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P R O C E E D I N G S

(11:19 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument next in Case 08-1196, Weyhrauch v. United States.  
Mr. Ayer.

ORAL ARGUMENT OF DONALD B. AYER  
ON BEHALF OF THE PETITIONER

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

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

I know that because the government lawyer was me, and that was the only thing I said that day that the 7-2 majority agreed with. But 22 years later, and one 28-word statute later, the United States is now pressing to take that extravagant language of the pre-McNally cases to the bank.

It does that by contending that a public

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

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

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

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

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

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

23           The more complex point is a point relating  
24 to this Court's clear statement rule and related  
25 concepts concerning particular duty, is that the State

1 creates a system of contractual duties, those duties  
2 have certain consequences.

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

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

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

18 To the contrary, I am arguing that,  
19 ultimately, the task this Court may decide it must  
20 pursue -- which, I think, frankly, is quite separate  
21 from our case, because our case is a case where there is  
22 no duty, period, in the law, which I want to explain  
23 procedurally why that's true -- if you are going to  
24 decide that some duties are enough and other duties are  
25 not, it is a very challenging thing to do, and a very --

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

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

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

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

18 But I would -- I would say this: There are  
19 two approaches that have been suggested that -- that  
20 have fewer problems than others.

21 And, one, if you begin with the question of  
22 duty and say, what duties will suffice -- and I'm not --  
23 I'm not endorsing this; I'm simply saying it -- it pares  
24 the covered duties back significantly to a point where  
25 this Court might find it preferable to some other

1 approaches -- would be the one Your Honor mentioned,  
2 criminal law duties, duties as to which the conduct  
3 breached already is criminal.

4           There is a subsidiary question, I think:  
5 Whether, in fact, you might want to require felony  
6 duties, because there are different penalties with  
7 regard to different duties.

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

15           So you are going to have, depending on  
16 geography, people potentially subject to a 20-year term  
17 because of the particularities of -- of a -- the State  
18 law.

19           MR. AYER: I agree, Your Honor. That is --  
20 that is a problem with it. And I am not -- I am not  
21 here to endorse that as a satisfactory alternative. I  
22 am simply saying it is preferable to some of the others.

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

25           MR. AYER: No, Your Honor, I'm not. I'm

1 asking the Court -- and that's a confusion in the  
2 question presented. This is a case in which the  
3 government very clearly, and the trial court found, made  
4 no attempt to produce anything other than 1346 as the  
5 source of any Federal disclosure duty. There was no  
6 Federal disclosure duty that they could point to  
7 specifically dealing with disclosure.

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

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

21           And there has never been a question in this  
22 case that if the government thinks it can prove that  
23 case, they are welcome to try. And -- and they can do  
24 that, and in the course of doing that, they have -- it's  
25 certainly open to them to show that the defendant didn't



1 specifically stand up and make an announcement that he  
2 had submitted a job solicitation to Company A, as he had  
3 submitted solicitations to a half a dozen other  
4 employers, as is perfectly legal under Alaska law. So  
5 all of that is fair game.

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

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

24 In other words, Mr. Weyhrauch -- Mr.  
25 Weyhrauch sent a solicitation letter, and that's about

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

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

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

24           MR. AYER: Absolutely right, Your Honor.  
25 And, in fact, if there is any doubt about that, all you

1 need to do is read at page 36a in the -- in the petition  
2 appendix, where the court says exactly where the case  
3 stands after his ruling.

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

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

16 JUSTICE SCALIA: That's what the statute  
17 says.

18 MR. AYER: I'm sorry?

19 JUSTICE SCALIA: That's what the statute  
20 says. It says "honest services."

21 MR. AYER: Well, what happened here is that  
22 the Ninth Circuit reversed the court of -- the court of  
23 appeals excluded the evidence, which was offered only in  
24 pursuit of that theory. Why? Because it said: I don't  
25 have a State law violation; I don't have a clear Federal

1 law violation; the only way I can do this is by  
2 invocation of Federal common law. And then he said, for  
3 a variety of reasons, citing some cases: This is not  
4 something I'm going to do; I think it's inappropriate.

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

18 JUSTICE SOTOMAYOR: I understand them to be  
19 saying non-disclosure of a conflict of interest, so they  
20 are a little bit more --

21 MR. AYER: Well, I think that's right. I  
22 think that's -- I think that's what -- and obviously  
23 there is the materiality requirement, as the government  
24 has said. But as --

25 JUSTICE SOTOMAYOR: So why don't you take

1 them at their face, which is, they are saying it has to  
2 be a non-disclosure of a conflict of interest that's  
3 material?

4 MR. AYER: Right.

5 JUSTICE SOTOMAYOR: I think that's what they  
6 have said earlier, and that's what I'm understanding  
7 them to say here.

8 MR. AYER: No, I think you are right, Your  
9 Honor.

10 JUSTICE SOTOMAYOR: So let's take it from  
11 there.

12 MR. AYER: Okay.

13 JUSTICE SOTOMAYOR: Why is that not a  
14 limiting principle?

15 MR. AYER: Well, I think -- I think the --  
16 the problem is that if you -- if you ask the question in  
17 the context of this pure non-disclosure theory, the  
18 materiality, as the -- as the government articulated it  
19 here today and as I think they have articulated it in  
20 their brief, was whether it's reasonably likely to  
21 affect the decision of the relevant whoever, the  
22 relevant person.

23 Now, as -- as Justice Breyer, I think,  
24 indicated, it's very easy to talk about materiality when  
25 you are talking about deception or concealment as a --

1 as a method of doing someone out of another thing.

2 JUSTICE SOTOMAYOR: It's -- it's much easier  
3 in the public sector, I agree with you, to -- to talk  
4 about it in the -- I'm sorry. In the private sector,  
5 it's easier to talk about.

6 MR. AYER: But I'm -- I'm talking -- I mean,  
7 I -- I can -- I can well understand the concept of  
8 bribery, say, where a public official has a duty to  
9 award contracts to the lowest competent bidder. And  
10 instead, he takes a bribe, and he awards the contract to  
11 someone else. He -- you know, I can accept the notion  
12 easily that he has defrauded -- in those terms, he has  
13 defrauded the public out of its right to have him do  
14 that job.

15 The materiality of a non-disclosure in that  
16 setting is -- is coherent in the context of what he did  
17 wrong. In other words, I hid the fact that I took a  
18 bribe. I took the money in cash. I -- I put it in the  
19 freezer.

20 JUSTICE SOTOMAYOR: I am not sure that --  
21 that whether he did it with disclosure or  
22 non-disclosure, what would make the non-disclosure more  
23 meaningful; meaning, it's taking the bribe whether he  
24 discloses it or not, and if he gets up on the floor of  
25 -- of the legislature and says: You know, I am going to

1 vote for this bill because somebody paid me money, he  
2 disclosed it. It doesn't make it any better.

3 MR. AYER: Well, I don't know if it does or  
4 not. I mean, I guess there is a fraud requirement here.  
5 And if somebody actually does that openly, I don't know  
6 if you can argue that he didn't -- that he didn't commit  
7 fraud. But I don't want to push that, because that is  
8 not something I have any interest in -- in promoting.

9 (Laughter.)

10 MR. AYER: But, in -- in any event, he  
11 certainly took a bribe. But the -- but the point I am  
12 making is that the non-disclosure, in the abstract --  
13 and that's what the government is charging here -- is  
14 impossible to evaluate the materiality of.

15 JUSTICE BREYER: No, I think they are  
16 saying -- which I am getting gradually --

17 MR. AYER: I'm sorry?

18 JUSTICE BREYER: I think what he is saying  
19 is: First, we know what bribery is; we can deal with  
20 that one. Second, we know what kickbacks are; we can  
21 deal with that one.

22 And what he means by the honest services  
23 other than that is, imagine a list of 5 million bits of  
24 honest service that a workman has to perform for his  
25 employer. Now, on that list, there might be 35

1 requirements to disclose something where the interest of  
2 the employer goes -- employee goes the other way.

3 And he's saying it violates the statute not  
4 to do that in circumstances where the employee knows  
5 that the failure to disclose will, in fact, lead the  
6 employer, to whom he should have disclosed it, to make a  
7 significant decision; namely, that decision to avoid  
8 which was the reason he didn't disclose it.

9 MR. AYER: Right.

10 JUSTICE BREYER: Now, I think what he is  
11 saying is, that is rather precise. That fits with what  
12 was there before, and therefore, all the government is  
13 saying is: Now we have those three things. If you  
14 didn't quite -- I didn't quite get that out of the  
15 brief, but that may be my fault. All right. So anyway,  
16 it was probably there; when I go back, I'll see it. And  
17 those are the three things.

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

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

24 MR. AYER: Well, I think -- I mean, I could  
25 argue with that, but I don't need to. Because our



1 principal submission, Your Honor, is that -- that we win  
2 this case because there is no clear duty to disclose.  
3 And we win it because --

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

8 MR. AYER: Well, there is no Alaska law --  
9 it is absolutely clear and it is not disputed here, but  
10 the trial court ruled there is no duty in Alaska to  
11 disclose whatever --

12 JUSTICE BREYER: Not even in the uniform  
13 commercial code or the --

14 MR. AYER: Well, one of the things -- well,  
15 the government certainly didn't offer anything other  
16 than what it offered, and the court looked at it and the  
17 court said there is no duty -- they went through several  
18 pages of saying there is no duty to disclose here, and  
19 the government did not appeal. The government didn't  
20 challenge that. The government said: Well, it doesn't  
21 matter.

22 JUSTICE STEVENS: Let me just ask you -- I  
23 am learning something about the case that I didn't  
24 understand before. Are you agreeing that if there were  
25 a duty to disclose exactly what happened in this case,

1 that then the statute would have been violated?

2 MR. AYER: I'm not -- I'm not, Your Honor.  
3 What I would do is bump the -- bump the inquiry to the  
4 next level, which is where the court was earlier today.  
5 You then have to go to the question about what kinds of  
6 duties would suffice.

7 My point is quite simple and I don't think  
8 it's evasive, but --

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

11 MR. AYER: I -- well, I -- you could argue  
12 that. I don't think -- you certainly don't need to  
13 assume that.

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

16 MR. AYER: Well, my position is that you  
17 must have some duty and there is no duty here other than  
18 1346.

19 JUSTICE STEVENS: But if you then -- but if  
20 you do have some duty, would the statute have been  
21 violated on these -- on these facts?

22 MR. AYER: You --

23 JUSTICE STEVENS: If there were a duty to  
24 disclose the negotiations of this prospective employer  
25 --

1 MR. AYER: Well, would you have -- you would  
2 have to ask -- you would have to ask a couple of  
3 questions, I think, further. You would have to ask:  
4 What kind of a duty is it?

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

7 MR. AYER: With a criminal penalty attached?

8 JUSTICE STEVENS: Well, I --

9 MR. AYER: Well, I think it matters, Your  
10 Honor, because I think what you get into when you are  
11 evaluating whether a duty is sufficient, is you get into  
12 a clear statement --

13 JUSTICE STEVENS: Your position is not that  
14 there is no duty; it's that there is not a duty with  
15 sufficiently severe penalties? Is that what your  
16 position is?

17 MR. AYER: Well, the point I am making is  
18 all about -- it's all about this Court's clear statement  
19 rule. It's all about, when are we going to take  
20 Congress, by using 28 very vague words, to have decided  
21 to mix up and confuse an existing system of rules.

22 Let's say it's a State ethical process where  
23 there is an administrative penalty. Maybe the maximum  
24 penalty is a \$100 fine; maybe the maximum penalty is  
25 censure. I talked about contracts earlier. There is

1 all kinds of regimes of rules and duties that we create  
2 in society. Some of them are not even created by  
3 government. Some of them are created by professional  
4 associations, where if you are a member you owe a duty  
5 to the professional association.

6 Which of these are we going to say are  
7 duties of sufficient moment -- and then there is all of  
8 the common law corporate fiduciary duties. There --  
9 there is a whole array of duties and the question of  
10 which will suffice is not an easy question.

11 JUSTICE STEVENS: But that is not a -- your  
12 position is not that there be no duty to disclose; you  
13 are saying there is not a duty to disclose of sufficient  
14 moment to justify criminal penalties.

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

18 I would say this: I think if the Court were  
19 to go down the road and think in terms of, well, the  
20 duties need to be criminal, and if they are criminal,  
21 then they at least are duties that the entity that  
22 created them -- it's, A, a government entity, it's a  
23 government norm, it has criminal consequences, and that  
24 -- that government body thought this conduct was  
25 important enough to give criminal penalties to, maybe --

1 I don't -- I can't judge this, but maybe the Court would  
2 look at that and say: Well, certainly, maybe we are  
3 comfortable with thinking that Congress, with these  
4 wonderful 28 words, actually meant to make the breach of  
5 that criminal duty punishable under this statute.

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

9 MR. ESTRADA: Right.

10 JUSTICE KENNEDY: -- which is the working  
11 problem here. You say it should be State law, because  
12 then the Federal courts would at least tell States that  
13 they can't enforce their own law strictly enough.

14 But if it's Federal law, then the Federal  
15 government tells the States: Well, regardless of your  
16 standards, we have our standards. I don't see much to  
17 choose from in this -- in those -- those two  
18 alternatives.

19 MR. AYER: Well, I'm not sure I understand  
20 your question, Your Honor. I -- it is certainly not our  
21 position that, for example, it would be --

22 JUSTICE KENNEDY: You say if there is a  
23 State law prohibition --

24 MR. AYER: Uh-huh.

25 JUSTICE KENNEDY: -- then this statute

1 applies. But then -- then the Federal government is  
2 telling the States: Well, we don't like the way you  
3 enforce your laws; we're going to do it.

4 MR. AYER: Well --

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

7 MR. AYER: Well, I guess the one thing I  
8 want to make real clear is that -- that we are in no way  
9 arguing that, for example, someone who violates the  
10 Hobbs Act and -- and does it by using the mail, and  
11 otherwise satisfies the fraud provision, the fraud  
12 requirement of the mail fraud statute and the mailing  
13 requirement, we are certainly not here contending that  
14 you couldn't prosecute him if you wanted to under this  
15 statute. We are not arguing this is only State law  
16 violations in any way.

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

18 JUSTICE GINSBURG: But then I don't  
19 understand your question presented. I thought the  
20 question presented is: Must the government prove the  
21 defendant violated the disclosure duty imposed by State  
22 law?

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

1           MR. AYER: Your Honor, there is a story  
2 there which I won't bore you with much of, but that's a  
3 question that the government rewrote and the Court  
4 adopted and I actually filed a motion. We filed a  
5 motion suggesting a small insert, and the small insert,  
6 which was not adopted, was the point that when there is  
7 no Federal statute requiring disclosure -- in other  
8 words, the facts of this case, if you take them and  
9 internalize them, make that an accurate question  
10 presented, but it's only an accurate question because  
11 the government made no effort to come up with a Federal  
12 disclosure.

13           JUSTICE GINSBURG: But you are asking for a  
14 State law reference, and that brings up the problem of  
15 the variety of State law. And we do have in the mail  
16 fraud property area a decision, the Cleveland  
17 decision --

18           MR. AYER: Right.

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

21           MR. AYER: Right.

22           JUSTICE GINSBURG: There should be a uniform  
23 Federal definition. Why -- if we had done that, the  
24 mail fraud statute in -- in connection with property,  
25 why shouldn't we do it also with honest services?

1           MR. AYER: Well, Your Honor, I think -- I  
2 think this is the situation -- it is certainly true --  
3 the government sites the Jerome case as well, for the  
4 general proposition that you don't take a Federal  
5 statute and just leap off and start applying State law  
6 norms.

7           But -- but when the inherent nature of the  
8 statute, like this, one which says -- we are talking  
9 about public officials; mostly we are talking about  
10 State officials; we are talking about rights, and  
11 therefore, we are talking about duties -- most of the  
12 legal duties -- if you are going to be requiring legal  
13 duties, most of the legal duties that a State official  
14 owes are State law duties. He owes them on account of  
15 his role in the State government.

16           Plus, we are talking about the Federal  
17 government, the Federal criminal statute, injecting  
18 itself into the relationship of State officials with  
19 their citizens and their government. And so the notion  
20 that you -- you know, there's the DeSylva case from  
21 1956, there's the Kamen case, the Brosnan case -- these  
22 are all cases where the Court has recognized a  
23 sensitivity about, there are times where it makes sense  
24 to look to, or at least consider as one of the elements,  
25 State law norms.



1           And that's really all we are saying here, is  
2 that State law rules, perhaps, could be sufficient. But  
3 I want to just emphasize, again, we are not here -- I am  
4 less helpful to you than perhaps I should be, but we  
5 have a case to argue.

6           And our case should win on the simple ground  
7 that the government has cited no real direct -- you  
8 know, disclosure obligation. All they have cited, and  
9 all they want to rely on, are the words of 1346.

10           Now, that violates this Court's clear  
11 statement rule, going in and messing around with  
12 Alaska's existing rules of when you have to disclose and  
13 when you don't.

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

16           JUSTICE ALITO: What if there's a statute  
17 that prohibits a legislator from engaging in certain  
18 conduct and attaches a significant penalty to it, but  
19 there is no statute that requires the disclosure of the  
20 conduct?

21           MR. AYER: Well, there's -- there's an  
22 argument to be made that the -- that the government  
23 could pursue, and I don't want to say they could, but if  
24 it's a criminal statute, there is an argument the  
25 government could pursue their case on that theory.

1           It's not a disclosure theory. It's a theory  
2 about -- you know, it's like a bribe. It's like, the  
3 State said you can't do X; you did X, and you  
4 fraudulently did X --

5           JUSTICE STEVENS: Let me give you this  
6 example: Take the Judge Holzer case we all know about.  
7 Suppose, in 49 States, it always violates State law, but  
8 there is some State that has a special rule that, unless  
9 the bribery exceeds \$1,000, there is no violation.  
10 Would -- could he be prosecuted in the 49th State?

11           MR. AYER: Well, I think -- the first thing  
12 I want to say is that I think that is counterfactual,  
13 and they were talking about bribery. Bribery is  
14 basically flatly illegal in every State.

15           JUSTICE STEVENS: But if it's not illegal in  
16 the State I'm asking you about?

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

21           JUSTICE STEVENS: It does not have to be  
22 Alaska law, then?

23           MR. AYER: I'm sorry?

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

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

3 The other problem with it, I want to say  
4 quickly and then sit down, is -- is this is making  
5 Federal common law. This is courts coming in and  
6 saying: You must disclose this and this and this, in  
7 these circumstances and not in those.

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

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

20 Is there a Federal duty that that act of  
21 taking a bribe violates? Well, if there is, then you  
22 can prosecute it, and if there is not, then you can't.  
23 And what I'm saying is, you can't make up a duty out of  
24 28 words in 1346.

25 If I could reserve the rest of my time, Your

1 Honor?

2 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

3 Mr. Dreeben, welcome back.

4 ORAL ARGUMENT OF MICHAEL R. DREEBEN

5 ON BEHALF OF THE RESPONDENT

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

7 It's good to be back.

8 The one thing that I think the parties, the  
9 cases, and this Court, in its description of Section  
10 1346, would agree on, is that the purpose of the statute  
11 was to restore at least some part of the pre-McNally  
12 doctrine of intangible rights.

13 It, therefore, makes sense to take a look at  
14 the theory of intangible rights violation that Mr. Ayer  
15 very ably argued for the government when he argued the  
16 McNally case.

17 And that case -- that theory --

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

22 So before we get to your larger theory of  
23 anything, we have a particular case to deal with. We  
24 have an Assistant U.S. Attorney who came to the judge  
25 and said, we have alternate theories of this case. One

1 is the quid pro quo theory. The other -- and I am  
2 reading from 42 of the appendix -- is that "a public  
3 official can be found guilty of honest services fraud,  
4 irrespective of whether the public official took any act  
5 thereafter." Just the bare non-disclosure.

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

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

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

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

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

6 The second is, two, non-disclosure of  
7 material information, period. That's got to be wrong.

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

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

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

21 JUSTICE SCALIA: Excuse me. I have been  
22 trying to find out what you were referring to on pages  
23 68 to 69.

24 MR. DREEBEN: On the bottom of page 68,  
25 Justice Scalia, there is a italicized word, "first."

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

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

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

20           JUSTICE GINSBURG: But this is an opinion  
21 that is going to govern district judges in the Ninth  
22 Circuit, so I take it that your answer is that  
23 non-disclosure of material information certainly is not  
24 enough --

25           MR. DREEBEN: No, it's not enough, Justice

1 Ginsburg, not standing alone. It's when the official  
2 takes action that furthers his undisclosed interest  
3 without telling the decision-making body to which he  
4 belongs that he becomes a fraud.

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

11 Hereto, this is not a pure non-disclosure  
12 theory. This is another form of corruption. It's the  
13 kind of --

14 JUSTICE SOTOMAYOR: He had voted against the  
15 legislation.

16 MR. DREEBEN: If he did not further his  
17 undisclosed interests, then he does not breach the duty  
18 that the governmental --

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

22 MR. DREEBEN: Correct. And --

23 JUSTICE ALITO: I imagine -- I'm sorry. I  
24 imagine legislators must vote on all sorts of things  
25 that have a -- an impact on their own financial



1 interests or the financial interests of their family or  
2 associates.

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

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

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

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

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

25 MR. DREEBEN: I think that when we are

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

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

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

21 And that means that in the typical case, the  
22 government will point to some external standard, be it a  
23 State criminal law, a State civil law, and --

24 CHIEF JUSTICE ROBERTS: But what if that  
25 external standard imposed penalties vastly different

1 from the mail fraud statute? For example, what if  
2 Alaska had a law here that said you must disclose this,  
3 and if you fail to disclose it, you are subject to six  
4 months in jail or a \$500 fine? It's a light sentence  
5 because the disclosure obligations are confusing, but --  
6 and then the Federal prosecutor comes along and says,  
7 well, you -- you are going away for 20 years because  
8 this violates 1346.

9 MR. DREEBEN: Well, we would have to show,  
10 first of all, that he knew that he was breaching a legal  
11 duty.

12 CHIEF JUSTICE ROBERTS: Yes, he knows that  
13 he should disclose this.

14 MR. DREEBEN: Okay.

15 CHIEF JUSTICE ROBERTS: Yes.

16 MR. DREEBEN: Then my answer is, we live in  
17 a dual system in which citizens are governed by and  
18 accountable both by their States and by the Federal  
19 government.

20 CHIEF JUSTICE ROBERTS: So, you have no  
21 problem with the idea that the State law, the source of  
22 the duty to disclose, imposes a penalty of six months,  
23 and the federal law you say you can still go after him  
24 not 20 years but an additional 20 years?

25 MR. DREEBEN: But this is fundamental to the

1 government's position here, Mr. Chief Justice. It's not  
2 imposing a criminal penalty for violation of the State  
3 law duty. There is an independent Federal duty.

4 Congress was well aware that --

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

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

20 And to prove the intent to defraud element  
21 that the individual intended to deprive the citizens of  
22 their right of honest services, the government has to  
23 know -- show that he knew he was breaching a fiduciary  
24 duty. And the government can do that by offering  
25 evidence, for example, that State law precluded the

1 action that he took -- the underlying action in this  
2 case by Mr. Weyhrauch was prohibited by State law.

3 You are not permitted to vote on legislation  
4 when you had were negotiating for employment.

5 JUSTICE STEVENS: Let me ask you right at  
6 that point. Does the prohibited action, namely, voting,  
7 does that vote have to be contrary to -- serve the  
8 interest of the other party?

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

12 JUSTICE BREYER: So, now -- now think of  
13 that answer -- complete that answer.

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

24 JUSTICE BREYER: Now, go back to -- I'm  
25 trying to get you back to your general answer that you

1 wanted to give. And I -- I -- remember my list of 6,000  
2 things which I made up --

3 MR. DREEBEN: Yes.

4 JUSTICE BREYER: -- and these are all the  
5 things that --

6 MR. DREEBEN: Yes.

7 JUSTICE BREYER: -- an employer -- that an  
8 employee owes an employer.

9 MR. DREEBEN: Right.

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

18 MR. DREEBEN: Something like that.

19 JUSTICE BREYER: Something like that. Okay.

20 (Laughter.)

21 JUSTICE BREYER: So, now, I think we -- I go  
22 back to Justice Scalia's language of that statute. And  
23 I say, oh, my goodness, why did you pick these three? I  
24 mean, I can easily -- I make up comical examples because  
25 they illustrate the point.

1 MR. DREEBEN: Justice Breyer, I --

2 JUSTICE BREYER: But we don't need to be  
3 comical. Look, think of a person who is really angry at  
4 his employer and he changes all the direction signs  
5 around in the building to mislead him so that the  
6 employer will miss the key meeting and make the wrong  
7 decision.

8 MR. DREEBEN: Justice Breyer, I really don't  
9 think that this Court needs to worry about that as a  
10 type of honest service prosecution, because this was a  
11 defined universal case --

12 JUSTICE BREYER: No, that's not my point. I  
13 don't believe the way you interpreted the statute that  
14 you had could or would -- could prosecute what I just  
15 made up as a funny example.

16 MR. DREEBEN: Right.

17 JUSTICE BREYER: But I can make up thousands  
18 of examples from the list, and I think Justice Scalia's  
19 original point was something like, well, you've taken  
20 some words, 28 words that covered 6,000 things, and out  
21 of those 6,000 things, you have picked, perhaps  
22 randomly, three --

23 MR. DREEBEN: Well, I --

24 JUSTICE BREYER: -- which you say it covers.

25 MR. DREEBEN: To say that we picked they

1 randomly --

2 JUSTICE BREYER: No, no, you picked them --

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

7 Before McNally there was a body of case law  
8 that made very clear that there was a substratum  
9 fiduciary duty -- and I will limit it to the public  
10 context for now, because that is the most critical  
11 context and important context. If you look at common  
12 law in every State, public officials are fiduciaries.  
13 The core obligation of a fiduciary is the duty of  
14 loyalty, the duty not to advance your personal interests  
15 at the expense of the government who you serve.

16 That core understanding of the duty of  
17 loyalty informed the honest services cases that arose in  
18 the courts of appeals, and for the most part, they  
19 involved as their core set of violations bribes, in  
20 which somebody is selling his office, so he is clearly  
21 not serving the public; kickbacks, where the individual  
22 is profiting at the expense of the government,  
23 oftentimes in his official capacity, and sometimes not  
24 profiting at the expense of the government, because the  
25 government couldn't be harmed in a pecuniary way by the



1 kickback; and undisclosed conflicts of interest when the  
2 official takes action to further that interest. And  
3 that --

4 JUSTICE SCALIA: Why didn't Congress say  
5 that instead of -- instead of -- of setting up this mush  
6 of language that doesn't even mention McNally, does not  
7 use a phrase that any opinion pre-McNally used? That --  
8 that phrase does not appear, as I understand, it in any  
9 of the cases.

10 MR. DREEBEN: Justice -- Justice Scalia, the  
11 phrase "intangible rights" is at the center of the  
12 McNally majority opinion, the language "honest services"  
13 is in the McNally dissent and in many of the pre-McNally  
14 opinions. For those --

15 JUSTICE SCALIA: What is the citizen  
16 supposed to do? He is supposed to go back and read all  
17 those pre-McNally cases?

18 MR. DREEBEN: Well, I --

19 JUSTICE SCALIA: Why would it have been so  
20 difficult for Congress to say no bribes, no kickbacks,  
21 and -- and -- and the third thing, however you want to  
22 describe it?

23 (Laughter.)

24 JUSTICE SCALIA: I mean, I think it's --  
25 if -- if -- if you have a -- a principle that the

1 citizen is supposed to know and he is violating a  
2 criminal statute -- this is -- I mean, this is just too  
3 much.

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

7 (Laughter.)

8 MR. DREEBEN: Defending what the Congress  
9 attempted to do. But I think that Congress viewed it as  
10 a permissible and in some ways clearer way of getting to  
11 the result it wanted, to point to the body of case law  
12 with the recognition that it was understood in its core  
13 aspects to cover what I have just described.

14 JUSTICE BREYER: I thought there was a  
15 principle that a citizen is supposed to be able to  
16 understand the criminal law that was around even before  
17 Justice Scalia.

18 MR. DREEBEN: I understand that, Justice  
19 Breyer --

20 (Laughter.)

21 MR. DREEBEN: -- but this would not -- this  
22 is not an isolated area where the Court has recognized  
23 that criminal sanctions need to take into account  
24 decisional law.

25 CHIEF JUSTICE ROBERTS: I thought the

1 principle was that it has to be able to understand the  
2 law, and if it can't, then the law is invalid.

3 MR. DREEBEN: Well, I think the principle is  
4 that the Court has recognized -- and it has done so most  
5 prominently in the Sherman Act and in the civil rights  
6 statute, 18 U.S.C., Section 241 and 242, that these are  
7 broad statutes with general language, and in order to be  
8 made susceptible of criminal punishment, you need two  
9 things.

10 You need clarifying judicial decisions that  
11 articulate the rights, and you need a standard of  
12 scienter that will allow the government to convict only  
13 those people who are on fair notice and act with a-- the  
14 bad purpose --

15 JUSTICE SCALIA: Number one, I am -- I am  
16 not going to draw any generalities from the civil rights  
17 statutes. I mean, this is an area unto itself, and,  
18 number two, the Sherman Act explicitly --  
19 "explicitly" -- clearly confers upon courts a common  
20 law, a common law ability to define the crime.

21 And that doesn't appear from this statute.

22 MR. DREEBEN: Well, I wasn't citing the  
23 Sherman Act as an example of formulating a common law of  
24 crimes, but there is only one due process clause,  
25 Justice Scalia, so if it is constitutional to prosecute

1 under the civil rights statutes and under the Sherman  
2 Act, then it is constitutional for this Court to divine  
3 from the pre-McNally case law principles and to  
4 articulate --

5 JUSTICE BREYER: Well, the Sherman Act  
6 criminalizes price fixing. You see, I can say that in  
7 two words, intentional price fixing.

8 Do you think what we have been talking about  
9 this morning can be reduced to anything like these two  
10 words?

11 MR. DREEBEN: I think I have got it down to  
12 around eight.

13 (Laughter.)

14 MR. DREEBEN: Let me -- let me just mention,  
15 in the civil rights area, it may not answer your  
16 concerns, Justice Scalia, but I think the Court should  
17 know that, in the United States v. Kozminski, the Court  
18 recognized -- and I am going to quote here -- that,  
19 "Congress intended the statute to incorporate, by  
20 reference, a large body of potentially evolving federal  
21 law."

22 And the Court recognized that that was a  
23 dilemma because you cannot have citizens criminally  
24 prosecuted for evolving law of which the citizens have  
25 no notice. And the Court's response was to say that,

1 when the right has been made specific by a decision of  
2 this Court and there is the requisite level of scienter,  
3 there is no due process --

4 JUSTICE SCALIA: There is no such thing as a  
5 vague law, so long as this Court says, oh, what the  
6 law -- it is absolutely unclear what the law means, so  
7 long as this Court says, oh, we think the law means --  
8 what do you want to pick -- bribery, then -- then it's  
9 okay. Right?

10 MR. DREEBEN: Justice Scalia --

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

13 MR. DREEBEN: That's not what --

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

17 MR. DREEBEN: That's not what this law says,  
18 and that's not what this Court has done in response to  
19 other criminal law.

20 JUSTICE SCALIA: What is it -- what is it  
21 that you are arguing for, that -- that a law that is, on  
22 its face, inherently vague can, somehow, be rendered  
23 valid to the citizens by a decision of this Court?

24 MR. DREEBEN: But that is common. This  
25 Court takes common law terms of art, such as fraud, and

1 it reads into them elements that are not on their face  
2 on the basis of the common law.

3 Take, for example, 18 U.S.C. 1111, which is  
4 the federal murder statute. It uses the phrase "malice  
5 aforethought."

6 CHIEF JUSTICE ROBERTS: Well, that is a  
7 familiar common law term. Honest services is not.

8 MR. DREEBEN: But it is a term of art that  
9 had reference to a specific body of case law that could  
10 not have been given a higher degree of prominence than  
11 it was by this Court's decision in McNally, which  
12 acknowledged that body of law, rejected it because it  
13 said the mail fraud statute did not protect intangible  
14 rights.

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

17 MR. DREEBEN: I don't recall, either,  
18 Mr. Chief Justice.

19 CHIEF JUSTICE ROBERTS: Okay.

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

24 It's referring to a mistaken series of  
25 decisions by the courts of appeals.

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

2 JUSTICE SCALIA: And that's quite different  
3 from -- from harking back to a common law term, such as  
4 fraud.

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

17 And it said this is a term of art. We know  
18 that this is a term of art. It's been shaped by the  
19 judiciary, but it doesn't just sit there as a  
20 pre-standing duty that had no antecedents in the law  
21 whatsoever.

22 JUSTICE GINSBURG: The problem is that --  
23 that, even if the U.S. attorney got it right in the end,  
24 if the U.S. attorney could think that all that's  
25 involved is nondisclosure, even if no action is taken

1 thereafter, the U.S. attorney could write that down  
2 twice, that suggests that this statute is open to a high  
3 degree of interpretation.

4 MR. DREEBEN: Well, Justice Ginsburg, I  
5 don't think that the Court should decide whether  
6 Congress validly accepted this Court's invitation to  
7 reinstate an important public corruption principle by  
8 looking to what one United States attorney, one set of  
9 federal prosecutors said in a pleading that was filed on  
10 very short notice, and that --

11 JUSTICE SCALIA: But it's -- it's not --  
12 it's not just one. One of the briefs in one or the  
13 other of these cases describes the great variety of  
14 pushing the envelope prosecutions that the justice  
15 department has, indeed, pursued, and they are all over  
16 the place.

17 And if the justice department can't figure  
18 out what -- what is embraced by this statute, I don't  
19 know how you can expect the average citizen to figure it  
20 out.

21 MR. DREEBEN: Well, this body of law evolved  
22 post-McNally, without this Court's intervention and  
23 guidance to provide clarification. I think that the  
24 core understanding of what honest services is may have  
25 been strayed from in some of those cases, and some



1 courts of appeals affirmed it.

2 That doesn't mean that the statute is vague.  
3 This Court accepted review in *Cleveland v. United States*  
4 because the courts of appeals were divided on whether  
5 defrauding a government agency of a license constituted  
6 a deprivation of money or property.

7 The U.S. attorneys on one side of the split  
8 were very aggressively pushing that theory. This Court  
9 held that it wasn't a valid interpretation. I think  
10 that it's the role of this Court and the -- within the  
11 proper disposition of this Court's authority to attempt  
12 to figure out what Congress did, and then to implement  
13 it in accordance with doctrines that are standard tools  
14 of the trade here, rule of lenity, concerns about  
15 federalism, and recognize that there is a core that  
16 Congress was looking at in the pre-McNally cases, and  
17 that that core can be implemented consistent with  
18 concerns about notice and clarity of definition, without  
19 either creating a statute that is totally freeform or  
20 without invalidating Congress' effort to respond to the  
21 Court's invitation in *McNally*.

22 And, if I could turn to the question  
23 presented in this case, which is whether State law  
24 duties need to be violated, State law disclosure  
25 obligations need to be violated in order to sustain a

1 valid mail fraud prosecution.

2           The pre-McNally cases and McNally itself  
3 answers that because, in the McNally decision, this  
4 Court acknowledged that the government's theory of  
5 prosecution was that McNally and his cohorts were  
6 accepting kickbacks in the form of commissions on  
7 insurance contracts.

8           And the courts recognized that the  
9 government's theory was they failed to disclose their  
10 interest to persons in State government who were in a  
11 position to take action with respect to that  
12 information.

13           And the court specifically said, we should  
14 assume that there was no violation of any State law  
15 obligations in holding those interests or no violation  
16 of any State law duty to disclose.

17           That was the theory of prosecution that the  
18 Court recognized the government was pursuing, and it was  
19 entirely consistent with the pre-McNally cases, Mandel  
20 and Margiotta, which were repeatedly cited in the  
21 legislative history.

22           I won't take the Court's time to read  
23 language, we cited it in our brief, where those cases  
24 clearly said, no State law duty was required to be  
25 breached in order to state a prosecution.

1           There is still protection in this statute  
2 against prosecution of citizens without notice because,  
3 as I said earlier, the government has to prove a  
4 violation of the duty to disclose by the officials  
5 taking action to further his undisclosed personal  
6 interest, and the citizen cannot be prosecuted and  
7 convicted without the government being able to show that  
8 he knew that he was violating a duty to disclose.

9           JUSTICE BREYER: I notice, in the Skilling  
10 case, the first question is whether the statute requires  
11 the government to prove the defendant's conduct was  
12 intended to achieve private gain, et cetera, and if not,  
13 whether the statute is unconstitutionally vague.

14           Now, does that first question give the  
15 government an opportunity sufficient to say whatever it  
16 wants in its brief about the constitutional question?

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

21           JUSTICE BREYER: All right. So then -- so  
22 we could assume that, if you need time, at time -- at  
23 that time, you could ask for whatever you wanted to ask  
24 for?

25           MR. DREEBEN: Certainly. And I don't -- the

1 government is not shying away from the question of  
2 vagueness. The question of vagueness has been raised by  
3 members of this Court as a legitimate concern.

4 I think it's a legitimate concern. That is  
5 why the government has offered to this Court a theory  
6 based on the prototypical and paradigm pre-McNally cases  
7 that explains what Congress said when it effectively  
8 pointed at that body of law and said, those are the  
9 intangible rights that we want to protect.

10 JUSTICE STEVENS: May I ask this question?  
11 You -- you describe the issue in this case as not merely  
12 a nondisclosure, but as you spell it out, it seems to me  
13 it is actually a quid pro quo theory.

14 MR. DREEBEN: It doesn't have to be quid pro  
15 quo, Justice Stevens, because even if Mr. Weyhrauch had  
16 not made an agreement with VECO that he was going to  
17 vote the way that VECO wanted him to, and the government  
18 does allege that, but even if he didn't do that, he knew  
19 that he had a personal financial interest in securing  
20 employment with VECO.

21 JUSTICE STEVENS: You say in order for the  
22 violation to be complete he must follow up by voting in  
23 the interest of the company rather than the post?

24 MR. DREEBEN: He has to take official  
25 action. That's where the breach of fiduciary --

1 JUSTICE STEVENS: And it has to be a  
2 specific kind of official action.

3 MR. DREEBEN: Official action that furthers  
4 his undisclosed interest. And to criminally prosecute  
5 him, he has to know that is what he is doing, and just  
6 to top it off, there are materiality ingredients both in  
7 the conflict of interest and in the implied  
8 misrepresentation.

9 JUSTICE SCALIA: You -- you say he violated  
10 State law? I -- I thought that the -- that the court  
11 found that he didn't. You say he violated State law  
12 when he voted.

13 MR. DREEBEN: Substantive State law  
14 prohibited him from taking official action with respect  
15 to a company whose interests would be benefited when he  
16 was negotiating employment --

17 JUSTICE SCALIA: I thought it was accepted  
18 in this case that -- that there was no violation of  
19 Alaska law.

20 MR. DREEBEN: It is accepted Justice Scalia  
21 that there is no duty to disclose under State law.

22 JUSTICE SCALIA: I -- I see.

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

1 JUSTICE SCALIA: Right.

2 MR. DREEBEN: My response is naturally there  
3 is no duty under State law to disclose as a matter of  
4 expressed State law.

5 JUSTICE SCALIA: Well, even -- even after he  
6 discloses he still couldn't vote that way, so he's  
7 supposed to vote against it even though he thinks it's a  
8 good thing for the State to do?

9 MR. DREEBEN: He's supposed to abstain.  
10 When he has a conflict of interest, he is supposed to  
11 note that conflict and he's supposed to abstain. And we  
12 argue --

13 CHIEF JUSTICE ROBERTS: Well, what if a  
14 public official -- you said in response to Justice  
15 Stevens that this actionable conduct has to benefit the  
16 defendant's interest. What if his interest is a  
17 particular policy contrary to that of his employer? In  
18 other words, he is a subordinate official, his employer  
19 says I want you to do this and this to advance our  
20 policy. He doesn't like the policy, so he does  
21 something you can characterize as dishonest that under  
22 undermines the policy or advanced a different policy  
23 that he agrees with.

24 MR. DREEBEN: That's not the sort of theory  
25 of honest services that we're arguing for, Mr. Chief

1 Justice.

2 CHIEF JUSTICE ROBERTS: Why? Because it  
3 doesn't involve tangible --

4 MR. DREEBEN: A personal, conflicting  
5 financial interest. It may involve --

6 CHIEF JUSTICE ROBERTS: Financial.

7 MR. DREEBEN: That's right.

8 CHIEF JUSTICE ROBERTS: It has to involve  
9 financial --

10 MR. DREEBEN: That's right. These -- the  
11 core of public corruption is about adverse pecuniary  
12 interests or benefits that a official is taking at the  
13 expense of the citizenry by virtue of his --

14 CHIEF JUSTICE ROBERTS: Well, where does the  
15 right to honest services say financial?

16 MR. DREEBEN: I think it says it,  
17 Mr. Chief Justice, by looking at the body of case law  
18 that involved violations of the right of honest service  
19 and seeing that that's what the government was after,  
20 personal conflicting financial interests.

21 And this is not a subtle or obscure  
22 principle of fiduciary law, if I might finish my last  
23 sentence. This is a bedrock principle of the common law  
24 that exists in all 50 States, and the mistake that the  
25 lower courts made in the pre-McNally era was in thinking

1 that the mail fraud statute protected it, but there was  
2 no obscurity whatever that the fiduciaries owe an  
3 obligation of undivided loyalty to their principal;  
4 that's what this statute is about.

5 CHIEF JUSTICE ROBERTS: Thank you, counsel.

6 Mr. Ayer, you have three minutes remaining.

7 REBUTTAL ARGUMENT OF DONALD B. AYER

8 ON BEHALF OF THE PETITIONER

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

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

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



1           But just by the way, he didn't violate it,  
2 and the reason he didn't violate it, particularly in  
3 light of what Mr. Dreeben has said, first of all we  
4 don't think he was in negotiations. He sent a letter.  
5 There was never an offer either way. There weren't  
6 negotiations, and that's been something that has been  
7 talked about in the Court.

8           Secondly he voted; when he voted he actually  
9 ended up voting twice on a bill in a form that -- that  
10 VECO didn't want. And so he actually -- and I learned  
11 today, and this is all, you know, shifting sands, that  
12 he has to have voted for the - the way that the  
13 conflicting interest would have had him vote.

14           So there is not a problem there. If they  
15 want to pursue that, go to it. They have every right  
16 to.

17           JUSTICE STEVENS: You're saying that you  
18 will win on the facts, not the theory.

19           MR. AYER: Yes. Yes. And they have the  
20 right to pursue it.

21           And -- and the third point I want to make is  
22 -- is that there is absolutely no doubt about this  
23 question with regard to what -- what the issue was in  
24 the court below. And I would simply direct a few  
25 references to the -- and I will read them very quickly.

1 But 23a, these are all a district court opinion: 23a  
2 the district court says he is dealing with the more  
3 general proposition, the government's more general  
4 proposition that honest services fraud may be proved by  
5 showing a violation of the duty to disclose. Then on  
6 29a the district court says the proposition advanced by  
7 the United States that honest service may be established  
8 that a public official knowingly concealed a conflict of  
9 interest, period.

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

22 Finally, the government in this Court has  
23 itself argued the case in a way that I think concedes  
24 the point. And -- and that is, essentially, if you look  
25 at the main heading in their brief on page 13, their

1 point is -- they finally say this and then I think they  
2 contradict themselves elsewhere, but they say in their  
3 heading a state official's violation of the honest  
4 services statute by taking official action while  
5 intentionally concealing a material conflict of  
6 interest. That's it. No action for anybody -- -

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

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

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
18 The case is submitted.

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

21  
22  
23  
24  
25

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