

# A POTENT FEDERAL PROSECUTORIAL TOOL: *WEYHRAUCH v. UNITED STATES*

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## I. INTRODUCTION

Since its revision in 1988, the federal mail fraud statute<sup>1</sup> and its accompanying “honest services” provision<sup>2</sup> have been used together to prosecute corrupt public officials and private employees.<sup>3</sup> By December 31, 1990, barely two years after § 1346 was passed, 1,561 state and local officials awaited trial on corruption charges, many of which included mail fraud charges.<sup>4</sup> The statute was used to convict a local housing official who failed to disclose a conflict of interest<sup>5</sup> and to convict students who conspired with their professors to submit plagiarized work.<sup>6</sup> It is currently being used to prosecute a former Alaska state legislator who concealed his dealings with an oil company while lobbying his colleagues in the legislature to pass legislation favorable to the oil company.<sup>7</sup>

The circuit courts are divided on how to interpret § 1346, the

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1. 18 U.S.C.A. § 1341 (West 2006). The history of the federal mail fraud statute traces back to 1872, when it was passed in an effort to prevent the use of the Post Office (now the Postal Service) to further fraudulent schemes. For a brief overview of the statute and its history, see Michael K. Avery, *Whose Rights? Why States Should Set the Parameters for Federal Honest Services Mail and Wire Fraud Prosecutions*, 49 B.C. L. REV. 1431, 1434–35 (2008).

2. 18 U.S.C.A. § 1346 (“For the purposes of this chapter, the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.”)

3. *Sorich v. United States*, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting), *denying cert. to United States v. Sorich*, 523 F.3d 702 (7th Cir. 2008).

4. Geraldine Szott Moohr, *Mail Fraud and the Intangible Rights Doctrine: Someone to Watch Over Us*, 31 HARV. J. ON LEGIS. 153, 154 (1994).

5. *United States v. Hasner*, 340 F.3d 1261, 1271 (11th Cir. 2003).

6. *United States v. Frost*, 125 F.3d 346, 369 (6th Cir. 1997).

7. *United States v. Weyhrauch*, 548 F.3d 1237, 1248 (9th Cir. 2008), *cert granted*, 129 S. Ct. 2863 (2009).

honest services provision.<sup>8</sup> In a recent dissent to the Court's denial of certiorari to a Seventh Circuit case<sup>9</sup> interpreting the section, Justice Scalia expressed frustration that courts have not developed "some coherent limiting principle to define what 'the intangible right of honest services' is, whence it derives, and how it is violated."<sup>10</sup> The dissent went on to caution that "this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct."<sup>11</sup>

Justice Scalia's concerns may be addressed during the current term of the Supreme Court. The Court, in granting review to *Weyhrauch v. United States*<sup>12</sup> from the Ninth Circuit, will decide whether, to convict a state official of honest services mail fraud, the government must prove that the defendant violated a disclosure duty imposed by state law.<sup>13</sup>

The Petitioner, Bruce Weyhrauch, argues that such a state law violation is required, contrary to the Ninth Circuit's ruling that "the vague language of § 1346 is a mandate to create a federal common law of disclosure obligations of state officials."<sup>14</sup> The United States, as Respondent, contends that the "*federal* crime of honest-services mail fraud" should not be encumbered by a "*state-law* limiting principle."<sup>15</sup>

Though most federal crimes operate independently of state law, it may be that the only way to limit the federal crime of honest-services mail fraud is to require an independent state law violation. Such a limitation would address compelling federalist concerns identified by Weyhrauch and the Ninth Circuit. Thus, it is likely the Supreme Court will not affirm the Ninth Circuit's ruling in its entirety, but will seek to limit the scope of § 1346.

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8. *Weyhrauch*, 548 F.3d at 1243.

9. *United States v. Sorich*, 523 F.3d 702 (7th Cir. 2008).

10. *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari).

11. *Id.*

12. *Weyhrauch v. United States*, 548 F.3d 1237, *cert. granted*, 129 S. Ct. 2863 (2009).

13. *Weyhrauch v. United States*, 129 S. Ct. 2863 (U.S. 2009). The Court will also address honest-services fraud in the private context in *United States v. Black*, 530 F.3d 596, *cert. granted*, 129 S. Ct. 2379 (2009). The Court in *Black* will have the opportunity to resolve a circuit split by deciding the scope of § 1346 with regard to private actors, since § 1346 ostensibly applies to any person. This case will not be discussed in this commentary.

14. Petition for Writ of Certiorari at 1, *Weyhrauch v. United States*, No. 08-1196 (U.S. Mar. 25, 2009).

15. Brief of Respondent at 6, *Weyhrauch*, No. 08-1196 (U.S. May 27, 2009) (emphasis added).

## II. FACTS

Attorney Bruce Weyhrauch was an elected member of the Alaska House of Representatives from 2002 to 2007.<sup>16</sup> In 2006, VECO Corp, an oil services company, was lobbying the House of Representatives in opposition to increased oil taxes.<sup>17</sup> On May 4, 2006, Weyhrauch mailed a resume and cover letter to VECO's CEO in which he offered to provide legal services and representation to the company.<sup>18</sup> In hope of securing future employment, Weyhrauch voted in ways favorable to VECO, lobbied other elected officials to vote similarly, and supported additional legislation favorable to VECO.<sup>19</sup>

Weyhrauch was indicted for “devising ‘a scheme and artifice to defraud and deprive the State of Alaska of its intangible right to [his] honest services . . . performed free from deceit, self-dealing, bias, and concealment’ and attempting to execute the scheme by mailing his resume to VECO.”<sup>20</sup> Weyhrauch never actually obtained any compensation or benefits from VECO.<sup>21</sup>

The district court found that Weyhrauch was not required to disclose his conflict of interest under Alaska state law.<sup>22</sup> The government argued at trial that evidence of Weyhrauch's potential ethical violations should nonetheless be admitted because such evidence could be used to support an honest services fraud conviction under federal law.<sup>23</sup> The district court ruled otherwise, holding that “any duty to disclose sufficient to support the mail and wire fraud charges here must be a duty imposed by state law.”<sup>24</sup>

## III. LEGAL BACKGROUND

Congress enacted the first mail fraud statute to protect citizens from deprivation of tangible assets, such as money or property.<sup>25</sup> Later, Federal appeals courts interpreted the scope of the mail fraud

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16. Joint Appendix at 14, *Weyhrauch*, No. 08-1196 (U.S. Sep. 14, 2009).

17. Richard Mauer, *Supreme Court Sets Date for Weyhrauch Arguments*, ANCHORAGE DAILY NEWS, Sept. 29, 2009, available at <http://www.adn.com/news/politics/fbi/weyhrauch/story/954429.html>.

18. Joint Appendix, *supra* note 16, at 23.

19. *Id.* at 19.

20. *United States v. Weyhrauch*, 548 F.3d 1237, 1239 (9th Cir. 2008) (quoting Weyhrauch's indictment).

21. *Id.*

22. *Id.* at 1240.

23. *Id.*

24. *U.S. v. Kott*, 2007 WL 2572355, \*6 (D. Alaska 2007).

25. Avery, *supra* note 1, at 1435 (citing CONG. GLOBE, 41st Cong., 3d Sess. 35 (1870)).

statute to include deprivation of intangible rights, such as the right to honest services.<sup>26</sup> The Supreme Court scaled this interpretation back considerably in *McNally v. United States*.<sup>27</sup> In addressing the question of whether § 1341 criminalized the deprivation of the public of honest services, the Court held that the statute was limited to the protection of property rights.<sup>28</sup> The Court noted nothing in the statute to indicate that Congress intended to diverge from the common understanding of the term when it enacted § 1341.<sup>29</sup> The following year Congress enacted § 1346, effectively overruling *McNally* and extending the definition of fraud to include “a scheme or artifice to deprive another of the intangible right of honest services.”<sup>30</sup>

Section 1346 has a rather sparse legislative history. The statute was passed as part of the Anti-Drug Abuse Act of 1988.<sup>31</sup> Representative John Conyers stated that the “amendment restores the mail fraud provision to where that provision was before the *McNally* decision. . . . This amendment is intended merely to overturn the *McNally* decision. No other change in the law is intended.”<sup>32</sup> After the Bill’s passage, Senator Biden explained that the amendment was intended to “reinstate all of the pre-*McNally* case law pertaining to the mail and wire fraud statutes without change.”<sup>33</sup> The clearest expression of Congress’s intent, therefore, was merely to overrule *McNally* and reinstate the pre-*McNally* line of cases. This effectively reestablished the pre-*McNally* precedent in the Supreme Court as well as in each of the circuit courts. The true meaning of § 1346, therefore, turns on whether the pre-*McNally* line of cases supported a federal common-law definition of honest services.

The circuit courts are split over the scope of the honest services doctrine.<sup>34</sup> The Third Circuit has adopted a broad rule, requiring the government to prove that a public official violated a fiduciary duty

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26. *Id.* See also *United States v. Clapps*, 732 F.2d 1148, 1153 (3d Cir. 1984) (“[T]he statute is ‘quite broad’ and ‘generally proscribes ‘any scheme or artifice to defraud’ which in some way involves the use of the postal system.” (quoting *United States v. Pearlstein*, 576 F.2d 531, 534 (3d Cir. 1978))).

27. *McNally v. United States*, 483 U.S. 350 (1987).

28. *Id.* at 360.

29. *Id.* at 351.

30. 18 U.S.C.A. § 1346 (West 2006).

31. Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181 (codified as 18 U.S.C. § 1346).

32. 134 CONG. REC. H11108-01 (daily ed. Oct. 21, 1988) (statement of Rep. Conyers).

33. 134 CONG. REC. S17360-02 (daily ed. Nov. 10, 1988) (statement of Sen. Biden).

34. *United States v. Weyhrauch*, 548 F.3d 1237, 1243 (9th Cir. 2008).

specifically established by state or federal law.<sup>35</sup> The Fifth Circuit requires the government to prove an independent state law violation.<sup>36</sup> None of the remaining circuits apply a state-law limiting principle, but they differ substantially in how a federal standard is to be applied.<sup>37</sup>

The Fifth Circuit is the only circuit that explicitly employs the state-law limiting principle.<sup>38</sup> Echoing the Supreme Court's concerns in *McNally*, the Fifth Circuit was concerned that § 1346 would promote overreaching by federal prosecutors into state and local public ethics standards,<sup>39</sup> thus posing a threat to federalism.<sup>40</sup> The First Circuit has stood out as the most prominent critic of the state-law limiting principle,<sup>41</sup> having repeatedly rejected it in its rulings.<sup>42</sup> The First Circuit requires that an official's misconduct involve more than a mere conflict of interest to support a conviction.<sup>43</sup> The Tenth and Eighth Circuits have held that a public official's breach of duty must be material and accompanied by fraudulent intent.<sup>44</sup> The Seventh Circuit takes a unique approach and has enunciated what it labels the

35. *United States v. Murphy*, 323 F.3d 102, 116–117 (3d Cir. 2003).

36. *Brumley*, 116 F.3d at 734–35 (“Stated directly, the official must act or fail to act contrary to the requirements of his job under state law.”)

37. *See Weyhrauch*, 548 F.3d at 1244 (“The majority of circuits . . . have held that the meaning of ‘honest services’ is governed by a uniform federal standard inherent in § 1346, although they have not uniformly defined the contours of that standard.”).

38. *See Brumley*, 116 F.3d at 734–35 (“Stated directly, the official must act or fail to act contrary to the requirements of his job under state law.”).

39. *See id.* at 734 (“We find nothing to suggest that Congress was attempting in § 1346 to garner to the federal government the right to impose upon states a federal vision of appropriate services—to establish, in other words, an ethical regime for state employees.”).

40. *See id.* (“Such a taking of power would sorely tax separation of powers and erode our federalist structure.”).

41. *Avery*, *supra* note 11, at 1439.

42. *See, e.g., United States v. Sawyer*, 85 F.3d 713, 726 (1st Cir. 1996) (“In general, proof of a state law violation is not required for conviction of honest services fraud.” (citing *United States v. Silvano*, 812 F.2d 754, 759 (1st Cir. 1987))); *United States v. Woodward*, 149 F.3d 46, 55 (1st Cir. 1998) (noting that a public official's “affirmative duty to disclose” may stem from general common law fiduciary duties); *United States v. Sawyer*, 239 F.3d 31, 41–42 (1st Cir. 2001) (holding that the government need not show a state law violation to go forward in prosecuting the defendant for honest-services mail fraud).

43. *See United States v. Urciuoli*, 513 F.3d 290, 298–99 (1st Cir. 2008) (“The issue could be pertinent here *if* the government in this case had chosen to proceed on the theory that a conflict of interest alone . . . was a basis for conviction.”).

44. *Id.* *See also United States v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997) (“We agree with the Eighth Circuit, however, that § 1346 must be read against a backdrop of the mail and wire fraud statutes, thereby requiring fraudulent intent and a showing of materiality.”); *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996) (“[P]rior intangible rights convictions involving private sector relationships have almost invariably included proof of actual harm to the victims’ tangible interests.”).

“misuse-of-position-for-private-gain limitation.”<sup>45</sup> Under this limitation, to prove an honest-services mail fraud violation, the government must prove that a public official misused or intended to misuse her office for private gain by use of the mail.<sup>46</sup>

#### IV. HOLDING

While the Ninth Circuit ultimately declined to adopt the state-law limiting principle,<sup>47</sup> it noted that the *Brumley* decision addressed all of the various federalist concerns by doing so.<sup>48</sup> The *Brumley* holding sets clear boundaries for federal honest-services fraud liability by limiting its scope to preexisting state law, thus preventing federal overreaching into state affairs.<sup>49</sup> The court also noted that a state-law limiting principle places redress for corruption in the hands the state and local political process rather than federal prosecution.<sup>50</sup>

The Ninth Circuit relied on the general proposition that the pre-*McNally* line of cases generally did not require an independent state law duty of honest services.<sup>51</sup> In forming its rule, the court attached this proposition to the rule of *Badders v. United States*,<sup>52</sup> which identified Congress’s affirmative power to prevent the use of the mail in furtherance of fraudulent schemes, whether Congress has the power to prohibit the particular scheme in question or not.<sup>53</sup> Additionally, due to the interdependent relationship between state and federal policy, Congress has a legitimate interest in ensuring that state policymakers and regulators, in failing to perform their services honestly, do not frustrate the goals of federal policies.<sup>54</sup> Such an interest may be protected by the federal fraud statutes.<sup>55</sup>

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45. See *United States v. Sorich*, 523 F.3d 702, 707 (7th Cir. 2008) (“[C]ourts have felt the need to find limiting principles, and ours has been that the ‘[m]isuse of office . . . for private gain is the line that separates run-of-the-mill violations of state-law fiduciary duty . . . from federal crime.’”) (citing *United States v. Bloom*, 149 F.3d 649, 655 (7th Cir. 1998)).

46. See *id.* at 708 (“Showing misuse for private gain means showing *an intent* to reap private gain; it is well established that a fraudulent scheme that does not actually cause harm is still actionable.”).

47. *United States v. Weyhrauch*, 548 F.3d 1237, 1245 (9th Cir. 2008).

48. *Id.* at 1244.

49. *Id.* at 1244–45.

50. See *id.* at 1245 (“[T]o the extent the honest services doctrine is intended to ensure public officials act ethically, elected state officials are accountable to their constituencies, who can punish dishonest or unethical conduct directly at the ballot box . . .”).

51. *Id.* at 1246.

52. *Badders v. United States*, 240 U.S. 391, 393 (1916).

53. *Id.*

54. *Weyhrauch*, 548 F.3d at 1246.

55. *Id.*

In declining to adopt the state-law limiting principle, the circuit court cited *United States v. Louderman*,<sup>56</sup> which held that state law plays no role in a court's determination whether a federal fraud statute has been violated.<sup>57</sup> The court found no indication that Congress meant to make the meaning of the term "honest services" dependent upon state law.<sup>58</sup> Moreover, the court identified a potentially troubling inconsistency in conditioning the mail fraud statute on state-law violations: "conduct in one state might violate the mail fraud statute, whereas identical conduct in a neighboring state would not."<sup>59</sup>

## V. ANALYSIS

The Ninth Circuit assessed the state-law limiting principle as applied by the *Brumley* court to § 1346 with substantial approval, yet the court ultimately rejected it on jurisprudential grounds. Determining that Ninth Circuit precedent did not support its adoption, the court instead adopted a uniform federal standard in its interpretation of § 1346.

### A. *The State-Law Limiting Principle*

The Fifth Circuit is the only circuit court to embrace fully a state-law limiting principle, and its holding in *Brumley* was cited with approval by the Ninth Circuit. Were the Supreme Court to adopt a state-law limiting principle, it would likely follow the model outline in *Brumley*. Because mail fraud has so frequently been used to prosecute state and local officials in corruption cases, the Court may prefer to adopt a model that respects more traditional principles of state sovereignty and federalism.<sup>60</sup> *Brumley* rejected interpreting § 1346 as a means by which the federal government could impose and enforce standards of good government upon the states.<sup>61</sup> The decision was strongly federalist,<sup>62</sup> as it would protect against the "danger to state sovereignty that results when the federal government is given

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56. *United States v. Louderman*, 576 F.2d 1383 (9th Cir. 1978).

57. *Id.* at 1387.

58. *Weyhrauch*, 548 F.3d at 1245–46.

59. *Id.* at 1246.

60. See John C. Coffee, Jr., *Modern Mail Fraud: The Restoration of the Public/Private Distinction*, 35 AM. CRIM. L. REV. 427, 428–29 (1998) (discussing *United States v. Lopez*, 514 U.S. 549 (1995)).

61. *United States v. Brumley*, 116 F.3d 728, 735 (5th Cir. 1997).

62. See Coffee, *supra* note 60, at 448 (discussing *Brumley*'s holding and impact).

*carte blanche* to prosecute individuals for honest services mail and wire fraud in connection with state or local public officials.”<sup>63</sup>

Adopting a federal common-law standard and allowing the federal government to determine both the meaning of “honest services” and prosecute individuals who do not provide such “honest services” may constitute overreaching into state affairs on the part of the federal government.<sup>64</sup> Michael K. Avery has argued that although federal prosecution of public corruption is a necessity, at some point “pervasive federal authority threatens to trample the sovereignty afforded to the states by the federalist structure of the Constitution.”<sup>65</sup> Avery argued that the original rationale for federal prosecution for honest-services mail fraud in connection with state and local public corruption was simply the inability of the states to prosecute such matters themselves due to their limited judicial resources.<sup>66</sup> So constructed, § 1346 is really intended to provide federal prosecutorial support for state and local ethics standards, rather than to import federal ethics standards into the state and local political processes. In this way, the two bodies of law complement each other and the potential geographical inconsistency in enforcement identified by the Ninth Circuit may be less of a concern.

### B. *The Uniform Federal Standard*

The Ninth Circuit declined to adopt the state-law limiting principle, despite its approval of *Brumley*.<sup>67</sup> In an attempt to deflect criticism, the court noted that “[a] federal action based on a valid constitutional grant of authority is not improper simply because it intrudes on state interests.”<sup>68</sup> If the court was correct that § 1346 does not refer to state law,<sup>69</sup> and that should § 1346 impose a general duty of honesty owed by public officials to their constituents, there would be no justification for imposing a state law limitation thereupon.<sup>70</sup> The question then becomes one of Congressional intent. It is possible that

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63. Avery, *supra* note 1, at 1456.

64. *Id.* at 1455.

65. Avery, *supra* note 1, at 1457.

66. *See id.* at 1456–57 (“[T]he rationale for these prosecutions is that the states would prefer to prosecute these crimes, but due to their incapacity to do so, federal enforcement is necessary.”).

67. *United States v. Weyhrauch*, 548 F.3d 1237, 1246 (9th Cir. 2008).

68. *Id.*; *see* U.S. CONST. art. VI, cl. 2 (“[T]he Laws of the United States . . . shall be the supreme Law of the Land.”).

69. *Id.* at 1245–46.

70. *Id.*

Congress has an interest in ensuring the honest behavior of state officials merely because state and federal policy affect one another, as the Ninth Circuit postulates.<sup>71</sup> Section 1346 would then just be Congress's attempt to put that interest into legal effect. This, however, clearly implicates the federalist concerns raised by the Fifth Circuit.

The Ninth Circuit's ruling in effect created a federal common-law crime of honest-services mail fraud that was independent of any state ethics laws. The Seventh Circuit called such a federal common-law crime "a beastie that many decisions say cannot exist."<sup>72</sup> At least one commentator argued that such a creation is entirely superfluous and that Congress likely meant to refer to state law governing public officials' conduct when it referred to the right to honest services.<sup>73</sup> The Supreme Court has thus far refused to recognize any federal criminal common law.<sup>74</sup> In *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, the court stated flatly, "there is no federal common law of crimes."<sup>75</sup>

The holding in *Weyhrauch*, however, has the advantage of uniformity. Had the Ninth Circuit adopted the state-law limiting principle, it would effectively sanction a state power to nullify a federal statute: were a state not to enact any laws protecting the public's right to honest services from their elected representatives, § 1346 would have no effect in that state. Moreover, corrupt public officials could evade federal prosecution by conducting illicit business out of state, resulting in a kind of corruption arbitrage.

## VI. ARGUMENTS AND DISPOSITION

### A. Arguments

Weyhrauch argues that the Court should adopt a limiting principle similar to that in *Brumley* because § 1346 does not authorize the federal government to prosecute state officials for failing to disclose conflicts of interest that do not violate state law. Primarily,

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71. *Id.* at 1246.

72. *United States v. Bloom*, 149 F.3d 649, 654–55 (7th Cir. 1998).

73. George D. Brown, *Should Federalism Shield Corruption?*, 82 CORNELL L. REV. 225, 283 n.491 (1996).

74. *See Wheeldin v. Wheeler*, 373 U.S. 647, 651 (1963) (noting that "we are not in the free-wheeling days antedating *Erie v. Tompkins*") (citation omitted).

75. *Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 181 (1994).

Weyhrauch argues that the phrase “scheme or artifice to defraud” in § 1346 evidences a legislative purpose to impose liability solely for violations of state disclosure laws.<sup>76</sup> Because the crime punishes public officials who deprive the public of honest services, Weyhrauch contends that “[c]ommon sense would dictate that absent a clear, affirmative duty . . . to disclose particular information” must exist before a local public official can be charged with a federal crime.<sup>77</sup>

Weyhrauch also argues that the Ninth Circuit’s interpretation of § 1346 violates three canons of statutory construction: the clear statement rule, the doctrine of constitutional avoidance, and the rule of lenity.<sup>78</sup> Under the clear statement rule, where an interpretation of a federal statute would upset the balance between federal and state power, the Court requires “unmistakably clear” statutory language before it will adopt such an interpretation.<sup>79</sup> Weyhrauch argues that the Ninth Circuit’s interpretation of § 1346 requires federal courts to create new federal common law “from scratch,” and that such a reading is unsustainable due to a lack of unmistakably clear statutory language authorizing such a mandate.<sup>80</sup> Weyhrauch also argues that the doctrine of constitutional avoidance compels a rejection of the Ninth Circuit’s reading of § 1346, because such a reading might render the statute void for vagueness.<sup>81</sup> A statute may be held to be void for vagueness if it “fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement.”<sup>82</sup> Weyhrauch argues that the disclosure obligations imposed by the Ninth Circuit’s holding would not provide a person of ordinary intelligence with fair notice because “it does not say what ‘honest services’ may be, or when they are withheld deceitfully.”<sup>83</sup>

The United States supports the Ninth Circuit’s reading of § 1346, contending that prosecution under § 1346 does not require an

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76. See Brief for Petitioner at 15, *Weyhrauch v. United States*, No. 08-1196 (Sep. 14, 2009) (“Where Alaska itself has enacted detailed provisions on the ethical and disclosure duties of its officials, the violation of some as yet unidentified and broader federal common law duty can hardly be deemed fraudulent.”).

77. *Id.* at 16.

78. Weyhrauch’s rule of lenity argument is brief and supplemental and shall not be discussed in this commentary.

79. Brief for Petitioner, *supra* note 76, at 17.

80. *Id.*

81. *Id.* at 19.

82. *Id.* (quoting *United States v. Williams*, 128 S. Ct. 1830, 1845 (2008)).

83. *Id.*

independent state law violation.<sup>84</sup> The United States advances two principal arguments: that the specific language of § 1346 was deliberately chosen by Congress to reject the need for an independent state law violation,<sup>85</sup> and that the pre-*McNally* line of cases § 1346 reinstated held that honest-services mail fraud does not require a violation of state law.<sup>86</sup>

The United States argues that Congress employed the phrase “the intangible right of honest services” as a term of art, intending to invoke the pre-*McNally* definition of honest-services mail fraud, which, the Government contends, does not require a state law violation.<sup>87</sup> Citing *McDermott International v. Wilander*,<sup>88</sup> the Government notes that where Congress directly overturns a decision of the Supreme Court and in doing so makes use of a specific term from that decision, that term is deemed to have its established meaning.<sup>89</sup> Here, since the phrase “the intangible right of honest services,” as used in the pre-*McNally* line of cases, did not require an independent state honest services law, that same phrase as used in § 1346 would similarly lack such a requirement.

Before *McNally*, the courts considered a failure to disclose a conflict of interest concerning official action to be honest services fraud.<sup>90</sup> Because § 1346 reinstates that line of cases, the United States contends that § 1346 also reinstates the general theory of liability for honest services fraud that existed before *McNally*.<sup>91</sup> The brief for the United States also contains a detailed and informative review of the statute’s legislative history, noting that the original draft of what would eventually become § 1346 *did* contain references to state law as requirements for prosecution under additional provisions.<sup>92</sup> These references, however, were not incorporated into the final honest-

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84. Brief for Respondent, *supra* note 15, at 11.

85. *See id.* at 12 (“When Congress enacted Section 1346, it employed language derived directly from *McNally* and the line of authority that *McNally* rejected.”).

86. *Id.* at 15.

87. *Id.* at 12.

88. *McDermott Int’l v. Wilander*, 498 U.S. 337, 342 (1991).

89. Brief for Respondent, *supra* note 15, at 16.

90. *Id.*

91. *See id.* at 19 (“[A]n individual ‘who fails to disclose material information’ can commit fraud through his silence if he has ‘a duty to [disclose]’ that information.” (quoting *Chiarella v. United States*, 445 U.S. 222, 228 (1980))).

92. The Department of Justice, which had drafted the proposal, initially included additional provisions which would have allowed for longer sentences for violations of state honest-services laws as well as for schemes specifically targeted to disrupt the election process through means violative of state law. Brief for Respondent *supra* note 15, at 22–23.

services provision.<sup>93</sup> Additionally, representative Conyers, who presided at the hearing at which the Department of Justice proposed its version of § 1346, stated that the statute would reestablish that an honest-services scheme to defraud was not dependent upon a state-law violation.<sup>94</sup>

While Weyhrauch's arguments are sensible and even somewhat persuasive, they are contradicted by the legislative history of § 1346. Weyhrauch neatly identifies many of the difficulties which the Ninth and Fifth Circuits sought to resolve, like the potential inter-state irregularity in enforcement as well as the potential for vagueness. However, the United States hews more closely to the actual statutory language and makes effective use of the statute's legislative history. Because § 1346 was expressly enacted to reinstate the pre-*McNally* line of cases, a body of law which uniformly rejected the need for an independent state law violation for honest-services fraud prosecution, the statute's purpose should be clear. Additionally, the fact that references to state law were deleted from the statute is strong evidence that Congress intended the statute to operate independent of state law; this is strong support that Congress identified a federal interest in all public officials, state or otherwise, performing their duties honestly.

### *B. Disposition*

While the United States' arguments are authoritative, Weyhrauch's argument is strongly in line with the Fifth Circuit's *Brumley* decision. Thus, while legal precedent and the current trend amongst the circuit courts toward a federal common-law standard would drive the Court to affirm the Ninth Circuit's ruling, the concerns identified by Weyhrauch and the Fifth and Ninth Circuits cannot and should not be ignored. Thus, the Court is not likely to affirm the Ninth Circuit's decision. Instead, it will probably adopt a principle that limits honest services mail fraud in some substantial way, potentially incorporating the need for an independent state law violation in the model of *Brumley*. The Supreme Court has been reluctant to create new federal common law.<sup>95</sup> Justice Scalia already

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93. See Brief for Respondent, *supra* note 15, at 22 (“[T]he text defining those offenses did not refer to state law, and the Department [of Justice] made clear that ‘proof of the elements of a State offense would not be required.’”).

94. *Id.* at 23 (quoting *United States v. Mandel*, 591 F.2d 1347, 1361 (4th Cir. 1979)).

95. See Petition for Writ of Certiorari, *supra* note 14, at 17 (listing instances in which the Supreme Court has declined to create new federal common law). See, e.g., *Wheeldin v. Wheeler*,

signaled his support for limiting the scope of the honest-services doctrine, possibly to the extent of a state-law limiting principle.<sup>96</sup>

The Court will probably seek to resolve the federalist concerns of the Fifth Circuit, especially given the strong support of the *Brumley* decision offered by the Ninth Circuit.<sup>97</sup> It is possible that the Ninth Circuit, by citing the *Brumley* decision with such approval yet declining to adopt the state-law limiting principle for precedential reasons, was signaling to the Supreme Court that it would prefer to incorporate the *Brumley* rule had it the power to do so. Additionally, the facts of *Weyhrauch* provide grounds for the Court to limit the scope of § 1346, as Alaska state law does not mandate disclosure of conflicts of interest. This case forces the Court to grapple with the problem Justice Scalia recently identified: “Is it the role of the Federal Government to define the fiduciary duties that a town alderman or school board trustee owes to his constituents?”<sup>98</sup> The federal government has prosecuted Bruce Weyhrauch for acts that, while unethical, are not illegal under Alaska state law. In fact, as Weyhrauch’s brief contends, the Alaska legislature is not expected to be a professional legislature, having only a 120-day session per year so that state officials may seek other employment during the remainder of the year.<sup>99</sup> The possibility that an Alaska legislator would seek employment while serving is less outlandish than it might be in a state with a more professional legislature. The imposition of a new federal common law crime of honest services fraud might simply impose a duty on the legislators of Alaska that its citizens may simply not want.

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373 U.S. 647, 651 (1963) (signaling the court’s reluctance to create federal common law); *United States v. Lanier*, 520 U.S. 259, 267 n.6 (1997) (“Federal crimes are defined by Congress, not the courts.”) (citing *United States v. Kozminski*, 487 U.S. 931, 939 (1988)).

96. *Sorich v. United States*, 129 S. Ct. 1308, 1310 (2009) (Scalia, J., dissenting from denial of certiorari) (“It is one thing to enact and enforce clear rules against certain types of corrupt behavior . . . but quite another to mandate a freestanding, open-ended duty to provide ‘honest services’—with the details to be worked out case-by-case.”).

97. *See United States v. Weyhrauch*, 548 F.3d 1237, 1244 (9th Cir. 2008) (“The Fifth Circuit’s state law limiting principle, which the district court adopted, addresses all of these [federalist] concerns.”).

98. *Sorich*, 129 S. Ct. at 1310 (Scalia, J., dissenting).

99. Brief for Petitioner, *supra* note 76, at 18.