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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

UNITED STATES OF AMERICA, Plaintiff, vs. RICHARD G. RENZI, JAMES W. SANDLIN, ANDREW BEARDALL Defendants.	No. 4:08-cr-00212-TUC-DCB (BPV) **DEFENDANT RICHARD RENZI'S MOTION TO DISMISS HONEST SERVICES CHARGES (COUNTS 1-10)** **ORAL ARGUMENT REQUESTED**

Defendant Richard G. Renzi, by and through counsel, respectfully moves this Court to dismiss the honest services mail and wire fraud charges against him, including the portion of Count 1 that alleges honest services fraud as an object of the purported conspiracy, and Counts 2 through 10, which allege substantive honest services wire fraud in violation of 18 U.S.C. §§ 1343 & 1346. As set forth in the accompanying memorandum of law, these charges must be dismissed because the Indictment fails to

allege the offense of honest services wire fraud, and because Section 1346 is unconstitutionally vague, either on its face or as applied to this case.

Congressman Renzi requests oral argument on this motion. A proposed order is attached.

DATED this 15th day of October, 2008.

Respectfully submitted,

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M E M O R A N D U M

INTRODUCTION

Much of the government's public corruption case against Congressman Renzi arises out of his alleged failure to disclose a potential conflict of interest—conduct that is not criminal under the federal anti-corruption statutes. Since this alleged conduct is not actually prohibited under any specific anti-corruption statute, the government resorts to a controversial theory of prosecution known as honest services fraud.

The honest services doctrine emerged in the 1970s as a means by which federal prosecutors could prosecute bribery of state and local officials under the mail and wire fraud statutes. After flourishing for several years, the honest services doctrine was emphatically rejected by the Supreme Court in *McNally v. United States*, 483 U.S. 350 (1987).

Sixteen months after *McNally*, Congress revived the honest services doctrine by enacting a new law, codified as 18 U.S.C. § 1346, that extended the reach of the mail and wire fraud statutes to "scheme[s] or artifice[s] to deprive another of their intangible right of honest services." Congress did not define any of these phrases, however, leaving it to the courts to determine what conduct Congress had intended to prohibit.

The courts have been unable to reach a consensus as to the meaning of Section 1346. Instead, variously recognizing that the statute is "open-ended," "ambulatory," "imprecise," and "ambiguous," courts have developed an *ad hoc* body of case law employing a series of "limiting principles" in an effort to give the statute meaning, cabin its reach, and provide fair notice of its prohibitions.

One such limiting principle requires that honest services fraud prosecutions be grounded in the pre-*McNally* case law. But this prosecution, premised as it is upon a Congressman's purported failure to disclose a conflict of interest, finds no support in the pre-*McNally* case law; indeed, no Member of Congress has *ever* been convicted of an honest services offense premised upon such a theory. And for good reason: Members of Congress are *not* criminally prohibited from participating in matters that that could affect their personal financial interests.

The Indictment's honest services charges violate still other of the limiting principles that constrain the reach of Section 1346. Under those principles, an honest services fraud prosecution must be predicated upon an alleged violation of an underlying state law coupled with an actual impact on the nature or quality of the services provided. But the Indictment here neither identifies any state law upon which to ground the prosecution nor alleges that the Congressman's conduct was in any way detrimental to the public.

For these and other reasons, as set forth more fully below, the Court should dismiss the Indictment's honest services charges for failing to state an offense. Alternatively, if the Court concludes that Section 1346 is broad enough to allow the charges here, then the statute must be invalidated as unconstitutionally vague, either on its face or as applied to the conduct alleged here, because it simply does not provide reasonable notice of that which is forbidden, and because it imposes no meaningful check on arbitrary, discriminatory, or politically-motivated enforcement by unelected federal prosecutors.

BACKGROUND

The Indictment's honest services charges stem from Congressman Renzi's alleged failure to disclose a potential conflict of interest, namely, that James Sandlin owed him money from an earlier business transaction. This theory is laid out in Count 1 of the Indictment, which alleges that Congressman Renzi and James Sandlin conspired to conceal this potential conflict and thereby defraud the United States of its "intangible right" to his "honest services … free from deceit, bias, self-dealing and concealment" in violation of 18 U.S.C. §§ 1341, 1343 and 1346. *See* Indictment ("Ind."), Count 1, ¶ 16(B). Counts 2 through 10 allege substantive wire transfers or communications in furtherance of the alleged scheme. *See id.*, Counts 2-10.

According to the Indictment, two private parties solicited Congressman Renzi's support of land exchange proposals by which they would have obtained title to valuable federal lands. *See id.* ¶¶ 13-15. Congressman Renzi allegedly advised these two private parties that he would not support their land exchange proposals unless they included the environmentally-sensitive San Pedro Property.[1] *See id.* ¶¶ 20 & 21. The government

[1] The San Pedro Property was the last significant agricultural property in the environmentally-sensitive Upper San Pedro River basin. The attached satellite images from July 1997 clearly show the center pivot irrigation systems on the Property, as well as a few smaller irrigation projects. *See* Exhibit A, Arizona Dept. of Water Resources, *Upper San Pedro Basin Active Management Area Review Report* (March 2005), at App. G-1. By 2002, the smaller irrigation projects had been retired, but irrigation on the San Pedro Property had expanded, with four center pivot wells irrigating roughly a square mile of desert. *See id.* at G-1–G-2. By 2002, the Property used more then 1,700 acre feet of water annually to irrigate alfalfa fields. *See id.* at 4-13 and G-3–G-4 (500 acres x 3.43 acre-feet/acre = 1,715 acre-feet/year). The Property's prodigious water use threatened the viability of Fort Huachuca, the economic engine of the Sierra Vista region, *id.* at 4-2, which was federally mandated to eliminate a water deficit estimated at roughly 9,900 acre feet annually. *See* Exhibit B, Report to Congress by Upper San Pedro Partnership, *Water*

claims that Congressman Renzi concealed from these parties that Mr. Sandlin, the then-owner of the San Pedro Property, owed him money from the sale of a real estate development company. *See id.* ¶ 22.

The Indictment alleges that one of these private parties purchased the San Pedro Property for $4.6 million, a price that is not alleged to have been inflated or otherwise above-market. *See id.* ¶ 23. According to the Indictment, Mr. Sandlin used $200,000 from the proceeds of the sale to pay down the debt to Congressman Renzi in April 2005. *See id.* ¶ 24. Mr. Sandlin allegedly then paid off the remainder of the debt in October 2005, in advance of closing on the San Pedro Property, using $533,000 that is *not* alleged to have been the proceeds of the property sale. *See id.* The Indictment alleges that Congressman Renzi failed to disclose the receipt of these payments on his 2005 Financial Disclosure Statement, which was timely filed in May 2006. *See id.* ¶¶ 19, 26(bb).

ARGUMENT

I. THE INDICTMENT FAILS TO ALLEGE A VIOLATION OF THE HONEST SERVICES STATUTE

The honest services statute, Section 1346, criminalizes schemes "to defraud another of the intangible right of honest services." 18 U.S.C. § 1346. The scope of the statute can only be understood by reviewing the history of the honest services doctrine. That history shows that the Indictment's honest services charges against Congressman Renzi are unprecedented and unsupportable, especially considering that Congress has

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Management of the Regional Aquifer in the Sierra Vista Subwatershed (March 30, 2005), at 10.

declined to criminalize a Member of Congress' participation in matters in which that Member has financial interests.

A. The Honest Services Doctrine Was Developed to Give Federal Prosecutors the Ability to Attack State and Local Corruption

During the 1970s, federal prosecutors began attacking corruption involving state and local officials. Since these state and local officials were beyond the reach of the federal bribery and gratuity statutes, *see* 18 U.S.C. § 201, prosecutors stretched existing federal statutes aimed at other forms of criminal conduct—including especially fraud and extortion—to permit a federal response to state and local corruption. For the most part, courts acquiesced to the use of these new theories, thus giving rise to the honest services doctrine.[2]

By 1987, most of the U.S. Courts of Appeals had held that the mail and wire fraud statutes reached schemes to defraud citizens of their right to honest government, at least when the schemes involved bribery-like conduct perpetrated by state or local officials. In *McNally*, however, the Supreme Court overturned the conviction of a public official employed by Kentucky who had devised a self-dealing patronage scheme. *See* 483 U.S. at 360. The Court explained that it was not willing to read the mail and wire fraud statutes to reach a right to honest government because it did not want either to leave the statutes' "outer boundaries ambiguous" or to involve the federal government "in setting standards of disclosure and good government for local and state officials."

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[2] *See generally* Sara Sun Beale, *Comparing the Scope of the Federal Government's Authority to Prosecute Federal Corruption and State and Local Corruption: Some Surprising Conclusions and a Proposal*, 51 Hastings L.J. 699 (April 2000) (hereinafter, "*Federal Corruption*").

Id. Applying the rule of lenity, the Court demanded that Congress "speak more clearly" if it desired to stretch the boundaries of the mail and wire fraud statutes. *Id.*

In the wake of *McNally*, Congress took up a variety of bills that would have addressed directly the duties of public officials, but none of those bills were enacted. *See United States v. Brumley*, 116 F.3d 728, 742-44 & 747-49 (5th Cir. 1997) (en banc) (dissenting opinion) (extensively discussing the legislative history of Section 1346). Instead, on the last day of the session in October 1988, Congress included the text of what would become Section 1346 in an omnibus drug bill. *See id.* at 742. This new provision, a single sentence, provided that the mail and wire fraud statutes reached "a scheme or artifice to deprive another of their intangible right of honest services." 18 U.S.C. § 1346. Congress did not define the terms "intangible right," "honest services," or the "intangible right of honest services" either in the text of the statute or in the sparse legislative history.

Congress has not amended Section 1346 since its enactment. Recently, however, Senator Patrick Leahy introduced legislation that would have clarified the reach of the honest services doctrine as applied to Members of Congress. He proposed enacting a new U.S. Code Section making illegal any scheme to defraud the United States of its right to the honest services of a Member of Congress. *See* S. 2559 (109th Cong.). Senator Leahy explained that his bill would give Members of Congress "much-needed notice and clarification as to what kind of conduct triggers this criminal offense" and "resolve the confusion about honest services fraud in the legislative context, by setting out a well-defined honest services fraud offense for violations involving Members of

Congress." CONG. REC. S3216 (Apr. 6, 2006). This bill was never enacted, however, leaving courts to guess as to how Congress intended the honest services doctrine to operate, if at all, in the federal legislative context.

B. Section 1346 Only Criminalizes Conduct That Was Criminal Before McNally

Courts have never agreed as to exactly what Section 1346 means. Read literally, Section 1346 seems to reach any dishonest conduct committed by anyone anywhere. *See e.g. United States v. Frost*, 125 F.3d 346, 365-69 (6th Cir. 1997) ("the literal terms of [Section 1346] suggest that dishonesty by an employee, standing alone, is a crime"). The courts rejected this broad reading of the statute, however, because they did not think that Congress could have intended so sweeping a result. *See, e.g., Brumley*, 116 F.3d at 728; *United States v. Czubinski,* 106 F.3d 1069, 1077 (1st Cir. 1997) (noting that Congress did not enact § 1346 "to create what amounts to a draconian personnel regulation").

Since the statute's text does not reveal its meaning, courts have looked to the circumstances surrounding its enactment. Most courts, including the Ninth Circuit, held that Section 1346 was meant to overturn *McNally*, at least with respect to the particular intangible right named in the statute, *i.e.*, the right to honest services. *See, e.g., United States v. Frega*, 179 F.3d 793 (9th Cir. 1999). The courts concluded, therefore, that "the meaning of honest services—given that the statute provides no perimeters—is to be found in the pre-*McNally* case law." *United States v. Brown,* 459 F.3d 509, 534 (5th Cir. 2006).

Because the meaning—and even the constitutionality—of Section 1346 is so dependent upon the "jumble of disparate" pre-*McNally* cases, *Brown*, 459 F.3d at 523, those precedents have become an important limitation on the statute's scope. As the Seventh Circuit explained:

> No one can be sure how far the intangible rights theory of criminal responsibility really extends, because it is a judicial gloss on § 1341. Congress told the courts in § 1346 to go right on glossing the mail fraud and wire fraud statutes along these lines. *Given the tradition (which verges on constitutional status) against common-law federal crimes, and the rule of lenity that requires doubts to be resolved against criminalizing conduct, it is best to limit the intangible rights approach to the scope it held when the Court decided (and Congress undid) McNally.*

United States v. Bloom, 149 F.3d 649, 656 (7th Cir. 1998) (emphasis added); *see also United States v. Rybicki*, 354 F.3d 124, 138 (2d Cir. 2003) (Section 1346 was intended to protect whatever rights to honest services existed before *McNally*, not "all intangible rights of honest services whatever they might be thought to be").

Under this limiting principle, honest services prosecutions must fail unless they are grounded in pre-*McNally* case law. In *United States v. Giffen*, for example, the defendant, a prominent businessman, allegedly violated the honest services statute by paying $78 million in bribes to the former Prime Minister and former President of Kazakhstan. *See* 326 F. Supp. 2d 497, 504-06 (S.D.N.Y. 2004). The court dismissed the charges as a matter of law, however, because the government was unable to point to any published, pre-*McNally* precedents showing that the honest services statute had been used to protect foreign citizens' rights to honest services. *See id.* at 505.

C. Section 1346's Reach is Constrained by Other Limiting Principles

In addition to the pre-*McNally* limiting principle, the scope of Section 1346 is constrained by other (sometimes competing) limiting principles, all of which are intended to give meaning to Section 1346's facially ambiguous text. The limiting principles most relevant to the Indictment are:

- ***State Law:*** The Third and Fifth Circuits have adopted state law as a limiting principle. In these circuits, an honest services prosecution fails unless the defendant's conduct violated a state law (or perhaps even a state criminal law). *See United States v. Panarella*, 277 F.3d 678, 692-93 (3d Cir. 2002) (rejecting the private gain limiting principle in favor of the state law limiting principle); *Brumley*, 116 F.3d at 734 (honest services fraud requires that the official "act or fail to act contrary to the requirements of his job under state law").

- ***Private Gain:*** The Seventh Circuit has adopted "misuse of office for private gain" as a limiting principle, meaning that an honest services prosecution must fail unless the government proves that a public official misused his or her office to generate a private gain. *See Bloom*, 149 F.3d at 655 (rejecting state law limiting principle; holding that "private gain" limits honest services prosecutions).

- ***Actual Deficiency of Services:*** The First, Fifth, Seventh, and Eighth Circuits require the government to prove that the services provided by a "dishonest" public servant were actually deficient. *See United States v. Thompson,* 484 F.3d 877 (7th Cir. 2007) (reversing honest services fraud conviction where there was no evidence that the defendant did anything other than "pursue the public interest as [she] understood it"); *Brumley*, 116 F.3d at 734 ("if the official does all that is required under state law, alleging that the services were not otherwise done 'honestly' does not charge a violation of the mail fraud statute"); *Czubinski*, 106 F.3d at 1077; *United States v. Rabbitt*, 583 F.2d 1014, 1026 (8th Cir. 1978).

As these descriptions show, even though the courts all recognize that there must be predictable limits to the honest services doctrine, the courts have not reached a consensus as to what those limits should be. As a result, "no one can be sure how far the intangible rights theory of criminal responsibility really extends…." *Bloom*, 149 F.3d at 656.

D. The Indictment Fails to Allege a Violation of the Honest Services Statute

The Indictment's conflict-of-interest honest services fraud charges fail for at least the following reasons: (i) Section 1346 cannot support a conflict-of-interest prosecution against a Member of Congress because there are no such pre-*McNally* precedents; (ii) Section 1346 cannot be read to criminalize conduct that Congress expressly declined to criminalize through its targeted anti-corruption laws; (iii) Section 1346 cannot support a conflict-of-interest prosecution because Congressman Renzi is not alleged to have had a "direct interest" in the San Pedro Property; (iv) Section 1346 cannot reach the conduct alleged here because Congressman Renzi is not alleged to have violated an underlying state law; (v) Section 1346 cannot support charges predicated on violations of House rules or civil ethics laws; and (vi) Section 1346 does not apply when the services rendered by a public official are not alleged to have been either deficient or contrary to the public interest.

1. Section 1346 Cannot Support a Conflict-of-Interest Prosecution Against a Member of Congress Because No Such Theory Was Established Before McNally

As noted above, one of the important limiting principles constraining the reach of Section 1346 is the pre-*McNally* case law. That precedent established two ways by which *state and local officials* might commit honest services fraud. The most common way for state and local officials to violate the statute was by selling their votes in exchange for bribes or kickbacks. *See, e.g., United States v. Mandel*, 591 F.2d 1347, 1362 (4th Cir. 1979) ("When a public official has been bribed, he breaches his duty of honest, faithful and disinterested service."). The courts reasoned that public officials

who accepted bribes defrauded the citizens of their right to disinterested decision making because the official effectively sold his decisions to the highest bidder. *See id.* at 1362-63.

In some circuits, state and local officials also could commit honest services fraud by concealing or failing to disclose a conflict of interest, although the viability of this theory was "not as clear-cut" as was the case with bribery. *Id.* at 1363. Pre-*McNally* cases held that the failure to disclose a conflict of interest, in and of itself, "could never be cognizable under the mail fraud statute…." *Id.* Rather, the pre-*McNally* courts held that a concealed or undisclosed conflict could amount to an honest services fraud only if the state or local official failed to disclose the existence of a "direct interest" in a matter on which he or she was passing (which, as explained below, has not been alleged here). *See id.* at 1363-64.

Not every circuit adopted the conflict-of-interest theory of mail fraud, and some circuits rejected it, at least when the state or local official in question was not subject to a specific statutory requirement mandating disclosure of the conflict. *See Rabbitt*, 583 F.2d at 1026 (concluding that state legislator did not commit fraud when he was not subject to any affirmative statutory duty to disclose his interests in decisions); *see also United States v. Kott*, No. 3:07-CR-0056, 2007 U.S. Dist. LEXIS 66125 (D. Ak., Sept. 4, 2007) (concluding that honest services charges against an Alaska legislator could not be based on alleged failure to disclose potential conflict of interest since there was no state statute mandating disclosure).

Whatever the pre-*McNally* limits of the conflict-of-interest theory of honest services may have been in the context of state and local officials, such a theory was *never* applied to a Member of Congress. Indeed, no published decision—either before or after *McNally*—has held that a Member of Congress could commit mail fraud by failing to disclose a conflict of interest.[3]

Consistent with the rule of lenity, the Court should not extend Section 1346 beyond its pre-*McNally* roots to criminalize a purported conflict of interest involving a Members of Congress. Since the honest services charges here are not supported by pre-*McNally* precedent, they should be dismissed outright. *See Giffen*, 326 F. Supp. 2d at 305 (dismissing honest services charges in absence of published pre-*McNally* decisions holding that the honest services doctrine reached foreign citizens).

2. Section 1346 Cannot Be Used to Criminalize Conduct that Congress Declined to Criminalize Through Targeted Prohibitions

The Court should also dismiss the honest services charges here because Congress has refused to criminalize a Member's failure to disclose a conflict of interest. Congress has instead determined that the conflict of interest and disclosure requirements should be enforced through civil actions or through the House and Senate ethics process. The

[3] Indeed, there have been only a handful of cases in which a Member of Congress has been charged with honest services fraud. Those cases have all involved either bribery or the theft of money from the United States government. *See United States v. Rostenkowski*, 59 F.3d 1291 (D.C. Cir. 1995) (theft of money from United States); *United States v. McDade*, 28 F.3d 283 (3d Cir. 1994) (bribery); *United States v. Williams*, 705 F.2d 603 (2d Cir. 1983) (bribery); *United States v. Myers*, 692 F.2d 823 (2d Cir. 1982) (bribery); *United States v. Diggs*, 613 F2d 988 (D.C. Cir. 1979) (theft of money from United States); *United States v. Jefferson*, 534 F. Supp. 2d. 645 (E.D. Va. 2008) (bribery).

government cannot use Section 1346 to end-run these considered Congressional judgments.

As the Supreme Court observed in its most recent public corruption case, Congress has enacted "an intricate web of [federal] regulations, both administrative and criminal, governing the acceptance of gifts and other self-enriching actions by public officials." *United States v. Sun-Diamond Growers of California*, 526 U.S. 398, 409 (1999). The relevant criminal statutes forbid Members of Congress from, among other things, accepting bribes or gratuities (18 U.S.C. § 201), providing compensated representational assistance to persons involved in proceedings involving the United States (*id.* §§ 203 & 205), practicing before certain federal courts (*id.* § 204) or lobbying their former colleagues within a year of leaving the House of Representatives (*id.* § 207).

What the federal criminal statutes do not do, however, is prohibit Members of Congress from participating in matters that impact their personal financial interests. This is not just an oversight: Section 208 of the Criminal Code expressly forbids *executive branch* employees from participating in matters that could impact their personal financial interests, *see* 18 U.S.C. § 208, but there are no similar prohibitions applicable to Members of Congress.

The criminal anti-corruption statutes "are merely the tip of the regulatory iceberg." *Sun-Diamond*, 526 U.S. at 410. Members of Congress are subject to the requirements of the Ethics in Government Act, including the Act's financial disclosure requirements. *See* 5 U.S.C. App. § 101, *et seq.* The Act authorizes the Attorney

General to bring actions for civil money penalties against any persons, including Members of Congress, who willfully violate the financial disclosure obligations. *See id.* § 104(a); *see also United States v. Rose*, 28 F.3d 181 (D.C. Cir. 1994) (finding the Department of Justice could maintain civil action against Member of Congress for knowing and willful violations of the Ethics in Government Act).

Members of Congress are also subject to the Rules of the Senate or the House of Representatives. The House Rules comprehensively address standards of official conduct (Rule XXIII), the permissible use of official funds (Rule XXIV), outside income restrictions (Rule XXV), financial disclosure requirements (XXVI), and disclosures of job negotiations (Rule XXVII). *See* Rules of the House of Representatives, 110th Cong. (Mar. 11, 2008). The House investigates potential rule violations through the Committee on Standards of Official Conduct, punishes rule-breakers through censure or expulsion, and refers suspected financial-disclosure violations to the Attorney General for consideration of civil action. *See* 5 U.S.C. App. § 104(b).

This overall regulatory scheme embodies Congress' considered judgments as to what conduct to prohibit and how best to enforce those prohibitions. Congress carefully calibrated the force behind those prohibitions, making the most serious political misconduct criminal, while leaving conduct it perceived as less serious to be enforced through civil or internal means. The government seeks to avoid these considered Congressional judgments through an ambulatory application of Section 1346, asserting, in essence, that Congress wanted Section 1346 to serve as a catch-all corruption offense

reaching supposedly "dishonest" political conduct not specifically prohibited in Congress' targeted corruption statutes.[4]

Allowing federal prosecutors to prosecute Members of Congress for conduct that is not criminal under the federal anti-corruption statutes flies in the face of the Supreme Court's decision in *Sun-Diamond*. As the Court there cautioned, federal anti-corruption statutes "that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter. Absent a text that clearly requires it, [courts] ought not expand … one piece of the regulatory puzzle so dramatically as to make many other pieces misfits." 526 U.S. at 412; *see also Brown*, 459 F.3d at 523, n.13 (declining to read section 1346 to reach accounting and securities fraud in part because such frauds "are heavily regulated under other statutes").

The Court should not read Section 1346 as a "meat axe." The statute was not intended to create a catch-all political corruption offense, criminalizing conduct that Congress has declined to criminalize through targeted prohibitions. Nothing in the statute's text compels such a result; to the contrary, Section 1346's text is "vague and amorphous on its face." *Brown*, 459 F.3d at 523. Moreover, while Congress clearly intended to overrule *McNally* and restore federal prosecutors' ability to prosecute state and local officials, there is "no indication" in the statute's legislative history to suggest

[4] As the Supreme Court put it in an analogous conduct, the government's suggestion that the honest services statute reaches conduct that Congress did not expressly prohibit presumes that Congress intended to adopt "an indirect but blunderbuss solution to a problem treated with precision when considered directly." *Dowling v. United States,* 473 U.S. 207, 226 (1985) (refusing to read a general theft statute broadly to reach the theft of copyrighted materials because the conduct in question was not criminalized under the copyright statutes).

that Congress was in any way "concerned with providing a mechanism to prosecute federal officials"—who, after all, are already subject to prosecution under a litany of targeted federal anti-corruption laws. *Federal Corruption*, 51 Hastings L.J. at 717.

Rather than create a *de facto* common law crime, something the courts may not constitutionally do, *see United States v. Bass*, 404 U.S. 336, 348 (1971), the Court should require Congress to "speak more clearly" than it has—such as through legislation similar to that proposed by Senator Leahy in 2006—if it wishes to criminalize a Member's failure to disclose a potential conflict of interest. Consistent with the Supreme Court's teachings in *McNally* and *Sun-Diamond*, as well as the rule of lenity, the Court should opt for a narrower, reasonable interpretation of the honest services statute that excludes conduct, such as that alleged here, that is neither supported by the pre-*McNally* precedents nor criminal under Congress' targeted anti-corruption statutes. *See Brown*, 459 F.3d at 523.

3. Section 1346 Cannot Support the Charges Here Because Congressman Renzi Is Not Alleged to Have Had a "Direct Interest" in the San Pedro Property

Even those circuits that recognize the conflict-of-interest theory of honest services fraud acknowledge that not every undisclosed conflict by a state or local official gives rise to an honest services fraud. *See Bloom*, 149 F.3d at 654; *Mandel*, 591 F.2d at 1363. Instead, a conflict of interest can only be actionable if the public official "fails to disclose the existence of a *direct interest* in a matter that he is passing on." *Mandel*, 591 F.2d at 1363 (emphasis added). No such "direct interest" is alleged here.

The *Mandel* case is instructive as to what constitutes an actionable "direct interest." Marvin Mandel, the governor of Maryland, failed to disclose the receipt of clothes, jewelry, and other financial interests from a group of men who also owned a Maryland racetrack. *See* 591 F.2d at 1354-56. Nonetheless, the Governor took steps to help the racetrack owners by taking positions on legislation that was favorable to them. *See id.* at 1356-57. The Fourth Circuit found that these facts could support an honest services prosecution under a bribery theory, *but not for an undisclosed conflict of interest*, because—notwithstanding the other financial ties between the Governor and the racetrack owners—there was no evidence showing that the Governor had a "direct interest in the racetrack business." *Id.* at 1364.

Congressman Renzi had no interest—let alone a direct interest—in the San Pedro Property. Congressman Renzi never owned, and is not alleged to have owned, that Property. *See* Ind. ¶ 17. And Congressman Renzi was never owed money because of that Property; rather, the alleged debt to Congressman Renzi arose out of the sale of real estate company operating hundreds of miles away on the other side of Arizona. *See* Ind. ¶ 5.

As in *Mandel*, the fact that Congressman Renzi allegedly received undisclosed benefits from the owner of the San Pedro Property is not enough to make out an honest services fraud under a conflict-of-interest theory. Just as Governor Mandel could not be prosecuted under a conflict-of-interest theory because he had no direct interest in the racetrack business, *see* 591 F.2d at 1364, Congressman Renzi cannot be prosecuted here

because he is not alleged to have had—and in fact did not have—a direct interest in the San Pedro Property.

4. Section 1346 Cannot Support the Charges Here Because The Indictment Does Not Allege that the Congressman Violated Any State Criminal Law

State law provides another limiting principle constraining the reach of Section 1346. In the Third and Fifth Circuits, the government must allege that a public official's conduct violated an underlying state law to make out an honest services fraud. The Ninth Circuit has not considered the issue yet, but a district court within the Circuit recently predicted that the Ninth Circuit would follow the Fifth Circuit's approach. *See Kott*, 2007 Dist. LEXIS 66125, at *14-15. Assuming that is so, the honest services charges here fail, since they do not allege that Congressman Renzi violated any state law.

The seminal Third Circuit case articulating this state law limiting principle is *United States v. Panarella*, 277 F.3d 678 (3d Cir. 2002). In that case, the defendant pled guilty as an accessory-after-the-fact to an honest services wire fraud committed by the former majority leader of the Pennsylvania state senate. *See id.* at 679.[5] The defendant challenged his conviction on the grounds that the superseding indictment to which he had pled failed to allege an offense. *See id.* In urging reversal, the defendant relied heavily on the Seventh Circuit's decision in *United States v. Bloom*, in which that Court

[5] According to the plea documents, the defendant, using intermediaries, paid the then-majority leader $330,000 over four years, purportedly for business consulting services. *See id.* at 681. While receiving this money, the majority leader took extensive discretionary actions to benefit Panarella. *See id.* He also failed to disclose the receipt of these payments on his financial disclosure statements in violation of a Pennsylvania criminal law. *See id.* at 681.

concluded that a state or local official committed honest services fraud "only if he misuse[d] his position (or the information he obtained in it) for personal gain." 149 F.3d 649, 656-57 (7th Cir. 1998).

The Third Circuit declined to adopt the Seventh Circuit's "misuse of office for personal gain" limiting principle, which it found to be ambiguous and inadequate. *See Panarella*, 277 F.3d at 692. But perceiving the need to limit the otherwise ambiguous reach of the statute, the Third Circuit concluded that more appropriate limiting principle would be to require that the conduct in question violate state law. *See id.* Having adopted that limiting principle, the Court held "that a public official who conceals a financial interest *in violation of state criminal law* while taking discretionary action that the official knows will directly benefit that interest commits honest services fraud." *Id.* at 694 (emphasis added).

The Third Circuit drew this state law limiting principle from the Fifth Circuit's en banc decision in *Brumley*, which involved a Texas official who "borrowed" (but never repaid) some $112,000 from lawyers who had business with the Workers' Compensation Commission for which Brumley worked. *See* 116 F.3d at 730-31. Rather than permit a conviction to turn on a jury's notion of honest services, the Court held that state law violations were necessary predicates for honest services fraud prosecutions. *See id.* at 734. Under the *Brumley* standard, "a federal prosecutor must prove that conduct of a state official breached a duty respecting the provision of services owed to the officials' employer under state law." *Id.*

The Indictment's honest services charges are plainly deficient under this state law limiting principle. The Indictment does not so much as reference a state law, let alone allege that Congressman Renzi violated such a law, criminal or otherwise. Rather, the Indictment alleges that Congressman Renzi violated an undefined "duty"—the source of which is never identified—to provide honest services, and that he failed to disclose a supposed financial interest under a federal law that provides for only civil penalties. *See* Ind. ¶¶ 8 & 9. Since the Indictment does not allege a violation of any state law, the Court should dismiss the honest services charges for failing to state an offense.

5. The Honest Services Fraud Charges Cannot Be Sustained Based on a Purported Violation of a House Ethics Rule or Civil Disclosure Statute

The Indictment cites the congressional oath of office, two House ethical rules, and the Ethics in Government Act, *see* Ind. ¶¶ 6-8, presumably to suggest that a breach of any one of these provisions could support an honest services fraud. But this argument fails for multiple, independent reasons.

First, no published case has ever held that a Member of Congress could commit honest services fraud by violating any of these provisions. Especially given the facial vagueness of the honest services statute, this lack of precedent is fatal to any possible attempt to expand the statute beyond its pre-*McNally* precedents. *See Giffen*, 326 F. Supp. 2d at 305 (dismissing honest services charges in absence of published pre-*McNally* decisions holding that the honest services doctrine reached foreign citizens).

Second, none of these cited provisions allow for criminal penalties. To the contrary, the House of Representatives enforces its rules through internal investigations,

and it can censure or expel rule-breakers. Similarly, the Ethics in Government Act, which is enforced by the Attorney General, authorizes courts to impose civil money penalties for willful violations. These enforcement mechanisms represent a balancing of competing interests and careful judgments about what conduct should be criminalized. The honest services statute cannot be construed to end-run this careful legislative scheme; certainly, nothing in its text or history requires such a result. *See Sun-Diamond*, 526 U.S. at 412.

Third, the U.S. Constitution reserves to the House the power to determine its own rules. Art. I, § 5. The extent to which courts may interpret and apply House Rules is governed by separation of powers considerations. *See United States v. Rostenkowski*, 59 F.3d 1291, 1306 (D.C. Cir. 1995). While courts may apply House Rules that are clear, they may not interpret an ambiguous House rule; to do so "runs the risk of the court intruding into the sphere of influence reserved to the legislative branch under the Constitution." *Id.* "Where . . . a court cannot be confident that its interpretation is correct, there is too great a chance that it will interpret the Rule differently than would the Congress itself; in that circumstance, the court would effectively be making the Rules—a power that the Rulemaking Clause reserves to each House alone." *Id.* at 1306-07. Accordingly, ambiguous House Rules are non-justiciable. *Id.* at 1306.

Neither of the rules cited in the Indictment can support a criminal prosecution. The first rule so cited, which prohibits a Member from receiving outside compensation as the result of the exercise of "improper influence" (House Rule XXIII, ¶ 3), is so general and standardless as to be non-justiciable; it cannot form the basis for a criminal

prosecution.[6] The second cited rule, the House rule implementing the Ethics in Government Act, adds nothing beyond the Act itself. The Act, however, provides for civil, not criminal, penalties, even with respect to willful violations. Moreover, a violation of this act—which is intended to address the appearance of impropriety—does not permit of a mail fraud prosecution. *See Brumley*, 116 F.3d at 734 (violation of a law that prohibits only appearances of corruption will not support an honest services fraud).

6. The Honest Services Fraud Charges Must Be Dismissed Because the Congressman's Behavior Is Not Alleged to Have Been Different from That of a Faithful Employee

It is axiomatic that "not every breach of every fiduciary duty works a criminal fraud." *Bloom*, 149 F.3d at 654-55. Rather, to state an honest services fraud, an indictment must allege that the purported fraud resulted in, or was intended to result in, an actual diminution of the services rendered by the official.

The Fifth Circuit explained this rule as follows:

> Stated another way, "honest 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—or that he consciously contemplated or intended such actions. 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.

[6] The oath of office similarly cannot support a criminal prosecution. While the oath was adopted by statute pursuant to the mandate of Article VI, clause 3 of the Constitution, rather than by rule, its vague language does not set forth adequate standards to define criminal violations—which is plainly not its purpose in any event. *See generally Cole v. Richardson*, 405 U.S. 676, 684 (1972) (the purpose of the oath "was not to create specific responsibilities but to assure that those in positions of public trust were willing to commit themselves to live by the constitutional processes of our system").

Brumley, 116 F.3d at 734.[7]

The Indictment's honest services fraud charges fail because they do not allege that Congressman Renzi took any action that a disinterested official would not have taken. For example, the Indictment does not allege, nor could it, that the acquisition of the San Pedro Property was against the public interest; retiring water use on the Property unquestionably would have benefited the region. Indeed, when Congressman Renzi was contemplating introducing the bill in April 2005, a member of his staff sent a draft to Congressman Jim Kolbe's Chief of Staff. Congressman Kolbe's Chief of Staff responded as follows:

> *This is a great bill and we need to make sure we get great press when we drop it….*
>
> Do you have any problems with us floating the language … past folks in Cochise County, including USPP [the Upper San Pedro Partnership], the Huachuca 50, TNC [The Nature Conservancy] and [the] Audubon [Society]? *I think if we get their buy in on this before we introduce, our press will be fantastic with positive quotes from the City, County, TNC, Audubon, and the Huachuca 50 (military folks).* I'm thinking we just give them a day because of the pending BRAC [Base Realignment and Closure] list. *I think if we link it to BRAC and the health of the River, folks will really get excited about this and be motivated to move quickly.*

Ex. C at 1 (emphasis added).

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[7] This actual detriment requirement is well-established across the circuits. *See, e.g., United States v. Thompson,* 484 F.3d 877, 884 (reversing honest services fraud conviction where there was no evidence that the defendant did anything other than "pursue the public interest as [she] understood it"); *Czubinski,* 106 F.3d at 1077 (1st Cir. 1997) (reversing honest services fraud conviction because there was no proof that the defendant "failed to carry out his official tasks adequately, or intended to do so"); *Rabbitt*, 583 F.2d at 1026 (reversing honest services fraud conviction because there was no evidence that the defendant "failed to carry out the duties and responsibilities of his legislative office"); *United States v. McNeive*, 536 F.2d 1245 (8th Cir. 1976) (plumbing inspector who routinely accepted gratuities did not commit honest services fraud because his conduct neither injured the government nor affected the performance of his duties).

Accordingly, other knowledgeable public officials believed that the proposed land exchange was a "great bill" that was in the best interests of the public. Since Congressman Renzi is not alleged to have taken actions that were contrary to the public interest, or that are different from those of a disinterested official, the honest services charges must fail.

II. THE HONEST SERVICES STATUTE IS VOID FOR VAGUENESS

If the Court concludes that Section 1346 is broad enough to support the Indictment's novel charges, it should conclude that the statute is unconstitutionally vague, either on its face or as applied to the conduct alleged here. A criminal statute is void for vagueness unless it defines the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited" and does so "in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). As shown below, Section 1346 fails both prongs of the *Kolender* test, and it should be struck down as unconstitutionally vague both on its face and as applied to the conduct in this novel prosecution.

A. The Honest Services Statute is Unconstitutionally Vague on its Face

Vagueness challenges to statutes that do not involve First Amendment freedoms must generally proceed only on as-applied basis. *See United States v. Mazurie*, 419 U.S. 544, 550 (1975).[8] Consistent with that approach, most courts have declined to assess

[8] The opinions in *City of Chicago v. Morales*, 527 U.S. 41 (1999), suggest that there are other circumstances where a statute may be challenged as facially invalid, such as when "a criminal statute that 'reach[es] a substantial amount of innocent conduct' and thereby fails to establish 'minimal guidelines to govern law enforcement' is, on its face, unconstitutionally vague." *Id., quoted in Rybicki*, 354 F.3d at 157 (dissenting opinion). Congressman Renzi respectfully adopts the arguments of the *Rybicki* dissenters and urges

Section 1346's constitutionality on its face; they have instead considered only whether the statute was constitutional on the facts of a given case. *See, e.g., United States v. Williams*, 441 F.3d 716 (9th Cir. 1998) (honest services fraud statute not impermissibly vague when applied to criminalize a lawyer's theft of money from an elderly client).

This case is different, however, because the honest services charges here are predicated on Congressman Renzi's efforts to develop and advance federal legislation. Not only is this conduct insulated from prosecution under the Speech or Debate Clause, but it is also conduct at the heart of the First Amendment. *See Bond v. Floyd*, 385 U.S. 116, 133 (1966) (recognizing First Amendment right of state legislator to criticize government policies). Like all other citizens, Members of Congress must be free to air their views, to speak with interested parties about potential legislation, to discuss the merits of different legislative proposals, and to share strategies to successfully enact legislation. A broad reading of the honest services statute chills the First Amendment rights of a Member of Congress. Since Section 1346 implicates First Amendment values, this Court must assess the constitutionality of the statute on its face.

1. Section 1346 Does Not Provide Fair Notice of That Which Is Prohibited

Section 1346 does not provide fair warning of that which is prohibited. The decisions recognizing the statute's ambiguity are legion. *See, e.g., United States v. Thompson*, 484 F.3d 877 (7th Cir. 2007) (criticizing Section 1346 as "ambulatory," "ambiguous" and "open-ended"); *Brown*, 459 F.3d at 523 (noting that section 1346 is

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the Court to assess the constitutionality of Section 1346 on its face whether or not it implicates First Amendment interests.

"vague and amorphous on its face"); *Rybicki*, 354 F.3d at 135 (majority opinion) (noting that the court would "labor long and with difficulty" to divine meaning of statute from its text) & 158 (dissenting opinion) ("The plain meaning of 'honest services' in the text of § 1346 simply provides no clue to the public or the courts as to what conduct is prohibited under the statute."); *Panarella*, 277 F.3d at 698 (recognizing that the "[d]eprivation of honest services is perforce an imprecise standard"); *Bloom*, 149 F.3d at 655 ("no one can be sure how far the intangible rights theory of criminal responsibility really extends"); *Sawyer*, 85 F.3d at 724 (concept of "honest services . . . eludes easy definition").

The statute's ambiguities are well-illustrated by the many different—and oftentimes competing—"limiting principles" that courts have felt compelled to devise. As the *Rybicki* dissenters observed:

> [T]he vagueness of the statute has induced court after court to undertake a rescue operation by fashioning something that (if enacted) would withstand a vagueness challenge. The felt need to do that attests to the constitutional weakness of section 1346 as written. And the result of all of these efforts – which has been to create different prohibitions and offenses in different circuits – confirms that the weakness is fatal. Judicial invention cannot save a statute from unconstitutional vagueness; courts should not try to fill out a statute that makes it an offense to "intentionally cause harm to another," or to "stray from the straight and narrow," or to fail to render "honest services."

354 F.3d at 163-64.

These repeated judicial rescue operations have created, in essence, a common law offense, the elements of which differ across judicial districts. That is not the way the criminal law is supposed to work; in our system, "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes,

which are solely creatures of statute." *Liparota v. United States*, 471 U.S. 419, 424 (1985); *see also Brown*, 459 F.3d at 534 (the lack of clarity in Section 1346 has caused the courts to do "precisely what most would say we lack the constitutional power to do, that is, define what constitutes criminal conduct on an *ex post facto* and *ad hoc* basis").

As a result, public officials and advocates cannot know exactly what is permitted. They will therefore likely refrain from lawful conduct for fear that a court or prosecution might later conclude that their actions were illegal. *See Buckley*, 424 U.S. 1, 41 n. 48 (1976) (vague laws can impermissibly chill speech by inducing citizens to steer far wider of the unlawful zone than if boundaries were clearly marked). Members of Congress may hesitate to develop or introduce legislation that they believe to be in the best interest of the country out of concern that federal prosecutors might label their efforts "dishonest." Simply put, section 1346 chills the First Amendment rights of Members of Congress. *See Panarella*, 277 F.3d at 698 (recognizing that political prosecutions threaten to "chill constitutionally protected political activity"); *see also Federal Corruption*, 51 Hastings L. J. at 719 (political prosecutions under an amorphous honest services statute can result in "a threat to First Amendment values").

2. Section 1346 Does Not Provide Minimal Guidelines to Govern Law Enforcement

Section 1346 also fails the second part of the *Kolender v. Lawson* test in that it fails to provide "minimal guidelines to govern law enforcement." 461 U.S. at 358. The lack of such minimal standards creates a risk that a statute may be used to pursue selective or politically-motivated prosecutions. *See Smith v. Goguen*, 415 U.S. 566, 575 (1974) ("the absence of specificity in a criminal statute invites abuse on the part of

prosecuting officials who are left free to harass any individuals or groups who may be the object of official displeasure.").

Careers have been ruined and innocent public servants have been imprisoned as a result of ambulatory prosecutions under Section 1346. Just last summer, the Seventh Circuit overturned the conviction of a Wisconsin procurement official, Georgia Thompson, who had been convicted based on a "preposterous" reading of Section 1346. *Thompson*, 484 F.3d at 883. The Court was so troubled by the prosecution's case that it ordered Ms. Thompson released from prison during oral argument. *See id.* at 877.

In explaining its reasoning, the Seventh Circuit noted that Section 1346 had "an open-ended quality" that allowed the government to bring tragically flawed cases even when prosecutors acted "in good faith with support in the case law." *Id.* at 884. The Seventh Circuit urged Congress to rethink this approach:

> Courts can curtail some effects of statutory ambiguity but cannot deal with the source. This prosecution, which led to the conviction and imprisonment of a civil servant for conduct that, as far as this record shows, was designed to pursue the public interest as the employee understood it, may well induce Congress to take another look at the wisdom of enacting ambulatory criminal prohibitions. Haziness designed to avoid loopholes through which bad persons can wriggle can impose high costs on people the statute was not designed to catch.

Id.

Other courts have requested Congress to speak more clearly about Section 1346. In *Brown*, for example, Judge Jolly, writing for the majority, refused to expand the honest services doctrine to reach accounting and securities frauds—even though such an expansion would require "no new explicit statement of law"—because of concerns about "the danger we face of defining an ever-expanding and ever-evolving federal

common law crime." 459 F.3d at 523, n.13. Judge DeMoss, writing separately, explicitly urged Congress to "repair" Section 1346 to ensure that that it provided "minimal guidelines to govern law enforcement." *Id.* at 534.

The problems posed by the "haziness" of Section 1346 are compounded by the "extraordinary degree of politicization within the Department of Justice" recently uncovered by the House Judiciary Committee. *Allegations of Selective Prosecution in Our Federal Criminal Justice System,* at 1, U.S. House of Rep., Committee on the Judiciary (Apr. 17, 2008). The Committee found evidence suggesting that the Department of Justice's investigations and prosecutions of political officials were influenced by partisan politics. The Committee discussed a series of cases in which it found evidence suggesting that cases proceeded for improper political reasons, including the case against Georgia Thompson. Remarkably, federal prosecutors relied upon the honest services statute in every single one of these controversial and politically-charged cases. *See id.*

B. The Honest Services Statute is Unconstitutionally Vague as Applied to the Facts Alleged in the Indictment

Even if the Court is unwilling to assess whether Section 1346 is unconstitutionally vague on its face, it should still strike down the statute, because it cannot be constitutionally applied to the allegations here. Due process and elementary principles of fairness require fair notice of that which is criminal so that people may conform their conduct to the law. *See Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

Nothing about the statute clearly criminalizes Congressman Renzi's alleged failure to disclose a conflict of interest. Indeed, it is impossible to know just what conflicts of interest, if any, are prohibited by the statute. As the Seventh Circuit observed:

> [S]ome conflicts of interest are tolerable; a member of General Motors' board of directors is (legally) entitled to drive a Ford; but it is frightening to contemplate the prospect that the federal mail fraud statute makes it a crime punishable by five years' imprisonment to misunderstand how a state court in future years will delineate the extent of impermissible conflicts. Then we would have a federal common-law crime, a beastie that many decisions say cannot exist. Courts have applied this no-common-law-crimes principle to mail fraud prosecutions by holding that violations of state-law fiduciary duties do not turn into mail fraud just because the mails are used in the process. 'Not every breach of a fiduciary duty works a criminal fraud.' But if 'not every breach' is a criminal fraud, where is the line drawn? *Its location cannot be found by parsing § 1341 or § 1346, a profound difficulty in a criminal prosecution.*

Bloom, 149 F.3d at 654 (internal citations omitted) (emphasis added).

Congressman Renzi was not on notice that the conduct alleged here could be considered criminal. No case has ever found that a Member of Congress committed honest services fraud by failing to disclose a conflict of interest. Because of an analogous absence of precedent, the District Court for the Southern District of New York concluded in *Giffen* that the honest services statute would be unconstitutionally vague if it were read to apply to a scheme to bribe a foreign official. 326 F. Supp. 2d at 506-07.

Moreover, Congress' targeted anti-corruption laws do not prohibit a Member of Congress from participating in legislation, even when that legislation could impact the Member's personal financial interests. Congressman Renzi could not have known that

he could be held criminally liable for engaging in conduct that Congress has declined to criminalize through its targeted anti-corruption statutes.

Since Section 1346 does not clearly criminalize the conduct alleged here, the honest services charges cannot be constitutionally applied to Congressman Renzi.

CONCLUSION

For the reasons set forth above, Congressman Renzi respectfully submits that the Court should dismiss Counts 2 through 10 of the Indictment, and should also dismiss the portion of Count 1 that relies on allegations of honest services fraud.

DATED this 15th day of October, 2008.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2008, a true and correct copy of Defendant Richard G. Renzi's Motion To Dismiss Honest Services Charges (Counts 1-10) was electronically transmitted to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the following CM/ECF registrants:

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