No. 01-1186

In the Supreme Court of the United States

MICHAEL CHARLES VINYARD, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's participation in a fraud scheme that involved self-dealing by a company employee constituted an "honest services" fraud under 18 U.S.C. 1341, 1346.

2. Whether the court of appeals correctly held that, under the plain error standard, petitioner did not establish that the government had suppressed allegedly exculpatory evidence.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 266 F.3d 320.

JURISDICTION

The judgment of the court of appeals was entered on September 11, 2001. A petition for rehearing was denied on October 10, 2001. Pet. App. 40a-41a. The petition for a writ of certiorari was filed on January 8, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of South Carolina, petitioner was convicted of 14 counts of mail fraud, in violation of 18

U.S.C. 1341, 1346; and 12 counts of money laundering, in violation of 18 U.S.C. 1956(a)(1)(B)(i). He was sentenced to 70 months of imprisonment, $1,418,419.65 in restitution, and three years of supervised release. The court of appeals affirmed. Pet. App. 1a-27a.

1. Petitioner was a partner in a law firm in Ottumwa, Iowa. Petitioner's brother, James Vinyard, worked for Sonoco Products Corporation in Hartsville, South Carolina. Sonoco manufactured plastic T-shirt grocery bags for grocery and convenience stores nationwide. In April 1990, Sonoco began a recycling program. James was assigned to find a method to reuse the internal scrap that was a by-product of manufacturing grocery bags, and to develop a program to collect and recycle used grocery bags. James concluded that Sonoco could recycle its scrap internally, but that it could not recycle used grocery bags because they were often too contaminated when returned to Sonoco. James believed that Sonoco could manufacture grocery bags from the recycled scrap ("pellets") from other companies, which would be cheaper than using virgin plastic products. Pet. App. 2a-3a; Gov't C.A. Br. 3-4.

James learned that Mindis, a Georgia company, could recycle plastics and recommended that Sonoco enter into a joint venture with Mindis to recycle Sonoco's used grocery bags. James also recommended that Sonoco create an internal recycling unit that James would head. Sonoco rejected both recommendations. Disappointed by Sonoco's rejection of his recycling recommendations, James schemed to defraud Sonoco by creating a private company to broker deals between Sonoco and recycling companies for personal profit. James contacted petitioner and persuaded him to join the scheme for a share of the profits. James explained to petitioner that James needed to conceal his role in

the scheme because self-dealing was a violation of James's employment contract with Sonoco. Pet. App. 3a; Gov't C.A. Br. 3-4.

Petitioner and James then formed Charles Stewart Enterprises (CSE). ("Charles" and "Stewart" are the brothers' middle names.) CSE was incorporated in Ottumwa; Pat Curran, Michael's law partner, was listed as CSE's corporate officer on CSE's annual report. James agreed to make CSE's business decisions. Petitioner agreed to handle administrative chores such as billing and invoicing. Pet. App. 3a; Gov't C.A. Br. 4.

CSE's business office was located in petitioner's law firm. Petitioner added a separate phone line at the firm that was to be used for CSE's business only. Petitioner directed the law firm staff not to answer calls in the name of the law firm on the CSE line. Petitioner told a secretary that it might be a "conflict of interest" if the law firm were associated with CSE. Petitioner told another secretary not to fax any materials to James at Sonoco unless she knew that he was at work to receive the fax. Petitioner answered "Charles Stewart" when taking calls on the CSE telephone line. When a secretary objected to working on CSE matters, petitioner fired her and gave her $1000 in cash. Pet. App. 3a-4a; Gov't C.A. Br. 4-5.

Meanwhile, James caused Sonoco to enter into several deals with recycling companies using CSE as a broker. In 1991, Dean Soti, the owner of Jadcore, Inc. in Terre Haute, Indiana, called James and offered to sell recycled plastic pellets to Sonoco. James accepted Jadcore's offer but told Jadcore to bill CSE because Sonoco did not want its customers to know that it was using recycled products to manufacture grocery bags. James marked the price of the pellets up by two or three cents per pound as CSE's "commission" before

selling them to Sonoco. Gov't C.A. Br. 5. CSE also brokered a deal between Sonoco and Security International in New Orleans, Louisiana, under which Security recycled Sonoco's used grocery bags. Sonoco paid an additional three cents per pound as CSE's commission. *Ibid.*

Between 1991 and 1997, Sonoco paid CSE $12,115,785.69; CSE's net profit was more than $2.8 million. Sonoco paid CSE with checks that were drawn on a bank in South Carolina and sent by United States mail to CSE in Iowa. Pet. App. 4a; Gov't C.A. Br. 5. As a result of the scheme, petitioner received about $1.2 million from CSE. By contrast, he earned less than $290,000 from his law practice during the same time period. Gov't C.A. Br. 6.

In 1994, a Sonoco vice president reviewed CSE's relationship with Sonoco and concluded that the costs of doing business with CSE were too high. Sonoco officials repeatedly tried to meet with "Charles Stewart" to re-evaluate their relationship, but James repeatedly stalled them. See Tr. 409. Independent of the CSE scheme, James demanded kickbacks from some of Sonoco's other recycling customers as a condition of Sonoco's continued business with them. In April 1997, a disgruntled customer reported James's kickback scheme to Sonoco, which resulted in an investigation into James's conduct and Sonoco's discovery of the fraudulent scheme involving CSE. Pet. App. 4a; Gov't C.A. Br. 5-6.

2. Before petitioner's trial, James pleaded guilty and agreed to cooperate with the government by testifying against petitioner. Petitioner and his attorney attended James's sentencing hearing on August 3, 1999. At that hearing, James submitted a sentencing memorandum that had been prepared and signed by Peggy

Swalis, a sentencing consultant. James served a copy of the document on the government the day before the sentencing hearing. The Swalis memorandum included a "statement of the defendant" that was written in the first person and enclosed in quotation marks. The "statement of the defendant" said that Sonoco had authorized James to deal with Sonoco through CSE and that James had told petitioner that CSE had been approved by Sonoco. The prosecutor and the district court remarked that those statements were inconsistent with James's guilty plea. James then withdrew the Swalis memorandum from evidence.

James testified as a government witness against petitioner at petitioner's trial, which took place in late August 1999. Gov't C.A. Br. 12-13. James testified, among other things, that petitioner knew of the scheme to defraud Sonoco and willingly participated in it. After deliberating for less than a day, the jury found petitioner guilty. Several months later, at his sentencing hearing, petitioner informed the district court that he had not been furnished with a copy of the Swalis memorandum. The district court stated that the document was written and prepared by Swalis, not by James. James's attorney concurred, stating that the Swalis memorandum was "not signed by [James] and [James] never testified that he adopted it." Gov't C.A. Br. 13.

3. Petitioner appealed his conviction and sentence, and the court of appeals affirmed.

a. Petitioner primarily argued that he had not violated 18 U.S.C. 1341 and 1346 because "he neither intended to cause economic harm, nor caused actual economic harm, to Sonoco." Pet. App. 6a. The court of appeals rejected that argument, holding that neither an intent to cause harm nor actual economic harm to the

victim is a necessary element of mail fraud. *Id.* at 17a. In enacting 18 U.S.C. 1346, the court explained, "Congress made it clear that the term 'scheme or artifice to defraud' includes a scheme or artifice to defraud another of the intangible right of honest services." *Id.* at 10a (some internal quotation marks omitted). Although "honest services" mail fraud prosecutions most often involve public officials, "the courts have consistently recognized the statute's province to encompass dishonest acts perpetrated in private commercial settings." *Id.* at 12a.

The court of appeals observed that, to ensure that employees are not exposed "to mail fraud prosecution for every breach of contract or every misstatement made in the course of dealing," federal courts had generally imposed narrowing constructions on 18 U.S.C. 1346. Pet. App. 12a (internal quotation marks omitted). Some courts had done so by adopting a "reasonably foreseeable harm" test whenever "honest services" fraud was charged in connection with private breaches of trust. Under that test, an employee's fraudulent breach of fiduciary duty and use of the mails in connection therewith can constitute mail fraud only if "the employee foresaw or reasonably should have foreseen that his employer might suffer an economic harm as a result of the breach." *Id.* at 14a. The court of appeals also indicated that other courts had employed a "materiality test." Under that approach, the government must show not only the intent to deceive, but also that the deception was "material." *Ibid.* A representation or omission is material, the court of appeals explained, if it "'has the natural tendency to influence or is capable of influencing' the employer to change his behavior." *Ibid.*

The court of appeals explained that the two formulations "are similar in many respects." Pet. App. 15a. "For the most part," it noted, "application of the materiality approach will be identical to the reasonably foreseeable harm test, because an employer would almost certainly" consider altering "his business practices if disclosure of a fraud scheme revealed either foregone business opportunities or an economic threat." *Id.* at 15a n.7. Nonetheless, the court of appeals decided to apply the "reasonably foreseeable harm" test in this case because it focuses on the intent of the defendant, rather than what the court thought to be the potentially idiosyncratic response of the victim, and because it better ensures that the mail fraud statute will apply only to "particularly significant" deceptions. *Id.* at 16a-17a. The court held that, in private sector "honest services" fraud cases, the government must prove that the employee could foresee that his fraud scheme "potentially might be detrimental to the employer's economic well-being." *Id.* at 17a-18a.

The court of appeals rejected petitioner's contention that there can be no mail fraud absent actual or intended "economic harm as a result of the alleged self-dealing." Pet. App. 17a. That contention, the court explained, "reveals a misunderstanding of § 1346." *Ibid.* Section 1346, the court explained, does not by its terms require the defendant to intend or cause an actual economic injury. At most, it requires that the employee "intend to breach his fiduciary duty and reasonably foresee that the breach would create 'an identifiable economic risk' for the employer." *Ibid.* "Whether the risk materializes or not," the court held, "is irrelevant; the point is that the employee has no right to endanger the employer's financial health or

jeopardize the employer's long-term prospects through self-dealing." *Id.* at 18a.

The court of appeals also concluded that, on the facts of this case, the district court had not erred in denying petitioner's motion for a judgment of acquittal. Pet. App. 18a. The evidence was sufficient to show both that petitioner "willingly aided and participated in the breach of a fiduciary duty" by his brother James "and that he could reasonably foresee that the breach would create an identifiable economic risk to Sonoco." *Ibid.* The court stressed that James had a contractual duty to disclose conflicts of interest to his employer, Sonoco; that he and petitioner had created CSE to conceal the fact that James was directing Sonoco's business to himself, as broker, and profiting therefrom; and that the two received more than $12 million in revenues and more than $2.8 million in profits from Sonoco. *Id.* at 18a-19a. The court concluded that those activities "exposed Sonoco to a reasonably foreseeable economic risk." *Id.* at 19a. Even if the transactions between CSE and Sonoco were objectively fair, the court explained, "there is no doubt that [petitioner's and his brother's] deception deprived Sonoco of the chance to consider a variety of brokers and to search for the best possible price." *Ibid.*

b. The court of appeals also rejected petitioner's claim that the government had suppressed exculpatory evidence. Petitioner argued that the prosecutor had violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), by failing to turn over the Swalis memorandum, which had been submitted to the court during James's sentencing hearing. Although petitioner and his lawyer were present at James's sentencing hearing, they had "made no request for the sentencing memorandum." Pet. App. 21a.

Because petitioner failed to raise the issue at trial, the court reviewed the alleged *Brady* violation for plain error. Pet. App. 7a. Under the circumstances, the court found that "it is unclear whether any error, much less a plain error, occurred." *Id.* at 21a. The court declined to address whether there was error, however, because it concluded that any error did not affect the outcome. *Ibid.* Although the memorandum may have assisted petitioner in impeaching James's testimony, the court found it "unlikely that it would have altered the trial's result." *Id.* at 22a.

ARGUMENT

Petitioner contends (Pet. 5-17) that his mail fraud convictions are invalid because there was insufficient evidence to prove that he actually harmed or intended to harm the victim of the fraudulent scheme. He also contends that the government violated *Brady* v. *Maryland*, 373 U.S. 83, 87 (1963). Those contentions lack merit and do not otherwise warrant this Court's review.

1. The mail fraud statute makes it unlawful to use the United States mails 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 this Court decided *United States* v. *McNally*, 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. In *McNally*, this Court disagreed, holding that the mail fraud statute reaches only schemes that seek to deprive victims of money or property. *McNally*, 483 U.S. at 356, 358-359.

In response, Congress enacted 18 U.S.C. 1346, to return the law to its pre-*McNally* state. Section 1346

provides that the phrase "scheme to defraud" in 18 U.S.C. 1341 includes any scheme "to deprive another of the intangible right of honest services." Although frauds involving a "deprivation of honest services" often arise in the context of "corruption among public officials," Pet. App. 11a-12a, Section 1346 does not limit itself to cases of public corruption. Instead, as the lower federal courts "have consistently recognized," Section 1346 also extends the mail fraud statute to certain corrupt acts (like bribery) "perpetrated in private commercial settings," if those acts fraudulently deprive the victim of the "honest services" of, for example, a fiduciary. Pet. App. 12a.

Seeking to avoid a perceived potentially overbroad construction of Section 1346, the courts of appeals have generally agreed that, if "honest services" mail fraud is charged in the context of private corruption, the government must show (among other things) that the deception was material, *i.e.*, that it had the natural tendency or capability to influence the victim's conduct, or that it exposed the employer to reasonably foreseeable economic injury. See Pet. App. 12a-15a (citing cases from the 1st, 5th, 6th, 8th, 10th, 11th and D.C. Circuits). Petitioner does not dispute the propriety of that limit on Section 1346's scope. To the contrary, he endorses it. "In this context," he states, "it is only where the nondisclosure poses *a business risk* to the employer that there is a violation of the mail fraud statute." Pet. 9 (emphasis added).

The decision below properly applied that standard to the facts of this case. To demonstrate mail fraud, the court held, the government must show not only a fraudulent breach of fiduciary duty, but also that "the breach would create 'an identifiable economic risk' for the employer." Pet. App. 17a. After reviewing the

evidence, the court of appeals found that the fraudulent scheme perpetrated by petitioner and his brother had indeed created an "identifiable economic risk" for the victim, Sonoco. James deceived Sonoco by concealing his role in CSE from Sonoco and engaging in self-dealing, despite his clear duty to disclose conflicts of interest. Further, petitioner and James could reasonably foresee harm to Sonoco, because their scheme "deprived Sonoco of the chance to consider a variety of brokers and to search for the best possible price." *Id.* at 19a. Indeed, rather than search for a broker who could arrange for recycling services or obtain recycled plastics with the lowest prices and commissions, James directed Sonoco's recycled plastics needs through CSE, the front he and his brother had established. Cf. *United States* v. *Montani*, 204 F.3d 761, 768 (7th Cir. 2000) (even if employer got the "best price the market would bear," actions were fraudulent because the employer was entitled to "the best efforts of its" fiduciary "without paying a premium in the form of secret profits"). On the facts of this case, moreover, a reasonable jury could infer that Sonoco was actually harmed by the fraudulent scheme. In 1994, a Sonoco vice president reviewed Sonoco's relationship with CSE and concluded that the costs of doing business with CSE were too high. It was for that reason that Sonoco representatives attempted to contact "Charles Stewart," only to be stalled by petitioner. See p. 4, *supra.* And James Vinyard testified that, while Sonoco officials "expected to get the lowest possible price," they "didn't," because he and his brother "cheated them." Tr. 226.[1]

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[1] Petitioner does not seem to dispute that Sonoco might have fared better or bargained for lesser commissions absent the self-dealing. To the contrary, petitioner appears to concede the infer-

Although petitioner endorses the standard employed by the court of appeals, Pet. 9, petitioner also appears to propose a further requirement. Deprivation of "honest services" in a private commercial setting cannot amount to mail fraud, he argues, unless the defendant actually inflicted harm on or intended to inflict harm on the victim. He thus contends that a "private-sector scheme to defraud which is based on a deprivation of a right to 'honest services' under § 1346 must at the very least contemplate that there be some intended harm to the victim." Pet. 9; see also *id.* at 7 (no mail fraud occurs unless "the defendant either intended to inflict or actually inflicted" harm on the target).[2]

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ence that, "but for the actions of" petitioner and his brother, Sonoco "could have kept the whole $4,095,051.62" that was saved through the use of recycled plastics. Pet. 15. Thus, because of the fraudulent scheme, Sonoco paid a significant portion of its potential profits (more than $2.8 million) to petitioner and his brother as commissions. As James Vinyard testified, Sonoco may have "saved money" by using recycled plastic, "but [it] could have saved a lot more." Tr. 200. Petitioner nonetheless appears to argue that there was no fraud because James told Sonoco that it could save money by not using a broker. See *id.* at 12-13. That fact-bound contention lacks merit. Even if James told Sonoco it could save some money, he nonetheless concealed the facts that he was channeling the brokerage function to his own business—rather than seeking the best available deal—and that he and petitioner were making millions as a result.

[2] At points, petitioner appears to accept the proposition that *potential* harm to the employer is sufficient, objecting instead to the additional requirement that the potential injury be "reasonably foreseeable." See Pet. i. To the extent the court of appeals required the government to show not only a potential harm to the victim but also that the harm was reasonably foreseeable to petitioner, the imposition of that additional burden on the government caused petitioner no injury.

That contention is incorrect. To prove honest services mail fraud in violation of 18 U.S.C. 1341 and 1346, "the government need not prove either that the defendant intended to cause the victim economic or pecuniary harm or that such harm actually resulted from the scheme to defraud." *United States* v. *Rybicki*, 287 F.3d 257, 2002 WL 741636, at *4 (2d Cir. Apr. 23, 2002).[3] The cases petitioner cites do not support his contrary view, and often expressly reject it. For example, while petitioner relies on and quotes at length from *United States* v. *Frost*, 125 F.3d 346, 369 (6th Cir. 1997), cert. denied, 525 U.S. 810 (1998), see Pet. 5-6, *Frost* specifically holds that the government need *not* prove that the defendant intended to harm or actually harmed the victim. "[A] defendant accused of scheming to deprive another of honest services" in violation of Sections 1341 and 1346, *Frost* holds, "does *not* have to intend to inflict an economic harm upon the victim." 125 F.3d at 369 (emphasis added). Instead, under *Frost*, the government need "prove only that the defendant intended to breach his fiduciary duty, and reasonably *should have foreseen* that the breach would create an identifiable *economic*

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[3] Nevertheless, there was such harm in this case. See p. 11 & n.1 *supra*. Moreover, the jury was instructed that it could find petitioner guilty of mail fraud for "obtain[ing] money * * * by means of false or fraudulent pretenses, representations or promises" in violation of 18 U.S.C. 1341. Tr. 665. In this case, petitioner and his brother obtained millions of dollars from Sonoco through CSE, all under the fraudulent pretense that CSE was an independent broker, when in fact it was a shell designed to hide the fact that a Sonoco employee (petitioner's brother, James) was directing Sonoco's business to himself at a substantial profit. Petitioner does not raise any challenge to the jury instructions, nor has he disputed the sufficiency of the evidence on the "money or property" theory that was submitted to the jury.

risk to the victim." *Ibid.* (emphasis added). That is precisely the standard the court of appeals applied in this case. Pet. App. 17a, 19a.

Petitioner's reliance (Pet. 8-9) on *United States* v. *Sun-Diamond Growers*, 138 F.3d 961 (D.C. Cir. 1998), aff'd on other grounds, 526 U.S. 398 (1999), is misplaced for identical reasons. *Sun Diamond*, like *Frost*, rejects the claim that actual or intended injury must be proved. See 138 F.3d at 974 ("[W]e disagree with Sun-Diamond's contention that § 1346 and [*United States* v. *Lemire*, 720 F.2d 1327 (D.C. Cir.), cert. denied, 467 U.S. 1226 (1983),] require the government to show that the defendant intended to cause economic harm to his victim."). Instead, *Sun Diamond*, like *Frost*, holds that a misrepresentation or nondisclosure may constitute mail fraud if the misrepresentation or nondisclosure "poses an independent business risk to the employer," *i.e.*, if economic harm is "reasonably foreseeable." *Id.* at 973. In other words, where self-dealing by an employee in breach of a fiduciary duty is fraudulent, it may constitute an "honest services" fraud under Section 1346 if it exposes the employer to a reasonably foreseeable potential injury. See *United States* v. *Martin*, 228 F.3d 1, 17-18 (1st Cir. 2000); *Montani*, 204 F.3d at 768, 769; *United States* v. *DeVegter*, 198 F.3d 1324, 1330 (11th Cir. 1999), cert. denied, 530 U.S. 1264 (2000).[4]

The remaining cases cited by petitioner likewise do not support his position. In *United States* v. *Cochran*,

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[4] For the same reason, the courts of appeals generally agree that a public official commits "honest services" fraud if, in violation of state criminal law, he conceals his own financial interest in a transaction while undertaking discretionary action that will benefit that financial interest. See *United States* v. *Panarella*, 277 F.3d 678, 694-695 (3d Cir. 2002) (collecting cases).

109 F.3d 660 (10th Cir. 1997), see Pet. 6-7, the court of appeals held that the government must provide evidence "independent of the alleged scheme * * * to show fraudulent intent toward the alleged victims" in "*the absence of actual or potential harm*." 109 F.3d at 668 (emphasis added).[5] Here, there was "potential harm." As the court of appeals explained, petitioner's fraud deprived Sonoco of the opportunity to seek better prices from other brokers. Pet. App. 19a; pp. 10-11, *supra*. Similarly, in *United States* v. *Jain*, 93 F.3d 436, 442 (8th Cir. 1996), cert. denied, 520 U.S. 1273 (1997), the court of appeals did not require proof of an intent to harm the victim. Instead, declining to "define the outer limits of the private sector rights to 'honest services' that are now protected by § 1346," the court concluded that nondisclosure cannot support a mail fraud conviction unless it is "material." 93 F.3d at 442. The court concluded that the nondisclosure in that case was not material because there was no evidence that any of the alleged victims would have considered the information material if "it did not affect the quality or cost" of the services. *Ibid.* Here, in contrast, the deceit was material to Sonoco—it prevented Sonoco from learning that one of its employees was channeling Sonoco's business to himself at a substantial profit, and it prevented Sonoco from seeking better terms from a different broker or intermediary. Furthermore, neither *Cochran* nor *Jain* involved self-dealing by an employee with a

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[5] In *Cochran*, a bond underwriter negotiated a deal between a buyer and seller and received a secret fee from the buyer. The court ruled that an "honest services" fraud was not shown. The court stressed that the seller was not entitled to the fee, so that the underwriter's concealment of the fee did not harm the seller, and that the seller would not have changed his conduct if the disclosure had been made. 109 F.3d at 668-669.

fiduciary duty, so neither is particularly comparable to this case.[6]

Ultimately, petitioner's claim that the government must prove *actual* or *intended* economic loss to the victim is not an effort to construe Section 1346 but an attempt to nullify it. *Rybicki*, 2002 WL 741636, at *4 (rejecting proposed rule requiring "actual or intended economic or pecuniary harm to the victim" because "[s]uch a reading 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"). Even absent Section 1346, the mail fraud statute covers cases in which the defendant intended the victim to lose tangible property or money. As this Court explained in *McNally*—before Section 1346 was enacted—"the words 'to defraud'" in Section 1341 "refer 'to wronging one in his property rights by dishonest methods or schemes,' and 'usually signify the deprivation of something of value.'" 483 U.S. at 358. Section 1346 was enacted to cover cases in which there is no actual or intended economic loss to the victim—cases where the scheme deprives the victim of the "intangible right to honest services."[7]

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[6] Petitioner's reliance (Pet. 15-16) on *United States* v. *Barnes*, 125 F.3d 1287 (9th Cir. 1997); *United States* v. *Maurello*, 76 F.3d 1304 (3d Cir. 1996); and *United States* v. *Dickler*, 64 F.3d 818 (3d Cir. 1995), is also misplaced. Those cases involved the proper measure of loss under the Sentencing Guidelines. None of those cases involved the scope of Section 1346.

[7] Petitioner's reliance (Pet. 11-12) on *United States* v. *D'Amato*, 39 F.3d 1249 (2d Cir. 1994), is similarly misplaced. *D'Amato* did not involve a scheme to deprive the victim of its right to "honest services" in violation of 18 U.S.C. 1346. In any event, the Second Circuit recently clarified in *Rybicki* that it does *not* require proof

2. Although petitioner does not press the issue, the decision below states that the courts of appeals have adopted different tests for determining the scope of "honest services" frauds covered by Section 1346 in the private sector. Several courts of appeals have concluded that, in cases of private corruption, the government must show that the fraudulent scheme exposed the victim to "an identifiable economic risk," Pet. App. 17a, or "a reasonably foreseeable economic risk," *id.* at 19a. That standard—endorsed by petitioner and employed by the decision below—has been expressly adopted by the First, Second, Sixth, Eleventh, and District of Columbia Circuits. See *Rybicki*, 2002 WL 741636, at *7-*8; *Martin*, 228 F.3d at 17-18; *Frost*, 125 F.3d at 369; *DeVegter*, 198 F.3d at 1330; *Sun-Diamond*, 138 F.3d at 974.

Nonetheless, the decision below suggests that other courts have adopted a different standard for private-sector "honest services" fraud, requiring the government to prove that the defendant possessed fraudulent intent and made a material misrepresentation. Pet. App. 14a (citing cases from the Eighth and Tenth Circuits, among others). The government does not believe that those cases conflict with the cases that employ a foreseeable-business-risk test. The cases requiring proof of intent and materiality merely recognize that Section 1346 does not establish a separate fraud offense, but rather defines honest-services fraud under the mail-fraud offense created by Section 1341. Because fraudulent intent and materiality are elements of mail fraud under Section 1341, they are also elements of honest-services mail fraud under Sections 1341 and

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of actual or intended economic harm in a Section 1346 honest-services case. 2002 WL 741636, at *3-*4.

1346 (whether the mail fraud takes place in the private or public sector).

In *Cochran*, 109 F.3d at 667, the Tenth Circuit stated that Section 1346 "must be read against a backdrop of the mail and wire fraud statutes, thereby requiring fraudulent intent and a showing of materiality," citing the Eighth Circuit's decision in *Jain*, 93 F.3d at 442. *Jain*, in turn, did not attempt to "define the outer limits of the private sector rights to 'honest services' [under] § 1346." Instead, relying on the fact that Section 1346 "does not stand alone—it modifies the definition of 'scheme or artifice to defraud' in § 1341"—*Jain* held that materiality and intent always must be proved to establish mail fraud. 93 F.3d at 442. Those cases do not reject the identifiable-business-risk standard used in other circuits.[8]

In any event, petitioner does not argue that the court of appeals erred in requiring proof that "the nondisclosure pose[d] a business risk to the employer." Pet. 9; p. 10, *supra*. To the contrary, petitioner relies extensively on cases—such as *Frost* and *Sun-Diamond*—applying that test. Application of an intent-and-materiality formulation would not alter the outcome of this case. As the court of appeals explained, "application of the materiality approach" is often "identical to the reason-

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[8] The decision below also cited *United States* v. *Pennington*, 168 F.3d 1060, 1065 (8th Cir. 1999), and *United States* v. *Gray*, 96 F.3d 769 (5th Cir. 1996), cert. denied, 520 U.S. 1129 (1997). In *Pennington*, the Eighth Circuit stated only that proof of fraudulent intent could be inferred from a fiduciary's willful nondisclosure of "material information that he ha[d] a duty to disclose." 168 F.3d at 1065. In *Gray*, the Fifth Circuit upheld the defendants' convictions after finding that they failed to disclose material information, but did not otherwise determine the reach of Section 1346 in private honest-services fraud cases. 96 F.3d at 774-775.

ably foreseeable harm test." Pet. App. 15a n.7. A misrepresentation or omission is generally considered "material" if it "'has the natural tendency to influence or is capable of influencing' the employer to change his behavior." *Id.* at 15a. If a deception exposes an employer to an identifiable business risk, it is also material, "because an employer would almost certainly" consider altering "his business practices if disclosure of a fraud scheme revealed either forgone business opportunities or an economic threat." *Id.* at 15a n.7. Furthermore, in this case, fraudulent intent and materiality were manifest. James's active concealment of his self-dealing, despite his contractual obligation to disclose it, undoubtedly was "material." See *Carpenter* v. *United States*, 484 U.S. 19, 28 (1987); *United States* v. *Dial*, 757 F.2d 163, 168 (7th Cir.), cert. denied, 474 U.S. 838 (1985). And the intent to defraud was more than amply proved. Petitioner and his brother not only deceived Sonoco, but exploited that deception to enrich themselves by $2.8 million at Sonoco's expense.

3. Petitioner also contends (Pet. 17-27) that the government violated *Brady* v. *Maryland*, 373 U.S. 83 (1963), by suppressing the Swalis memorandum. That claim is largely fact-bound and does not warrant further review.

Because petitioner did not raise a *Brady* claim before the district court, the claim is reviewable only for plain error. See Fed. R. Crim. P. 52(b).[9] To establish plain error, a defendant must show that (1) there was an error, (2) the error was plain, and (3) the error affected

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[9] Petitioner suggests (Pet. 25) that he could not have raised the issue at trial because he was not aware of the issue then. If that is true, he could have raised the issue at sentencing, after informing the court that he had not received the Swalis memorandum at trial.

his substantial rights. See, *e.g.*, *Jones* v. *United States*, 527 U.S. 373, 388-389 (1999); *United States* v. *Olano*, 507 U.S. 725 (1993). Even if a defendant establishes those pre-requisities, a reviewing court should exercise its discretion to correct the error only if the error "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings." *Johnson* v. *United States*, 520 U.S. 461, 466-467 (1997); *Jones*, 527 U.S. at 388-389. In this case, there was no error, much less plain error.

Due process is violated if the prosecution suppresses evidence favorable to the accused where the evidence is material to guilt or punishment, regardless of the intent of the prosecutor. The duty to disclose the evidence applies even if the accused has not requested the evidence, and that duty applies to impeachment evidence as well as exculpatory evidence. Evidence is material if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *Strickler* v. *Greene*, 527 U.S. 263, 280 (1999); *United States* v. *Bagley*, 473 U.S. 667, 676 (1985); *Brady*, 373 U.S. at 87. Evidence is not "suppressed" if the defendant knew or should have known of the existence of the evidence at trial. See *Spicer* v. *Roxbury Corr. Inst.*, 194 F.3d 547, 557-558 (4th Cir. 1999); *United States* v. *Torres*, 129 F.3d 710, 716 (2d Cir. 1997).

The Swalis memorandum was neither exculpatory nor suppressed by the government. The memorandum did not exculpate petitioner because it was a hearsay statement by Swalis, a sentencing consultant, not a statement by James. Accordingly, petitioner could not have impeached James at trial with Swalis's statement. For that reason alone, there is no reason to believe that, had petitioner obtained the memorandum at or before

trial, he could have used it to alter the outcome of the case. Furthermore, the memorandum was not suppressed by the government. The memorandum was submitted in open court as a defense exhibit during James's sentencing hearing—a hearing that both petitioner and his lawyer attended.[10] In any event, the court of appeals properly concluded that, in view of the evidence, there was no reasonable probability that disclosure of the document would have altered the outcome of the trial. That case- and record-specific determination does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[10] Petitioner also argues (Pet. 25) that the government suborned perjury from James at trial. Petitioner's sole support for that contention, however, is the Swalis memorandum, which James never signed or otherwise verified.