No. 23–6753

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

REPLY BRIEF FOR PETITIONER

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Petitioner was convicted of federal crimes punishable by more than 40 years' imprisonment based on a civil settlement demand. That remarkable result cries out for this Court's intervention. First, as Justices Gorsuch and Thomas have suggested, this Court should grant certiorari to hold that the honest services fraud statute, 18 U.S.C. § 1346, is void for vagueness. *See Percoco v. United States*, 143 S. Ct. 1130, 1139 (2023) (concurring op.). This Court's "rescue mission" in *Skilling v. United States*, 561 U.S. 358 (2010), has proved ineffectual, both because *Skilling* failed to answer fundamental questions about § 1346's scope, and because that decision's atextual bribes-and-kickbacks limitation is easily evaded, as the decision below illustrates. *See Percoco*, 143 S. Ct. at 1140–41 (Gorsuch, J., joined by Thomas, J.). Second, this Court should grant certiorari to resolve a developed Circuit split and hold that litigation conduct cannot give rise to federal criminal extortion liability, as the majority of the Courts of Appeals have concluded. Respondent's efforts to avoid review lack merit. Petitioner has preserved both questions, and both are outcome-determinative. The petition should be granted.

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

1. Respondent asserts that Petitioner's vagueness challenge was neither pressed nor passed on below. BIO 10–12. On the contrary, Petitioner presented this claim to the Court of Appeals, in both his principal briefs and in a Fed. R. App. P.

28(j) letter filed after the intervening decision in *Percoco*. The Court of Appeals, in turn, resolved this claim by concluding that Petitioner's conduct amounted to the solicitation of a bribe, such that affirmance posed no vagueness problem in light of *Skilling*. In any case, wooden application of a prudential preservation rule would make little sense where, as here, Petitioner asks this Court to overrule one of its own precedents: There was nothing that the Court of Appeals, bound to follow *Skilling*, could have said to facilitate this Court's review.

Petitioner argued below that he had engaged in, at most, undisclosed self-dealing, conduct that falls outside § 1346's scope under *Skilling* and *Black v. United States*, 561 U.S. 465 (2010). Thus, he contended, affirming his conviction by characterizing his conduct as soliciting a bribe would end-run the holdings of *Skilling* and *Black* and raise the very vagueness concerns that those cases meant to address. C.A. Doc. 68, at 46. This was not a "constitutional avoidance" argument. BIO 11. The avoidance canon had no role to play, as *Skilling* supplied the construction of § 1346 that bound the Court of Appeals. Rather, Petitioner argued that affirmance on a bribery theory would result in a constitutional violation.

Petitioner made the point explicit in a Rule 28(j) letter filed after *Percoco*, where Justice Gorsuch, joined in a concurring opinion by Justice Thomas, invited a vagueness challenge to § 1346. Specifically, Petitioner contended that his "honest services fraud conviction violates the Fifth Amendment's prohibition on vague criminal laws." C.A. Doc. 109, at 1. This was a proper means of preservation, too. Even if Petitioner's appellate brief had not presented a vagueness challenge, the

Second Circuit regularly considers arguments first raised in Rule 28(j) letters, especially arguments like Petitioner's based on intervening decisional law. *E.g.*, *United States v. Hunt*, 82 F.4th 129, 138 (2d Cir. 2023) (deciding sufficiency challenge first raised in Rule 28(j) letter following *Counterman v. Colorado*, 143 S. Ct. 2106 (2023)); *United States v. Keith*, 797 F. App'x 649, 650 (2d Cir. 2020) (deciding challenges to indictment and conviction first raised in Rule 28(j) letter following *Rehaif v. United States*, 139 S. Ct. 2191 (2019)).

The opinion below confirms that the Court of Appeals did resolve Petitioner's vagueness challenge, rendering review suitable here regardless of preservation. *E.g.*, *United States v. Williams*, 504 U.S. 36, 41 (1992) (discussing this Court's "traditional rule" against granting certiorari "only when 'the question was not pressed or passed upon below,' and explaining that rule "operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon"); *see also, e.g.*, *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2175 (2020) (Gorsuch, J., dissenting) (emphasizing rule's "disjunctive phrasing" and concluding that Court of Appeals "did pass upon" question, "so forfeiture or waiver presents no impediment to our review"). The Court of Appeals specifically addressed Petitioner's Rule 28(j) letter and its citation to *Percoco.* Pet. App. 44a n.27. Notably, the Court did not find Petitioner's vagueness claim waived, as Respondent had urged. C.A. Doc. 111, at 1. Nor, as Respondent now contends, did the Court understand Petitioner to press "only a statutory construction argument." BIO 11 n.1. Rather, the Court of Appeals correctly understood Petitioner to advance a

vagueness challenge and resolved that challenge by explaining that Petitioner "could be found guilty of honest-services fraud ... if the government 'proved beyond a reasonable doubt that [he] solicited a bribe.'" Pet. App. 44a n.27. Then, the Court went on to "discuss[]" in the body of the opinion "why the evidence was sufficient to permit a reasonably jury to conclude that [Petitioner] had so acted." *Ibid.*; *see* Pet. App. 44a–50a. That is, instead of accepting Respondent's waiver argument, the Court of Appeals reached and decided Petitioner's vagueness claim by determining that his conduct amounted to a bribe, which, in the Court's view, satisfied any constitutional concern arising from § 1346's application to Petitioner.

Finally, and most important, this Court's preservation rule is prudential, not jurisdictional or otherwise preclusive. *Carlson v. Green*, 446 U.S. 14, 17 n.2 (1980). Here, rigid insistence upon presentation to the Court of Appeals would make little sense because Petitioner asks this Court to overrule one of its own precedents, *Skilling*. The Court of Appeals could not have entertained that claim. *See Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 484 (1989). Thus, although this Court might benefit from the perspective of the Court of Appeals in the ordinary case of a Circuit split on a disputed question of law, that is not true here. Only this Court can overrule *Skilling*, and there is nothing that the Second Circuit could have said below to make this case a better vehicle for doing so.

2. On the merits, Respondent contends that Petitioner's conviction complies with the Fifth Amendment in light of *Skilling*. BIO 12–16. This begs the question whether *Skilling* should be overruled because § 1346 is insolubly vague.

See Percoco, 143 S. Ct. at 1139 (Gorsuch, J., joined by Thomas, J., concurring) ("To 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."); *see also id.* at 1141–42 ("[E]ven 80 years after lower courts began experimenting with the honest-services fraud theory, no one can say what sort of fiduciary relationship is enough to sustain a federal felony conviction and decades in federal prison.").

Petitioner has shown why his conduct lies far afield from the traditional concerns of the federal fraud statutes in general and the honest-services theory in particular: He acted as a private individual, not a public officer; he neither sought to inflict nor actually inflicted pecuniary harm on his client; and his conviction rested upon his breach of a rule of professional ethics, not a provision of state statutory law. *See* Pet. 21–23. Respondent counters not by defending the extraordinary reach of § 1346 in this case as a matter of principle, but by repeating *Skilling*'s holding. BIO 14–15. This proves Petitioner's point. *Skilling* licenses federal prosecutors to pursue, and federal courts to impose, criminal liability based on conduct that, at most, violates rules of ethics, despite this Court's frequent admonitions against just such expansions of the federal criminal code. *E.g.*, *Kelly v. United States*, 140 S. Ct. 1565, 1571–72 (2020). Respondent tries to parry this last point, contending: "Petitioner was not convicted for violating [the California Rules of Professional Conduct]; instead, those rules were used to establish the fiduciary duty to his client that petitioner violated when he proposed to sacrifice his client's

interests in return for millions of dollars for himself." BIO 14–15. Respondent obscures the fact that a breach of the California Rules of Professional Conduct was an element of Petitioner's conviction. C.A. Doc. 63, at A.680 (T.2337) (jury instructions) ("[T]he government must prove beyond a reasonable doubt—as one element of honest services wire fraud—that [Petitioner] violated one or more duties that he owed [Gary] Franklin under California law."); *id.* at A.680–81 (T.2337–39) (enumerating some dozen California Rules of Professional Conduct). Such wholesale assimilation of vague state ethics rules into federal criminal law is untenable.

Respondent also tenders a perfunctory defense of the Court of Appeals's determination that Petitioner solicited a bribe. BIO 15–16. In Respondent's view, Petitioner "indicated both 'implict[ly]' and 'explicit[ly] that 'in return for Nike agreeing to [Petitioner's] own payment demand, [Petitioner would] use his influence with the unwitting Franklin to have him accept $1.5 million in settlement of his claims.'" BIO 15 (quoting Pet. App. 46a–47a). But Respondent nowhere engages with Petitioner's substantive objections, namely: This reading is speculative, self-contradictory, and worst, flagrantly flouts *Skilling* by expressly relying on undisclosed self-dealing to prove a bribe. More fundamentally, Petitioner does not seek review of the Court of Appeals's "fact-specific determination that the evidence sufficed to show *quid pro quo* bribery." BIO 16. Petitioner seeks review of the broad, institutionally important question of § 1346's constitutional validity, both on its face and as applied to him. Petitioner highlights the dubious factual basis for the Second Circuit's sufficiency ruling not to request error correction, but to show that *Skilling*

does not meaningfully constrain the operation of § 1346, just as the separate opinion in that case predicted. *See* 561 U.S. at 421 (Scalia, J., joined by Kennedy, J., and Thomas, J., concurring in part and concurring in judgment) (bribes-and-kickbacks limitation "would not solve the most fundamental indeterminacy: the character of the 'fiduciary capacity' to which the bribery and kickback restriction applies," whether "public officials," "private individuals who contract with the public," or "everyone"). "Thus, even with the bribery and kickback limitation the statute does not answer the question, 'What is the criterion of guilt?'" *Ibid.*

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

1. Respondent asserts, as above, that this specific question was not pressed or passed on below. BIO 16. Again, Respondent is mistaken. Below, in the context of his sufficiency challenge, Petitioner emphasized that all of his communications with Nike were "settlement discussion[s]" governed by Fed. R. Evid. 408. *E.g.*, C.A. Doc. 68, at 17; C.A. Doc. 97, at 10; *see also* Pet. 7 (noting that Mark Geragos's first communication with Nike requested a "[c]onfidential mediation discussion"). Petitioner argued that his internal-investigation demand was a permissible component of a settlement of Franklin's claims. *E.g.*, C.A. Doc. 97, at 11–12 ("'[A] lawyer may, as part of a settlement on behalf of a current client, be retained to conduct an internal investigation of the current client's adversary and to be paid by the adversary to conduct the investigation.'" (quoting D. Ct. Doc. 96–1, at 3)). Thus, Petitioner argued that his internal-investigation demand was not

wrongful because it would have achieved, through settlement, Franklin's objective of securing "justice" and removing the corrupt Nike executives. *E.g.*, C.A. Doc. 68, at 34–35. The Court of Appeals addressed that claim. Pet. App. 26a–36a. More broadly, Petitioner repeatedly contended that affirming his extortion convictions would wrongly criminalize everyday litigation activity. *E.g.*, C.A. Doc. 97, at 4–5, 17. All of these contentions apprised the Court of Appeals of the substance of this claim. In any case, Respondent concedes that Petitioner properly presented a constitutional sufficiency challenge to the wrongfulness element of his extortion convictions below (BIO 16), and "'[o]nce a federal claim is properly presented, a party can make any argument in support of that claim.'" *Hemphill v. New York*, 595 U.S. 140, 149 (2022) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)). This Court "may therefore consider any argument" that Petitioner presses "in support of his claim" that the evidence did not suffice to prove wrongfulness. *Ibid.*

2. On the merits, Respondent buries the single most important reason to grant certiorari: The opinion below deepens a mature Circuit split on the question whether litigation conduct can give rise to federal criminal extortion liability. *See* Pet. 25–30; *compare, e.g.*, *United States v. Pendergraft*, 297 F.3d 1198, 1208 (11th Cir. 2002) (reversing extortion conviction; 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) *with United States v. Koziol*, 993 F.3d 1160, 1170 (9th Cir. 2021) (affirming extortion conviction;

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").

Respondent minimizes *Pendergraft* as a case involving a threat to litigation against a local government, which "more acutely implicat[ed] the First Amendment 'right of citizens to petition their government for the redress of grievances.'" BIO 19 (quoting 297 F.3d at 1207). Granted, the Eleventh Circuit's specific holding in *Pendergraft* itself was "narrow," but that court, contrary to Respondent's suggestion, has not hesitated to apply *Pendergraft* to cases involving "nongovernmental victims." BIO 20. *See, e.g.*, *Raney v. Allstate Ins. Co.*, 370 F.3d 1086, 1088 (11th Cir. 2004) (affirming dismissal of civil RICO action; holding, in light of *Pendergraft*, that neither threats to litigate nor actual litigation against a private entity can, as a matter of law, be "wrongful" under the Hobbs Act).

Respondent also downplays the decisions from the First, Fifth, Sixth, Eighth, and Tenth Circuits holding that litigation conduct cannot be extortionate, arguing that "those decisions all addressed pre-existing litigation involving business disputes." BIO 20. In Respondent's view, "the 'policy concerns asserted in th[o]se cases are not implicated' in cases in which the defendant 'ha[d] no relationship with his alleged extortion victim, including any prior or pending litigation.'" *Ibid.* (quoting *Koziol*, 993 F.3d at 1174). But that riposte is not persuasive. Petitioner was convicted of federal extortion offenses based solely on a demand for relief made during negotiations to settle potential civil contract and tort claims. The deleterious consequences of such a rule obtain whether the demand precedes or postdates the

filing of a lawsuit. If anything, pre-suit settlement demands far outnumber post-suit negotiations. Anyway, in either scenario, "[t]rying to transmogrify what [is] obviously a settlement demand ... into an act of extortion[,] ... [i]f given widespread credence, ... would severely impede the salutary policies favoring settlements in civil actions." *Waldron v. George Weston Bakeries, Inc.*, 570 F.3d 1, 10 (1st Cir. 2009).

Moreover, Respondent neglects the most pernicious aspect of the Second Circuit's opinion: The rule—which surpasses even *Koziol*—that a settlement demand may be criminally extortionate even if the civil plaintiff "has a claim of right to *some* amount of money" but not "a plausible claim of right to the amount of money demanded." Pet. App. 32a; *see* Pet. 28–30. That is, under the opinion below, a civil litigant with a valid damages claim (or an attorney acting on his behalf) commits federal extortion crimes if he demands too much in exchange for settling his claims. The BIO leaves this sweeping grab of federal criminal jurisdiction unaddressed.

Finally, Respondent wrongly asserts that this petition does not "implicate" the split just described because "the extortion charges in this case were not premised on [P]etitioner's 'litigation conduct' at all." BIO 20 (quoting Pet. 26). Of course they were: Petitioner was representing a plaintiff with claims for breach of contract and tortious interference with contract against Nike. He approached Nike on his client's behalf, ensured that the parties' discussions would be covered by Rule 408, proffered evidence supporting those claims,[1] and made a demand that would

[1] Respondent intimates that Petitioner's use of Franklin's confidential information was improper. BIO 3, 7. In fact, Franklin "understood that at some point

have resolved the claims in lieu of suit. *See* Pet. 7–8. That was core litigation conduct, and by classifying it as extortionate, the opinion below deviates from the majority rule in the Courts of Appeals. Petitioner's convictions would not have survived in those Circuits. *See, e.g.*, *Langan v. Smith*, 312 F. Supp. 3d 201, 205–06 (D. Mass. 2018) (rejecting "the argument that ... a settlement demand ... constitutes the 'wrongful use of actual or threatened force, violence, or fear' for purposes of the extortion statute, 18 U.S.C. § 1951" and collecting Circuit cases); *Atlantic Recording Corp. v. Raleigh*, 2008 WL 3890387, at *5 (E.D. Mo. Aug. 18, 2008) ("[D]emands for settlement do not constitute extortion within the meaning of RICO." (citing *I.S. Joseph Co., Inc. v. J. Lauritzen A/S*, 751 F.2d 265, 267 (8th Cir. 1984)).

[Petitioner] might share these documents with Nike." Pet. App. 125a. And Respondent conceded below that Petitioner hadn't "breached [his] duty of loyalty or confidentiality by showing" Nike evidence of player payments. C.A. Doc. 63, at A.598 (T.2009–10). Even Petitioner's tweet (BIO 7) didn't identify Franklin, his program, his players, or any information that Franklin had shared with Petitioner.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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