No. 23–_____

In the
Supreme Court of the United States

Michael Avenatti,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner, an attorney representing a plaintiff with potential contract and tort claims, was convicted of honest services fraud, in violation of 18 U.S.C. §§ 1343 and 1346, and extortion offenses, in violation of 18 U.S.C. §§ 875(d) and 1951, based on demands that he made during settlement negotiations with a defendant. The questions presented are:

1. Is § 1346 void for vagueness?

2. Can civil litigation conduct—in particular, an attorney's settlement demand—support federal criminal extortion liability?

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OPINIONS AND ORDERS BELOW

The opinion of the United States Court of Appeals for the Second Circuit affirming the judgment of conviction appears at Pet. App. 1a–79a and is reported at 81 F.4th 171. The opinion of the United States District Court for the Southern District of New York denying Petitioner's pretrial motion to dismiss the honest services fraud count appears at Pet. App. 80a–99a and is reported at 432 F. Supp. 3d 354. The opinion of the District Court denying Petitioner's pretrial motion to dismiss the extortion counts appears at Pet. App. 100a–117a and is reported at 2020 WL 70951. The opinion of the District Court denying Petitioner's posttrial motion for judgment of acquittal on all counts appears at Pet. App. 118a–213a and is reported at 2021 WL 2809919. The order of the Court of Appeals denying panel rehearing/rehearing *en banc* appears at Pet. App. 214a.

JURISDICTION

The District Court had jurisdiction under 18 U.S.C. § 3231, entered judgment on July 15, 2021, and entered amended judgment on February 18, 2022. The Court of Appeals had jurisdiction under 28 U.S.C. § 1291, affirmed on August 30, 2023, and denied a timely petition for panel rehearing/rehearing *en banc* on November 13, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The **Fifth Amendment** provides, in relevant part:

> No person shall ... be deprived of life, liberty, or property, without due process of law.

18 U.S.C. § 1343 (Fraud by wire, radio, or television) provides, in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than 20 years, or both. ...

18 U.S.C. § 1346 (Definition of "scheme or artifice to defraud") provides:

> For the purposes of this chapter, the term "scheme or artifice to defraud" includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 875(d) (Interstate communications) provides:

> Whoever, with intent to extort from any person, firm, association, or corporation, any money or other thing of value, transmits in interstate or foreign commerce any communication containing any threat to injure the property or reputation of the addressee or of another or the reputation of a deceased person or any threat to accuse the addressee or any other person of a crime, shall be fined under this title or imprisoned not more than two years, or both.

18 U.S.C. § 1951 (Interference with commerce by threats or violence) provides, in relevant part:

> (a) Whoever in any way or degree obstructs, delays, or affects commerce or the movement of any article or commodity in commerce, by ... extortion or attempts or conspires so to do, ... shall be fined under this title or imprisoned not more than twenty years, or both.
> (b) As used in this section— ...
> (2) The term "extortion" means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence, or fear, or under color of official right.

STATEMENT OF THE CASE

In recent years, this Court has, time and again, had occasion to caution against—and to restrain—"'sweeping expansion[s] of federal criminal jurisdiction.'" *Kelly v. United States*, 140 S. Ct. 1565, 1574 (2020) (quoting *Cleveland v. United States*, 531 U.S. 12, 24 (2000)). This case necessitates another such intervention.

Petitioner Michael Avenatti, a high-profile plaintiff's attorney, represented Gary Franklin, the director of a youth basketball program, in prospective litigation against Nike. Franklin had been coerced by Nike executives to funnel secret payments to elite amateur players and submit bogus invoices to Nike to cover up what he had done. These same executives then replaced Franklin as coach of his best team and cancelled his program's lucrative sponsorship contract with Nike. Franklin told Petitioner that he wanted "justice," which meant compensation and removing the corrupt executives. So, when Petitioner approached Nike on Franklin's behalf to negotiate a settlement, that is what he sought: (i) $1.5 million for Franklin, to resolve the coach's claims for breach of contract and tortious interference with contract; and (ii) that Nike hire Petitioner to conduct an internal investigation into Nike, a step that would have developed the factual grounds for the executives' dismissal and rid the company of its misconduct. In the alternative, Petitioner proposed, Nike could settle by paying Franklin $22.5 million. But if the corporation refused, Petitioner threatened to hold a press conference and "blow the lid" on Nike's corrupt activities. Based on that conduct, all of which occurred during civil settlement negotiations, Petitioner was convicted of honest services wire fraud

against Franklin, §§ 1343 and 1346; and attempting to extort Nike, §§ 875(d) and 1951.

These convictions implicate two critical issues that merit review.

First, Petitioner's honest services fraud conviction cannot stand because § 1346 is void for vagueness, both on its face and as applied, in violation of the Fifth Amendment's Due Process Clause. As Justice Gorsuch, joined by Justice Thomas, recently observed, despite this Court's many efforts to cabin and clarify § 1346's scope, "[t]o this day, no one knows what 'honest-services fraud' encompasses. And the Constitution's promise of due process does not tolerate that kind of uncertainty in our laws—especially when criminal sanctions loom." *Percoco v. United States*, 143 S. Ct. 1130, 1140 (2023) (concurring op.). Below, the Court of Appeals ducked Petitioner's vagueness challenge by adopting an untenable reading of the record—one that not even the government had advanced—to characterize Petitioner's actions as soliciting a bribe, conduct that falls within § 1346 as construed by *Skilling v. United States*, 561 U.S. 358 (2010). In truth, Petitioner was at worst guilty of abusing his fiduciary duty as Franklin's attorney by leveraging Franklin's claims to pursue compensation for himself. But *Skilling* rejected mere "undisclosed self-dealing" as a basis for honest services fraud liability in order to avoid the vagueness problems that would arise from criminalizing this "amorphous category of cases." *Id.* at 409. The opinion below blows past *Skilling*'s limits, reviving this unconstitutional theory of liability and the very vagueness problems

that *Skilling* meant to address. This Court must either strike § 1346 outright, or at a minimum, enforce *Skilling*'s holding as to Petitioner.

Second, Petitioner's extortion convictions must be reversed because civil litigation conduct—in particular, an attorney's settlement demand—cannot support federal criminal extortion liability, as the majority of the federal courts have held. *See, e.g.*, *United States v. Pendergraft*, 297 F.3d 1198 (11th Cir. 2002) (reversing conviction for attempted Hobbs Act extortion, holding that even a bad-faith threat to sue, supported by false affidavits, was not "wrongful" and thus not extortionate within § 1951). Indeed, the opinion below not only upheld Petitioner's extortion convictions based on what he said during settlement negotiations, but went a step farther, announcing the unprecedented and unworkable rule that a settlement demand is criminally extortionate if the demand is "far in excess of any amount that the claim will plausibly support." Pet. App. 24a. That rule is impossible to administer, as it requires a trial-within-a-trial on the value of a civil claim—imagine, for example, dueling expert testimony on causation and damages—as a prerequisite to a determination of criminal liability. Worse, that rule makes the most commonplace civil litigation conduct criminal. In the Second Circuit, an "excess[ive]" demand to settle a plaintiff's claims, coupled with a threat to sue (that is, to disclose a defendant's misconduct), is now attempted Hobbs Act extortion punishable by 20 years' imprisonment.

The opinion below "vastly expands federal jurisdiction without statutory authorization," *Ciminelli v. United States*, 143 S. Ct. 1121, 1128 (2023), converting

what was at most attorney misconduct remediable in a state bar disciplinary proceeding into a spate of federal crimes. This Court should once again hold that the federal criminal code is not so boundless. The petition should be granted.

1. This prosecution arises from Petitioner's representation of Gary Franklin, the director of California Supreme, an amateur youth basketball program, in civil settlement negotiations with Nike. Pet. App. 3a. Between the mid-2000s and mid-2010s, Nike sponsored California Supreme, providing the program with funds and equipment. Pet. App. 3a–4a & n.2. California Supreme's 17-and-under team, which Franklin coached, competed in Nike's Elite Youth Basketball League. Pet. App. 3a–4a. In 2016 and 2017, two Nike executives, Carlton DeBose and Jamal James, had Franklin funnel payments to the families and handlers of top amateur basketball players, then disguise the payments by submitting phony invoices to Nike. Pet. App. 4a. Later, DeBose and James "bullied" Franklin into stepping down as California Supreme's coach in favor of a player's parent. *Ibid.*

Franklin—on the advice of Jeffrey Auerbach, an entertainment-industry consultant whose son Franklin had coached—engaged Petitioner to represent him against Nike. Pet. App. 4a–6a. Over a series of meetings, Auerbach and Franklin showed Petitioner documentary evidence of Nike's misconduct, including bank statements, texts, and emails reflecting payments to players made at the direction of DeBose and James. Pet. App. 5a. Aurebach and Franklin shared with Petitioner a PowerPoint presentation that they had prepared, which posed several questions that they wanted answered, including: "Is this a case of rogue executives Carlton

De[B]ose & [Jamal] James committing egregious acts on their own, or was Nike, a [F]ortune 500 company, complicit in the corruption?" Pet. App. 127a–128a & n.3. Franklin wanted "justice" "above all," which meant getting DeBose and James fired so that they "did not hurt any other coaches or program directors." Pet. App. 5a–6a. Franklin also wanted to reestablish his relationship with Nike, resume coaching his team, receive whistleblower protection, and get compensation from Nike. Pet. App. 6a. Petitioner told Franklin that Nike would not likely reinstate him but promised to seek $1 million and to get the executives fired. Pet. App. 8a.

Petitioner asked another attorney, Mark Geragos, who knew Nike's general counsel, to work with him on the matter. Pet. App. 5a n.4. Geragos contacted Nike to request a "[c]onfidential mediation discussion" of Franklin's claims. Pet. App. 7a; C.A. Doc. 61, at A.96 (T.204); C.A. Doc 67, at A.984. Nike agreed, and Petitioner and Geragos together spoke three times with Nike and its attorneys from the Boies Schiller Flexner law firm. Pet. App. 9a–16a. Petitioner began the first meeting, on March 19, 2019, by securing Nike's agreement that the meeting "would be a 408 discussion"—a settlement discussion governed by Fed. R. Evid. 408. *See* Pet. App. 129a–130a. Petitioner then explained that he represented a "whistleblower" with information about improper payments made to amateur basketball players who had been "squeezed" out of his contract with Nike, and therefore had contract and tort claims against the corporation. Pet. App. 9a, 129a–130a. He showed Nike some of the documentary proof that Auerbach and Franklin had compiled. Pet. App. 10a. Petitioner demanded that Nike: (i) "pay a civil settlement" of $1.5 million to

Franklin; and (ii) hire Petitioner and Geragos to conduct an internal investigation into Nike's misconduct in amateur basketball. Pet. App. 9a, 130a, 132a. The latter step, Petitioner argued, would confirm DeBose's and James's misconduct and prompt Nike to fire them, and would answer the question of Nike's complicity posed in the PowerPoint. *See* C.A. Doc. 68, at 34–35. If Nike refused, Petitioner would "blow the lid on this scandal" by holding a press conference that would "take billions of dollars off the company's market cap." Pet. App. 10a. After reviewing the documents that Petitioner had shown him, Robert Leinwand, Nike's chief litigation officer, responded: "I get the claims." C.A. Doc. 62, at A.419 (T.1488).

In a phone call with Nike's attorneys the next day, Petitioner reiterated: "[W]e're gonna get a million five for our guy, and we're gonna be hired to handle the internal investigation." Pet. App. 11a–12a. Petitioner clarified that his fee to run the investigation would not "be capped at 3 or 5 or 7 million dollars," because it was "worth more in exposure to me to just blow the lid on this thing." Pet. App. 12a. Pressed for a specific figure, Petitioner countered by asking what Boies Schiller would charge for similar work, and elicited a concession from Scott Wilson, Boies's lead attorney, that an "investigation like this" could "hit the ten to twenty million dollar range," a figure that Petitioner characterized as "reasonable[]." Pet. App. 13a.

In the parties' final meeting, on March 21, Petitioner presented Wilson with a draft settlement agreement that called for a $1.5 million payment to Franklin in exchange for a release of Franklin's civil claims. *Ibid.* As to the internal investigation, Petitioner explained that Nike would have to pay him and Geragos a

$12 million retainer, "deemed earned when paid," with a minimum of $15 million and a cap of $25 million. Pet. App. 13a–14a. The investigation would encompass "payments made to players in order to route them to various colleges, or shoe contracts, prior to them being eligible to receive any such payments." Pet. App. 14a.

Wilson said that "settlement of Mr. Franklin's civil claims for [$] 1.5 million" would not "be the stumbling block here," but asked if there was "a way to avoid your press conference without hiring you and [Geragos] to do an internal investigation." Pet. App. 15a. Petitioner commented: "I don't think that it makes any sense for Nike to be paying ... an exorbitant sum of money to Mr. Franklin, in light of his role in this." *Ibid.* However, Petitioner agreed that if Nike "wants to have one confidential settlement agreement—and we're done, they can buy that for 22 and a half million dollars." *Ibid.* He elaborated: "Fully confidential, we can leave it to Nike and its other lawyers to figure out what to do with this and handle it appropriately—and full confidentiality, we ride off into the sunset, if you need assistance from us as it relates to ... Franklin, ... we'd be happy to provide that, obviously we're not going to do anything illegal—or he's not going to do anything illegal— ... and we can be done." *Ibid.*; Pet. App. 138a. But if the parties did not settle, Petitioner warned, Nike's misconduct would "become[] public," and "this will snowball," with "parents, and coaches, and friends, and all kinds of people" contacting him to report Nike payments. Pet. App. 16a. "[A]nd every time we get more information, that's gonna be The Washington Post, The New York Times, ESPN, a press conference—and the company will die, not die, but they're going to

incur cut after cut after cut after cut .... [I]t is in the company's best interest to avoid this becoming public." *Ibid.*

During this time frame, Petitioner spoke several times with Auerbach and Franklin. Petitioner assured his client that talks were "going well," but, because Nike had not made a formal settlement offer (and because Franklin didn't ask), Petitioner never conveyed the particulars of the negotiations. *Ibid.*; Pet. App. 139a–140a; *see, e.g.*, Cal. R. Prof'l Conduct 1.4.1(a)(2) (attorney need only convey "written offer of settlement"). The parties never settled, and Petitioner was arrested after Nike contacted the United States Attorney's Office for the Southern District of New York. Pet. App. 11a, 18a. Before he was arrested, Petitioner alluded in a tweet to "a major high school/college basketball scandal perpetrated by @Nike that we have uncovered." Pet. App. 17a–18a. But he had never held a press conference, named Franklin or California Supreme, or disclosed to the public any of the documentary proof that Auerbach and Franklin had shown him.

2. A grand jury in the United States District Court for the Southern District of New York returned a superseding indictment charging Petitioner with honest services wire fraud, §§ 1343 and 1346; transmitting interstate communications with intent to extort, § 875(d); and attempted Hobbs Act extortion, § 1951. Pet. App. 80a. Pretrial, Petitioner moved to dismiss all three counts. As to the honest services fraud count, he argued that the indictment failed to allege a bribe or kickback, as required by *Skilling*, such that § 1346 was unconstitutionally vague as applied to him. *See* Pet. App. 80a–81a. As to the extortion counts, he

argued that the indictment failed to allege wrongful conduct, noting that "'[c]ourts have largely exempted [litigation-related] threats from the extortion statutes as a matter of law.'" Pet. App. 100a–101a, 115a n.1 (quoting D. Ct. Doc. 35, at 13). The District Court (Gardephe, J.) denied the motions to dismiss. The Court deemed the vagueness challenge "premature" and deferred consideration pending the development of a more expansive factual record at trial. Pet. App. 97a–99a. And the Court concluded that the indictment had pleaded wrongfulness, noting the allegation that Petitioner, "using his client's confidential information[,] demanded millions of dollars for himself, without his client's knowledge, and to his client's detriment." Pet. App. 115a–116a & n.1. These allegations "take this case outside the usual parameters of civil litigation, constitute 'wrongful' conduct, and raise the specter of extortion." Pet. App. 115a n.1.

Petitioner proceeded to trial. As relevant, the jury was instructed that it could find the breach of fiduciary duty necessary for the honest services fraud count if Petitioner violated one of the duties set forth in the California Rules of Professional Conduct applicable to attorneys. *See* C.A. Doc. 63, at A.680–681 (T.2337–2339) (listing several such duties, including "loyalty," securing "informed consent" in the event of a "conflict of interest," "abid[ing] by the client's decisions concerning the objectives of the representation," "reasonably consult[ing] with the client," "confidentiality," and "keep[ing] clients reasonably informed of significant developments"). Following a three-week trial, Petitioner was convicted on all three counts. Pet. App. 18a. Post-trial, he moved for judgment of acquittal pursuant to

Fed. R. Crim. P. 29, renewing his as-applied vagueness challenge to the honest services fraud count and arguing that the evidence did not suffice to prove the wrongfulness element of the extortion counts. *See* Pet. App. 142a–143a. The District Court denied the motions for judgment of acquittal. The Court concluded that § 1346 was not vague as applied to Petitioner, who had "breached" the "duties of loyalty, confidentiality, and reasonable communication" that he owed to Franklin by misusing Franklin's confidential information to "enrich himself." Pet. App. 163a. The Court located the necessary *quid pro quo* in Petitioner's proposal "not to make public Franklin's claims against Nike, and to settle Franklin's claims against Nike, if Nike paid him millions of dollars," a proposal made "without his client's knowledge or authorization." *Ibid.* Likewise, the District Court found sufficient evidence of wrongfulness in Petitioner's civil settlement demand that Nike hire him to conduct an internal investigation. Pet. App. 148a–151a. The Court sentenced Petitioner to concurrent terms of 30 months on the honest services fraud count and 24 months on each of the extortion counts. Pet. App. 18a.

3. Petitioner appealed, challenging the sufficiency of the evidence on all counts. In particular, he argued that upholding the honest services fraud conviction based on what was, in essence, undisclosed self-dealing would contravene *Skilling*: "Construing §§ 1343 and 1346 to criminalize [Petitioner's] conduct just because he sought (and failed to disclose that he was seeking) personal benefit would raise vagueness concerns." C.A. Doc. 68, at 46 (citing *Skilling*, 561 U.S. at 408, and *Black v. United States*, 561 U.S. 465, 469, 474 (2010)). After the appeal was argued, this

Court decided *Percoco*. In a Fed. R. App. P. 28(j) letter, Petitioner therefore renewed his contention that "his honest services fraud conviction violates the Fifth Amendment's prohibition on vague criminal laws." C.A. Doc. 109, at 1; *see id.* at 2 ("*Percoco* emphasized the constitutional need 'to avoid giving ... § 1346 an indeterminate breadth," reaffirming that § 1346 cannot reach what was alleged here—'undisclosed self-dealing by ... a private employee—*i.e.*, the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty.'" (quoting 143 S. Ct. at 1138)). Petitioner also argued that his settlement demand that Nike hire him to conduct an internal investigation could not establish the wrongfulness requisite to sustain the extortion convictions. C.A. Doc. 68, at 34–38.

4. The Court of Appeals (Raggi, J., joined by Walker and Park, JJ.) affirmed. As to the honest-services wire fraud count, the Court held that the evidence sufficed to prove the solicitation of a bribe, in conformance with *Skilling*, because Petitioner "offer[ed] to take action, specifically, to use his particular influence as Franklin's attorney to have his client settle his potential claims against Nike for receipt of $1.5 million, but only if Nike guaranteed a multi-million-dollar payment to [Petitioner] himself." Pet. App. 45a. For that conclusion, the Court relied primarily on a single statement from the parties' March 21 meeting, during which Petitioner "offered his 'assistance ... as it relates to ... Franklin.'" Pet. App. 46a–47a. Although the government had never urged this interpretation, the Court misread Petitioner's words as an "implicit" offer to "advise his client to settle his

claims with Nike" but only "if Nike paid [Petitioner] millions of dollars." Pet. App. 47a. Having decided that this putative *quid pro quo* supported a bribery theory of honest services fraud liability, the Court dismissed Petitioner's vagueness challenge. Pet. App. 44a n.17 (discussing *Skilling* and *Percoco*).

As to the extortion counts, the Court of Appeals held, as the District Court had, that Petitioner's settlement demand supported a finding of wrongfulness. The evidence "permitted a reasonable jury to conclude that [Petitioner] had no claim of right to a personal payment from Nike, let alone to a $15–25 million payment," and no "plausible claim of right" to be hired by Nike and paid that sum to "conduct an internal investigation." Pet. App. 26a. En route to that holding, the Court determined that the evidence defeated Petitioner's contention that he "inten[ded] to conduct a *bona fide* investigation of Nike, one that he fairly valued at $15–25 million." Pet. App. 32a. In pertinent part, that was because Petitioner had demanded too much: "Whether a payment demand made under threat of harm is extortionate depends not only on whether a party has a claim of right to *some* amount of money, but also on whether he has a plausible claim of right to the amount of money demanded. ... [W]here it is 'utter[ly] implausib[le]' that a claim of right could yield an award in the amount demanded, the nexus necessary to preclude a jury finding of extortion is lacking." *Ibid.* Despite declaring that "[a] plausibility standard does not contemplate exacting scrutiny of a claim's value," the panel determined that Petitioner's demand flunked even that test. Boies Schiller "had never received a $10 million retainer from Nike," and Petitioner had

"repeatedly press[ed] for a concession as to the possibility of an internal investigation costing more than $10 million." Pet. App. 32a–33a. The amount of Petitioner's demand, when "considered together with other evidence favorable to the prosecution," allowed a finding that Petitioner "demanded this money not as fair compensation for a *bona fide* internal investigation of Nike, but as a payoff for his own silence." Pet. App. 33a.

The Court of Appeals denied panel rehearing/rehearing *en banc*. Pet. App. 214a.

REASONS FOR GRANTING THE WRIT

This petition presents two questions that warrant review.

First, this Court should grant certiorari to hold that § 1346 is void for vagueness, in violation of the Fifth Amendment's Due Process Clause. Despite this Court's frequent attempts to define and limit the term—*e.g.*, *Percoco*, 143 S. Ct. 1130; *Skilling*, 561 U.S. 358; *McNally v. United States*, 483 U.S. 350 (1987)—"honest services" fraud has proved hopelessly indeterminate. Uncertainty persists regarding "when the duty of honest services arises, what sources of law create that duty, or what amounts to a breach of it." *Percoco*, 143 S. Ct. at 1140 (Gorsuch, J., joined by Thomas, J., concurring). By leaving those questions unanswered, § 1346 "provides no 'ascertainable standard' for the conduct it condemns." *Skilling*, 561 U.S. at 424 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring) (quoting *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921)). The result is that "private citizens"—the "main victims here"—lack "'fair notice of the conduct [§ 1346]

punishes.'" *Percoco*, 143 S. Ct. at 1141 (Gorsuch, J., joined by Thomas, J., concurring) (quoting *Johnson v. United States*, 576 U.S. 591, 595 (2015)).

Just so here. Petitioner was a private individual, not an elected official who owed a fiduciary duty to the public. He did not take "money or property" from his client, *see* § 1343; indeed, the jury was instructed that he need not have harmed Franklin at all. Rather, the jurors were permitted to predicate the necessary "breach" of fiduciary duty upon Petitioner's deviation from any of the numerous California Rules of Professional Conduct on which the District Court instructed them. The time has come to stop rewriting § 1346 and instead to put the statute out of its misery, so that Congress, if so inclined, can "set things right by revising § 1346 to provide the clarity it desperately needs." *Percoco*, 143 S. Ct. at 1142 (Gorsuch, J., joined by Thomas, J., concurring). The alternative—letting federal prosecutors continue to wield this standardless statute to enforce whatever codes of good conduct they choose (here, ethical rules for the California bar)—is intolerable.

Second, this Court should grant certiorari to resolve a circuit split and hold that litigation conduct—in particular, an attorney's settlement demand—cannot give rise to federal criminal extortion liability. The courts of appeals are divided on the question, but as the majority have reasoned, litigation is a socially preferred form of dispute resolution, and exposing litigants to criminal sanctions disserves that policy. At a minimum, this Court should grant review to correct the Second Circuit's erroneous and unworkable rule that a settlement demand can be criminally extortionate if it is "excess[ive]" relative to the value of the underlying claim. That

rule would expose everyday litigation activity to criminal prosecution and allow every state-law civil suit to sprawl into a federal civil RICO action.

I. This Court Should Grant Certiorari To Hold That § 1346 Is Void For Vagueness.

1. The Fifth Amendment's Due Process Clause prohibits the government from "taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." *Johnson*, 576 U.S. at 595 (citing *Kolender v. Lawson*, 461 U.S. 352, 357–58 (1983)). "The prohibition of vagueness in criminal statutes 'is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law,' and a statute that flouts it 'violates the first essential of due process.'" *Id.* (quoting *Connally v. General Constr. Co.,* 269 U.S. 385, 391 (1926)). Vague laws "hand off the legislature's responsibility for defining criminal behavior to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct." *United States v. Davis*, 139 S. Ct. 2319, 2323 (2019). "In that sense, the doctrine is a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not." *Sessions v. Dimaya*, 138 S. Ct. 1204, 1212 (2018). In recent Terms, this Court has several times granted review, sometimes in the absence of a circuit split, to invalidate federal criminal statutes as void for vagueness. *E.g.*, *Davis*, 139 S. Ct. 2319; *Dimaya*, 138 S. Ct. 1204; *Johnson*, 576 U.S. 591.

"Honest-services fraud and this Court's vagueness jurisprudence are old friends." *Percoco*, 143 S. Ct. at 1140 (Gorsuch, J., joined by Thomas, J., concurring). The theory's history is well-rehearsed. *See, e.g.*, *Skilling*, 561 U.S. at 399–402. In 1909, Congress amended the federal fraud statute to prohibit "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." *Id.* at 399–400. *See also* 18 U.S.C. §§ 1341 and 1343 (same). Seizing on that disjunctive language, lower courts incorrectly "interpreted the term 'scheme or artifice to defraud' to include deprivations not only of money or property, but also of intangible rights." *Id.* at 400.

But when it came to the particulars, "[e]ven the lower courts that devised the theory could not agree. They clashed over everything from who owes a duty of honest services to what sources of law may give rise to that duty to what sort of actions constitute a breach of it." *Percoco*, 143 S. Ct. at 1140 (Gorsuch, J., joined by Thomas, J., concurring). Some of these cases involved "public officials," some "private individuals who merely participated in public decisions," and still others "private employees who had no role in public decisions." *Skilling*, 561 U.S. at 417 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring). Yet "[n]one of the 'honest services' cases, neither those pertaining to public officials nor those pertaining to private employees, defined the nature and content of the fiduciary duty central to the 'fraud' offense." *Ibid.* Indeed, "[t]here was not even universal agreement concerning the *source* of the fiduciary obligation—whether it must be

positive state or federal law, or merely general principles, such as the 'obligations of loyalty and fidelity' that inhere in the 'employment relationship." *Ibid.*

In 1987, this Court intervened, holding in *McNally* that the federal fraud statutes did not protect "the intangible right of the citizenry to good government." 483 U.S. at 356. Observing the breadth and diversity of honest services cases in the lower federal courts, this Court concluded: "Rather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has." *Id.* at 360. The next year, Congress enacted § 1346, which provides: "the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." But that law "clarified nothing." *Percoco*, 143 S. Ct. at 1140 (Gorsuch, J., joined by Thomas, J., concurring). "Nothing in the new law attempted to resolve when the duty of honest services arises, what sources of law create that duty, or what amounts to a breach of it." *Ibid.*

In *Skilling*, this Court confronted a vagueness challenge to § 1346. Rather than invalidate the statute outright, this Court limited § 1346 to "bribery and kickback schemes." 561 U.S. at 368. "Construing the honest-services statute to extend beyond that core meaning, we conclude, would encounter a vagueness shoal." *Ibid.* As relevant here, *Skilling* expressly rejected the government's argument that § 1346 also encompasses "undisclosed self-dealing by a public official or a private

employee—*i.e.*, the taking of official action by the employee that furthers his own undisclosed financial interests while purporting to act in the interests of those to whom he owes a fiduciary duty." *Id.* at 409. "[A] reasonable limiting construction of § 1346 "must exclude this amorphous category of cases." *Id.* at 410. *See also Black*, 561 U.S. at 469, 474 (decided in tandem with *Skilling*; holding it erroneous to instruct jury "that a person commits honest services fraud if he 'misuse[s] his position for private gain for himself ... ' and 'knowingly and intentionally breache[s] his duty of loyalty'").

Justice Scalia, joined by Justices Kennedy and Thomas, rejected the *Skilling* majority's effort to "define [a] new federal crime[]." *Id.* at 415. More fundamentally, these Justices correctly observed that "the majority's reconstruction of the statute failed to eliminate [its] vagueness.'" *Percoco*, 143 S. Ct. at 1141 (Gorsuch, J., joined by Thomas, J., concurring) (quoting *Skilling*, 561 U.S. at 421 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring)). Specifically, the majority's construction of § 1346 "did not solve the most fundamental indeterminacy: the character of the 'fiduciary capacity' to which the bribery and kickback restriction applies. Does it apply only to public officials? Or in addition to private individuals who contract with the public? Or to everyone ... ? ... [E]ven with the bribery and kickback limitation the statute does not answer the question, 'What is the criterion of guilt.'" *Skilling*, 561 U.S. at 421 (Scalia, J., joined by Kennedy and Thomas, JJ., concurring).

In *Percoco*, this Court shaved off one more unconstitutionally vague application of § 1346: the Second Circuit's rule that a private individual could be

convicted for breaching a fiduciary duty to the public if he "dominated and controlled any governmental business" and "people working in the government actually relied on him because of a special relationship he had with the government." 143 S. Ct. at 1135, 1138. In particular, *Percoco* reiterated that § 1346 must not be given "an indeterminate breadth that would sweep in any conception of 'intangible rights of honest services' recognized by some courts prior to *McNally*." 143 S. Ct. at 1137. Specifically, *Percoco* highlighted *Skilling*'s "rejection of the Government's argument that § 1346 should be held to reach cases involving 'undisclosed self-dealing.'" *Id.* (quoting *Skilling*, 561 U.S. at 409–10).

In short, the honest services doctrine has been vague from the outset. This Court's periodic interventions have imposed some limits on the theory, but the core indeterminacy remains. No case tells judges, prosecutors, or ordinary citizens "what principle it is that separates the criminal breaches, conflicts, and misstatements from the obnoxious but lawful ones .... Without some coherent limiting principle to define what 'the intangible right of honest services' is, whence it derives, and how it is violated, this expansive phrase invites abuse by headline-grabbing prosecutors in pursuit of local officials, state legislators, and corporate CEOs who engage in any manner of unappealing or ethically questionable conduct." *Sorich v. United States*, 555 U.S. 1204 (2009) (Scalia, J., dissenting from denial of certiorari).

2. This case presents in stark form the vagueness concerns that have long plagued honest services fraud. To start, Petitioner was convicted for actions undertaken as a private individual with no relationship to government whatsoever,

conduct one step removed from the "core" of the pre-*McNally* caselaw that *Skilling* read § 1346 to capture. *See* 561 U.S. at 401 (noting that "'[m]ost often,' honest services fraud cases "'involved bribery of public officials'" (quoting *United States v. Bohonus*, 628 F.2d 1167, 1171 (9th Cir. 1980)). In addition, Petitioner did not cause his client, Franklin, any pecuniary harm, and the District Court expressly instructed the jury that "[i]t is not necessary for the government to show that the steps that [Petitioner] offered to take for Nike ... were detrimental to [] Franklin." C.A. Doc. 63, at A.681 (T.2341). But before *Skilling*, most of the circuits had held that private-sector honest services fraud required proof of tangible economic harm to the victim. *See, e.g.*, *United States v. Sun-Diamond Growers of California*, 138 F.3d 961, 973 (D.C. Cir. 1998) (in "private sector context," "[a]bsent reasonably foreseeable economic harm, '[p]roof that the employer simply suffered only the loss of the loyalty and fidelity of the [employee] is insufficient to convict'" (quoting *United States v. Frost*, 125 F.3d 346 (6th Cir. 1997)); *United States v. Jain*, 93 F.3d 436, 442 (8th Cir. 1996) ("When there is no tangible harm to the victim of a private scheme, it is hard to discern what intangible "rights" have been violated.").

Moreover, the jury was permitted to find that Petitioner had breached a fiduciary duty not because he violated a California state statutory enactment, but rather because he departed from the California Rules of Professional Conduct, a compendium of legal ethics rules "adopted by the Board of Trustees of the State Bar of California and approved by the [California] Supreme Court." Cal R. Prof'l Conduct 1.0(a). *But see, e.g.*, *United States v. Murphy*, 323 F.3d 102, 116 (3d Cir.

2002); *United States v. Brumley*, 116 F.3d 728, 734 (5th Cir. 1997) (*en banc*) (pre-*Skilling*, both holding that state law must supply fiduciary duty of honest services). In fact, Petitioner's jury was instructed on a raft of duties under the California Rules of Professional Conduct—many of them vague, but any of them sufficient, under the District Court's charge, to support the honest services fraud count. *E.g.*, C.A. Doc. 63, at A.680 (T.2338) ("reasonably consult with the client as to the means by which the [client's] objectives are to be pursued"); *id.* at A.681 (T.2339) ("keep the client reasonably informed about significant developments relating to the representation"). This Court has stressed that the federal fraud statutes do not license prosecutors to enforce ethical codes, especially not codes as loosely written as California's code of attorney conduct. *E.g.*, *Ciminelli*, 143 S. Ct. at 1128 (chastising Second Circuit for "employ[ing]" invalid "right-to-control" theory of property "to affirm federal convictions regulating the ethics (or lack thereof) of state employees and contractors"); *Kelly*, 140 S. Ct. at 1574 ("Federal prosecutors may not use property fraud statutes to set standards of disclosure and good government for state and local officials."). And yet here, breach of an ethical rule was the critical element of Petitioner's honest services conviction. C.A. Doc. 68, at A.680 (T.2337).

3. The Court of Appeals did not address any of the above. Instead, the Court avoided Petitioner's vagueness objections by reading the record to support the inference that Petitioner was soliciting a bribe, such that his conduct fell within the bounds of § 1346 as narrowed by *Skilling*. *See* Pet. App. 44a n.27. This holding

rested on an unreasonable reading of the record—one that not even the government urged—and enabled an unconstitutionally vague application of § 1346.

The Court's principal evidentiary justification for this reading was Petitioner's offer, during his March 21 meeting with Nike, to provide "assistance ... as it relates to ... Franklin." Pet. App. 46a–47a. The Court's reliance on that statement was self-contradictory. The Court said that Petitioner was soliciting a bribe by offering to exert his influence to induce the "unwitting" Franklin to settle for just $1.5 million. Pet. App. 46a. But the "assistance" offer came in the context of a $22.5 million settlement demand for Franklin. Moreover, the only reasonable reading of this statement is that Petitioner was offering to "assist[]" Nike by making Franklin available to cooperate with whatever internal investigation Nike decided to conduct—because, in this scenario, Nike would not hire Petitioner. This context explains why the government never—not at trial, not on appeal—relied upon the Court's misinterpretation of this offer of "assistance."

Worse, the Court of Appeals circumvented *Skilling* by relying on Petitioner's self-dealing to prove the bribe. As noted above, *Skilling* rejected the government's argument that § 1346 reaches mere "undisclosed self-dealing." Yet here, the Court bootstrapped what was, at worst, exactly that—Petitioner's undisclosed self-dealing in brokering a payment for himself while purporting represent Franklin—into proof of a bribe. Indeed, the panel did so explicitly: "[A] reasonable jury could have found that in negotiating with Nike, [Petitioner] was not serving Franklin's interests, but rather using them to enrich himself. That, in turn, supported a finding that, in

return for Nike agreeing to [Petitioner's] own payment demand, [Petitioner] offered to use his influence with the unwitting Franklin." *Id.* at 196. By deploying self-dealing to prove bribery, the panel rendered § 1346 vague as applied.

* * *

"Criminal statutes are not games to be played in the car on a cross-country road trip. To satisfy the constitutional minimum of due process, they must at least provide 'ordinary people' with 'fair notice of the conduct [they] punis[h].'" *Dubin v. United States*, 143 S. Ct. 1557, 1576 (2023) (Gorsuch, J., concurring) (quoting *Johnson*, 576 U.S. at 595). Here, Petitioner was convicted of violating a statute whose vagueness has been apparent since its enactment. His conduct was, at worst, self-dealing—the precise conduct that *Skilling* excluded from the statute's scope. The Court of Appeals ducked Petitioner's vagueness challenge by squinting to see a bribe—a reading of the record so strained that even the government never pressed it. This case vivifies all the ills of honest services fraud. Federal and state law already contain ample tools to combat abuses of fiduciary duty—bribery prosecutions, or, as might be relevant here, professional disciplinary proceedings. A formless provision so amenable to prosecutorial abuse does more harm than good. This Court should grant the petition and put an end to § 1346's hopeless indeterminacy once and for all.

II. This Court Should Grant Certiorari To Resolve A Circuit Split And Hold That Litigation Conduct Cannot Give Rise To Federal Criminal Extortion Liability.

Certiorari is warranted for the additional reason that the opinion below, by upholding Petitioner's extortion convictions on the basis of the settlement demand he made to Nike, deepens a circuit split on the question whether litigation conduct can give rise to federal criminal extortion liability under the Hobbs Act, § 1951.

The Eleventh Circuit holds that it cannot. *Pendergraft*, 297 F.3d 1198. *Pendergraft* reversed convictions for attempted Hobbs Act extortion, holding that a "threat to file litigation," "even if made in bad faith and supported by false affidavits," is not "'wrongful' within the meaning of the Hobbs Act" and is therefore not extortionate. *Id.* at 1208; *see* 18 U.S.C. § 1951(b)(2). The Eleventh Circuit was "troubled by *any* use of this federal criminal statute to punish civil litigants. Sanctions for filing lawsuits, such as malicious prosecution, lead to collateral disputes and 'a piling of litigation on litigation without end.' Allowing litigants to be charged with extortion would open yet another collateral way for litigants to attack one another. The reality is that litigating parties often accuse each other of bad faith. The prospect of such civil cases ending as criminal prosecutions gives us pause." 297 F.3d at 1207. *Pendergraft* emphasized that litigation is a socially preferred form of dispute resolution, and "under our system, parties are encouraged to resort to the courts for the redress of wrongs and the enforcement of rights." 297 F.3d at 1206. Exposing civil litigants to criminal sanctions disserves that policy. The Fifth Circuit has expressly aligned itself with *Pendergraft*. *Snow Ingredients, Inc. v. SnoWizard, Inc.*, 833 F.3d 512, 525 (5th Cir. 2016) ("agree[ing] with *Pendergraft* that 'prosecuting litigation activities as federal crimes would

undermine the policies of access and finality that animate our legal system'" (quoting 297 F.3d at 1208)).

In contrast, the Ninth Circuit in *United States v. Koziol*, 993 F.3d 1160, 1170 (9th Cir. 2021), affirmed an attempted Hobbs Act extortion conviction and holding that "threats of sham litigation, which are made to obtain property to which the defendant knows he has no lawful claim, are 'wrongful' under the Hobbs Act." *Koziol* distinguished *Pendergraft* on the ground that the Eleventh Circuit's "policy concerns—promoting access to the courts and avoiding collateral litigation—are not implicated by threats of sham litigation." 993 F.3d at 1175. The Third Circuit reached a similar result in *United States v. Tobin*, 155 F.3d 636, 640–41 (3d Cir. 1998) (Alito, J.), affirming a conviction for extortion under the Hobbs Act based, in part, on threats to file an unrelated and false lawsuit alleging sexual harassment in an attempt to enforce an alleged oral contract. The opinion below thus deepens a mature split on the question whether litigation activity can be criminal extortion.

Numerous Circuits agree with *Pendergraft*'s reasoning in the civil context and reject litigation conduct and settlement demands as extortion predicates for civil RICO suits. *E.g.*, *Waldron v. George Weston Bakeries Inc.*, 570 F.3d 5, 10 (1st Cir. 2009) ("Trying to transmogrify what was obviously a settlement demand in a pending civil case into an act of extortion is like trying to fit a square peg into a round hole. If given widespread credence, that tactic would severely impede the salutary policies favoring settlements in civil actions."); *Deck v. Engineered Laminates*, 349 F.3d 1253, 1258 (10th Cir. 2003) ("[W]e join a multitude of other

courts in holding that meritless litigation is not extortion under § 1951."); *Vemco, Inc. v. Camardella*, 23 F.3d 129, 134 (6th Cir. 1994) ("A threat of litigation if a party fails to fulfill even a fraudulent contract ... does not constitute extortion."); *I.S. Joseph Co., Inc. v. J. Lauritzen A/S*, 751 F.2d 265, 267 (8th Cir. 1984) ("groundless" and "bad faith" threat to sue "may be tortious under state law, but we decline to expand the federal extortion statute to make it a crime").

As the Tenth Circuit has explained: "[R]ecognizing abusive litigation as a form of extortion would subject almost any unsuccessful lawsuit to a colorable extortion (and often a RICO) claim. Whenever an adverse verdict results from failure of the factfinder to believe some evidence presented by the plaintiff"—or failure to accept the plaintiff's damages demand—"the adverse party could contend that the plaintiff engaged in extortionate litigation." *Deck*, 349 F.3d at 1258.

Below, the Court of Appeals didn't just rely on Petitioner's settlement demand to find criminal wrongfulness. The Second Circuit went further, upholding Petitioner's convictions, in part, by reasoning that even if he had a claim of right to demand that Nike hire him, his demand was nonetheless extortionate because he did not have a "plausible claim of right to the amount of money demanded." Pet. App. 32a. That erroneous holding warrants further review. The panel's "utterly implausible" test not only conflicts with the authorities just cited but would also work a significant expansion of federal criminal law in a state domain, contrary to this Court's repeated, and recent, admonitions against that course. *E.g.*, *Ciminelli*, 143 S. Ct. at 1128; *Kelly*, 140 S. Ct. at 1574. Civil plaintiffs and their attorneys

make sizeable, perhaps unreasonable, settlement demands every day. Often, they pair these demands with threats to inflict reputational harm. ("If you don't settle for $100 million, I'll tell the world that your drug gave my client cancer."). Under the holding below, if a later factfinder—or, as here, a reviewing court—decides that the demand was too large, the plaintiff and his attorney have attempted Hobbs Act extortion and may be criminally prosecuted and sentenced.

Indeed, the logic of the panel's holding would sweep more broadly still, to any demand, monetary or not, for which a plaintiff might not have a plausible claim. For example, Franklin had no "claim of right" to have DeBose and James fired—that decision belonged to Nike, their employer. But if Petitioner had demanded that relief, would the panel have deemed it "utterly implausible," and therefore extortionate, too? Civil plaintiffs and their lawyers often demand in settlement negotiations things that they could not secure as of right through litigation. The panel's holding imperils these plaintiffs and their lawyers as well.

The holding below is also unworkable. Countless factors—severity of the plaintiff's injury, availability of proof, background legal rules, venue and jury makeup, the defendant's potential reputational harm and appetite for settlement, the defendant's insurance coverage, expert opinions, even the quality of the attorneys—affect the value of a civil claim. To apply the "utterly implausible" test, a factfinder would need to hear evidence on all of them. And a defendant charged with extortion based on what the government deems an "utterly implausible" demand has Fifth and Sixth Amendment rights to present a complete defense, and so to

tender evidence on all of these factors. That regime would spawn unwieldy mini-trials. This Court should strike this unsound rule and resolve the circuit split.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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