HALL, *Circuit Judge*, concurring:

I fully concur with Judge Sack's opinion. I write separately to add that even if the Defendants-Appellants had argued below that honest services wire-fraud is unconstitutionally vague because the statute, 18 U.S.C. § 1346, does not define the scope of the fiduciary duty required to prove the element of "honest services," *see* Slip Op. at 38-45, I would affirm their convictions.

As the opinion notes, "perhaps the earliest application" of an honest services fraud theory in a criminal case occurred in 1940, in *United States v. Procter & Gamble Co.*, 47 F. Supp. 676 (D. Mass. 1942). Slip Op. at 33 (quoting *Skilling v. United States*, 561 U.S. 358, 401 (2010)). In *Procter & Gamble*, the district court observed that "[t]he normal relationship of employer and employee implies that the employee will be loyal and honest in all his actions with or on behalf of his employer, and that he will not wrongfully divulge to others the confidential information, trade secrets, etc., belonging to his employer."

47 F. Supp. at 678. Although *McNally v. United States*, 483 U.S. 350 (1987), limited the government's ability to pursue honest services fraud cases, *see* Slip Op. at 34, the near immediate adoption of § 1346 after that decision has led this court to look back at pre-*McNally* case law to determine the scope of that section. *See, e.g.*, *United States v. Rybicki*, 354 F.3d 124, 144-45 (2d Cir. 2003) (*en banc*). Prior to *McNally*, courts considered the combination of two factors—(a) the fiduciary duty inherent in an employer-employee relationship and (b) the acceptance of bribes or kickbacks in breach of that duty—to be sufficient to convict an individual of mail fraud. *See Skilling*, 561 U.S. at 401 (citing *United States v. McNeive*, 536 F.2d 1245, 1249 (8th Cir. 1976)). Thus, were we deciding the issue here, I would hold that § 1346 encompasses the duty that existed between the Defendants-Appellants and their employers, FIFA and CONMEBOL.

Although there has been some discussion of whether the source of the fiduciary duty required to be proven in an honest services

wire-fraud prosecution must arise from "positive state or federal law," Slip Op. at 43 (quoting *Skilling*, 561 U.S. at 417 (Scalia, *J.*, concurring)), there was no such requirement in our pre-*McNally* understanding of the mail fraud statute. In *United States v. Von Barta*, 635 F.2d 999 (2d Cir. 1980), affirming a conviction of mail fraud and discussing the development of honest services fraud, we noted explicitly:

> Our discussion is not to be construed as holding that an employee's duty to disclose material information to his employer must be imposed by state or federal statute. Indeed, the employment relationship, by itself, may oblige an employee not to conceal, and in fact to reveal, information he has reason to believe is material to the conduct of his employer's business.

Von Barta, 635 F.2d at 1007; *see also United States v. Bronston*, 658 F.2d 920, 926 (2d Cir. 1981). This understanding of the fiduciary duty requirement, moreover, was not limited to our Circuit. *See United States v. Bush*, 522 F.2d 641, 651-52 (7th Cir. 1975) (holding that a defendant's "duty to disclose need not be based upon the existence of some statute prescribing such a duty"); *United States v. Brown*, 540 F.2d

364, 374-75 (8th Cir. 1976) (same); *see also United States v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir. 1980) (concluding "that depriving an employer of one's honest services and of its right to have its business conducted honestly can constitute a 'scheme to defraud'"). In sum, when the government proves that a defendant-employee has concealed information that is material to the conduct of his employer's business, it has proven the defendant has breached a fiduciary duty to his employer and has thus deprived the employer of his honest services. *See also Rybicki*, 354 F.3d at 141-42, 142 n.17; *United States v. Milovanovic*, 678 F.3d 713, 724 (9th Cir. 2012) (*en banc*); *United States v. Bryza*, 522 F.2d 414, 422 (7th Cir. 1975).

Defendants-Appellants' argument that the statute does not apply to foreign employment relationships fares no better under our more recent precedent. "At the heart of the fiduciary relationship lies reliance, and de facto control and dominance." *United States v. Halloran*, 821 F.3d 321, 338 (2d Cir. 2016) (alternation, quotation, and

citation omitted). These characteristics are obviously inherent in employer-employee relationships—including the relationships in this case. Had the argument been properly raised below, I would hold that a cognizable fiduciary duty exists here.

Defendants-Appellants, by virtue of their relationship with FIFA and CONMEBOL, had a fiduciary duty not to accept bribes or kickbacks, a duty that was explicitly laid out by the two associations' respective codes of conduct. Because, in my view, the element of honest services in § 1346 encompasses "the obligations of loyalty and fidelity that inhere in the employment relationship," *Skilling*, 561 U.S. at 417 (Scalia, *J.*, concurring), it follows that the statute is not unconstitutionally vague as applied to Defendants-Appellants.