of cases that have prosecuted similar private sector frauds under federal law, and [petitioners'] conduct is precisely the type of misuse of the mails and wires the statutes were meant to address." Pet. App. A104.

4. The court of appeals granted rehearing en banc, and the en banc court affirmed petitioners' convictions. Pet. App. A1-A79.

Because petitioners had not raised a facial vagueness challenge to Section 1346 at trial, the en banc court of appeals reviewed their facial vagueness claim under the plain-error standard of Federal Rule of Criminal Procedure 52(b). Pet. App. A7-A8. In addressing that challenge to Section 1346, the court framed the relevant question as "whether, even if the meaning of the statute is not plain enough on its face, there was a 'well-settled meaning' of 'scheme or artifice to deprive another of the intangible right of honest services' at the time that Congress enacted section 1346 in 1988." *Id.* at A21. To resolve that question, the court looked to the line of authority that was overruled by this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), which held that the mail and wire fraud statutes were enacted to protect property rights and did not criminalize schemes to deprive individuals or the government of intangible rights, such as the right of honest services. Pet. App. A22. The court explained that Section 1346 was intended to "'overrule' *McNally* at least in part, *i.e.*, to place within the statutory proscription certain frauds that *McNally* had held were not covered by the mail-fraud and wire-fraud statutes." *Id.* at A21.

After reviewing pertinent pre-*McNally* decisions, the en banc court of appeals concluded that, as applied to private actors, Section 1346 proscribes "a scheme or artifice to use the mails or wires to enable an officer or employee of a private entity * * * purporting to act for and in the interests of his or her employer * * * 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." Pet. App. A31-A32 (footnote omitted); see *id.* at A40-A41. Under that standard, the court explained, "actual or intended economic or pecuniary

harm to the victim need not be established." *Id.* at A37. Rather, for purposes of the statute, a misrepresentation or omission is "material" if it "would naturally tend to lead or is capable of leading a reasonable employer to change its conduct." *Id.* at A39.

The en banc court of appeals held that petitioners' actions "f[e]ll squarely" within the coverage of Section 1346 as so construed. Pet. App. A32-A33; see *id.* at A41. The court further concluded (*id.* at A35) that the statute's "clear prohibition" applied to a sufficiently "wide swath of behavior" as to foreclose a determination of facial invalidity under either *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) (facial challenge may be sustained only if no set of circumstances exists under which the statute would be valid), or *City of Chicago* v. *Morales*, 527 U.S. 41, 55 (1999) (opinion of Stevens, J.) (statute may be struck down as impermissibly vague if "vagueness permeates the text" of the law). The court did not "suggest [a] preference" for either approach to facial challenges. Pet. App. A13.

Four members of the en banc court of appeals dissented. Pet. App. A61-A79; see *id.* at A59-A60 (separate dissenting opinion for two of the four judges). The dissenters acknowledged that petitioners had "likely forfeited their vagueness challenge, and that the issue is one of plain error." *Id.* at A61. Based on their analysis of the separate opinions in *Morales*, the dissenting judges would have held that a criminal statute is impermissibly vague if it "reaches a substantial amount of innocent conduct and thereby fails to establish minimal guidelines to govern law enforcement." *Id.* at A64 (brackets and internal quotation marks omitted). Those judges would have found Section 1346 to be impermissibly vague under that standard. *Id.* at A65-A79. The dissenting judges stated that "there is no

settled meaning to the phrase 'the intangible right of honest services' that is capable of providing constitutionally adequate notice" (*id.* at A69); that Section 1346 provides insufficient guidance to law enforcement officials charged with enforcing it (*id.* at A70-A73); and that there is "wide disagreement among the circuits as to the elements of the 'honest services' offense" (*id.* at A73).

ARGUMENT

1. Petitioners contend (Pet. 12-22) that 18 U.S.C. 1346 is void for vagueness. As all the members of the en banc court of appeals recognized (Pet. App. A7, A61), petitioners failed to raise that contention in the district court. Accordingly, their claim may be reviewed only for plain error. See Fed. R. Crim. P. 52(b).

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); see *United States* v. *Brumley*, 116 F.3d 728, 732 (5th Cir.) (en banc) ("Gauging fair notice requires an inquiry into the state of the law as a whole, not merely into the words printed on a single page of the United States Code."), cert. denied, 522 U.S. 1028 (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 would 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. 735, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness."). Petitioners cannot show that Section 1346 was vague as applied to the conduct for which they were convicted, much less that any error in applying the statute to them was "plain" within the meaning of Rule 52(b), in the sense of "'clear' or, equivalently, 'obvious.'" *United States* v. *Olano*, 507 U.S. 725, 734 (1993).

a. The mail fraud statute, 18 U.S.C. 1341, and the wire fraud statute, 18 U.S.C. 1343, make it unlawful to use mail or wire communications 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."[1] Before this Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987), the courts of appeals generally agreed that the mail fraud statute extended to schemes to deprive the public of the intangible right to the honest services of government officials. The courts of appeals also generally agreed that the intangible rights covered by the statute included the right of a private employer or other principal to the honest and faithful services of its employees or agents. See, *e.g.*, *United States* v. *Lemire*, 720 F.2d 1327, 1336-1337 (D.C. Cir. 1983), cert. denied, 467 U.S. 1226 (1984).

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[1] Because the mail and wire fraud statutes share the same operative language, the same analysis applies to both sets of offenses. See *Carpenter* v. *United States*, 484 U.S. 19, 25 n.6 (1987).

In *McNally*, this Court rejected the "intangible rights" theory of mail fraud prosecution, holding that the mail fraud statute in its then-existing form reached only schemes that seek to deprive victims of money or property. 483 U.S. at 356, 358-359. The Court stated in *McNally* that Congress "must speak more clearly than it has" in order to criminalize a broader range of fraudulent conduct. *Id.* at 360. Shortly thereafter, Congress enacted 18 U.S.C. 1346 in order to restore the pre-*McNally* understanding of the scope of the federal fraud statutes. See *Cleveland* v. *United States*, 531 U.S. 12, 19-20 (2000). Section 1346 defines the term "scheme or artifice to defraud" to include "a scheme or artifice to deprive another of the intangible right of honest services."

b. The lower federal courts "have consistently recognized" that Section 1346 extends the coverage of the mail and wire fraud statutes to certain corrupt acts, such as bribery, "perpetrated in private commercial settings," if those acts fraudulently deprive the victim of the "honest services" of a person owing him a duty of honesty or loyalty. *United States* v. *Vinyard*, 266 F.3d 320, 326 (4th Cir. 2001), cert. denied, 536 U.S. 922 (2002). At the time of petitioners' offenses, there was consequently ample precedent indicating that the undisclosed payment of bribes to an employee in order to obtain favored treatment from his company constitutes a deprivation of "honest services" within the meaning of Section 1346. That interpretation is consistent with the understanding of honest services fraud that prevailed in the lower courts before this Court's decision in *McNally*. By requiring proof beyond a reasonable doubt of intent to defraud, see, *e.g.*, *United States* v. *Paradies*, 98 F.3d 1266, 1285 (11th Cir. 1996), cert. denied, 522 U.S. 1014 (1997), Sections 1341 and

1343 ensure that defendants are not subjected to criminal liability for accidental misrepresentations or omissions. That requirement does much to "relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." *Screws* v. *United States*, 325 U.S. 91, 102 (1945) (opinion of Douglas, J.).

c. The courts of appeals have unanimously rejected claims that Section 1346 is void for vagueness. See, *e.g.*, *United States* v. *Welch*, 327 F.3d 1081, 1109 n.29 (10th Cir. 2003); *United States* v. *Szur*, 289 F.3d 200, 209 n.5 (2d Cir. 2002); *United States* v. *Frega*, 179 F.3d 793, 803 (9th Cir. 1999), cert. denied, 528 U.S. 1191 and 529 U.S. 1029 (2000); *United States* v. *Frost*, 125 F.3d 346, 370-371 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998); *United States* v. *Gray*, 96 F.3d 769, 776-777 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997); *United States* v. *Castro*, 89 F.3d 1443, 1455 (11th Cir. 1996), cert. denied, 519 U.S. 1118 (1997).[2] In light of that judicial consensus, petitioners cannot plausibly claim that the court of appeals committed "clear" or "obvious" error (see p. 8, *supra*) entitling them to relief under Rule 52(b).

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[2] In *United States* v. *Handakas*, 286 F.3d 92 (2d Cir.), cert. denied, 537 U.S. 894 (2002), the only case in which a vagueness challenge to Section 1346 has been upheld, the court concluded that the statute was impermissibly vague as applied to a bid contractor who willfully breached a contractual requirement that he pay the prevailing wage to his employees and who then misrepresented the wages on disclosure forms required to be filed under state law. *Id.* at 96-97. In the instant case, the en banc court overruled the constitutional holding in *Handakas* and concluded that the conduct at issue there was not within the scope of Section 1346. Pet. App. A36.

d. Petitioners contend (Pet. ii, 14-15) that Section 1346 is unconstitutionally vague as applied to their conduct because the insurance companies were not shown to have suffered any financial loss as a result of the fraudulent scheme. Congress's objective in enacting Section 1346, however, was to make clear that the coverage of the mail and wire fraud statutes is not limited to schemes to defraud the victim of money or property. As the court of appeals panel in this case explained, requiring proof of actual or intended financial loss would "vitiate § 1346 and would contravene Congress's clear intent to bring within the scope of the mail and wire fraud provisions fraudulent conduct that did not have as its object the deprivation of money or property of another." Pet. App. A87.

In any event, petitioners' scheme created a clear *potential* for financial loss to the victimized insurance companies. As the court of appeals panel explained, "the jury could have found that it was reasonably foreseeable to [petitioners] that the effect of the payments made to the adjusters would have been to provide an incentive to the adjusters to not seek the lowest settlement amount or to not delay the settlement." Pet. App. A96. That is so notwithstanding the government's acknowledgment at trial "that it would not seek to prove that the amount of any of the settlements connected with a payment to an adjuster had been inflated above what would have been a reasonable range for that settlement." *Id.* at A5. The concept of a "reasonable range" for settlement presupposes the existence of higher and lower figures within the range. If adjusters' settlement decisions were affected in one of the ways described above, the effect would be to "depriv[e] the insurance companies of the difference between the most favorable settlement the adjusters could have other-

wise obtained and the settlement actually agreed upon or the time value of money lost by expediting the settlement and disrupting the normal patterns of case disposition." *Id.* at A96. In either event, the insurer would suffer a financial loss, notwithstanding the reasonableness of the settlement amount. See *id.* at A97.

Petitioners' reliance (Pet. 14) on *United States* v. *Jain*, 93 F.3d 436 (8th Cir. 1996), cert. denied, 520 U.S. 1273 (1997), is misplaced. In *Jain*, the court reversed the mail fraud conviction of a psychologist who received kickbacks from a hospital for patient referrals. *Id.* at 441-442. In rejecting the contention that the defendant had defrauded his patients by failing to disclose the referral fees, the court stated that "a fiduciary's nondisclosure must be material to constitute a criminal scheme to defraud." *Id.* at 442. The court found "no evidence that any patient would have considered Dr. Jain's [referral fee] material if it did not affect the quality or cost of his services to that patient." *Ibid.* In the instant case, by contrast, the relevant insurers evidently did regard petitioners' kickbacks as objectionable, since "[e]ach of the insurance companies maintained a written policy that prohibited the adjusters from accepting any gifts or fees and required them to report the offer of any such gratuities." Pet. App. A4.

e. Petitioners assert (Pet. 14-17) that the courts of appeals are divided on certain subsidiary issues relating to the proper construction of Section 1346. Those issues include whether economic harm to the victim must be reasonably foreseeable to the defendant; whether the defendant must intend to obtain personal gain from the scheme; whether the defendant must breach a fiduciary duty; and whether the duty to provide honest services must arise from state law. As the en banc court of

appeals explained, however, "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." Pet. App. A33.

In any event, the circuit divisions alleged by petitioners could not have rendered Section 1346 vague as applied to the conduct that formed the basis of the instant prosecution. The court of appeals panel correctly found that the evidence satisfied any requirement of "reasonably foreseeable" economic harm to the victimized insurance companies (Pet. App. A96); petitioners intended to obtain a personal benefit from the scheme in the form of claims settlements that were more advantageous to their clients, in terms either of timing or of settlement value; and insurance adjusters have a duty under New York's commercial bribery law to refrain from the type of transactions that are at issue in this case (*i.e.*, the payment of kickbacks by attorneys in return for quicker or larger settlements for their clients), see *People* v. *Wolf*, 98 N.Y.2d 105, 109-119 (2002). Thus, any uncertainty about the precise scope of Section 1346's coverage could not have deprived petitioners of fair warning that their own conduct was prohibited by the federal mail and wire fraud statutes.

f. Petitioners argue (Pet. 19-20) that the appropriate test for reviewing their void-for-vagueness claim is not whether Section 1346 is vague as applied to their own conduct, but whether "vagueness permeates the text" of the statute. See *City of Chicago* v. *Morales*, 527 U.S. 41, 55 & n.22 (1999) (opinion of Stevens, J.). The en banc court of appeals, however, correctly held that Section 1346 would not be impermissibly vague under that standard because the statute's "clear pro-

hibition applies to a wide swath of behavior." Pet. App. A35.

In any event, the standard articulated by the *Morales* plurality does not apply in the circumstances presented here. Justice Stevens's opinion in that case explained that the challenged anti-loitering ordinance "contain[ed] no *mens rea* requirement and infringe[d] on constitutionally protected rights." *Id.* at 55 (citation omitted). The plurality then stated that, "[w]hen vagueness permeates the text of *such a law*, it is subject to facial attack." *Ibid.* (emphasis added). Unlike the ordinance at issue in *Morales*, the federal mail and wire fraud statutes contain an explicit scienter requirement (*i.e.*, that the mails or wires be used "for the purpose of executing [a] scheme or artifice [to defraud]," 18 U.S.C. 1341, 1343), and they do not infringe on constitutionally protected rights. A vagueness challenge to the application of those statutes is therefore properly reviewed "in light of the facts of the case at hand." *Mazurie*, 419 U.S. at 550.

2. Petitioners contend (Pet. 25-27) that Section 1346 violates principles of federalism. As with their vagueness challenge, petitioners failed to raise that claim in the district court, and it is therefore reviewable only for plain error.

The courts of appeals have uniformly rejected federalism challenges to 18 U.S.C. 1346. See, *e.g.*, *United States* v. *Antico*, 275 F.3d 245, 262 n.18 (3d Cir. 2001), cert. denied, 537 U.S. 821 (2002); *United States* v. *Sawyer*, 239 F.3d 31, 43 n.13 (1st Cir. 2001); *Brumley*, 116 F.3d at 735; *Castro*, 89 F.3d at 1456. Section 1346 does not establish a freestanding federal offense; it simply defines the term "scheme or artifice to defraud" for purposes of the mail and wire fraud statutes. Those statutes in turn require proof that the defendant used

the mails (18 U.S.C. 1341) or some "wire, radio, or television communication in interstate or foreign commerce" (18 U.S.C. 1343) to execute the fraudulent scheme. Those jurisdictional nexus requirements provide a constitutionally sufficient predicate for the exercise of congressional power. See, *e.g.*, *Badders* v. *United States*, 240 U.S. 391, 393 (1916) ("Whatever the limits to [Congress's] power, it may forbid [the use of the mails] in furtherance of a scheme that it regards as contrary to public policy, whether it can forbid the scheme or not.").

Petitioners argue (Pet. 26) that Section 1346 violates principles of federalism as applied in this case because their conduct was sufficiently regulated by New York law. A large number of federal offenses, however, including bank robbery and narcotics trafficking—and, for that matter, fraudulent efforts to obtain money or property—can also be prosecuted under state law. This Court has made clear that "an act denounced as a crime by both national and state sovereignties is an offense against the peace and dignity of both and may be punished by each." *United States* v. *Lanza*, 260 U.S. 377, 382 (1922). Rather than creating a constitutional infirmity, the existence of a state law prohibition on a particular defendant's conduct reduces any potential federalism concerns that might otherwise be presented by a prosecution under 18 U.S.C. 1341 or 1343. See *United States* v. *Panarella*, 277 F.3d 678, 699 (3rd Cir.), cert. denied, 537 U.S. 819 (2002); *Brumley*, 116 F.3d at 735.

Petitioners' reliance (Pet. 25) on *Cleveland* v. *United States*, 531 U.S. 12 (2000), is also unavailing. In *Cleveland*, the Court concluded that unissued state permits or licenses do not constitute "property" within the meaning of 18 U.S.C. 1341. See 531 U.S. at 26-27.

Nothing in *Cleveland* casts doubt on the constitutionality of Section 1346. Indeed, the Court in *Cleveland* specifically noted that "[i]n this case, there is no assertion that Louisiana's video poker licensing scheme implicates the intangible right to honest services." *Id.* at 20.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
CHRISTOPHER A. WRAY
Assistant Attorney General
JOEL M. GERSHOWITZ
Attorney

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