**No. 05-20319**

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

---

**UNITED STATES OF AMERICA,**

**Plaintiff/Appellee,**

**v.**

**JAMES A. BROWN**
**DANIEL BAYLY**
**ROBERT S. FURST**
**WILLIAM R. FUHS,**

**Defendants/Appellants.**

---

**On Appeal From The United States District Court**
**For The Southern District of Texas, Houston Division**
**No. CR H-03-363**

---

# BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* SUPPORTING APPELLANTS AND URGING REVERSAL

---

**James E. Boren**
**830 Main Street**
**Baton Rouge, Louisiana 70802**
**Telephone: (225) 387-5786**
**Facsimile: (225) 336-4667**

**Attorney for *Amicus Curiae***
**National Association of**
**Criminal Defense Lawyers**

## CERTIFICATE OF INTERESTED PERSONS

Pursuant to 5th Cir. R. 28.2.1 & 29.2, the undersigned counsel for *amicus curiae* National Association of Criminal Defense Lawyers certifies that it is unaware of any persons or entities that have an interest in the outcome of this appeal, No. 05-20319, other than those persons and entities referenced in the appellants' opening briefs.

Respectfully submitted,

/s/ James E. Boren
James E. Boren

## TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS .................... i

TABLE OF AUTHORITIES .................... iii

INTEREST OF THE AMICUS CURIAE .................... 1

SUMMARY OF ARGUMENT .................... 1

ARGUMENT .................... 3

I. The Recognition Of A Property Right To Receive "Full and Accurate Economic Information" Represents A Dangerous Expansion Of The Wire Fraud Statute. .................... 3

  A. The Law Has Not Traditionally Recognized A Property Right In Non-Confidential Business Information. .................... 4

  B. The Recognition Of A "Property Right" In Receiving Full And Accurate Information For Purposes Of The Wire And Mail Fraud Statutes Is Inconsistent With Circuit Precedent. .................... 8

II. The Wire Fraud Statute Reaches Only Schemes To "Obtain" Money or Property. .................... 13

II. Private-Sector Honest-Services Fraud Occurs Only When An Employee Secretly Acts In His Own Interest, To His Employer's Detriment. .................... 17

  A. The Case Law Limits § 1346 To Bribery And Self-Dealing Cases. .................... 17

  B. Fundamental Canons Of Statutory Interpretation Support Limiting § 1346 To The Bribery and Self-Dealing Cases Identified In Pre-*McNally* Case Law. .................... 20

CONCLUSION .................... 22

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

## TABLE OF AUTHORITIES

## CASES

*Carpenter v. United States*, 484 U.S. 19 (1987) ............................................... 5, 6, 7

*Cleveland v. United States*, 531 U.S. 12 (2000) ................................ 4, 5, 14, 15, 21

*Drye v. United States*, 528 U.S. 49 (1999) ............................................................. 7

*Durland v. United States*, 161 U.S. 306 (1896) ............................................... 14, 15

*Int'l News Serv. v. Associated Press*, 248 U.S. 215 (1918) ...................................... 7

*Jones v. United States*, 526 U.S. 227 (1999) ......................................................... 21

*Kolender v. Lawson*, 461 U.S. 352 (1983)............................................................ 22

*McBoyle v. United States*, 283 U.S. 25 (1931) ........................................................ 5

*Pasquantino v. United States*, 125 S. Ct. 1766 (2005) ......................................... 5, 6

*Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984) ................................................ 7

*United States v. Ballard*, 663 F.2d 534 (5th Cir. 1981)...................................... 9, 20

*United States v. Bloom*, 149 F.3d 649 (7th Cir. 1998)..................................... 18, 19

*United States v. Brumley*, 116 F.3d 728 (5th Cir. 1997) ................ 17, 19, 20, 21, 22

*United States v. Caldwell*, 302 F.3d 399 (5th Cir. 2002)........................................ 20

*United States v. Cochran*, 109 F.3d 660 (10th Cir. 1997) ...................................... 19

*United States v. Covino*, 837 F.2d 65 (2d Cir. 1988)............................................. 11

*United States v. Czubinski*, 106 F.3d 1069 (1st Cir. 1997)............................... 19, 21

*United States v. D'Amato*, 39 F.3d 1249 (2d Cir. 1994) .................................. 11, 12

*United States v. Edwards*, 458 F.2d 875 (5th Cir. 1972).......................................... 1

*United States v. Fagan*, 821 F.2d 1002 (5th Cir. 1987).....................................9, 10

*United States v. Gimbel*, 830 F.2d 621 (7th Cir. 1987) ..........................................10

*United States v. Herron*, 825 F.2d 50 (5th Cir. 1987) .............................8, 9, 10, 11

*United States v. Johns*, 742 F. Supp. 196 (E.D. Pa. 1990) ....................................11

*United States v. Lewis*, 67 F.3d 225 (9th Cir. 1995)...............................................10

*United States v. Little*, 889 F.2d 1367 (5th Cir. 1989)............................................10

*United States v. Mangiardi*, 962 F. Supp. 49 (M.D. Pa. 1997) ..............................19

*United States v. Matt*, 838 F.2d 1356 (5th Cir. 1988) ............................................10

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

*United States v. Miller*, 997 F.2d 1010 (2d Cir. 1993) ..........................................13

*United States v. Murphy*, 836 F.2d 248 (6th Cir. 1988) .........................................11

*United States v. Ochs*, 842 F.2d 515 (1st Cir. 1988) .............................................10

*United States v. Regan*, 713 F. Supp. 629 (S.D.N.Y. 1989)...................................11

*United States v. Richerson*, 833 F.2d 1147 (5th Cir. 1987)....................................10

*United States v. Rico Indus., Inc.*, 854 F.2d 710 (5th Cir. 1988)............................10

*United States v. Rochester*, 898 F.2d 971 (5th Cir. 1990).......................................10

*United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003)....................17, 18, 19, 21, 22

*United States v. Salvatore*, 110 F.3d 1131 (5th Cir. 1997).......................................5

*United States v. Slay*, 858 F.2d 1310 (8th Cir. 1988) .............................................10

*United States v. Stever*, 222 U.S. 167 (1911) ...................................................15, 16

*United States v. Wallach*, 935 F.2d 445 (2d Cir. 1991)..............................11, 12, 13

*United States v. Walters*, 997 F.2d 1219 (7th Cir. 1993)........................................14

**STATUTES**

18 U.S.C. § 1343.............................................................................................3, 13

18 U.S.C. § 1346........................................................................................... *passim*

**MISCELLANEOUS**

A. Bell & G. Parchomovsky, *A Theory of Property,* 90 Cornell L. Rev. 531 (2005)...........................................................................................................8

W. Blackstone, *Commentaries* ..........................................................................16

W. East*, A Treatise of the Pleas of the Crown* 818 (Professional Books Ltd. 1987) (1803) .................................................................................................16

F. Easterbrook, *Cyberspace Versus Property Law?*, 4 Tex. Rev. L. & Pol. 103 (1999)...................................................................................................8

W. Hawkins, *A Treatise of the Pleas of the Crown* 188 (Garland Publishing Inc. 1978) (1716) ...........................................................................................16

A.M. Honoré, *Ownership*, in *Oxford Essays in Jurisprudence* 107 (A.G. Guest ed. 1961).................................................................................................8

G. Szott Moohr, *Federal Criminal Fraud and the Development of Intangible Property Rights in Information,* 2000 U. Ill. L. Rev. 683 (2000) ...................5

The National Association of Criminal Defense Lawyers respectfully submits this brief as *amicus curiae* supporting appellants.

## INTEREST OF THE *AMICUS CURIAE*

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit national bar association working in the interest of criminal defense attorneys and their clients. NACDL was founded to ensure justice and due process for persons accused of crimes and to foster the integrity, independence, and expertise of the criminal defense profession. NACDL has more than 12,500 members—joined by 90 affiliate organizations with 35,000 members—including criminal defense lawyers, U.S. military defense counsel, law professors, and judges committed to preserving fairness within America's criminal justice system. NACDL has a strong interest in ensuring that the wire and mail fraud statutes, two powerful weapons in the federal prosecutor's arsenal, are applied only in the manner that Congress intended.

## SUMMARY OF ARGUMENT

This Court has long recognized that "statutes like the federal mail fraud statute . . . must be strictly construed in order to avoid extension beyond the limits intended by Congress." *United States v. Edwards*, 458 F.2d 875, 880 (5th Cir. 1972). In this case, however, appellants were prosecuted under novel theories that dramatically expand the wire fraud statute beyond the boundaries recognized by this Circuit or any other. That expansion is not merely inconsistent with the statute's text, structure, and history. It also unmoors the statute from any limiting principle, effectively criminalizing virtually any act of dishonesty.

The convictions in this case are premised on three fundamental errors of statutory construction. *First*, the wire fraud statute neither creates nor protects a novel "property right" of corporations and shareholders to receive "full and

accurate economic information." The Supreme Court has established that the wire fraud statute encompasses only those rights traditionally recognized as "property." The purported "right" of a corporation and shareholders to receive accurate economic information is not a traditionally recognized form of *property*. The vast majority of circuits, including this one, have rejected arguments that a purported right to receive accurate information is "property." The recognition of a property right to accurate information, moreover, effectively upends the disclosure regime established by the securities laws, creating mass uncertainty.

*Second*, the phrase "scheme to defraud" in the wire fraud statute is limited to schemes in which the defendant *obtains* money or property. The law has long recognized the difference between wrongfully depriving another of property and wrongfully depriving another of property so as to *obtain* that property for oneself. The ruling below erases that distinction.

*Third*, and finally, the instructions below erroneously extend the private-sector "honest services" theory of wire fraud beyond its traditional boundaries to cases in which an individual works *openly* with company employees to *benefit* the company and its shareholders. While such conduct may, in a particular case, be improper, it cannot defraud the company of honest services. If the private-sector "honest services" theory is to have any limits at all, it cannot extend beyond the paradigmatic cases in which an employee secretly acts for his own benefit and to his employer's detriment.

The Supreme Court has cautioned that courts should not "construe the [mail and wire fraud statutes] in a manner that leaves [their] outer boundaries ambiguous." *United States v. McNally*, 483 U.S. 350, 360 (1987). Any one of the novel theories endorsed in this case would stretch the wire fraud statute past its breaking point. Taken together, they obliterate the boundaries of the statute

altogether. This Court should reject those theories and limit the wire fraud statute to its intended applications.

## ARGUMENT

The wire fraud statute, 18 U.S.C. § 1343, prohibits the use of the wires in "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." In this case, appellants—James A. Brown, Daniel Bayly, Robert S. Furst, and William R. Fuhs—were charged with violating that prohibition. Each wire fraud count included these two different theories: (1) that appellants engaged in a scheme to deprive Enron of a putative *property right* to receive full and accurate reporting of the corporation's material economic information; and (2) that appellants engaged in a scheme to defraud Enron of the *intangible right of honest services of its employees*. Both theories are legally deficient. With respect to the first, the wire fraud statute neither creates nor recognizes a "property" interest in receiving accurate non-confidential information. Further, the statute requires that the scheme be designed to "obtain" money or property; merely depriving another of money or property is insufficient. The second theory—defrauding Enron of honest services—fails because private sector "honest services" fraud extends only to cases where the defendant enriches himself to his principal's detriment; it does not extend to cases, like this one, where the defendant was openly acting to benefit the corporation.

### I. The Recognition Of A Property Right To Receive "Full and Accurate Economic Information" Represents A Dangerous Expansion Of The Wire Fraud Statute.

It is the business of the criminal laws to protect property rights, not to create them. However, the jury instructions below, which stated that corporations and shareholders have a "property right" in the "full and accurate reporting of the

corporation's material economic information," Tr. 6130, breached that boundary, dramatically expanding the definition of "property" beyond any traditional conception and commensurately expanding the reach of the wire fraud statute. That decision was contrary to both precedent and common sense. The courts of appeals (including this Court) have repeatedly declined to recognize a property right in receiving "full and accurate information." This Court should decline to do so again. Congress and the states have enacted securities laws for the specific purpose of protecting the interests of corporations and shareholders in accurate information. Those laws have created settled expectations regarding what information must be disclosed to the investing public, who is responsible for making those disclosures, and what the consequences are for failing to comply. In creating a *property* right to receive full and accurate economic information that may be policed through the blunt instrument of the wire fraud statute, the jury instructions upset the careful balances struck in the securities laws, creating uncertainty as to the application of both the wire fraud statute and federal securities laws.

### A. The Law Has Not Traditionally Recognized A Property Right In Non-Confidential Business Information.

The wire and mail fraud statutes have their origins "in the desire to protect individual property rights." *McNally v. United States*, 483 U.S. 350, 359 n.8 (1987).[1] The Supreme Court has repeatedly held that, when determining whether an interest is considered "property" for purposes of the wire and mail fraud statutes, courts should look to whether that interest has "long been recognized as property." *Cleveland v. United States*, 531 U.S. 12, 23-24 (2000); *see also*

[1] "The mail and wire fraud statutes share the same language in relevant part," and accordingly opinions interpreting one statute are applicable to the other. *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

*Pasquantino v. United States*, 125 S. Ct. 1766, 1772 (2005); *Carpenter v. United States*, 484 U.S. 19, 26 (1987). This Court has adopted the same approach, looking to "traditional property law" to determine "whether something is 'property' for purposes of the federal mail fraud statute." *United States v. Salvatore*, 110 F.3d 1131, 1142 (5th Cir. 1997). Adopting novel notions of property law in a federal criminal prosecution offends the principle that criminal statutes must provide defendants with fair notice of what conduct is proscribed,[2] and that criminal cases are not an appropriate forum for creating property rights.[3] The convictions here are inconsistent with those principles. Whether or not corporations have a "right" to receive accurate economic information, four Supreme Court cases—*McNally, Carpenter, Cleveland,* and *Pasquantino*—make clear that any such expectation falls well short of being a *property* right.

In *McNally*, the issue was whether the mail fraud statute protected citizens' intangible right to have their governmental affairs conducted honestly. 483 U.S. at 352. After examining the statute's language and legislative history, the Court held that it was "limited in scope to the protection of property rights" and did not reach the intangible right to honest services. *Id.* at 360. The Court concluded that "[i]f Congress desires to go further, it must speak more clearly than it has." *Ibid.* *McNally* makes clear that "honest services" are not a species of "property."

The next Term, in *Carpenter*, the Court confirmed that the right to "honest and faithful service" is "too ethereal in itself to fall within the protection of the mail fraud statute." 484 U.S. at 25. In *Carpenter*, the Court considered whether

---

[2] *See McBoyle v. United States*, 283 U.S. 25, 27 (1931) ("[A] fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.").

[3] *See* Geraldine Szott Moohr, *Federal Criminal Fraud and the Development of Intangible Property Rights in Information*, 2000 U. Ill. L. Rev. 683, 730 (2000) ("[C]riminal law is not an appropriate context in which to create property rights.").

the information in a newspaper column, before publication, was the newspaper's "property" under the mail and wire fraud statutes. *Ibid.* The Court clarified that, while the mail fraud statute was limited to property rights, it protected intangible as well as tangible property rights. *Ibid.* The Court considered the prepublication information to be the newspaper's "confidential business information," and demonstrated that "[c]onfidential business information has long been recognized as property." *Id.* at 26.[4]

In *Cleveland*, the Court held that unissued gambling licenses were not the State of Louisiana's "property." 531 U.S. at 15. While Louisiana had a "substantial economic stake in the video poker industry," the Court nevertheless held that the State's interest in deciding to whom it would issue licenses did not "compos[e] an interest that has long been recognized as property," and thus did not fall within the protection of the mail fraud statute. *Id.* at 22-23. And just last Term in *Pasquantino*, the Court reaffirmed that approach, holding that Canada's right to excise taxes was property under the wire fraud statute. 125 S. Ct. at 1771-72. Citing Blackstone, the Court concluded that "[t]he right to be paid money has long been thought to be a species of property." *Ibid.*

Against this backdrop, it is beyond doubt that any "right" of corporations and shareholders to receive full and accurate economic information is not "property" within the meaning of the wire fraud statute, because no such interest has "long been recognized as property." Typically, when the law creates property rights in information, it does so through one of the branches of intellectual property, such as patent law, copyright law, trade secrets, and trademark law. *See*

---

[4] Tellingly, when amending the wire fraud statute in response to *McNally*, Congress did not alter *Carpenter*'s and *McNally*'s conclusion that the "intangible right of honest services" is not *property*. Instead, Congress declared that, for purposes of the mail and wire fraud statutes, "the term 'scheme or artifice to defraud' includes a scheme to deprive another of the intangible *right* of honest services." 18 U.S.C. § 1346.

Frank H. Easterbrook, *Cyberspace Versus Property Law?*, 4 Tex. Rev. L. & Pol. 103, 104-105 (1999). There can be no serious argument that the supposed right to receive accurate economic information falls within one of these categories. Nor does that "right" qualify as the sort of confidential business information protected in *Carpenter*—if the right to receive the information is claimed by all of the shareholders, the information is by definition non-confidential.

Indeed, the purported right to receive full and accurate information does not embody *any* of the recognized incidents of property. As an initial matter, raw factual information is "little susceptible of ownership or dominion." *Int'l News Serv. v. Associated Press*, 248 U.S. 215, 237 (1918). More fundamentally, as the Supreme Court observed in *Carpenter*, "*exclusivity* is an important aspect of . . . most private property." 484 U.S. at 26-27 (emphasis added). But neither a corporation nor its shareholders could claim any power of exclusion over the corporation's information because the securities laws require its *public* disclosure. Further, a right to receive accurate but non-confidential economic information concerning a company would not have any pecuniary value and would not be transferable, two other hallmarks of property. *See Drye v. United States*, 528 U.S. 49, 59-60 (1999). It would not be assignable, it could not form the *res* of a trust, and it could not pass to a trustee in bankruptcy, as can other property rights. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1002 (1984). Nor would such a right be consistent with any of eleven other elements that round out the "generally accepted list of the 'incidents' of property or ownership":

> 'the right to possess, the right to use, the right to manage, the right to income of the thing, the right to the capital, the right to security, the rights or incidents of transmissibility and absence of term, the prohibition of harmful use, liability to execution, and the incident of residuarity.'

Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 Cornell L. Rev. 531, 546 (2005) (quoting A.M. Honoré, *Ownership*, in *Oxford Essays in Jurisprudence* 107, 113 (A.G. Guest ed., 1961)).

In sum, the interest corporations and shareholders have in full and accurate reporting of information has not "long been recognized" as a property right. Accordingly, it is not encompassed by the wire fraud statute.

### B. The Recognition Of A "Property Right" In Receiving Full And Accurate Information For Purposes Of The Wire And Mail Fraud Statutes Is Inconsistent With Circuit Precedent.

The courts of appeals, including this Court, have repeatedly refused to convert an interest in receiving full and accurate information into a property right under the wire and mail fraud statutes. The Court should likewise decline to create a new species of property here.

In this Circuit, the leading case is *United States v. Herron*, 825 F.2d 50 (5th Cir. 1987). In *Herron*, the defendants executed a scheme to make a large bank deposit without generating a Currency Transaction Report (CTR). *Id.* at 51. At the time, the law required financial institutions to file a CTR with the government upon a deposit, withdrawal, or exchange of currency in excess of $10,000. *Id*. at 52 n.1. The purpose of the CTR requirement was "to leave a 'paper trail' so the IRS will be able to ascertain if taxes have been paid on large sums of money." *Id.* at 56.

The government obtained wire fraud convictions on the theory that the defendants "schemed to defraud the Treasury Department and IRS out of information contained on the CTR forms." *Herron*, 825 F.2d at 53. The indictment did not, however, allege that the defendants defrauded the United States of tax revenue. *Id.* at 56. This Court reversed the convictions. The Court held that—even though the law entitled the government to the information, which

would have facilitated the collection of tax revenue—the claim that the government was denied the reports "fails to satisfy the 'money or property' requirement of *McNally*." *Id.* at 57. This case is no different—the mere legal entitlement to information does not give rise to a property interest.

*United States v. Fagan*, 821 F.2d 1002 (5th Cir. 1987), which *Herron* distinguished, is not to the contrary. *Fagan* characterized the issue before it as whether "section 1341 is violated when an employee violates his duty to disclose to his employer economically material information which the 'employee has reason to believe . . . would lead a reasonable employer to change its business conduct.'" *Id.* at 1009 (quoting *United States v. Ballard*, 663 F.2d 534, 541 (5th Cir. 1981)) (alteration in original). Notwithstanding that loose language, *Herron* clarified that *Fagan*'s reach is quite limited. *Fagan* was a case in which an employee took kickbacks, and the Court's decision there turned on two crucial facts: first, the employee "had a fiduciary duty to disclose his acceptance of bribes to his employer"; and second, the company "clearly had a property right in control over its own money and the 'economic value' of conducting business without supporting the kickback payments." *Herron*, 825 F.2d at 57 (internal quotations omitted).[5] In *Fagan* itself, moreover, the Court noted that the employee's failure to divulge that he was receiving payments ended up depriving the employer of specific property rights. *See* 821 F.2d at 1010 n.6. Accordingly, as this Court

---

[5] As explained below, *Fagan* is the sort of self-dealing case that can now be prosecuted as private-sector honest-services fraud whether or not a property interest is at stake. In fact, *Fagan* was originally tried under an "honest services" theory, and the Court's opinion was substantially written before the Supreme Court struck down that theory of liability in *McNally*. *Fagan*, 821 F.2d at 1010 n.6. Nowhere in *Fagan* did this Court consider whether the right to receive accurate information was *itself* a property right.

recognized in *Herron*, *Fagan* did *not* acknowledge any self-contained property right to receive full and accurate information. *Herron*, 825 F.2d at 57.[6]

Consistent with *Herron*, other circuits have concluded that the interest in receiving full and accurate information is not property within the meaning of the wire fraud statute. For example, in *United States v. Gimbel*, 830 F.2d 621, 626 (7th Cir. 1987), the defendant was charged with "depriving the Treasury Department of Currency Transaction Reports and of other 'accurate and truthful information and data.'" The government had argued that the information was the equivalent of property, claiming that "because Gimbel's scheme concealed information from the Treasury Department which, if disclosed, might have resulted in the Department assessing tax deficiencies, [the defendant] was in effect depriving the Treasury of tax revenues." *Ibid*. The Seventh Circuit rejected that argument, holding that the indictment "did not state an offense, because it did not charge that the scheme deprived the Treasury Department of money or property." *Id.* at 626. Other courts have reached similar results in a wide range of factual contexts. *See United States v. Lewis*, 67 F.3d 225, 233 (9th Cir. 1995) ("[T]he right to make an informed business decision is not the kind of intangible right protected under the wire fraud statute."); *United States v. Slay*, 858 F.2d 1310, 1317 (8th Cir. 1988) (refusing to recognize an "intangible property interest of the citizenry in information relating to dishonest activities affecting good

[6] The continued viability of the *Fagan* theory is questionable, even on its own terms. While several Fifth Circuit cases followed *Fagan* in the two years after it was decided, *United States v. Rochester*, 898 F.2d 971 (5th Cir. 1990); *United States v. Little*, 889 F.2d 1367 (5th Cir. 1989); *United States v. Rico Indus., Inc.*, 854 F.2d 710 (5th Cir. 1988); *United States v. Matt*, 838 F.2d 1356 (5th Cir. 1988); *United States v. Richerson*, 833 F.2d 1147 (5th Cir. 1987), no opinion of this circuit has cited *Fagan* (for this point) in any case brought after Congress revived the "honest services" theory with the passage of 18 U.S.C. § 1346 in 1988. Moreover, most circuits disagreed with *Fagan*. *See Matt*, 838 F.2d at 1358, 1359 & n.2 (collecting cases); *see, e.g.*, *United States v. Ochs*, 842 F.2d 515, 526-27 (1st Cir. 1988).

government"); *United States v. Covino*, 837 F.2d 65, 71-72 (2d Cir. 1988) (holding that defendant's defrauding his employer of "material information" did not constitute a deprivation of his employer's property rights); *United States v. Murphy*, 836 F.2d 248, 254 (6th Cir. 1988) ("Tennessee's right to accurate information with respect to its issuance of bingo permits constitutes an intangible right and thus . . . does not state a crime."); *United States v. Johns*, 742 F. Supp. 196, 214-15 (E.D. Pa. 1990) ("[T]he right to know material information . . . is too ethereal to constitute a *McNally* property interest."); *United States v. Regan*, 713 F. Supp. 629, 636 (S.D.N.Y. 1989) ("The limited partners may indeed have had a contractual right to receive truthful information . . . [but] this right creates no property interest in the information allegedly withheld from them.").

Notwithstanding *Herron* and the weight of authority from other circuits, the jury charge in this case was based on two Second Circuit cases—*United States v. Wallach*, 935 F.2d 445, 463 (2d Cir. 1991), and *United States v. D'Amato*, 39 F.3d 1249, 1258 (2d Cir. 1994)—stating that shareholders have a property right in receiving complete and accurate economic information concerning the corporation. But those opinions are highly suspect in the Second Circuit. Neither attempts to reconcile its ruling with the Second Circuit's earlier holding in *Covino* that an employee's defrauding his employer of "material information" did not constitute a deprivation of his employer's property rights. 837 F.2d at 71-72. And no court of appeals—*not even the Second Circuit*—has relied upon those cases to support the expansive view of information-as-property adopted here.

And with good reason. *Wallach* rests on a series of bold assertions about the property rights of shareholders, such as "A stockholder's right to monitor and to police the behavior of the corporation and its officers is a property interest," and "the right to complete and accurate information is one of the most essential sticks in the bundle of rights that comprise a stockholder's property interest." 935 F.2d at

463. But *Wallach* cites no authority to support those statements. *Wallach* does cite a treatise on corporations for the proposition that ownership of stock *entitles* one to inspect the corporation's books and records, *ibid.*, but it does not explain how a protected interest in gaining access to books and records could be transformed into a *property* right that the information be accurate.

While *D'Amato* cites *Wallach*, it also strives mightily to distinguish that case and, in the process, exposes the difficulty with the property right *Wallach* purported to recognize. For example, the Second Circuit acknowledged that "persons acting on behalf of a corporation may well find it necessary to disguise or conceal certain matters in the interests of that corporation." 39 F.3d at 1258. The court therefore invented a judicial safeguard to insulate persons from mail fraud liability if they (1) made an "otherwise lawful decision that concealment or a failure to disclose is in the corporation's best interests"; (2) acted in good faith; and (3) did not personally profit from the decision. *Ibid.* Based on that new safeguard, the Second Circuit reversed the defendant's mail fraud conviction. But the mail fraud statute itself contains no such limitations. If *Wallach* were correct that shareholders do have a recognized property right in receiving full and accurate economic information concerning the corporation, and if management made a conscious decision to keep certain information from the shareholders (even if it was not required to disclose it under the securities laws), why wouldn't that be punishable under the mail and wire fraud statutes? It is difficult to imagine most courts instructing a jury that it is a defense to mail fraud if the defendant believed it was in the best interests of the victim to defraud him of a property right. In attempting to limit *Wallach*, *D'Amato* simply demonstrates that *Wallach* is not only pernicious but wrong. Since *D'Amato*, moreover, the Second Circuit has

further distinguished *Wallach* such that, whatever is left of *Wallach*, it has no application here.[7]

This case, moreover, does not arise on a clean slate. It arises against the backdrop of the Nation's securities laws, as well as corresponding state laws, that comprehensively regulate public disclosures and establish settled expectations regarding the information that must be disclosed to the investing public, who is responsible for making those disclosures, and what the consequences are for failing to comply. This Court would throw those expectations out the window if it recognized a nebulous property right of corporations and shareholders to receive full and accurate information. Indeed, because courts have not historically recognized any such property right, there could be no certainty as to its scope. Moreover, such an expansion of the criminal laws is either limitless or purposeless. If the supposed right to full and accurate information were something broader than the shareholder protections already provided by the securities laws, then there is no principled boundary to that "right." Conversely, if the supposed right to full and accurate information were deemed to be coextensive with the shareholder protections already provided by the securities laws, then there would be no need to invoke the specter of the wire and mail fraud statutes at all.

## II. The Wire Fraud Statute Reaches Only Schemes To "Obtain" Money Or Property.

The wire fraud statute proscribes "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. § 1343. Despite the disjunctive "or" between the phrases "scheme or artifice to defraud" and "for obtaining money or

[7] While the Second Circuit has not formally overruled *Wallach*, it has limited it to cases in which the deprivation of information is part of a larger scheme to obtain the victim's money or property. *See United States v. Miller*, 997 F.2d 1010, 1020 (2d Cir. 1993).

property by means of false or fraudulent pretenses, representations, or promises," the Supreme Court twice has held—based on the history of the mail and wire fraud statutes and the meaning of the term "defraud"—that those phrases are to be read together as defining a single offense. *See Cleveland*, 531 U.S. at 25-26; *McNally*, 483 U.S. at 358-359. In this case, the jury instructions effectively deleted the "obtaining" element, declaring that defendants could be convicted if they merely devised a "scheme to *deprive*" Enron and its shareholders of money or property. *See* Tr. 6123, 6125. However, a "*deprivation* is a necessary but not a sufficient condition of [wire] fraud," because "only a scheme to *obtain* money or other property from the victim by fraud violates [§ 1343]." *United States v. Walters*, 997 F.2d 1219, 1227 (7th Cir. 1993) (emphasis added).

That conclusion flows from the Supreme Court's analysis in *McNally*. As the Court explained, the mail fraud statute when enacted in 1872 simply prohibited use of the mails in furtherance of "any scheme or artifice to defraud." *McNally*, 483 U.S. at 356. In *Durland v. United States*, 161 U.S. 306 (1896), the Court held that the phrase "any scheme or artifice to defraud" was not limited to the common-law crime of false pretenses, which required misrepresentations regarding *existing* facts. The Court nonetheless held that the phrase "scheme or artifice to defraud" also encompassed "suggestions and promises *as to the future*." 161 U.S. at 312-313. In 1909, Congress added the phrase "or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" to the statute in order to codify *Durland*'s holding. *McNally*, 483 U.S. at 357-359.

Because the "or for obtaining money or property" clause was added "simply [to make] it unmistakable that the statute reached false promises and misrepresentations as to the future," *McNally* cautions that it should not be read to imply any distinction between the "scheme or artifice to defraud" in the first clause and the "obtaining money or property" provision in the second clause. *See* 483

U.S. at 358-359; *see also Cleveland*, 531 U.S. at 25-26. Although *McNally* focused on the term "property" rather than the term "obtaining"—holding that the "money or property" requirement applied to "schemes to defraud"—its logic applies equally here. It would be nonsensical to argue that the words "money or property" in the phrase "for obtaining money or property" modify the phrase "scheme to defraud," but that the term "obtaining" does not.

Further, the 1909 amendment represented Congress's attempt to codify *Durland*, which construed "scheme to defraud" as encompassing false promises about future events. *McNally*, 483 U.S. at 357-358. Congress surely did not intend the words "scheme to defraud" to require an "obtaining" of the victim's money or property when the false representations are about future events, as in *Durland*, but for a mere "deprivation" of money or property to suffice when the false representations are about existing facts. Had Congress understood *Durland* and the mail fraud statute to encompass acts that merely "deprive" others of money or property, it would have codified *Durland* by barring "scheme[s] or artifice[s] to defraud, or for *the deprivation of* money or property by means of false or fraudulent pretenses." That Congress instead codified that case by barring schemes or artifices "for *obtaining* money or property" speaks volumes about its understanding of *Durland* and the mail fraud statute.[8]

That conclusion is reinforced by the Supreme Court's decision in *United States v. Stever*, 222 U.S. 167 (1911). In *Stever*, the Court addressed whether a statute barring use of the mail to send materials offering "any lottery or other similar enterprise dependent on lot or chance, or concerning schemes devised for

[8] When Congress revived the "honest services" theory in 18 U.S.C. § 1346, it specifically expanded the definition of "scheme to defraud" to include "a scheme or artifice to *deprive* another of the intangible right of honest services," 18 U.S.C. § 1346 (emphasis added), but it did not alter the requirement that a defendant *obtain* money or property in all other cases. *See* note 4, *supra*.

the purpose of obtaining money or property under false pretences," was limited to lottery-like materials. The government contended that the phrase "or concerning schemes devised for the purpose of obtaining money or property under false pretences" extended the statute beyond lotteries and similar chance-based schemes. Invoking the canon of *ejusdem generis*, the Court held that the general prohibition there must be limited to the sorts of schemes identified in the particularized listing, despite the use of the conjunction "or." *Id.* at 174-175. Likewise here, the general reference to "schemes to defraud" must be understood as extending only to the sorts of schemes identified in the more specific clause that follows, *i.e.*, schemes to *obtain* money or property.

That requirement has deep historical roots. The original prohibitions on "cheats," the equivalent of fraud, expressly required an obtaining of the victim's property. *See* 1 William Hawkins, *A Treatise of the Pleas of the Crown* 188 (Garland Publishing Inc. 1978) (1716) (noting that early statutes made it a crime for a person to "falsely and deceitfully *obtain or get into his or their Hands or Possession*, any Money . . . or other Things of any other Person or Persons") (emphasis added); 2 William H. East, *A Treatise of the Pleas of the Crown* 818 (Professional Books Ltd. 1987) (1803) (same). That is consistent with the longstanding distinction between larceny, which Blackstone defined as "the felonious taking, and carrying away, of the personal goods of another," 4 William Blackstone, *Commentaries* *230, and malicious mischief, which consisted of an "injury to private property" without "an intent of gaining by another's loss," *id.* at *243. The criminal law has long distinguished between offenses in which the wrongdoer acquires the victim's property, and offenses that merely deprive others of, or interfere with the use of property. The construction of the fraud statute adopted below obliterates that distinction.

## III. Private-Sector Honest-Services Fraud Occurs Only When An Employee Secretly Acts In His Own Interest, To His Employer's Detriment.

The conduct alleged here does not support a conviction for honest services fraud under 18 U.S.C. § 1346. The indictment charged that defendants executed a scheme to defraud Enron of its right to the honest services of its employees. But the indictment does not allege that Enron employees engaged in self-dealing or took bribes. It alleges only that employees engaged in misconduct *on behalf of* the corporation—that Enron employees booked a sham sale by promising to buy back Merrill Lynch's interest in certain barges. If true, the conduct may be wrongful. But § 1346 does not criminalize every illegal or immoral act committed in the course of employment. *See United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997) (*en banc*). It is only when an employee secretly acts in his own interest, to his employer's detriment, that he can be convicted of fraudulent deprivation of honest services.

### A. The Case Law Limits § 1346 To Bribery And Self-Dealing Cases.

Section 1346 amended the mail and wire fraud statutes to provide that "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. Section 1346 overturned the Supreme Court's decision in *McNally*, which held that deprivations of intangible rights, such as the right to honest services, were not covered by the mail and wire fraud statutes. *See Brumley*, 116 F.3d at 732. As such, it returned the doctrine of honest-services fraud to its pre-*McNally* state. *See Brumley*, 116 F.3d at 733.

The leading case on private-sector honest-services fraud is the Second Circuit's decision in *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (*en banc*). After thoroughly examining pre-*McNally* private-sector cases upholding honest-services fraud convictions, the court classified them into two categories:

bribery or kickback cases, and self-dealing cases. "In the bribery or kickback cases, a defendant who has or seeks some sort of business relationship or transaction with the victim secretly pays the victim's employee . . . in exchange for favored treatment." *Id.* at 139. "In the self-dealing cases, the defendant typically causes his or her employer to do business with a corporation or other enterprise in which the defendant has a secret interest, undisclosed to the employer." *Id.* at 140. Accordingly, the court distilled this general rule:

> [Section 1346 encompasses] a scheme or artifice to enable an officer or employee of a private entity . . . purporting to act for or in the interests of his or her employer . . . secretly to act in his or her or the defendant's own interest instead, accompanied by a material misrepresentation made or omission of information disclosed to the employer or another person.

*Id.* at 142.

The Second Circuit's interpretation is faithful to the text and purpose of the statute and avoids converting all employee misconduct into wire fraud—unless an employee *purports* to act in his employer's interest and *secretly* acts in his own, the misconduct can hardly be called a "scheme or artifice to *defraud*" his employer. An employee cannot "defraud" his employer where, as alleged here, he *openly* commits misconduct *on behalf of* the employer, or if he commits misconduct outside of his employment capacity. *See United States v. Bloom*, 149 F.3d 649, 656 (7th Cir. 1998) (Easterbrook, J.) (reversing conviction of city alderman who, in capacity as private attorney, counseled client how to cheat city out of tax revenue, because such conduct "might violate principles of legal ethics, but it [does] not *defraud* anyone" of honest services). Moreover, unless the employee substitutes *his own interest* for the employer's, he has merely committed misconduct; he has not deprived his employer of the right to his honest services.

Court after court has reached the same conclusion. In *United States v. Czubinski*, 106 F.3d 1069, 1071 (1st Cir. 1997), for example, the First Circuit addressed the § 1346 conviction of an IRS employee for unauthorized browsing of taxpayer files. Explaining that § 1346 incorporates pre-*McNally* case law, the court reasoned that it criminalizes "embezzlement," "bribery," and failure to disclose conflicts of interest. *Id.* at 1076. Because the conduct at issue fell "outside of the core of honest services fraud precedents," the court reversed. *Id.* at 1077. While the defendant "clearly committed wrongdoing . . . , there is no suggestion that he failed to carry out his official tasks adequately," nor did he "inten[d] to use the IRS files he browsed for any private purposes." *Id.*[9]

This Court's *en banc* decision in *Brumley* adopts the approach embodied in *Rybicki* and *Czubinski*. In *Brumley*, the Court affirmed the § 1346 conviction of a state agency official who accepted bribes from lawyers who appeared before the agency. 116 F.3d at 735. The Court first reviewed numerous pre-*McNally* cases, all of which fit within the bribery or self-dealing paradigms recognized by *Rybicki* and *Czubinski*. *See id.* at 733. The Court then explained the distinction between "illegal [employment] conduct alone" and honest services fraud under § 1346:

> "[H]onest services" contemplates that in rendering some particular service or services, the defendant was conscious of the fact that his actions were something less than in the best interests of the employer . . . . For example, *something close to bribery*. If the employee *renders all the services his position calls for*, and if these and all other services rendered by him are just the services which would be rendered by a *totally faithful employee*, and if the scheme does not contemplate otherwise, there has been no deprivation of honest services.

[9] *See also Bloom*, 149 F.3d at 656-57; *United States v. Cochran*, 109 F.3d 660, 667 (10th Cir. 1997); *United States v. Mangiardi*, 962 F. Supp. 49 (M.D. Pa. 1997).

*Id.* at 734 (emphasis added). The Court thus upheld the defendant's conviction, noting that by accepting bribes he "*[used] his office to pursue his own account and not that of his employer*." *Id.* at 735 (emphasis added).

In case after case, this Court has applied the same principle. For example, in *United States v. Ballard*, 663 F.2d 534 (5th Cir. 1981), a pre-*McNally* case, the Court reversed honest-services convictions arising out of a self-dealing scheme to sell oil because the government had failed to prove "some detriment to the employer." *Id.* at 540-41. Thus, even self-dealing is insufficient to sustain a conviction where the employee's misconduct does not harm the interests of his employer. *Cf. United States v. Caldwell*, 302 F.3d 399, 407-11 (5th Cir. 2002) (upholding conviction of CEO of venture capital fund who engaged in massive self-dealing scheme).

The misconduct charged here goes far beyond what Congress contemplated when it enacted § 1346 and ratified pre-*McNally* case law. Enron's allegedly false financial statements were not produced by employees who defrauded their employer by secretly acting in their own interest as a result of bribes or self-dealing. Those statements were produced *by Enron*, with the *open* cooperation of its employees and senior officers, all acting *on behalf of* the corporation, not for personal gain. The convictions therefore cannot stand. To hold otherwise would not only contravene *Brumley* and the decisions of every other circuit to have reached the issue. It would also open the floodgates to fraud prosecutions whenever an employee commits misconduct *on behalf of* a corporation.

### B. Fundamental Canons Of Statutory Interpretation Support Limiting § 1346 To The Bribery And Self-Dealing Cases Identified In Pre-*McNally* Case Law.

Three longstanding canons of statutory interpretation independently support construing § 1346 in light of pre-*McNally* case law.

*First*, the rule of lenity dictates that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Cleveland*, 531 U.S. at 25. This rule applies with special force here because mail and wire fraud are predicate offenses under RICO. *Id.* Thus, if this Court faces a close call between the limited interpretation of "honest services" offered in *Rybicki* and *Czubinski* (and endorsed in *Brumley*) and the nearly limitless alternative offered by the government, "it is appropriate, before . . . choos[ing] the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *Cleveland*, 531 U.S. at 25; *accord Czubinski*, 106 F.3d at 1077 (reversing § 1346 conviction outside of bribery and self-dealing context "in the absence of the clearest legislative mandate").

*Second*, "powerful" principles of federalism also "inform the definition of 'honest services'" and counsel against a broad interpretation. *Brumley*, 116 F.3d at 735. The government's interpretation would allow federal prosecution of all employee misconduct, far beyond the traditional context of bribery and self-dealing. *See Czubinski*, 106 F.3d at 1077 (rejecting government's interpretation as portending a "draconian personnel regulation"). The Supreme Court recently declined a similarly "sweeping expansion of federal criminal jurisdiction [under the mail and wire fraud statutes] in the absence of a clear statement by Congress." *Cleveland*, 531 U.S. at 24. The term "honest services" is not a sufficiently clear statement of Congressional intent to move far beyond the pre-*McNally* case law and displace the states' traditional regulation of the employment relationship.

*Third*, and finally, this Court should avoid interpreting § 1346 to render it unconstitutionally vague as applied to this case. *See Jones v. United States*, 526 U.S. 227, 239 (1999) ("[W]here a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter.") (internal

quotation marks omitted). "[T]he void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Needless to say, § 1346's plain text gives little notice as to what conduct it prohibits. *See Rybicki*, 354 F.3d at 135. Even with pre-*McNally* case law as an interpretive guide, this Court has candidly recognized that "some defendants on the outer reaches of the statute might be able to complain that they were not on notice that Congress criminalized their conduct when it revived the honest services doctrine." *Brumley*, 116 F.3d at 733. The defendants here are well outside even the "outer reaches" of the statute. No court has ever upheld a conviction—either before or after *McNally*—on similar facts. Defendants outside the traditional bribery and self-dealing contexts simply lack notice that they may be prosecuted under § 1346. *See Rybicki*, 354 U.S. at 143 (rejecting as-applied vagueness challenge *only after* limiting § 1346 to bribery and self-dealing cases).

## CONCLUSION

For the foregoing reasons, this Court should reverse appellants' wire fraud convictions.

DATED this 4th day of August, 2005.

Respectfully submitted,

By: /s/ James E. Boren

James E. Boren
830 Main Street
Baton Rouge, Louisiana 70802
Telephone: (225) 387-5786
Facsimile: (225) 336-4667

Attorney for *Amicus Curiae*
National Association of
Criminal Defense Lawyers

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies on this 4th day of August, 2005, that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) because it contains 6,979 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). Undersigned counsel further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point typeface, Times New Roman style.

/s/ James E. Boren
James E. Boren

## CERTIFICATE OF SERVICE

Undersigned counsel hereby certifies that true and complete copies of the foregoing Amicus Brief for the National Association of Criminal Defense Lawyers (along with an electronic version of the brief contained on a 3.5” diskette) were served via United States mail, postage prepaid, on the government’s counsel of record and counsel for defendants-appellants at the following addresses this 4th day of August, 2005:

Matthew W. Friedrich
Kathryn Ruemmler
U.S. Department of Justice
Enron Task Force
1400 New York Avenue, N.W.
Washington, D.C. 20530

Stephen Oestreicher
U.S. Department of Justice
P.O. Box 899
Ben Franklin Station
Washington, D.C. 20044-0899

Sidney Powell
Powell & Pearce
1854 A Hendersonville Road, No. 228
Asheville, North Carolina 28803

R. Thomas Seymour
The Seymour Law Firm
100 West Fifth Street, Suite 550
Tulsa, Oklahoma 74103

Seth P. Waxman
Wilmer Cutler Pickering Hale & Dorr LLP
2445 M Street, N.W.
Washington, D.C. 20037

John W. Nields, Jr.
Howrey LLP
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Thomas A. Hagemann
Marla Thompson Poirot
Gardere Wynne Sewell LLP
1000 Louisiana, Suite 3400
Houston, Texas 77002-5007

Lawrence S. Robbins
Gregory L. Poe
Alan E. Untereiner
Alice W. Yao
Robbins Russell Englert Orseck & Untereiner LLP
1801 K Street, N.W., Suite 411
Washington, D.C. 20006

/s/ James E. Boren
James E. Boren