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No. 86-422

In the Supreme Court of the United States

OCTOBER TERM, 1987

DAVID CARPENTER, KENNETH P. FELIS, AND
R. FOSTER WINANS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUPPLEMENTAL BRIEF FOR THE UNITED STATES

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This brief is filed pursuant to Rule 35.5 of the Rules of this Court to address the significance to this case of *McNally* v. *United States*, No. 86-234 (June 24, 1987), which was decided after the submission of the government's brief on the merits. In *McNally*, the Court held that the federal mail fraud statute, 18 U.S.C. 1341, proscribes " 'wronging one in his property rights by dishonest methods or schemes' " (slip op. 8 (citations omitted)), but does not reach "schemes to defraud citizens of their intangible rights to honest and impartial government" (*id.* at 5).

McNally does not affect petitioners' convictions under the mail and wire fraud statutes. Petitioners were *not* convicted because they deprived the Journal of Winans' loyalty, or of some other abstract expectation. As the district court explained in some detail (see Pet. App. 63a-65a)—in findings endorsed by the court of appeals (see *id.* at 18a)—petitioners' convictions were based squarely on their fraudulent misappropriation of proprietary information about the contents and timing of the *Heard* column. The Journal explicitly (and correctly) considered this information to be its property (Pet. App. 36a), and the misappropriation of that property by petitioners plainly interfered with the Journal's right to control its use. Petitioners' actions also threatened to reduce the interest of readers in, and thus the value to the Journal of, the *Heard* column, a continuing newspaper feature that was regarded by Journal editors as "one of the most important" of the newspaper's columns (C.A. App. 118). And the fraud threatened "potentially devastating harm" (Pet. App. 65a) to a closely related Journal asset: the worldwide reputation for fairness and integrity that gives value to all of the Journal's columns and features.[1]

Nor does *McNally* affect petitioners' convictions under Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder. The offense defined by those provisions does not require an injury to property. Section 10(b) and Rule 10b-5 were designed to help "insure the maintenance of fair and honest markets in [securities] transactions," 15 U.S.C. 78b, and these provisions make no reference to "money or property." Instead, the limiting principle in cases under these provisions is that the fraud must occur "in connection with the purchase or sale of any security," an element that is plainly present here.

1. a. *McNally* does not alter the rule that nondisclosure by a person in a position of trust may constitute a

[1] The district court summarized this harm as follows (Pet. App. 64a-65a):

> [T]he fraudulent misappropriation or theft of the WSJ's property is in itself sufficient to satisfy the requirement of contemplation of harm. The theft of valuable property is of course a crime even if the victim is unaware of the loss. Here, the fraudulent taking and misuse of the confidential information stolen from the WSJ placed immediately in jeopardy probably its most valuable asset—its reputation for fairness and integrity. These conspirators, with their intimate knowledge of the financial and stock markets and of the influential role that the Heard column played in these markets, were hardly unaware of the potentially devastating harm that

"'trick, deceit, chicane or overreaching'" (slip op. 8 (citation omitted)) sufficient to establish the existence of a scheme or artifice to defraud. This Court had previously made clear that a person commits fraud when he fails to disclose "information 'that the other [party] is entitled to know because of a fiduciary or other similar relation of trust and confidence between them'" (*Chiarella* v. *United States*, 445 U.S. 222, 228 (1980) (citation omitted)), and nothing in *McNally* casts doubt on that established rule. Indeed, *McNally* is not at all concerned with the *means* by which the defendant effects his scheme; it addresses only the requisite injury to the victim. Cf. *McNally*, slip op. 10 (suggesting that breach of fiduciary duty may amount to fraud if it wrongs the victim in his property rights); *id.* at 11 (Stevens, J., dissenting). Here, as we have previously explained (Gov't Br. 14-27), Winans' knowing breach of duties to the Journal (including, among others, the duty to disclose leaks of the *Heard* column (Pet. App. 37a)) afforded him continuing access to the Journal's confidential information about the contents and timing of the *Heard* column, which he and the other petitioners then misappropriated. That conduct clearly establishes the first element of the crime.

b. With respect to the second element—the requirement under 18 U.S.C. 1341 and 1343 that a scheme to defraud contemplate harm to the victim (see Gov't Br. 14)—the specific holding of *McNally* is that the mail fraud statute does not "proscribe[] schemes to defraud citizens of their intangible rights to honest and impartial government" (slip op. 5); the Court concluded that the statute is "limited in scope to the protection of property rights" (*id.* at 10). But nothing in the Court's opinion suggests that Section 1341 fails to protect well-established forms of intangible property—a reading that would dramatically narrow the reach of a statute that "has been characterized as the 'first line of defense' against virtually every new area of fraud to develop in the United States in the past century" (Rakoff, *The Fed-*

eral Mail Fraud Statute (Part I), 18 Duq. L. Rev. 771, 772 (1980) (citation omitted)). To the contrary, the Court emphasized in *McNally* that the mail fraud statute "is to be interpreted broadly insofar as property rights are concerned" (slip op. 6). The "right of the citizenry to good government" at issue in *McNally* (slip op. 5) cannot be valued in monetary terms, and no individual has an enforceable possessory interest in it (cf. slip op. 9 n.8). But many intangibles have monetary value and belong to identifiable persons who are entitled to exclude other persons; such intangibles are universally thought of as "property."

While the Court in *McNally* did not define "property" for purposes of the mail and wire fraud statutes, the term surely includes many kinds of valuable proprietary information such as trade secrets, customer lists, business plans, financial analysis and advice, and the like. The misappropriation of such information has long been understood to deprive the owner of something of value (see generally *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1001-1004 (1984); *International News Service* v. *Associated Press*, 248 U.S. 215 (1918); *United States* v. *Girard*, 601 F.2d 69, 70-71 (2d Cir.), cert. denied, 444 U.S. 871 (1979); *NCH Corp.* v. *Broyles*, 749 F.2d 247, 254 (5th Cir. 1985); *Vigitron, Inc.* v. *Ferguson*, 120 N.H. 626, 419 A.2d 1115 (1980)), and to give rise to liability under the mail and wire fraud statutes (see, *e.g.*, *United States* v. *Kent*, 608 F.2d 542, 545 (5th Cir. 1979), cert. denied, 446 U.S. 936 (1980); *United States* v. *Louderman*, 576 F.2d 1383, 1387 (9th Cir.), cert. denied, 439 U.S. 896 (1978); *Abbott* v. *United States*, 239 F.2d 310, 314 (5th Cir. 1956); *United States* v. *Procter & Gamble Co.*, 47 F. Supp. 676 (D. Mass. 1942)).

An individual or firm reputation is also an intangible asset with a monetary value. See, *e.g.*, *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 350 (1974); *Marcone* v. *Penthouse Int'l Magazine for Men*, 754 F.2d 1072, 1079-1080 (3d Cir.), cert. denied, 474 U.S. 864 (1985); *Braun* v. *Flynt*, 726 F.2d 245, 250-251 (5th Cir.), cert. denied

469 U.S. 883 (1984); *Sauerhoff* v. *Hearst Corp.*, 538 F.2d 588, 590 (4th Cir. 1976); *Lewis* v. *Elliott*, 628 F. Supp. 512, 523 (D.D.C. 1986); *Sharon* v. *Time, Inc.*, 599 F. Supp. 538, 586 (S.D.N.Y. 1984). That is particularly true of a reputation that gives added value to a firm's commercial product—a reputation that the firm is entitled to exploit, convey, and protect from others. Indeed, a reputation for integrity and reliability is an integral part of good will, an asset that often has a specific cash value (see, *e.g.*, *Stewart & Stevenson Services, Inc.* v. *Pickard*, 749 F.2d 635, 649 (11th Cir. 1984); *North Clackamas Community Hosp.* v. *Harris*, 664 F.2d 701, 706 (9th Cir. 1980); *Levitt Corp.* v. *Levitt*, 593 F.2d 463, 468 (2d Cir. 1979); *General Television, Inc.* v. *United States*, 449 F. Supp. 609, 611 (D. Minn. 1978), aff'd, 598 F.2d 1148 (8th Cir. 1979)) that may be purchased and reflected on a balance sheet (see, *e.g.*, *Lambert* v. *Fisherman's Dock Co-op, Inc.*, 61 N.J. 596, 297 A.2d 566 (1972)).

c. Petitioners plainly threatened harm to these property rights of the Journal. The *Heard* column was prepared by Journal employees (both Winans and other, honest reporters (see Pet. App. 42a)), using the Journal's resources, for the Journal's benefit; indeed, the Journal's business was the preparation and dissemination (for profit) of the *Heard* column, along with many other features of the newspaper. The Journal had an undisputed right to prohibit other persons from making undesired uses of its proprietary information about the contents and timing of the *Heard* column. The convictions in this case were based on explicit findings that petitioners invaded that property right, fraudulently misappropriating proprietary information about the *Heard* column. Their invasion [redacted] " 'wrong[ed the Journal in its] property rights by dishonest methods or schemes' " (*McNally*, slip op. 8 (citation omitted)).

This was more than an abstract interference with the Journal's property: petitioners used the misappropriated information in a way that threatened to diminish the value of the *Heard* column as a continuing feature that attracted readers to the Journal. The *Heard* column is "a daily market gossip feature which highlights a stock or group of stocks" (Pet. App. 35a). It was of great interest to Journal readers (and therefore of great value to the Journal) because it provided "both negative and positive information about its featured stocks" (*ibid.*) and often "[took] a point of view with respect to investment in the stocks that it reviews" (*ibid.*).[2] But as both courts below found, "the predictability of the columns' market impact depended in large part on the *perceived* quality and integrity of the columns" (Pet. App. 7a (emphasis added), citing Pet. App. 44a n.4). And the Journal had every reason to assume that the public's interest in the column, and hence the column's value to the Journal, would be sharply diminished if the public were to learn that Journal employees and their co-conspirators were misusing their knowledge of the contents and timing of columns to beat the public to the trading floor, or come to believe that an author of the *Heard* column might distort or time the column to fit his own investment strategies.[3] That is why the Journal exercised (see J.A. 40-43) its property right to control the use of information about the *Heard* column (and other Journal columns) by Journal employees. The dis-

[2] It is apparent from the record here that the *Heard* column was a significant source of information for Journal readers: both courts below found that the column has a predictable and often dramatic impact on the prices of the securities that it discusses (Pet. App. 19a n.9, 35a-36a). And the likelihood that the column would move the market in turn plainly made it essential reading for many in the investment community. On the other hand, the district court found that "if false or slanted articles were published, the column's readers would very likely lose confidence in the column and cease to rely on it" (Pet. App. 44 & n.4). Of course, such damage would occur not only if the column were slanted in fact, but also if readers perceived that, because of conflicting interests, it might be.

[3] Petitioners have argued throughout this case that Winans maintained "the journalistic purity of the column" (Pet. App. 44a n.4). The district court did not wholly believe [illegible]

trict court thus correctly found that the Journal viewed information about the contents and timing of its columns as its property (Pet. App. 36a), that Winans knew that his actions violated the Journal's policies restricting the use of this property (*id.* at 37a)—and that petitioners' conduct accordingly amounted to a "fraudulent misappropriation or theft of the [Journal's] property" (*id.* at 64a).[4]

The effect of petitioners' actions on the *Heard* column also illustrates how, more generally, "the fraudulent taking and misuse of the confidential information stolen from the [Journal] placed * * * in jeopardy probably [the Journal's] most valuable asset—its reputation for fairness and integrity" (Pet. App. 64a). This reputation (for, among other things, not letting staff members do what Winans did) was no mere abstraction: it gave every financial column and story more importance to potential readers, more market impact,[5] and more value

44a-45a), but the argument in any event misses the point: Journal readers would have no reason to believe that a reporter could and would "maintain[] a stance of journalistic purity when the reporter is engaged in a decidedly unpure venture" (*id.* at 44a). By giving themselves a conflicting interest in the *Heard* column, petitioners obviously endangered its reputation for reliability and hence its value.

[4] Indeed, at least as between the Journal and Winans, the Journal was entitled to the profits Winans obtained through the misappropriation of the *Heard* column: "If an agent receives anything as a result of his violation of a duty of loyalty to the principal, he is subject to a liability to deliver it, its value, or its proceeds, to the principal." Restatement (Second) of Agency § 403 (1958). Since this Court's decision in *McNally*, at least one court of appeals has held that an employee's receipt of secret profits supports a mail fraud charge. *United States* v. *Fagan*, No. 86-2284 (5th Cir. June 30, 1987), slip op. 16 & n.4, 18-19 n.6.

[5] As we have noted (note 2, *supra*), a story's expected market impact would obviously increase readers' interest in it and therefore its value to the Journal. Market impact, which depended on the Journal's reputation, is also what made petitioners' scheme work. Petitioners were thus exploiting, for their own commercial purposes, the very reputation they were endangering, which had

to the Journal than it would have if the Journal were suspected of letting its writers have conflicting interests in their stories, or if the Journal were thought to let its reporters beat readers to the punch. Petitioners, by simultaneously using, threatening, and diminishing the Journal's reputation, "thereby defraud[ed the Journal] 'as surely as if they took its money'" (Pet. App. 18a (citation omitted)).

In sum, unlike *McNally*, this case does not involve merely an abstract expectation on the part of the public at large. Petitioners here took, used, and damaged specific (albeit intangible) property belonging to an identifiable victim: information about the *Heard* column that the Journal was entitled to prohibit others from misusing, so as to preserve, inter alia, the value of the column as an attraction for readers. And petitioners' conduct threatened to have a destructive effect on the Journal's general reputation. These property rights existed independently of the Journal's interest in the loyalty of its employees.[6]

2. *McNally* is entirely inapposite to petitioners' convictions under Section 10(b) and Rule 10b-5. The theory of those convictions was that "'one who misappropriates nonpublic information in breach of a fiduciary duty and trades on that information to his own advantage violates Section 10(b) and Rule 10b-5'" (Pet. App. 53a (citation omitted)). As we have explained (Gov't Br. 42-45), such a use of fraudulently acquired information in securities trading injures the integrity of the market. This "misappropriation theory" of liability—which has been accepted by four Justices of this Court, has been endorsed

[6] Although this was not the basis of the prosecution here (see Gov't Br. 32 n.32), an employee's breach of duty that deprives his employer of bargained-for services may well defraud the employer of money, since the employer in such a case "is not getting what he paid for" (*McNally*, slip op. 17 n.10 (Stevens, J., dissenting)). See also *United States* v. *Fagan*, slip op. 15, (post-*McNally* holding that an employee's receipt of kickbacks deprived the employer of property, because it deprived the employer of the opportunity to "capture[] for itself the large sums that [the employee] was secreting").

by committees of Congress, and is firmly settled in the Second Circuit—simply does not involve the question whether there has been an injury to "property" within the meaning of *McNally*.

In holding that Section 1341 protects only property rights, the Court in *McNally* relied on the language (see slip op. 6-8, 9), history (see *id.* at 6), and purposes (see *id.* at 5-6) of the mail fraud statute. But all of these considerations suggest the *absence* of any such limitation under Section 10(b) and Rule 10b-5. First, in contrast to Section 1341, the securities fraud provisions make no reference to property; to the contrary, Section 10(b) prohibits the use "in connection with the purchase or sale of any security" of "any manipulative or deceptive device or contrivance" in contravention of the Commission's rules, while Rule 10b-5 prohibits "any act, practice or course of business which operates * * * as a fraud or deceit upon any person." Those provisions "establish[] higher standards of conduct in the securities industry" than those mandated by the common law, and the Court accordingly has "eschewed rigid common-law barriers in construing the securities laws." *Bateman Eichler, Hill Richards, Inc.* v. *Berner*, 472 U.S. 299, 310 (1985). See *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 388-389 (1983).

Second, the stated purposes of Section 10(b) are quite different from those of Section 1341, and the difference explains why the former contains no reference to deprivations of "money or property." While Section 1341 was enacted to "protect[] property rights" (*McNally*, slip op. 5), the Exchange Act was designed to "insure the maintenance of fair and honest markets in [securities] transactions." 15 U.S.C. 78b. See H.R. Conf. Rep. 94-229, 94th Cong., 1st Sess. 91-92 (1975) ("the basic goals" of the Exchange Act are "to assure that dealing in securities is fair and without undue preferences or advantages among investors"). Section 10(b), in turn, has the specific purpose of eliminating from the securities markets all "manipulative and deceptive practices." S. Rep. 792, *Hochfelder*, 425 U.S. 185, 203 (1976); *Stock Exchange Regulation: Hearing on H.R. 7852 Before the House Comm. on Interstate and Foreign Commerce*, 73d Cong., 2d Sess. 115 (1934) (statement of Thomas G. Corcoran). As we have explained (Gov't Br. 40-45), trading on fraudulently acquired information is just such a deceptive practice or "cunning device" (*Hochfelder*, 425 U.S. at 203 (brackets omitted)).[7] Regardless of whether misappropriated information is deemed to be "property," its use in trading corrupts honest markets and discourages investors from trading (see Gov't Br. 43-45). Cf. *McNally*, slip op. 8-9 n.8 (noting that the policies served by another specialized fraud statute, 18 U.S.C. 371, mandate the conclusion that the term "to defraud" in that statute is not limited to the deprivation of property rights).

Finally, there is no reason to fear that failure to limit Section 10(b) to injury to *property* would lead either to open-ended criminal liability or to federal involvement in the regulation of matters of state concern (cf. *McNally*, slip op. 9). Liability under Section 10(b) and Rule 10b-5 is bounded by the requirement that the fraud have occurred in connection with the purchase or sale of a security. And more than half a century ago Congress declared that transactions in securities markets are "affected with a national public interest which makes it necessary to provide for regulation and control of such transactions and of practices and matters relating thereto" (15 U.S.C. 78b); indeed, conduct that tends to drive investors out of the market threatens "our nation's economic growth and stability" (H.R. Rep. 98-355, 98th Cong., 1st Sess. 2 (1983); see Gov't Br. 44). There is no reason to doubt that Congress intended in Section 10(b) to prohibit conduct like the "decidely unpure venture" (Pet. App. 44a) of which petitioners stand convicted.

[7] While the legislative history of Section 1341 is "sparse" (*McNally*, slip op. 6), a congressional committee report that the Court has found relevant in construing Section 10(b) (see Gov't Br. 41) expressly endorsed the proposition that "deceitful misappropriation of confidential information ...

CONCLUSION

For the foregoing reasons and the reasons stated in our opening brief, the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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