

1 IN THE SUPREME COURT OF THE UNITED STATES

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[illegible]

4 Petitioner :

5 v. : No. 08-1196

6 UNITED STATES. :

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8 Washington, D.C.

9 Tuesday, December 8, 2009

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11 The above-entitled matter came on for oral
12 argument before the Supreme Court of the United States
13 at 11:19 a.m.

14 APPEARANCES:

15 DONALD B. AYER, ESQ., Washington, D.C.; on behalf of
16 the Petitioner.

17 MICHAEL R. DREEBEN, ESQ., Deputy Solicitor General,
18 Department of Justice, Washington, D.C.; on behalf of
19 the Respondent.

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1 P R O C E E D I N G S

2 (11:19 a.m.)

3 CHIEF JUSTICE ROBERTS: We'll hear argument
4 next in Case 08-1196, Weyhrauch v. United States.

5 Mr. Ayer.

6 ORAL ARGUMENT OF DONALD B. AYER

7 ON BEHALF OF THE PETITIONER

8 MR. AYER: Mr. Chief Justice, and may it
9 please the Court:

10 When counsel for the United States defended
11 the McNally prosecution before this Court in 1987, the
12 first thing he did was to acknowledge that many of the
13 existing intangible rights cases contained what he
14 called "extravagant" language that, on its face,
15 extended the doctrine far beyond the principle that one
16 can be guilty of fraudulently denying others the
17 performance of a clear legal duty that he owes.

18 I know that because the government lawyer
19 was me --

20 (Laughter.)

21 MR. AYER: And that was the only thing I
22 said that day that the 7-2 majority agreed with. But 22
23 years later, and one 28-word statute later, the United
24 States is now pressing to take that extravagant language
25 of the pre-McNally cases to the bank.

1 It does that by contending that a public
2 official commits honest services fraud simply by failing
3 to disclose an arguable conflict of interest, even
4 though he has no legal duty to disclose apart from the
5 words of 1346.

6 And it -- and it is possible to do that
7 under the extravagant words of the earlier cases by
8 relying on a supposed Federal common law fiduciary duty
9 of loyalty that is owed by all public officials,
10 including State officials, to their constituents.

11 CHIEF JUSTICE ROBERTS: So if the --
12 there were a State law that said you must disclose
13 anything that could reasonably be viewed as a conflict
14 of interest, then -- then you would lose?

15 MR. AYER: Your Honor, you are now asking me
16 the question about the outer perimeter of the statute.
17 My argument is that a duty -- some duty clear in the law
18 is absolutely necessary.

19 What kind of a duty would be sufficient is a
20 much more difficult question, and it's a difficult
21 question for -- for, essentially, two reasons.

22 One is, the duty must be clear and not
23 vague. That's one point.

24 The more complex point is a point relating
25 to this Court's clear statement rule and related

1 concepts concerning particular duties. If a State
2 creates a system of contractual duties, those duties
3 have certain consequences.

4 Generally speaking, contractual duties have
5 a consequence of paying damages. People conduct
6 themselves in certain ways in a contractual system.
7 They don't expect to go to jail, usually, for breaching
8 a contractual duty. Similarly --

9 JUSTICE ALITO: I mean, the mail fraud
10 statute carries a very heavy penalty, and are you -- you
11 are arguing that Congress intended to impose this
12 penalty on individuals who breach some Federal or State
13 disclosure requirement, even if that is viewed by the
14 body that is responsible for the disclosure requirement
15 as a very minor thing.

16 MR. AYER: Oh, I'm -- I'm -- Your Honor, if
17 I left that impression, let me completely reject it.
18 That is not at all what I'm arguing.

19 To the contrary, I am arguing that -- that
20 ultimately, the task this Court may decide it must
21 pursue -- which, I think, frankly, is quite separate
22 from our case, because our case is a case where there is
23 no duty, period, in the law, which I want to explain
24 procedurally why that's true -- if you are going to
25 decide that some duties are enough and other duties are

1 not, it is a very challenging thing to do, and a very --

2 JUSTICE ALITO: But that's what you're
3 asking us to do. I understand you are saying that --
4 that there cannot be a conviction without the violation
5 of some duty.

6 But if we agree with that, then we are going
7 down the road of deciding what sort of duty suffices,
8 and does it have to be a duty that is backed up by a
9 State criminal sanction?

10 What if -- what if it's a 1-year felony?
11 What if it's a misdemeanor? What if it's a -- simply a
12 civil penalty? What if it's simply some sort of
13 precatory code of ethics --

14 MR. AYER: Right.

15 JUSTICE ALITO: -- for legislators?

16 MR. AYER: Well, Your Honor, I -- let me --
17 I want to repeat again that -- that in -- in my view,
18 our case doesn't turn on my ability to satisfactorily
19 draw this line which no court has driven -- drawn
20 effectively in 50 years.

21 But I would -- I would say this: There are
22 two approaches that have been suggested that -- that
23 have fewer problems than others.

24 And one -- if you begin with the question of
25 duty and say, what duties will suffice -- and I'm not --

1 I'm not endorsing this; I'm simply saying it -- it pares
2 the covered duties back significantly to a point where
3 this Court might find it preferable to some other
4 approaches -- would be the one Your Honor mentioned,
5 criminal law duties, duties as to which the conduct
6 breached already is criminal.

7 There's a subsidiary question, I think:
8 Whether, in fact, you might want to require felony
9 duties, because there are different penalties with
10 regard to different duties.

11 JUSTICE GINSBURG: The real problem with
12 your approach, which I take it is you have to find these
13 duties in State law, is that some States will classify
14 the same conduct as a felony that another will classify
15 as a misdemeanor. So that line won't work. And then
16 some States will make something criminal that other
17 States won't.

18 So you're going to have, depending on
19 geography, people potentially subject to a 20-year term
20 because of the particularities of -- of a -- the State
21 law.

22 MR. AYER: I agree, Your Honor. That is --
23 that is a problem with it. And I am not -- I am not
24 here to endorse that as a satisfactory alternative. I'm
25 simply saying it's preferable to some of the others.

1 JUSTICE GINSBURG: But you are asking us to
2 say State law is the reference.

3 MR. AYER: No, Your Honor, I'm not. I'm
4 asking the Court -- and that's a confusion in the
5 question presented. This is a case in which the
6 government very clearly, and the trial court found, made
7 no attempt to produce anything other than 1346 as the
8 source of any Federal disclosure duty. There was no
9 Federal disclosure duty that they could point to
10 specifically dealing with disclosure.

11 The court -- the trial court ended up
12 focusing -- in fact, I'd like, if I could, to take a
13 couple of minutes on the procedure to establish sort of
14 the posture of this case, because I think it may
15 otherwise be confusing.

16 Essentially, what we had here was an
17 indictment that, when filed, in the vaguest of terms, it
18 alleged as the purpose -- and this is at joint appendix
19 page 35 -- the purpose of the scheme was for Company A
20 to agree to provide things of value to the Petitioner to
21 cause Petitioner to misuse his official authority for
22 the benefit of Company A. A traditional, simple
23 allegation of -- of bribery.

24 And there has never been a question in this
25 case that if the government thinks it can prove that

1 case, they are welcome to try. And -- and they can do
2 that, and in the course of doing that, they have -- it's
3 certainly open to them to show that the defendant didn't
4 specifically stand up and make an announcement that he
5 had submitted a job solicitation to Company A, as he had
6 submitted solicitations to a half a dozen other
7 employers, as is perfectly legal under Alaska law. So
8 all of that is fair game.

9 But a few days before trial, what ended up
10 happening here -- and this is where this case comes
11 from. A few days before trial, first in a trial brief
12 and thereafter in a motion in limine dealing with
13 submission of evidence, the government announced that it
14 wanted to -- to pursue what it called -- what the trial
15 court called its alternative theory; frankly, we think,
16 because they couldn't prove their bribery case.

17 And what they said their theory was, was
18 that when a public official -- this is in the trial
19 brief. There's an almost exact quote, similar, at J.A.
20 42 in the joint appendix. "When a public official fails
21 to disclose the existence of a conflict of interest,
22 whether required by law to do so or whether required by
23 fiduciary duty to do so, the public official can be
24 found guilty of honest services fraud, irrespective of
25 whether the public official took any action thereafter,

1 much less a fraudulent or harmful act."

2 In other words, Mr. Weyhrauch -- Mr.
3 Weyhrauch sent a solicitation letter, and that's about
4 the size of it. He sent a solicitation letter to a
5 number of people. He is a part-time legislator in a
6 State that has a citizen legislature that has made a
7 decision specifically not to have its -- its disclosure
8 rules be unduly burdensome. That's their own specific
9 language: They don't want them to be unduly burdensome.
10 They have required certain disclosures. They have not
11 required others.

12 The trial court here looked at the
13 government's motion, which was to put in evidence about
14 Alaska ethics rules in support of this alternative
15 theory. And, indeed, the court said -- and the court of
16 appeals, at 3a of the -- of the Pet. App. said that the
17 evidence was exclusively to pursue this alternative
18 theory that all you needed to do was fail to disclose in
19 breach of a fiduciary duty, and, bingo, if you go on
20 doing your job, you have committed honest services
21 fraud.

22 JUSTICE GINSBURG: But you have no objection
23 to what they call the quid pro quo theory; that is, I --
24 I want you to hire me after I leave the legislature, and
25 in return, I'm going to see what I can do to keep the

1 tax level low on the --

2 MR. AYER: Absolutely right, Your Honor.

3 And, in fact, if there is any doubt about that, all you
4 need to do is read at page 36a in the -- in the petition
5 appendix, where the court says exactly where the case
6 stands after his ruling.

7 He says at the end of his order, "This
8 leaves the United States to prove the honest services
9 fraud charges in this case based on violations of the
10 law other than a duty to disclose defendant's dealings
11 with VECO."

12 They can pursue any theory they want that --
13 that is a legitimate theory. They just can't come in
14 and say: You breached a duty to disclose. Alaska law
15 doesn't require that you disclose. There's no Federal
16 statute saying you have to disclose. It's just implicit
17 in the concept of honest services that you needed to
18 disclose this. Now, basically, I --

19 JUSTICE SCALIA: That's what the statute
20 says.

21 MR. AYER: I'm sorry.

22 JUSTICE SCALIA: That's what the statute
23 says.

24 MR. AYER: Well, it --

25 JUSTICE SCALIA: It says "honest services."

1 MR. AYER: Well, what happened here is that
2 the Ninth Circuit reversed the court of -- the court of
3 appeals excluded the evidence, which was offered only in
4 pursuit of that theory. Why? Because it said: I don't
5 have a State law violation; I don't have a clear Federal
6 law violation; the only way I can do this is by
7 invocation of Federal common law. And then he said, for
8 a variety of reasons, citing some cases: This is not
9 something I'm going to do; I think it's inappropriate.

10 The Ninth Circuit reversed, and the Ninth
11 Circuit essentially said -- and it's very much like what
12 I heard this morning from government's counsel -- that
13 section 1346 reinstated the pre-McNally law, including
14 all of its wonderful dicta and -- and wild phrases about
15 duties that exist, that nondisclosure -- and I think
16 this is even highly dubious; in fact, I think it's
17 flatly wrong -- that within that body of law,
18 nondisclosure of material information -- and this is
19 just standing alone. It's not nondisclosure in the
20 context of, I'm defrauding you; I'm tricking you out of
21 money, or I'm tricking you out of some duty that I
22 really -- sorry, Your Honor.

23 JUSTICE SOTOMAYOR: I understand them to be
24 saying nondisclosure of a conflict of interest, so they
25 are a little bit more --

1 MR. AYER: Well, I think that's right. I
2 think that's -- I think that's what -- and obviously
3 there is the materiality requirement, as the government
4 has said. But -- but as --

5 JUSTICE SOTOMAYOR: So why don't you take
6 them at their face, which is, they are saying it has to
7 be a nondisclosure of a conflict of interest that's
8 material?

9 MR. AYER: Right.

10 JUSTICE SOTOMAYOR: I think that's what --

11 MR. AYER: Well, that's right.

12 MR. AYER: -- they said earlier, and that's
13 what I'm understanding them to say now.

14 MR. AYER: No, I think you are right, Your
15 Honor.

16 JUSTICE SOTOMAYOR: So let's take it from
17 there.

18 MR. AYER: Okay.

19 JUSTICE SOTOMAYOR: Why is that --

20 MR. AYER: Well, I think --

21 JUSTICE SOTOMAYOR: -- not a limiting
22 principle?

23 MR. AYER: I think the -- the problem is
24 that if you -- if you ask the question in the context of
25 this pure nondisclosure theory, the materiality, as the

1 -- as the government articulated it here today and as I
2 think they have articulated it in their brief, was
3 whether it's reasonably likely to affect the decision of
4 the relevant whoever, the relevant person.

5 Now, as -- as Justice Breyer, I think,
6 indicated, it's very easy to talk about materiality when
7 you are talking about deception or concealment as a --
8 as a method of doing someone out of another thing.

9 JUSTICE SOTOMAYOR: It's -- it's much easier
10 in the public sector, I agree with you, to --

11 MR. AYER: But I'm -- but --

12 JUSTICE SOTOMAYOR: -- to talk about it in
13 the -- I'm sorry. In the private sector, it's easier to
14 talk about.

15 MR. AYER: But I'm talking -- I mean,
16 I -- I can -- I can well understand the concept of
17 bribery, say, where a public official has a duty to
18 award contracts to the lowest competent bidder, and
19 instead, he takes a bribe, and he awards the contract to
20 someone else. He -- you know, I can accept the notion
21 easily that he has defrauded -- in those terms, he has
22 defrauded the public out of its right to have him do
23 that job.

24 The materiality of a nondisclosure in that
25 setting is -- is coherent in the context of what he did

1 wrong. In other words, I hid the fact that I took a
2 bribe. I took the money in cash. I -- I put it in the
3 freezer.

4 JUSTICE SOTOMAYOR: I'm not sure that --
5 that whether he did it with disclosure or nondisclosure,
6 what would make the nondisclosure more meaningful?
7 Meaning, it's taking the bribe, whether he discloses it
8 or not --

9 MR. AYER: Well, but there are also --

10 JUSTICE SOTOMAYOR: -- and if he gets up on
11 the floor of -- of the legislature and says: You know,
12 I am going to vote for this bill because somebody paid
13 me money, he disclosed it. It doesn't make it any
14 better.

15 MR. AYER: Well, I don't know if it does or
16 not. I mean, I guess there is a fraud requirement here.
17 And if somebody actually does that openly, I don't know
18 if you can argue that he didn't -- that he didn't commit
19 fraud. But I don't want to push that, because that's
20 not something I have any interest in -- in promoting.

21 (Laughter.)

22 MR. AYER: But, in -- in any event, he
23 certainly took a bribe. But the -- but the point I am
24 making is that the nondisclosure, in the abstract --
25 and that's what the government is charging here -- is

1 impossible to evaluate the materiality of. So --

2 JUSTICE BREYER: No, I think they're
3 saying -- which I am getting gradually --

4 MR. AYER: I'm sorry.

5 JUSTICE BREYER: I think what he's saying
6 is: First, we know what bribery is; we can deal with
7 that one. Second, we know what kickbacks are; we can
8 deal with that one.

9 And what he means by the honest services
10 other than that is, imagine a list of 5 million bits of
11 honest service that a workman has to perform for his
12 employer. Now, on that list, there might be 35
13 requirements to disclose something where the interest of
14 the employer goes -- employee goes the other way.

15 And he's saying it violates the statute not
16 to do that in circumstances where the employee knows
17 that the failure to disclose will, in fact, lead the
18 employer, to whom he should have disclosed it, to make a
19 significant decision; namely, that decision to avoid
20 which was the reason he didn't disclose it.

21 MR. AYER: Right.

22 JUSTICE BREYER: Now, I think what he is
23 saying is that's rather precise. That fits with what
24 was there before, and therefore, all the government is
25 saying is: Now we have those three things. If you

1 didn't quite -- I didn't quite get that out of the
2 brief, but that may be my fault. All right? So anyway,
3 it was probably there; when I go back, I'll see it. And
4 those are the three things.

5 So he's saying: You see? It doesn't matter
6 the source as long as there is a clear legal obligation,
7 which could come from corporation law, for the employee
8 to disclose the conflict in this situation. I think
9 that's what it is.

10 Well, and so what's your response to that?

11 MR. AYER: Well, I think -- I mean, I could
12 argue with that, but I don't need to, because our
13 principal submission, Your Honor, is that -- that we win
14 this case because there is no clear duty to disclose.
15 And we win it because --

16 JUSTICE BREYER: You are saying, I take it,
17 that there was no duty in Alaska criminal law,
18 disclosure law, to disclose. I think you might find in
19 a treatise on agency that there is a duty to disclose.

20 MR. AYER: Well, there is no Alaska law --
21 it's absolutely clear and it is not disputed here. The
22 the trial court ruled there's no duty in Alaska law to
23 disclose whatever --

24 JUSTICE BREYER: Not even in the Uniform
25 Commercial Code or the --

1 MR. AYER: Well, one of the things -- well,
2 the government certainly didn't offer anything other
3 than what it offered, and the court looked at it and the
4 court said there's no duty -- he went through several
5 pages of saying there is no duty to disclose here, and
6 the government did not appeal. The government didn't
7 challenge that.

8 JUSTICE STEVENS: Let me just ask you --

9 MR. AYER: The government said: Well, it
10 doesn't matter.

11 JUSTICE STEVENS: I'm learning something
12 about the case that I didn't understand before. Are you
13 agreeing that if there were a duty to disclose exactly
14 what happened in this case, that then the statute would
15 have been violated?

16 MR. AYER: I'm not -- I'm not, Your Honor.
17 What I would do is bump the -- bump the inquiry to the
18 next level, which is where the Court was earlier today.
19 You then have to go to the question about what kinds of
20 duties would suffice.

21 My point is quite simple, and I don't think
22 it's evasive. You must have some duty --

23 JUSTICE STEVENS: I thought you were arguing
24 that a duty to disclose could never qualify.

25 MR. AYER: I -- well, I -- you could argue

1 that. I don't think -- you certainly don't need to
2 assume that.

3 JUSTICE STEVENS: I'm trying to figure out
4 what your position is, not what you could argue.

5 MR. AYER: Well, my position is that you
6 must have some duty, and there's no duty here other than
7 1346.

8 JUSTICE STEVENS: But if you then -- but if
9 you do have some duty, would the statute have been
10 violated on these -- on these facts?

11 MR. AYER: You --

12 JUSTICE STEVENS: If there were a duty to
13 disclose the negotiations of this prospective employer
14 or --

15 MR. AYER: Well, would you have -- you would
16 have to ask -- you would have to ask a couple of
17 questions, I think, further. You would have to ask:
18 What kind of a duty is it?

19 JUSTICE STEVENS: Well, it's a duty to
20 disclose those facts to the legislature.

21 MR. AYER: With a criminal penalty attached?

22 JUSTICE STEVENS: Well, I --

23 MR. AYER: Well, I think it matters, Your
24 Honor, because I think what you get into, when you are
25 evaluating whether a duty is sufficient, is you get into

1 a clear statement --

2 JUSTICE STEVENS: But your position is not
3 that there's no duty; it's that there is not a duty with
4 sufficiently severe penalties? Is that what your
5 position is?

6 MR. AYER: No, the point I'm making is
7 all about -- it's all about this Court's clear statement
8 rule. It's all about, when are we going to take
9 Congress, by using 28 very vague words, to have decided
10 to mix up and confuse an existing system of rules.

11 Let's say it's a State ethical process where
12 there's an administrative penalty. Maybe the maximum
13 penalty is a \$100 fine; maybe the maximum penalty is
14 censure. I talked about contracts earlier. There's
15 all kinds of regimes of rules and duties that we create
16 in society. Some of them are not even created by
17 government. Some of them are created by professional
18 associations, where if you are a member you owe a duty
19 to the professional association.

20 Which of these are we going to say are
21 duties of sufficient moment -- and then there's all of
22 the -- the common law corporate fiduciary duties. There
23 -- there's a whole array of duties. And the question of
24 which will suffice is not an easy question.

25 JUSTICE STEVENS: But that is not a -- your

1 position is not that there be no duty to disclose; you
2 are saying there is not a duty to disclose of sufficient
3 moment to justify criminal penalties.

4 MR. AYER: I -- I don't -- that's one way to
5 say it, sufficient moment, or of a character that makes
6 it appropriate.

7 I would say this: I think if the Court were
8 to go down the road and think in terms of, well, the
9 duties need to be criminal, and if they are criminal,
10 then they at least are duties that the entity that
11 created them -- it's (a) a government entity, it's a
12 government norm, it has criminal consequences, and that
13 -- that government body thought this conduct was
14 important enough to give criminal penalties to, maybe --
15 I don't -- I can't judge this, but maybe the Court would
16 look at that and say: Well, certainly, maybe we are
17 comfortable with thinking that Congress, with these
18 wonderful 28 words, actually meant to make the breach of
19 that criminal duty punishable under this statute.

20 JUSTICE KENNEDY: One of your arguments --
21 an important argument in your brief is the -- the
22 Federal balance, apart from vagueness for a moment --

23 MR. ESTRADA: Right.

24 JUSTICE KENNEDY: -- which was the lurking
25 problem here. You say it should be State law, because

1 then the Federal courts would at least tell States that
2 they can't enforce their own law strictly enough.

3 But if it's Federal law, then the Federal
4 government tells the States: Well, regardless of your
5 standards, we have our standards. I don't see much to
6 choose from in this --

7 MR. AYER: Well, I'm not sure I understand
8 --

9 JUSTICE KENNEDY: -- in those -- those two
10 alternatives.

11 MR. AYER: -- your question, Your Honor. I
12 -- it's certainly not our position that, for example, it
13 would be --

14 JUSTICE KENNEDY: You say if there's a
15 State law prohibition --

16 MR. AYER: Uh-huh.

17 JUSTICE KENNEDY: -- then this statute
18 applies. But then -- then the Federal government is
19 telling the States: Well, we don't like the way you
20 enforce your laws; we're going to do it.

21 MR. AYER: Well --

22 JUSTICE KENNEDY: So it seems to me there's
23 not much to choose between -- between the two arguments.

24 MR. AYER: Well, I guess the one thing I
25 want to make real clear is that -- that we are in no way

1 arguing that, for example, someone who violates the
2 Hobbs Act and -- and does it by using the mail and
3 otherwise satisfies the fraud provision, the fraud
4 requirement of the mail fraud statute and the mailing
5 requirement, we are certainly not here contending that
6 you couldn't prosecute him if you wanted to under this
7 statute. We're not arguing this is only State law
8 violations, in any way.

9 The point is, there's got to be --

10 JUSTICE GINSBURG: But then I don't
11 understand your question presented. I thought the
12 question presented is: Must the government prove the
13 defendant violated a disclosure duty imposed by State
14 law?

15 What you've been arguing isn't in sync with
16 what I thought the question presented was: Must you
17 look for the duty to State law?

18 MR. AYER: Your Honor, there's a story
19 there which I won't bore you with much of, but that's a
20 question that the government rewrote and the Court
21 adopted and I actually filed a motion. We filed a
22 motion suggesting a small insert, and the small insert,
23 which was not adopted, was the point that when there is
24 no Federal statute requiring disclosure -- in other
25 words, the facts of this case, if you take them and

1 internalize them, make that an accurate question
2 presented, but it's only an accurate question because
3 the government made no effort to come up with a Federal
4 disclosure requirement.

5 JUSTICE GINSBURG: But you are asking for a
6 State law reference, and that brings up the problem of
7 the variety of State law. And we do have in the mail
8 fraud property area a decision, the Cleveland
9 decision --

10 MR. AYER: Right.

11 JUSTICE GINSBURG: -- that says: Don't look
12 to how the States define property.

13 MR. AYER: Right.

14 JUSTICE GINSBURG: There should be a uniform
15 Federal definition. Why -- if we have done that, the
16 mail fraud statute in -- in connection with property,
17 why shouldn't we do it also with honest services?

18 MR. AYER: Well, Your Honor, I think -- I
19 think this is the situation -- it's certainly true --
20 the government cites the Jerome case as well for the
21 general proposition that you don't take a Federal
22 statute and just leap off and start applying State law
23 norms.

24 But -- but when the inherent nature of the
25 statute, like this one, which says -- we're talking

1 about public officials; mostly we're talking about
2 State officials; we're talking about rights, and
3 therefore, we're talking about duties -- most of the
4 legal duties -- if you are going to be requiring legal
5 duties, most of the legal duties that a State official
6 owes are State law duties. He owes them on account of
7 his role in the State government.

8 Plus, we are talking about the Federal
9 government, the Federal criminal statute, injecting
10 itself into the relationship of State officials with
11 their citizens and their government. And so the notion
12 that you -- you know, there's the De Sylva case from
13 1956, there's the Kamen case, the Brosnan case -- these
14 are all cases where the Court has recognized a
15 sensitivity about there are times when it makes sense
16 to look to, or at least consider as one of the elements,
17 State law norms.

18 And that's really all we are saying here, is
19 that State law rules, perhaps, could be sufficient. But
20 I want to just emphasize, again, we are not here -- I'm
21 -- I'm less helpful to you than perhaps I should be, but
22 we have a case to argue.

23 And our case should win on the simple ground
24 that the government has cited no real direct, you
25 know, disclosure obligation. All they have cited, and

1 all they want to rely on, are the words of 1346.

2 Now, that violates this Court's clear
3 statement rule, going in and messing around with
4 Alaska's existing rules of when you have to disclose and
5 when you don't.

6 Can Congress really have thought about that
7 and meant to do that? I'm sure not.

8 JUSTICE ALITO: What if there's a statute
9 that prohibits a legislator from engaging in certain
10 conduct and attaches a significant penalty to it, but
11 there is no statute that requires the disclosure of the
12 conduct?

13 MR. AYER: Well, there's -- there's an
14 argument to be made that the -- that the government
15 could pursue, and I don't want to say they could, but if
16 it's a criminal statute, there's an argument the
17 government could pursue their case on that theory.

18 It's not a disclosure theory. It's a theory
19 about -- you know, it's like a bribe. It's like, the
20 State said you can't do X; you did X, and you
21 fraudulently did X --

22 JUSTICE STEVENS: Let me give you this
23 example: Take the Judge Holzer case we all know about.
24 Suppose, in 49 States, it always violates State law, but
25 there's some State that has a special rule that, unless

1 the bribery exceeds \$1,000, there's no violation.

2 Would -- could he be prosecuted in the 49th State?

3 MR. AYER: Well, I think -- the first thing
4 I want to say is that I think that is counterfactual,
5 and they were talking about bribery. Bribery is
6 basically flatly illegal in every State.

7 JUSTICE STEVENS: But if it's not illegal

8 MR. AYER: If it's not illegal --

9 JUSTICE STEVENS: -- in the State I'm asking
10 you about?

11 MR. AYER: If it's not illegal, then I would
12 say that there has to be -- the conduct he engaged in
13 must be illegal under some law or it -- he didn't breach
14 a duty.

15 JUSTICE STEVENS: It does not have to be
16 Alaska law, then?

17 MR. AYER: I'm sorry?

18 JUSTICE STEVENS: In this case, it does not
19 have to be Alaska law, then?

20 MR. AYER: It wouldn't have to be Alaska
21 law. It has got to be some law, and it can't be 1346.

22 The other problem with it, I want to say
23 quickly and then sit down, is -- is this is making
24 Federal common law. This is courts coming in and
25 saying: You must disclose this and this and this, in

1 these circumstances and not in those.

2 JUSTICE STEVENS: But I'm just trying -- if
3 it's -- it's illegal in 47 States, but not in the State
4 in which the prosecution is brought, you say the Federal
5 rule could not apply?

6 MR. AYER: I would say that -- that -- yes,
7 that is my answer. And my answer is that because what
8 you have to find is that this person breached a duty.
9 If what he did was perfectly legal under the State law
10 where he was, just hypothetical -- hard to imagine -- if
11 he's committing bribery. Hard to imagine. Not true in
12 reality, but if that were true, he hasn't violated any
13 duty there.

14 Is there a Federal duty that that act of
15 taking a bribe violates? Well, if there is, then you
16 can prosecute it, and if there is not, then you can't.
17 And what I'm saying is, you can't make up a duty out of
18 28 words in 1346.

19 If I could reserve the rest of my time, Your
20 Honor?

21 CHIEF JUSTICE ROBERTS: Thank you, counsel.

22 Mr. Dreeben, welcome back.

23 ORAL ARGUMENT OF MICHAEL R. DREEBEN

24 ON BEHALF OF THE RESPONDENT

25 MR. DREEBEN: Thank you, Mr. Chief Justice.

1 It's good to be back.

2 (Laughter.)

3 MR. DREEBEN: The one thing that I think the
4 parties, the cases, and this Court, in its description
5 of section 1346 in Cleveland, agree on is that the
6 purpose of the statute was to restore at least some part
7 of the pre-McNally doctrine of intangible rights.

8 It, therefore, makes sense to take a look at
9 the theory of intangible rights violation that Mr. Ayer
10 very ably argued for the government when he argued the
11 McNally case.

12 (Laughter.)

13 JUSTICE GINSBURG: Before we do that,
14 Mr. Dreeben --

15 MR. DREEBEN: And that case -- that theory
16 --

17 JUSTICE GINSBURG: Mr. Dreeben, I would like
18 to ask you about this case particularly: One thing that
19 the prosecutor did, one thing that the Ninth Circuit
20 did.

21 So before we get to your larger theory of
22 anything, we have a particular case to deal with. We
23 have an Assistant U.S. Attorney who came to the judge
24 and said, we have alternate theories of this case. One
25 is the quid pro quo theory; the other -- and I am

1 reading from 42 of the appendix -- is that "a public
2 official can be found guilty of honest services fraud,
3 irrespective of whether the public official took any act
4 thereafter." Just the bare nondisclosure.

5 That was what the Assistant U.S. Attorney
6 was asking for.

7 MR. DREEBEN: That's what the document that
8 you are reading from said, Justice Ginsburg. One week
9 later, the government filed a clarification of its -- of
10 its position in response to Petitioner's briefing of the
11 issue, and this appears at pages 68 and 69 of the joint
12 appendix.

13 And in that filing, the government made
14 clear that its theory, consistent with the theory that I
15 am arguing here today, is that when the legislator takes
16 official action having an undisclosed conflict of
17 interest, that's when he violates the honest services
18 statute under the nondisclosure theory.

19 We are not here to urge that there is a
20 general duty of disclosure that is separate and apart
21 from any official act that the official takes. We are
22 not here to argue that there's a free-standing Federal
23 duty of disclosure that applies in all cases, regardless
24 of the other elements of the mail fraud statute.

25 JUSTICE GINSBURG: Then you must agree that

1 the Ninth Circuit was wrong, at least in this
2 particular -- this -- I'm now reading from 19a. One is
3 bribe, and that's -- everyone seems to agree that that
4 could come within the statute.

5 The second is (2) nondisclosure of
6 material information. Period. That's got to be wrong.

7 MR. DREEBEN: Well, Justice Ginsburg, I
8 think that's -- that's a shorthand summary of the
9 nondisclosure theory. The more accurate summary of the
10 government's theory is on page 20a, on the first full
11 paragraph that begins with the bracketed 9.

12 And it says, "Here, Weyhrauch allegedly
13 voted and took other official acts on legislation at the
14 direction of VECO while engaged in undisclosed
15 negotiations for future legal work from VECO."

16 And then it goes on to say, "These
17 allegations describe an undisclosed conflict of interest
18 and could also support an inference of a quid pro quo."
19 Furthermore, Petitioner --

20 JUSTICE SCALIA: Excuse me. I have been
21 trying to find out what you were referring to on pages
22 68 to 69.

23 MR. DREEBEN: On the bottom of page 68,
24 Justice Scalia, there's a italicized word, "first."
25 And it describes --

1 JUSTICE SCALIA: Yes.

2 MR. DREEBEN: -- the more detailed theory
3 that the government is elaborating, and then on page 69,
4 it says, quote, "By introducing amendments to and voting
5 on legislation that each defendant knew would affect
6 Company A, an entity with whom each defendant either had
7 or was negotiating for a financial relationship, each
8 defendant knowingly breached that duty of disclosure."

9 So I think the government tied up the
10 nondisclosure to the official act and that the Ninth
11 Circuit was not under an incorrect impression about
12 that. And more fundamentally, Petitioner says -- I
13 believe it's in footnote 6 of his opening brief -- that
14 that's not the issue before the Court, how to instruct
15 the jury on the duty of disclosure.

16 That's an issue that will arise, and I think
17 Petitioner's counsel said this to the district court --
18 it's in a page of the joint appendix that I don't have
19 at my fingertips -- that's a matter for jury
20 instructions. And we agree.

21 JUSTICE GINSBURG: But this is an opinion
22 that's going to govern district judges in the Ninth
23 Circuit. So I take it that your answer is that
24 nondisclosure of material information certainly is not
25 enough --

1 MR. DREEBEN: No, it's not enough, Justice
2 Ginsburg, not standing alone. It's when the official
3 takes action that furthers his undisclosed interest
4 without telling the decision-making body to which he
5 belongs that he becomes a fraud.

6 It's just like O'Hagan, Justice Ginsburg.
7 When O'Hagan, the lawyer, took the information from his
8 firm, posed as a loyal employee, the partner who comes
9 to work every day just doing his job, it became a fraud
10 when he took that information and used it in his own
11 securities trading.

12 Here, too, this is not a pure nondisclosure
13 theory. This is another form of corruption. It's the
14 kind of --

15 JUSTICE SOTOMAYOR: What if he had voted
16 against the legislation?

17 MR. DREEBEN: If he did not further his
18 undisclosed interests, then he does not breach the duty
19 that the government alleges.

20 JUSTICE SOTOMAYOR: So it's not merely the
21 taking official action; it's taking official action that
22 benefits him?

23 MR. DREEBEN: Correct. And --

24 JUSTICE ALITO: I imagine -- I'm sorry. I
25 imagine legislators must vote on all sorts of things

1 that have a -- an impact on their own financial
2 interests or the financial interests of their family or
3 associates.

4 For example, suppose this -- the Petitioner
5 was a practicing attorney. Suppose he's voting on an
6 overhaul of the rules of civil procedure, and some of
7 them may benefit him and his practice. Or suppose he's
8 voting on a new tax code, and the provisions may benefit
9 him or his family or his associates in a -- in a variety
10 of ways.

11 Don't you need some kind of a disclosure
12 code to separate the things that have to be disclosed
13 from the things that don't have to be disclosed, because
14 they are just too common?

15 MR. DREEBEN: You -- you could do it that
16 way, Justice Alito, but the way that the mail fraud
17 statute does it is it looks for the kind of personal
18 conflicting financial interest that, in the universal
19 view of the common law, raised a problem.

20 Those are interests that are different from
21 the public at large and that are not widely held by a
22 large segment of the community.

23 JUSTICE BREYER: And this is supposed to be
24 something that the average citizen who works there just
25 knows all about?

1 MR. DREEBEN: I think that when we are
2 talking about State legislative officers, when we are
3 talking about public officials, they know that they are
4 fiduciaries. They have a set of fiduciary obligations.
5 But to answer most directly, Justice Breyer, your
6 concern, which I believe goes to notice, and whether a
7 State legislator can be held criminally liable for
8 violating a standard stated as I have just stated it,
9 the government must prove in a criminal case an intent
10 to defraud. That means that the government must show
11 that the defendant sought to deceive the body to which
12 he belongs.

13 JUSTICE BREYER: He intended not to disclose
14 something, right.

15 MR. DREEBEN: And that he knew he was
16 breaching a duty. He does not need to know the legal
17 source of the duty. That's conventional law as in
18 Bryan v. United States. You can know that you are
19 acting illegally without knowing that it's Federal law,
20 State law, or local law --

21 JUSTICE BREYER: Okay, okay. I see.

22 MR. DREEBEN: -- but the government needs to
23 show that. And that means that in the typical case, the
24 government will point to some external standard, be it a
25 State criminal law, a State civil law, and --

1 CHIEF JUSTICE ROBERTS: But what if -- what
2 if that external standard imposed penalties vastly
3 different from the mail fraud statute? For example,
4 what if Alaska had a law here that said you must
5 disclose this, and if you fail to disclose it, you are
6 subject to 6 months in jail or a \$500 fine?

7 MR. DREEBEN: Well, there's --

8 CHIEF JUSTICE ROBERTS: It's a light
9 sentence because the disclosure obligations are
10 confusing, but -- and then the Federal prosecutor comes
11 along and says, well, you -- you are going away for 20
12 years because this violates 1346.

13 MR. DREEBEN: Well, we would have to show,
14 first of all, that he knew that he was breaching a legal
15 duty.

16 CHIEF JUSTICE ROBERTS: Yes, he knows that
17 he should disclose this, and --

18 MR. DREEBEN: Okay.

19 CHIEF JUSTICE ROBERTS: Yes.

20 MR. DREEBEN: Then my answer is we live in
21 a dual system in which citizens are governed by and
22 accountable both by their States and by the Federal
23 government.

24 CHIEF JUSTICE ROBERTS: So, you have no
25 problem with the idea that the State law, the source of

1 the duty to disclose, imposes a penalty of 6 months,
2 and the Federal law you say you can still go after him
3 not only 20 years but an additional 20 years?

4 MR. DREEBEN: But this is fundamental to the
5 government's position here, Mr. Chief Justice. It's not
6 imposing a criminal penalty for violation of the State
7 law duty. There is an independent Federal duty.
8 Congress was well aware that --

9 JUSTICE SOTOMAYOR: Please articulate it
10 again for me. I -- I am -- I don't think I'm being
11 thick. I'm trying to understand exactly what that duty
12 is, because I think I just heard something that doesn't
13 make sense to me. You are saying if there's a State
14 duty to disclose, a Federal duty to disclose, if they
15 are legal duties, that would violate it, and now
16 something else?

17 MR. DREEBEN: Well, Justice Sotomayor, what
18 I am trying to say to this Court this morning is that
19 what 1346 reinstated was the notion that if fiduciaries
20 have a duty not to further their own personal
21 conflicting financial interests by taking official
22 action, it becomes a Federal crime only when there is
23 both materiality and intent to defraud.

24 And to prove the intent to defraud element
25 that the individual intended to deprive the citizens of

1 their right of honest services, the government has to
2 know -- show that he knew he was breaching a fiduciary
3 duty. And the government can do that by offering
4 evidence, for example, that State law precluded the
5 action that he took -- the underlying action in this
6 case by Mr. Weyhrauch was prohibited by State law.

7 You are not permitted to vote on legislation
8 when you were negotiating for employment.

9 JUSTICE STEVENS: Let me ask you right at
10 that point: Does the prohibited action, namely, voting
11 -- does that vote have to be contrary to -- serve the
12 interest of the other party?

13 MR. DREEBEN: Yes, it does, Justice Stevens.
14 He has to be furthering his undisclosed interest. And
15 in this case he did it --

16 JUSTICE BREYER: So, now -- now think of
17 that answer -- complete that answer, if you can.

18 MR. DREEBEN: He did it in violation of a
19 State substantive duty, and the government's burden
20 will be to show he knew he was acting wrongfully.
21 And often we will do that by pointing to State law and
22 saying he violated State law or he violated an ethics
23 code that attached to him as a fiduciary. If not, we
24 are going to have to find some evidence of
25 circumvention, structuring transactions, nominee

1 accounts, surreptitious meetings, things that indicate
2 that an individual knows that he is acting fraudulently.

3 JUSTICE BREYER: Now, go back to -- I'm
4 trying to get you back to your general answer that you
5 wanted to give. And I -- I -- remember my list of 6,000
6 things --

7 MR. DREEBEN: Yes.

8 JUSTICE BREYER: -- which I made up, and
9 these are all the things that --

10 MR. DREEBEN: Yes.

11 JUSTICE BREYER: -- an employee owes an
12 employer.

13 MR. DREEBEN: Right.

14 JUSTICE BREYER: Now, some of them -- you
15 have taken out three -- no bribes, no kickbacks and no
16 conflicts of interest where that's defined in the
17 narrow way you've defined it. You have to know you
18 are not disclosing, you know you have the obligation,
19 you know action will be taken on it, and the action will
20 be taken to help somebody else or to the detriment of
21 the employer or something like that. Right?

22 MR. DREEBEN: Something like that.

23 JUSTICE BREYER: Something like that. Okay.

24 (Laughter.)

25 JUSTICE BREYER: So, now, I think, well, I

1 go back to Justice Scalia's language of that statute.

2 And I say, oh, my goodness, why did you pick these
3 three? I mean, I can easily -- I make up comical
4 examples because they illustrate the point.

5 MR. DREEBEN: Well, Justice Breyer, I --

6 JUSTICE BREYER: But I don't mean them to be
7 comical. Look, think of a person who is really angry at
8 his employer and he changes all the direction signs
9 around in the building to mislead him so that the
10 employer will miss the key meeting and make the wrong
11 decision.

12 MR. DREEBEN: Justice Breyer --

13 JUSTICE BREYER: I mean, why not that one?

14 MR. DREEBEN: -- I really don't think that
15 this Court needs to worry about that as a type of honest
16 services prosecution, because this was a defined
17 universe of cases --

18 JUSTICE BREYER: No, no. That's not my
19 point. I don't believe the way you've interpreted the
20 statute that you could or would -- could prosecute what
21 I just made up as a funny example.

22 MR. DREEBEN: Right.

23 JUSTICE BREYER: But I can make up thousands
24 of examples from the list, and I think Justice Scalia's
25 original point was something like, well, you've taken

1 some words, 28 words that cover 6,000 things, and out
2 of those 6,000 things, you have picked, perhaps
3 randomly, 3 which --

4 MR. DREEBEN: Well, I -- I think --

5 JUSTICE BREYER: -- you say it covers.

6 MR. DREEBEN: To say that we picked them
7 randomly --

8 JUSTICE BREYER: No, no, you picked them --
9 all right.

10 MR. DREEBEN: -- ignores the story of
11 McNally. And I think that if I could take a minute to
12 walk the Court through the legal history that brought us
13 to this, I think it would be helpful.

14 Before McNally, there was a body of case law
15 that made very clear that there was a substratum
16 fiduciary duty -- and I'll limit this to the public
17 official context for now, because that's the most
18 critical and important context. If you look at the
19 common law in every State, public officials are
20 fiduciaries. The core obligation of a fiduciary is the
21 duty of loyalty, the duty not to advance your personal
22 interests at the expense of the government who you
23 serve.

24 That core understanding of the duty of
25 loyalty informed the honest services cases that arose in

1 the courts of appeals, and for the most part, they
2 involved, as their core set of violations, bribes, in
3 which somebody is selling his office, so he's clearly
4 not serving the public; kickbacks, where the individual
5 is profiting at the expense of the government,
6 oftentimes in his official capacity, and sometimes not
7 profiting at the expense of the government, because the
8 government couldn't be harmed in a pecuniary way by the
9 kickback; and undisclosed conflicts of interest when the
10 official takes action to further that interest. And
11 that's --

12 JUSTICE SCALIA: Why didn't Congress say
13 that instead of -- instead of -- of setting up this mush
14 of language that doesn't even mention McNally, does not
15 use a phrase that any opinion pre-McNally used? That --
16 that phrase does not appear, as I understand, it in any
17 of the cases.

18 MR. DREEBEN: Justice -- Justice Scalia, the
19 phrase "intangible rights" is at the center of the
20 McNally majority opinion. The language "honest
21 services" is in the McNally dissent and in many of the
22 pre-McNally opinions. For those --

23 JUSTICE SCALIA: What is a citizen
24 supposed to do? He's supposed to go back and read all
25 those pre-McNally cases?

1 MR. DREEBEN: Well, I --

2 JUSTICE SCALIA: Why would it have been so
3 difficult for Congress to say no bribes, no kickbacks,
4 and -- and -- and the third thing, however you want to
5 describe it?

6 (Laughter.)

7 JUSTICE SCALIA: I mean, I think it's --
8 if -- if -- if you have a -- a principle that the
9 citizen is supposed to know when he's violating a
10 criminal statute, this is -- I mean, it is just too
11 much.

12 MR. DREEBEN: I think we would all agree,
13 Justice Scalia, that had Congress taken your counsel, I
14 would not be here today --

15 (Laughter.)

16 MR. DREEBEN: -- defending what the Congress
17 attempted to do. But I think that Congress viewed it as
18 a permissible and in some ways clearer way of getting to
19 the result it wanted, to point to the body of case law
20 with the recognition that it was understood in its core
21 aspects to cover what I have just described. And --

22 JUSTICE BREYER: I thought there was a
23 principle that a citizen is supposed to be able to
24 understand the criminal law that was around even before
25 Justice Scalia.

1 MR. DREEBEN: I understand that, Justice
2 Breyer --

3 (Laughter.)

4 MR. DREEBEN: -- but this would not -- this
5 is not an isolated area where the Court has recognized
6 that criminal sanctions need to take into account
7 decisional law.

8 CHIEF JUSTICE ROBERTS: I thought the
9 principle was that a citizen has to be able to
10 understand the law, and if he can't, then the law is
11 invalid.

12 MR. DREEBEN: Well, I think the principle is
13 that the Court has recognized -- and it has done so most
14 prominently in the Sherman Act and in the civil rights
15 statutes, 18 U.S.C., Section 241 and 242, that these are
16 broad statutes with general language, and in order to be
17 made susceptible of criminal punishment, you need two
18 things.

19 You need clarifying judicial decisions that
20 articulate the rights, and you need a standard of
21 scienter that will allow the government to convict only
22 those people who are on fair notice and act with a --
23 the bad purpose --

24 JUSTICE SCALIA: Number one, I am -- I am
25 not going to draw any generalities from the civil rights

1 statutes. I mean, this is an area unto itself, and,
2 number two, the Sherman Act explicitly --
3 "explicitly" -- clearly confers upon courts a common
4 law, a common law ability to define the crime.

5 And that doesn't appear from this statute.

6 MR. DREEBEN: Well, I wasn't citing the
7 Sherman Act as an example of formulating a common law of
8 crimes, but there is only one Due Process Clause,
9 Justice Scalia, so if it is constitutional to prosecute
10 under the civil rights statutes and under the Sherman
11 Act, then it is constitutional for this Court to divine
12 from the pre-McNally case law principles and to
13 articulate them.

14 JUSTICE BREYER: Well, the Sherman Act
15 criminalizes price fixing. You see, I can say that in
16 two words, intentional price fixing.

17 Do you think what we have been talking about
18 this morning can be reduced to anything like those two
19 words?

20 MR. DREEBEN: I think I've got it down to
21 around eight.

22 (Laughter.)

23 MR. DREEBEN: Let me -- let me just mention,
24 in the civil rights area, it may not answer your
25 concerns, Justice Scalia, but I think the Court should

1 know that, in the United States v. Kozminski, the Court
2 recognized -- and I am going to quote here -- that,
3 "Congress intended the statute to incorporate, by
4 reference, a large body of potentially evolving federal
5 law."

6 And the Court recognized that that was a
7 dilemma because you cannot have citizens criminally
8 prosecuted for evolving law of which the citizens have
9 no notice. And the Court's response was to say that,
10 when the right has been made specific by a decision of
11 this Court and there's the requisite level of scienter,
12 there is no due process problem in prosecuting --

13 JUSTICE SCALIA: There's no such thing as a
14 vague law, so long as this Court says, oh, what the
15 law -- the law -- it's absolutely unclear what the law
16 means, so long as this Court says, oh, we think the law
17 means -- what do you want to pick -- bribery, then --
18 then it's okay. Right?

19 MR. DREEBEN: Justice Scalia --

20 JUSTICE SCALIA: Is that the system we have,
21 that Congress can say, nobody shall do any bad things?

22 MR. DREEBEN: That's not what this --

23 JUSTICE SCALIA: And it comes to this Court,
24 and this Court says, bad things means bribery. And that
25 law is a valid law, right?

1 MR. DREEBEN: That's not what this law says,
2 and that's not what this Court has done in response to
3 other criminal law.

4 JUSTICE SCALIA: The principle that you're
5 arguing for, that -- that a law that is, on
6 its face, inherently vague can somehow be rendered
7 valid to the citizens by a decision of this Court?

8 MR. DREEBEN: But that's common. This
9 Court takes common law terms of art, such as fraud, and
10 it reads into them elements that are not on their face
11 on the basis of the common law.

12 Take, for example, 18 U.S.C. 1111, which is
13 the federal murder statute. It uses the phrase "malice
14 aforethought."

15 CHIEF JUSTICE ROBERTS: Well, that's a
16 familiar common law term. "Honest services" is not.

17 MR. DREEBEN: But it is a term of art that
18 had reference to a specific body of case law that could
19 not have been given a higher degree of prominence than
20 it was by this Court's decision in McNally, which
21 acknowledged that body of law, rejected it because it
22 said the mail fraud statute did not protect intangible
23 rights.

24 CHIEF JUSTICE ROBERTS: I'm not remembering.
25 Was the phrase "honest services" used in Lemire?

1 MR. DREEBEN: I don't recall, either,
2 Mr. Chief Justice --

3 CHIEF JUSTICE ROBERTS: Okay.

4 MR. DREEBEN: -- whether the phrase --

5 JUSTICE SCALIA: Well, you say it was a body
6 of law. It wasn't about a body of law. We said it was
7 wrong. So Congress is not here referring to some
8 established common law crimes at all.

9 It's referring to a mistaken series of
10 decisions by the courts of appeals.

11 MR. DREEBEN: Well, I can't --

12 JUSTICE SCALIA: And that's quite different
13 from -- from harking back to a common law term, such as
14 fraud.

15 MR. DREEBEN: In McNally, this Court said
16 that body of law was not a valid implementation of the
17 mail fraud statute, and it invited Congress to come back
18 and legislate if it wanted to protect intangible rights,
19 and Congress did that in a way that doesn't have the
20 commendable clarity of the statute that you just drafted
21 for us, Justice Scalia, but it does refer -- and I
22 think, for those members of the Court who read
23 legislative history, legislative history was replete
24 with references to the key cases on which we rely here,
25 such as United States v. Mandel and United

1 States v. Margiotta.

2 And it said this is a term of art. We know
3 that this is a term of art. It's been shaped by the
4 judiciary, but it doesn't just sit there as a
5 pre-standing duty that had no antecedents in the law
6 whatsoever.

7 JUSTICE GINSBURG: The problem is that --
8 that, even if the U.S. attorney got it right in the end,
9 if the U.S. attorney could think that all that's
10 involved is nondisclosure, even if no action is taken
11 thereafter, the U.S. attorney could write that down
12 twice, that suggests that this statute is open to a high
13 degree of interpretation.

14 MR. DREEBEN: Well, Justice Ginsburg, I
15 don't think that the Court should decide whether
16 Congress validly accepted this Court's invitation to
17 reinstate an important public corruption principle by
18 looking to what one United States attorney, one set of
19 federal prosecutors said in a pleading that was filed on
20 very short notice and that was --

21 JUSTICE SCALIA: But it's -- it's not --
22 it's not just one. One of the briefs in one or the
23 other of these cases describes the great variety of
24 "pushing the envelope" prosecutions that the Justice
25 Department has, indeed, pursued, and they are all over

1 the place.

2 And if the Justice Department can't figure
3 out what -- what is embraced by this statute, I don't
4 know how you can expect the average citizen to figure it
5 out.

6 MR. DREEBEN: Well, this body of law evolved
7 post-McNally, without this Court's intervention and
8 guidance to provide clarification. I think that the
9 core understanding of what honest services is may have
10 been strayed from in some of those cases, and some
11 courts of appeals affirmed it.

12 That doesn't mean that the statute is vague.
13 This Court accepted review in *Cleveland v. United States*
14 because the courts of appeals were divided on whether
15 defrauding a government agency of a license constituted
16 a deprivation of money or property. The U.S. attorneys
17 on one side of the split were very aggressively pushing
18 that theory. This Court held that it wasn't a valid
19 interpretation.

20 I think that it's the role of this Court and
21 the -- within the proper disposition of this Court's
22 authority to attempt to figure out what Congress did,
23 and then to implement it in accordance with doctrines
24 that are standard tools of the trade here -- rule of
25 lenity, concerns about federalism -- and recognize that

1 there is a core that Congress was looking at in the pre-
2 McNally cases, and that that core can be implemented
3 consistent with concerns about notice and clarity of
4 definition, without either creating a statute that is
5 totally freeform or without invalidating Congress's
6 effort to respond to the Court's invitation in McNally.

7 And, if I could turn to the question
8 presented in this case, which is whether State law
9 duties need to be violated, State law disclosure
10 obligations need to be violated in order to sustain a
11 valid mail fraud prosecution.

12 The pre-McNally cases and McNally itself
13 answers that because, in the McNally decision, this
14 Court acknowledged that the government's theory of
15 prosecution was that McNally and his cohorts were
16 accepting kickbacks in the form of commissions on
17 insurance contracts.

18 And the courts recognized that the
19 government's theory was they failed to disclose their
20 interest to persons in State government who were in a
21 position to take action with respect to that
22 information.

23 And the Court specifically said: We should
24 assume that there was no violation of any State law
25 obligations in holding those interests or no violation

1 of any State law duty to disclose.

2 That was the theory of prosecution that the
3 Court recognized the government was pursuing, and it was
4 entirely consistent with the pre-McNally cases, Mandel
5 and Margiotta, which were repeatedly cited in the
6 legislative history.

7 And I won't take the Court's time to read
8 language -- we've cited it in our brief -- where those
9 cases clearly said no State law duty was required to be
10 breached in order to state a prosecution.

11 There is still protection in this statute
12 against prosecutions of citizens without notice because,
13 as I said earlier, the government has to prove a
14 violation of the duty to disclose by the officials
15 taking action to further his undisclosed personal
16 interest, and the citizen cannot be prosecuted and
17 convicted without the government being able to show that
18 he knew that he was violating a duty to disclose.

19 JUSTICE BREYER: Well, let me ask a quick
20 question here. I notice, in the Skilling case, the
21 first question is whether the statute requires the
22 government to prove the defendant's conduct was intended
23 to achieve private gain, et cetera, and if not, whether
24 the statute is unconstitutionally vague.

25 Now, does that first question give the

1 government an opportunity sufficient to say whatever it
2 wants in its brief about the constitutional question?

3 MR. DREEBEN: Justice Breyer, until
4 Mr. Skilling files his brief and explains the kind of
5 argument that he wants to make, I can't answer you that
6 question. All I know is that in one of --

7 JUSTICE BREYER: All right. So we could
8 assume that, if you need time, at that time, you could
9 ask for whatever you wanted to ask for?

10 MR. DREEBEN: Certainly. And I don't -- the
11 government is not shying away from the question of
12 vagueness. The question of vagueness has been raised by
13 members of this Court as a legitimate concern.

14 I think it's a legitimate concern. That is
15 why the government has offered to this Court a theory
16 based on the prototypical and paradigm pre-McNally cases
17 that explains what Congress said when it effectively
18 pointed at that body of law and said those are the
19 intangible rights that we want to protect.

20 JUSTICE SCALIA: I have one --

21 JUSTICE STEVENS: May I ask you this
22 question? You -- you have described the issue in this
23 case as not merely a nondisclosure, but as you spell it
24 out, it seems to me it is actually a quid pro quo
25 theory.

1 MR. DREEBEN: It doesn't have to be quid pro
2 quo, Justice Stevens, because even if Mr. Weyhrauch had
3 not made an agreement with VECO that he was going to
4 vote the way that VECO wanted him to, and the government
5 does allege that, but even if he didn't do that, he knew
6 that he had a personal financial interest in securing
7 employment with VECO.

8 JUSTICE STEVENS: Yes, but you say that in
9 order for the violation to be complete, he must follow
10 up by voting in the interest of the company rather than
11 the polls?

12 MR. DREEBEN: He has to take official
13 action. That's where the breach of his duty and loyalty
14 --

15 JUSTICE STEVENS: And it has to be a
16 specific kind of official action.

17 MR. DREEBEN: Official action that furthers
18 his undisclosed interest. And to criminally prosecute
19 him, he has to know that's what he is doing, and just
20 to top it off, there are materiality ingredients both in
21 the conflict of interest and in the implied
22 misrepresentation of --

23 JUSTICE SCALIA: You -- you say he violated
24 State law? I -- I thought that the -- that the court
25 found that he didn't. You say he violated State law

1 when he voted.

2 MR. DREEBEN: Substantive State law
3 prohibited him from taking official action with respect
4 to a company whose interests would be benefited when he
5 was negotiating employment --

6 JUSTICE SCALIA: I thought they -- I thought
7 it was accepted in this case that -- that there was no
8 violation of Alaska law.

9 MR. DREEBEN: It's accepted Justice Scalia
10 that there's no duty to disclose under State law.

11 JUSTICE SCALIA: I -- I see.

12 MR. DREEBEN: That is solely what Petitioner
13 argues as being the deficiency in the government's case;
14 there's no State law duty to disclose.

15 JUSTICE SCALIA: Right.

16 MR. DREEBEN: My response is naturally
17 there's no duty under State law to disclose as a matter
18 of express State law.

19 JUSTICE SCALIA: Well, even --

20 MR. DREEBEN: State laws prohibit --

21 JUSTICE SCALIA: Even after he
22 discloses he still couldn't vote that way, so he's
23 supposed to vote against it even though he thinks it's a
24 good thing for the State to do?

25 MR. DREEBEN: He's supposed to abstain.

1 When he has a conflict of interest, he is supposed to
2 note that conflict and he's supposed to abstain. And we
3 argued --

4 CHIEF JUSTICE ROBERTS: Well, what if a
5 public official -- you said in response to Justice
6 Stevens that this actionable conduct has to benefit the
7 defendant's interest. What if his interest is a
8 particular policy contrary to that of his employer? In
9 other words, he is a subordinate official. His employer
10 says, I want you to do this and this to advance our
11 policy. He doesn't like the policy, so he does
12 something you can characterize as dishonest that
13 undermines the policy or advanced a different policy
14 that he agrees with.

15 MR. DREEBEN: That's not the sort of theory
16 of honest services that we're arguing for, Mr. Chief
17 Justice.

18 CHIEF JUSTICE ROBERTS: Why? Because it
19 doesn't involve tangible --

20 MR. DREEBEN: A personal, conflicting
21 financial interest. It may involve --

22 CHIEF JUSTICE ROBERTS: Financial.

23 MR. DREEBEN: That's right.

24 CHIEF JUSTICE ROBERTS: It has to involve
25 financial --

1 MR. DREEBEN: That's right. These -- the
2 core of public corruption is about adverse pecuniary
3 interests or benefits that an official is taking at the
4 expense of the citizenry by virtue of his position.

5 CHIEF JUSTICE ROBERTS: Well, where does the
6 right to honest services say "financial"?

7 MR. DREEBEN: I think it says it,
8 Mr. Chief Justice, by looking at the body of case law
9 that involved violations of the right of honest services
10 and seeing that that's what the government was after,
11 personal conflicting financial interests.

12 And this is not a subtle or obscure
13 principle of fiduciary law -- if I might finish my last
14 sentence.

15 CHIEF JUSTICE ROBERTS: Yes.

16 MR. DREEBEN: This is a bedrock principle of
17 the common law that exists in all 50 States, and the
18 mistake that the lower courts made in the pre-McNally
19 era was in thinking that the mail fraud statute
20 protected it, but there was no obscurity whatever that
21 the fiduciaries owe an obligation of undivided loyalty
22 to their principal.

23 That's what this statute is about.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Now, Mr. Ayer, you have 3 minutes remaining.

1 REBUTTAL ARGUMENT OF DONALD B. AYER

2 ON BEHALF OF THE PETITIONER

3 MR. AYER: Thank you, Your Honor. I have
4 four quick points I'd like to make.

5 The first one is that McNally is a case --
6 there were issues about the jury instructions, but the
7 basic fact pattern was clear. It was a kickback scheme.
8 It was illegal under the Kentucky constitution. There's
9 no question that if it were charged properly, it
10 could be convicted, and that's clear I think at page 11
11 of our yellow brief.

12 The second point I want to make is that this
13 talk about whether or not Petitioner violated the
14 statute about voting when he was in negotiations --
15 number one, the first answer to that is the government
16 is perfectly free to prove that case if they want to;
17 that's not before the Court. That's -- that's a
18 different theory that they can pursue. It's not the
19 disclosure theory.

20 But just by the way, he didn't violate it,
21 and the reason he didn't violate it, particularly in
22 light of what Mr. Dreeben has said -- first of all we
23 don't think he was in negotiations. He sent a letter.
24 There was never an offer either way. There weren't
25 negotiations, and that's been something that has been

1 talked about in the court.

2 Secondly, he voted; when he voted he
3 actually ended up voting twice on the bill in a form
4 that -- that VECO didn't want. So he actually -- and I
5 learned today -- and this is all, you know, shifting
6 sands -- that he has to have voted for the -- the way
7 that the conflicting interest would have had him vote.

8 So there's not, I think, a problem there.
9 If they want to pursue that, go to it. They have every
10 right to.

11 JUSTICE STEVENS: You're saying that you'll
12 win on the facts, not the theory.

13 MR. AYER: Yes. Yes, and they have the
14 right --

15 JUSTICE STEVENS: But that's not what we
16 have to decide.

17 MR. AYER: -- to pursue it.

18 And -- and the third point I want to make is
19 -- is that there is absolutely no doubt about this
20 question with regard to what -- what the issue was in
21 the court below. And I would simply direct a few
22 references to the -- and I'll read them very quickly.
23 But 23a -- these are all the district court opinion:
24 23a, the district court says he is dealing with the more
25 general proposition -- the government's more general

1 proposition -- that honest services fraud may be proved
2 by showing a violation of the duty to disclose. Then on
3 29a, the district court says "the proposition advanced
4 by the United States, that honest services may be proved
5 by establishing that a public official knowingly
6 concealed a conflict of interest," period.

7 Then, on 36a, at the end the court says, you
8 can bring any other theory you want other than the
9 nondisclosure theory. Now, did the government object?
10 Did the government at any time say, oh, no, that's not
11 our theory? No. They didn't; they adopted that, and
12 that's the theory they argued on appeal in the Ninth
13 Circuit. And that's exactly the theory that the Ninth
14 Circuit talked about when it has these two forms of core
15 conduct, one of which is -- is the conduct about failing
16 to disclose material information, period. Not in doing
17 anything else, just failing to disclose material
18 information re a conflict.

19 Finally, the government in this Court has
20 itself argued the case in a way that I think concedes
21 the point. And -- and that is, essentially, if you look
22 at the main heading in their brief on page 13, their
23 point is -- they finally say this, and then I think they
24 contradict themselves elsewhere, but they say in their
25 heading a "State official's violation of the honest

1 services statute by taking official action while
2 intentionally concealing a material conflict of
3 interest." That's it. No action for --

4 JUSTICE STEVENS: May I ask this question?
5 We might then say the theory that they described there
6 is inadequate. But would we then send the case back and
7 say decide it on the theory that Mr. Dreeben has
8 explained today?

9 MR. AYER: No, I think they made their
10 argument. They lost in the trial court. They are
11 pursuing this extreme, overreaching theory that -- that
12 they only can get to by the -- by the extravagant
13 language in the -- in the pre-McNally cases.

14 Thank you, Your Honor.

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 The case is submitted.

17 (Whereupon, at 12:20 p.m., the case in the
18 above-entitled matter was submitted.)

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