No.

IN THE

Supreme Court of the United States

FULL PLAY GROUP, S.A.,

Petitioner,

v.

UNITED STATES OF AMERICA, ET AL.,

Respondents.

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

1. Whether 18 U.S.C. § 1346, which defines "scheme or artifice to defraud" under the mail and wire statutes to include a scheme or artifice to "deprive another of the intangible right of honest services," allows the government to secure a conviction based on the breach of a private code of conduct without proving that the asserted fiduciary duty has the force of law.

2. Whether the "intangible right of honest services" extends to foreign commercial bribery schemes.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

1. Petitioner Full Play Group, S.A. was a defendant in the district court and an appellee in the court of appeals. Hernán Lopez also was a defendant in the district court and an appellee in the court of appeals. Jeffrey Webb, Eduardo Li, Julio Rocha, Costas Takkas, Jack Warner, Eugenio Figueredo, Rafael Esquivel, José Maria Marin, Nicolás Leoz, Alejandro Burzaco, Aaron Davidson, Hugo Jinkis, Mariano Jinkis, José Marguilies AKA José Lázaro, Alfredo Hawit, Ariel Alvarado, Rafael Callejas, Brayan Jiménez, Rafael Salguero, Héctor Trujillo, Reynaldo Vasquez, Juan Ángel Napout, Manuel Burga, Carlos Chávez, Luis Chiriboga, Marco Polo del Nero, Eduardo Deluca, José Luis Meiszner, Romer Osuna, Ricardo Teixeira, Carlos Martinez, and Gerard Romy were defendants in the district court. Respondent United States was an appellant in the court of appeals.

2. Full Play Group, S.A. is incorporated under Uruguayan law, is not publicly traded, and has no parent company, and no publicly held corporation owns 10% of more of its stock.

RELATED PROCEEDINGS

United States District Court (E.D.N.Y.):

United States v. *Full Play Group, S.A.*,
No. 15-cr-252 (Sept. 12, 2023)

United States Court of Appeals (2d Cir.):

United States v. *Napout*,
Nos. 18-2750, 18-2820 (June 22, 2020)

United States v. *Lopez*,
Nos. 23-7183, 23-7186 (July 2, 2025)

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Full Play Group, S.A. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-33a) is reported at 143 F.4th 99. The order of the district court granting motions for judgment of acquittal (App., *infra*, 34a-103a) is reported at 690 F. Supp. 3d 5. The order of the district court denying motions to dismiss the indictment (App., *infra*, 104a-143a) is not reported but is available at 2021 WL 5038765. An earlier opinion of the court of appeals (App., *infra*, 144a-195a) is reported at 963 F.3d 163.

JURISDICTION

The judgment of the court of appeals was entered on July 2, 2025. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The wire-fraud statute, 18 U.S.C. § 1343, provides in pertinent 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. * * *

The honest-services statute, 18 U.S.C. § 1346, provides in full:

> 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.

INTRODUCTION

In a recent string of decisions, this Court has repeatedly rejected the government's extravagant readings of federal criminal statutes. The decision below, however, might be the most egregious example of the lengths to which prosecutors will go to evade this Court's clear direction.

Petitioner, a company based in Argentina, paid soccer executives in South America for rights to market and broadcast games in South America. The government claims that those payments were bribes, but the United States has never assumed the role of policing foreign commercial bribery. To justify federal involvement, the government argued that petitioner had deprived the Switzerland-based Fédération Internationale de Football Association (better known as FIFA) and the South American soccer confederation of "the intangible right of honest services" owed by the private officials who solicited payments through U.S. wires to steer media rights to petitioner. 18 U.S.C. § 1346. The Second Circuit blessed that theory on the ground that the officials' acceptance of payments breached a purported fiduciary "duty" derived not from any state, federal, or even foreign law, but solely from FIFA's private "code of ethics." App., *infra*, 31a.

The right of honest services had its origins in a line of lower-court decisions that slowly transformed the wire- and mail-fraud statutes into a wide-ranging tool to police unethical behavior, largely by public officials who acted dishonorably in office. See *McNally* v. *United States*, 483 U.S. 350, 358 (1987). Upon finally confronting the issue, this Court found no basis for a right of honest services in the federal fraud statutes, which had always been concerned with frauds to obtain "money or property." *Id.* at 359. The Court told Congress that "it must speak more clearly than it has" to criminalize schemes to deprive someone of honest services. *Id.* at 360.

Congress "spoke shortly thereafter"—but not more clearly. *Sorich* v. *United States*, 555 U.S. 1204, 1205 (2009) (Scalia, J., dissenting from denial of certiorari). The year after *McNally*, Congress expanded the defini-

tion of "'scheme or artifice to defraud'" for purposes of federal fraud offenses to "includ[e] a scheme or artifice to deprive another of the intangible right of honest services." 18 U.S.C. § 1346. But it did not define the concept further. Prosecutors picked back up where they had left off before *McNally*, charging as "fraud" a wide range of conduct they perceived as unethical. And for the next two decades, the lower courts developed increasingly expansive bases for invoking honest-services fraud—flouting the centuries-old settled understanding that the federal courts do not create common-law crimes. *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812).

The inherent indefiniteness of Section 1346—and the resulting fracturing of the lower courts—led this Court to intervene again. Unlike in *McNally*, honest-services fraud survived, but barely. This Court saved Section 1346 from a serious vagueness challenge by holding that Congress had cabined Section 1346 to a narrow set of "core pre-*McNally* applications" of the honest-services doctrine. *Skilling* v. *United States*, 561 U.S. 358, 408 (2010). Although some found the statute irredeemably vague, *id.* at 423-424 (Scalia, J., concurring in part and concurring in judgment), the Court limited Section 1346 to "offenders who, in violation of a fiduciary duty, participat[e] in bribery or kickback schemes," *id.* at 407.

Skilling did not resolve "the most fundamental indeterminacy" in Section 1346: "the character of the 'fiduciary capacity' to which the bribery and kickback restriction applies." 561 U.S. at 421 (Scalia, J., concurring in part and concurring in judgment). The Second Circuit has since led the charge in endorsing extremely broad conceptions of fiduciary duties that can support federal criminal liability. In *Percoco* v. *United*

States, 598 U.S. 319 (2023), this Court addressed one of those theories: that a former public official owes fiduciary duties to the public when he "dominate[s] and control[s] any governmental business" and "people working in the government actually relied on him." *Id.* at 330 (citation omitted). That standard, even though grounded in pre-*McNally* precedent of the Second Circuit, was "too vague" under *Skilling*. *Ibid.* The Court reminded the Second Circuit that honest-services fraud "must be defined with the clarity typical of criminal statutes." *Id.* at 328.

The message was not received. While other circuits have tried to put guardrails on honest-services fraud by requiring the government to prove a breach of a positive-law fiduciary duty, the Second Circuit has entrenched a deep circuit conflict by adhering to its pre-*Skilling* view that a private code of conduct (here, FIFA's code of ethics) itself establishes fiduciary duties. That extreme position deprives the public of fair notice and allows federal prosecutors to pick and choose arbitrarily which private codes of conduct trigger criminal liability. The question whether the fiduciary duties that support honest-services fraud arise only from positive law (as two circuits hold), instead from general principles of agency or trust law (five circuits), or even from private codes of conduct (three circuits) has "long divided lower courts" and amply warrants this Court's resolution. *Percoco*, 598 U.S. at 336 (Gorsuch, J., concurring in judgment).

The Second Circuit's decision to export its rule that private codes create knockoff fiduciary duties makes the need for this Court's review all the more obvious and urgent. A "smattering of pre-*McNally* decisions" cannot support applying honest-services fraud to "an ill-defined category of circumstances."

Percoco, 598 U.S. at 328-329. Before *McNally*, zero decisions had endorsed the notion that foreign employers have a right of honest services from foreign employees. Congress couldn't have invented a universal agency law in salvaging the narrow core of preexisting honest-services doctrine. In holding otherwise, the Second Circuit defied *Skilling* and *Percoco*, flouted the presumption against extraterritoriality, and negated Congress's considered choice not to criminalize foreign commercial bribery in parallel provisions.

The need for this Court's intervention is unmistakable. Because New York is a clearinghouse for the world's wire transfers, the decision below casts the shadow of honest-services fraud over the globe. The expansion of Section 1346 to foreign commercial bribery has particularly pernicious consequences because many foreign countries neither recognize fiduciary duties in the traditional Anglo-American sense nor criminalize commercial bribery. Federal criminal liability thus will turn on private employers' codes of conduct for billions of employees—a disaster for those who favor the predictable and evenhanded application of criminal law. If federal prosecutors are to police such ethical violations for the whole world, Congress certainly has to "speak more clearly than it has." *Skilling*, 561 U.S. at 411 (citation omitted).

STATEMENT

A. Factual Background

1. FIFA is the self-regulatory body for global soccer. App., *infra*, 5a. Headquartered in Switzerland and organized under Swiss law, FIFA has more than 200 member associations representing nations and territories. *Ibid.* Those associations also are members of six continental confederations that periodically

organize tournaments and World Cup qualifiers. *Id.* at 5a-6a. In the Americas, those entities are the Confederación Sudamericana de Fútbol (CONMEBOL) and the Confederation of North, Central American and Caribbean Association Football (CONCACAF). *Id.* at 5a.

The continental confederations award media rights for the events that they organize. App., *infra*, 5a-7a. Since at least the early 1980s, CONMEBOL and CONCACAF officials would request direct payments from sports marketing companies for broadcasting and marketing rights, which the companies in turn distribute to television and radio broadcast networks, sponsors, and licensees. *Id.* at 155a-162a. A company called Traffic Group, for example, paid CONMEBOL officials to secure exclusive broadcasting and marketing rights to the Copa América (a quadrennial tournament among South American national teams) from 1987 to 2010. *Id.* at 156a. Another company, Torneos y Competencias, paid CONMEBOL officials for the rights to broadcast the Copa Libertadores, an annual tournament among South American club teams. *Id.* at 159a-160a.

In 2004, FIFA adopted a "written code of ethics" that stated that "executives of FIFA, its continental confederations, and member associations" all owe "a duty of 'absolute loyalty' to FIFA." App., *infra*, 5a. That private code prohibited such officials "from accepting bribes or otherwise abusing their positions of power for personal gain." *Ibid.* In 2013, CONMEBOL adopted its own code of ethics that also announced a duty of "'absolute loyalty'" and prohibited officials from securing "personal benefits" with their positions. *Ibid.*; see *id.* at 152a.

2. Petitioner is a Uruguayan sports-marketing company owned by Hugo Jinkis and his son, Mariano Jinkis, with a principal place of business in Argentina. App., *infra*, 4a. Starting in 2000, petitioner assisted a joint venture of Torneos y Competencias and Fox Sports in paying for media rights for the Copa Libertadores. *Id.* at 7a-8a & n.3. Hernán Lopez was a Fox executive who purportedly hid the payments from Fox to avoid scrutiny. *Id.* at 8a-9a.

In 2009, petitioner began competing with Traffic by building relationships with the presidents of six smaller CONMEBOL associations: Bolivia, Colombia, Ecuador, Paraguay, Peru, and Venezuela. App., *infra*, 7a. The government called these federation presidents the "Group of Six" at trial. *Ibid.* Petitioner made payments to the Group of Six related to media rights for World Cup qualifiers, exhibitions called friendlies, and the Copa América tournaments in 2011 and 2015. *Id.* at 7a-8a; see *id.* at 48a-49a. Although all six officials were based in South America, petitioner wired some of the payments through U.S. banks. *Id.* at 8a. Petitioner also negotiated with a Cayman Islands official about a payment for the rights to the 2016 Copa América that CONCACAF jointly hosted, but no payment was ever made. *Id.* at 7a n.2.

B. Procedural History

1. In 2015, the government indicted numerous FIFA, CONMEBOL, and CONCACAF officials for participating in alleged bribery schemes. App., *infra*, 162a-164a. The government secured guilty pleas from many of the defendants and then filed a superseding indictment against only three defendants who had headed their national federations: Manuel Burga (Peru), Juan Ángel Napout (Paraguay), and José Maria Marin (Brazil). *Id.* at 164a. According to the government,

those officials had conspired to deprive FIFA and CONMEBOL of their "right of honest services" through wire fraud by procuring payments in exchange for media rights. *Id.* at 165a. The government's theory at trial was that the executives had "violated the fiduciary duty they owed to FIFA and CONMEBOL under the organizations' codes of ethics." *Id.* at 181a. The jury acquitted Burga but convicted Napout and Marin of honest-services wire fraud. *Id.* at 166a.

2. In its published *Napout* opinion, the Second Circuit affirmed the convictions for honest-services fraud. App., *infra*, 144a-192a.

a. To begin with, the court of appeals rejected the officials' extraterritoriality defense. App., *infra*, 166a-174a. The court held that the prosecution of foreign employees for breaching purported fiduciary duties to foreign employers does not implicate the presumption against extraterritoriality so long as the "use of wires in the United States" (*i.e.*, transfers from or to U.S. bank accounts, or through U.S. banks) was "integral to the transmission of the bribes." *Id.* at 173a.

The court of appeals also rejected an unpreserved vagueness challenge that the officials lacked fair notice that the honest-services statute could be applied in the foreign context. App., *infra*, 174a-180a. The court candidly acknowledged "'lingering ambiguities in § 1346,'" including whether "a fiduciary duty 'must' arise from 'positive state or federal law,' or whether 'merely general principles, such as the obligations of loyalty and fidelity that inhere in the employment relationship' can suffice." *Id.* at 178a (first citation omitted) (quoting *Skilling* v. *United States*, 561 U.S. 358, 417 (2010) (Scalia, J., concurring in part and concurring in judgment)). But applying plain-error review,

the court held that it "remains unsettled, at best," whether "a foreign employee's duty to his foreign employer" can support a conviction for honest-services fraud under *Skilling*. *Id.* at 180a.

The court of appeals then found that the government had proved the breach of fiduciary duties owed to FIFA and CONMEBOL. App., *infra*, 180a-181a. The court explained that the government had not prosecuted the officials "for breaching a fiduciary duty created by Paraguayan law—or Brazilian, Swiss or U.S. law, for that matter." *Id.* at 181a. The basis for the convictions instead was their breach of "the fiduciary duty they owed to FIFA and CONMEBOL under the organizations' codes of ethics," which demanded "'absolute loyalty'" from officials. *Ibid.* The honest-services violation, the court emphasized, "arose from their acceding to FIFA and CONMEBOL's rules, not the provision of the law of any state or country." *Ibid.*

b. Concurring, Judge Hall defended the application of the honest-services statute to duties in a foreign employer's private code of conduct. App., *infra*, 192a-195a. He explained that the Second Circuit had long rejected any requirement that "the fiduciary duty * * * must arise from 'positive state or federal law.'" *Id.* at 194a (citing *United States* v. *Von Barta*, 635 F.2d 999, 1007 (2d Cir. 1980)). In his view, the officers deprived FIFA and CONMEBOL of honest services by breaching the "duty that was explicitly laid out by the two associations' respective codes of conduct." *Id.* at 195a.

3. Shortly before the Second Circuit's *Napout* decision, the government secured a superseding indictment in the same case naming petitioner as a defendant, along with Lopez and another Fox executive. App., *infra*, 37a. The government raised the same the-

ory that the Group of Six "were bound by the FIFA Code of Ethics and the later-enacted CONMEBOL Code of Ethics not to accept bribes" and asserted that petitioner committed wire fraud by concealing payments that deprived FIFA and CONMEBOL of their right of honest services. *Id.* at 61a; see *id.* at 39a-40a. The government also charged petitioner with money-laundering schemes and conspiracy under the Racketeer Influenced and Corrupt Organizations Act. *Id.* at 37a.

a. The district court denied all three defendants' motions to dismiss the indictment. App., *infra*, 104a-143a. First, the court rejected their extraterritoriality argument under *Napout*. *Id.* at 115a. Second, the court held that the honest-services statute was not vague even when "the indictment bases the fiduciary duties on private employer codes of ethics" that prohibit payments that the foreign jurisdictions do not criminalize as "private-sector bribery." *Id.* at 123a-124a. Third, the court applied *Napout* in holding that the indictment sufficiently alleged honest-services fraud on the theory that payments to the Group of Six deprived FIFA and CONMEBOL of honest services. *Id.* at 128a-129a.

b. After the government abandoned its RICO and substantive wire-fraud counts, the case proceeded to a jury trial on conspiracy counts for honest-services fraud and money laundering. App., *infra*, 37a-38a. The district court instructed the jury that a "scheme or artifice to defraud" includes a scheme to deprive a "soccer organization" of a fiduciary's "honest and loyal service." *Id.* at 65a (emphasis omitted). The court also instructed the jury that, "[i]n determining the source and scope of a fiduciary duty, you may take into consideration codes of conduct, if any, that would have

applied to the relationship." *Ibid.* (emphasis omitted). The jury convicted petitioner and Lopez on all remaining counts while acquitting the other Fox executive on all counts. *Id.* at 67a-68a.

c. The district court granted petitioner's and Lopez's motions for judgment of acquittal, holding that the right of honest services in Section 1346 does not extend to foreign commercial bribery. App., *infra*, 34a-103a. Congress, the court explained, had codified only the "core" of the honest-services precedent that developed before this Court rejected that theory of wire and mail fraud in *McNally* v. *United States*, 483 U.S. 350 (1987). App., *infra*, 73a (quoting *Skilling*, 561 U.S. at 409). Under *Percoco* v. *United States*, 598 U.S. 319 (2023), a "smattering of pre-*McNally* decisions" can't justify applying the honest-services statute to "an ill-defined category of circumstances." App., *infra*, 85a (quoting 598 U.S. at 328-329) (emphasis omitted). The court reasoned that, if a few outlier decisions were insufficient, then *Percoco* necessarily forecloses this prosecution when not "a single pre-*McNally* case appl[ied] honest services wire fraud to foreign commercial bribery." *Id.* at 94a. Because the money-laundering convictions were "predicated" on honest-services fraud, the court acquitted petitioner and Lopez "on all counts of conviction." *Id.* at 100a.

4. On the government's appeal, the Second Circuit reversed and remanded with instructions for the district court to reinstate the convictions. App., *infra*, 1a-33a.

The court of appeals first set forth four propositions that governed its application of Section 1346. First, the scheme "must involve bribery and/or kickbacks." App., *infra*, 20a (citing *Skilling*, 561 U.S. at 409). Second, "an employer-employee relationship, or

a similar relationship, is a well-accepted example of a fiduciary relationship that falls within the scope of § 1346." *Ibid.* (citing *Skilling*, 561 U.S. at 407 n.41). Third, "an employee's violation of his employer's codes of conduct" establishes "breach of a fiduciary duty" even when the conduct does not violate "local law." *Id.* at 20a-21a. And fourth, "the presence of foreign defendants or an international component to a scheme does not categorically remove an offense from the ambit of § 1346." *Id.* at 21a. The court reasoned that *Percoco* didn't require the government to identify any pre-*McNally* decisions treating foreign commercial bribery as honest-services fraud. *Id.* at 22a-24a.

The court of appeals also held that the government had proved honest-services fraud. App., *infra*, 24a-33a. The court determined that the government proved a breach of a fiduciary duty based on FIFA's and CONMEBOL's "express rules proscribing the use of an employment position for personal gain and imposing on officials a duty of 'absolute loyalty.'" *Id.* at 25a. Although petitioner argued that the officials' civil-law countries do not recognize such fiduciary duties, the court deemed a duty's force of law to be irrelevant. *Id.* at 26a-27a. The court reiterated its holding in *Napout* that this case involves the breach of duties in private codes of ethics, not any "duty created by Paraguayan law—or Brazilian, Swiss or U.S. law." *Id.* at 31a (quoting *id.* at 181a). The court also dismissed any "cause for alarm" that "'criminal sanctions [would] flow from violations of employment policies'" because a defendant still could argue to a jury on a case-by-case basis that a given private code of ethics doesn't create fiduciary duties. *Id.* at 32a-33a.

REASONS FOR GRANTING THE PETITION

This Court saved Section 1346 from a serious vagueness challenge in *Skilling* v. *United States*, 561 U.S. 358 (2010), by limiting honest-services fraud to a core set of decisions that criminalized bribes and kickbacks before *McNally* v. *United States*, 483 U.S. 350 (1987). Since *Skilling*, the Court has made clear that, even within that core, "'[t]he intangible right of honest services' must be defined with the clarity typical of criminal statutes." *Percoco* v. *United States*, 598 U.S. 319, 328 (2023). The decision below blows past both gateways. In reinstating petitioner's convictions, the Second Circuit entrenched its maximally permissive rule that private codes of conduct create fiduciary duties that support prosecutions for honest-services fraud. The court then extended that theory to alleged foreign commercial bribery without even the slightest support in the pre-*McNally* decisions that Congress codified in Section 1346.

The first question presented seeks this Court's much-needed resolution of a longstanding circuit conflict regarding the key element of honest-services fraud—the "violation of a fiduciary duty"—that distinguishes lawful payments from bribes and kickbacks. *Skilling*, 561 U.S. at 407. Before *Skilling*, this Court had granted review in two cases to resolve confusion that had plagued the lower courts, including about the source of fiduciary duties for honest-services fraud, but ultimately did not decide those questions. *Weyhrauch* v. *United States*, 561 U.S. 476 (2010) (per curiam); see *Black* v. *United States*, 561 U.S. 465 (2010). The Court hoped that limiting the statute to "'the body of pre-*McNally* honest-services law'" that was most clearly established would answer most subsidiary questions. *Skilling*, 561 U.S. at 405; see *id.* at 407 n.41. Yet the

circuits have continued to break along the same pre-*Skilling* lines.

To prevent prosecutors, juries, and courts from creating fiduciary duties on a case-by-case basis, the Third and Fifth Circuits hold that the *right* of honest services exists only when positive law creates a fiduciary duty not to accept the payment. The First, Fourth, Sixth, Ninth, and Eleventh Circuits instead have developed a federal common law of fiduciary duties based on general principles of agency or trust law. And occupying the extreme end of the spectrum, the Second Circuit has joined the D.C. and Seventh Circuits in holding that private codes of conduct (like FIFA's ethics rules or an employer handbook) establish fiduciary duties whose breach triggers federal criminal liability.

The second question presented concerns the Second Circuit's unprecedented expansion of honest-services fraud to foreign commercial bribery. The court candidly admitted that no pre-*McNally* precedent recognized a foreign employer's right of honest services from a foreign employee. App., *infra*, 22a-23a. So in codifying only "core applications of the honest-services doctrine," Congress necessarily could not have embraced that never-before-seen right. *Percoco*, 598 U.S. at 328 (citation omitted). Congress also has made the considered decision in the Foreign Corrupt Practices Act (FCPA) to prohibit only bribes to foreign public officials, perhaps in recognition that criminalizing foreign commercial bribery would impose massive compliance costs on U.S. companies.

Both questions are worthy of this Court's review—and together only more so. Because of New York's status as the world's financial hub, the Second Circuit is a fertile breeding ground for wire-fraud prosecutions. The extension of Section 1346 to foreign commercial

bribery supercharges the importance of deciding the appropriate source of fiduciary duties because many foreign countries do not recognize fiduciary relationships. And pegging criminal liability to private codes of conduct adopted by foreign employers makes fair notice even less attainable as people inside and outside the United States now face "the threat of up to [20] years in prison if they happen to guess wrong." *Snyder* v. *United States*, 603 U.S. 1, 16 (2024). This case is another opportunity to remind the government "[t]hat is not how federal criminal law works." *Ibid.*

I. THE SECOND CIRCUIT DOUBLED DOWN ON THE WRONG SIDE OF AN INTRACTABLE CONFLICT ABOUT THE SOURCE OF FIDUCIARY DUTIES FOR HONEST-SERVICES FRAUD

The decision below deepens an entrenched conflict "concerning the *source* of the fiduciary obligation" that triggers a duty of honest services. *Skilling*, 561 U.S. at 417 (Scalia, J., concurring in part and concurring in judgment). This question has "long divided lower courts" and "remain[s] unanswered." *Percoco*, 598 U.S. at 336 (Gorsuch, J., concurring in judgment). In adopting the most expansive approach to recognizing fiduciary duties that arise not from positive law or even from federal common law but instead from private codes of conduct, the Second Circuit has again shirked its responsibility to "define 'the intangible right of honest services' with sufficient definiteness that ordinary people can understand what conduct is prohibited." *Id.* at 331 (majority opinion) (citation and some quotation marks omitted).

A. The Circuits Openly Disagree About What Kinds Of Duties Implicate The Right Of Honest Services

Skilling made clear that honest-services fraud requires proof of the "violation of a fiduciary duty." 561 U.S. at 407. But this Court didn't say "[w]hat 'fiduciary duty' is necessary." *United States* v. *Householder*, 137 F.4th 454, 499 (6th Cir. 2025) (Thapar, J., concurring). That question still bedevils the circuits, which remain "unsure" how to determine the existence of a fiduciary duty that can support federal criminal liability. *Id.* at 502. Some courts look to "positive state or federal law." *Skilling*, 561 U.S. at 417 (opinion of Scalia, J.). Others turn to "general principles" of trust or agency law, *id.* at 417-418, "in effect creating a federal common law of fiduciary duty," *Householder*, 137 F.4th at 502 (Thapar, J., concurring). And yet others (like the Second Circuit here) cast the honest-services net even more broadly to catch breaches of *private* codes of conduct like ethics policies and employer handbooks. App., *infra*, 30a-32a.

1. Taking a more restrictive approach, the Third and Fifth Circuits require the government to ground asserted fiduciary duties in positive law external to Section 1346.

The Fifth Circuit first articulated that view in *United States* v. *Brumley*, 116 F.3d 728 (5th Cir. 1997) (en banc), which concerned a state official who adjudicated workers-compensation claims and regularly took payments from attorneys appearing before him. *Id.* at 730-731. The court held that the government "must prove that conduct of a state official breached a duty respecting the provision of services owed to the official's employer under state law." *Id.* at 734. The court was unwilling to believe "that Congress intended to

leave to courts and prosecutors, in the first instance, the power to define the range and quality of services" an employee must provide. *Ibid.* Section 1346 nowhere suggests that Congress "impose[d] upon states a federal vision of appropriate services" or "an ethical regime for state employees"—an outcome that "would sorely tax separation of powers and erode our federalist structure." *Ibid.*

The Fifth Circuit has maintained its rule that the government must prove conduct that "breached a duty respecting the provision of services owed to th[e] official's employer under state law." *United States* v. *Grace*, 568 F. App'x 344, 348-349 (5th Cir. 2014) (citation omitted); see, *e.g.*, *United States* v. *Whitfield*, 590 F.3d 325, 348 (5th Cir. 2009); *United States* v. *Caldwell*, 302 F.3d 399, 409 (5th Cir. 2002) (same test for private employees). The court also rejected the argument that *Skilling* had replaced the *Brumley* requirement of a deprivation of services owed under positive law (there, state law) with a "uniform national standard" of federal-law fiduciary duties. *United States* v. *Teel*, 691 F.3d 578, 583 (5th Cir. 2012) (quoting *Skilling*, 561 U.S. at 411). In the Fifth Circuit's view, *Skilling* does not "establish *federal law* as the uniform standard" for proving bribery and kickback schemes under Section 1346. *Ibid.*

The Third Circuit has "endorse[d]" *Brumley* in holding that "a violation of state law serves as an important limiting principle on the scope of § 1346 honest services fraud." *United States* v. *Murphy*, 323 F.3d 102, 114, 116 & n.5 (3d Cir. 2003). To demonstrate "an established 'right' of honest services," the government must prove the scheme breached a "preexisting legal duty" where "state or federal law already clearly establishe[d] a fiduciary relationship." *Id.* at 115, 117.

The Third Circuit has justified requiring the "anchor of a fiduciary relationship established by state or federal law" as necessary to "'allay fears that the federal fraud statutes give inadequate notice of criminality and delegate to the judiciary impermissibly broad authority to delineate the contours of criminal liability.'" *Id.* at 104, 116 (citation omitted).

In *Murphy*, the Third Circuit rebuked the Second Circuit's contrary approach in *United States* v. *Margiotta*, 688 F.2d 108 (2d Cir. 1982)—a forerunner of the decision below, see p. 21, *infra*—which disclaimed any need to root the "fiduciary duty" in "local law." 688 F.2d at 124. Rather than requiring the government to identify a "preexisting legal duty," *Margiotta* had "approved a gestalt approach" by which fiduciary duties could be "derive[d]" from the circumstances. *Murphy*, 323 F.3d at 112, 115. That approach doesn't restrain "the potentially limitless application of § 1346" and thus stands "in direct contravention of the principles of honest services fraud" that the Third Circuit has adopted. *Id.* at 117-118.

2. In stark contrast to the Third and Fifth Circuits, the First, Fourth, Sixth, Ninth, and Eleventh Circuits have endorsed the view that Section 1346 codified a federal common law of fiduciary obligations that underlie the right of honest services.

The Ninth Circuit has taken square aim at the Third and Fifth Circuits' approach. In *United States* v. *Weyhrauch*, 548 F.3d 1237 (9th Cir. 2008), the court rejected the "limiting principle" of positive law on the theory that Section 1346 codified a "uniform" duty based on the "contours" of pre-*McNally* cases. *Id.* at 1245, 1247. This Court granted review to resolve this conflict but vacated and remanded after *Skilling* limited Section 1346 to bribes and kickbacks. *Weyhrauch*,

561 U.S. at 476. Later, the Ninth Circuit reiterated its position that Section 1346 doesn't require an "independent violation" of a fiduciary duty rooted in positive law, *United States* v. *Inzunza*, 638 F.3d 1006, 1018 (9th Cir. 2011), and instead adopted a general-law test that encompasses "both formal * * * and informal fiduciaries," *United States* v. *Milovanovic*, 678 F.3d 713, 723-725 (9th Cir. 2012) (en banc); see, *e.g.*, *United States* v. *Solakyan*, 119 F.4th 575, 586 (9th Cir. 2024) (recognizing "a fiduciary duty arising from the doctor-patient relationship" under general principles of trust law).

The First Circuit recently restated its similar position that the "duty of 'honest services'" rests on "the common law obligations of fiduciaries." *United States* v. *Pullman*, 139 F.4th 35, 46 (1st Cir. 2025). There, a union president received a kickback for securing a contract paid with union funds. *Id.* at 42. The First Circuit held that Section 1346 categorically treats a "core set of relationships" (including unions and their officials) as sources of fiduciary duties. *Id.* at 47 (citing *Skilling*, 561 U.S. at 407 n.41). *Pullman* is in line with the First Circuit's longstanding position that the right of honest services "derives from fiduciary duties at common law as well as from statute" and that Section 1346 "does not require proof of a violation of any state law." *United States* v. *Sawyer*, 239 F.3d 31, 41 (1st Cir. 2001).

The Fourth, Sixth, and Eleventh Circuits have also long taken the position that a federal common law of fiduciary relationships governs honest-services fraud and relieves the government of proving "the violation of any state or federal law" creating a fiduciary duty. *United States* v. *Bryan*, 58 F.3d 933, 940 (4th Cir. 1995) (citation omitted); see, *e.g.*, *United States* v.

deVegter, 198 F.3d 1324, 1329 (11th Cir. 1999). These courts likewise define that duty by reference to the accretion of honest-services precedents and general-law principles. *United States* v. *Frost*, 125 F.3d 346, 366-369 (6th Cir. 1997). In their view, Section 1346 "restore[d] opinions predating" this Court's rejection of the honest-services theory in *McNally*, and these decisions' "contours" were "sufficiently clear" to provide fair notice of actionable fiduciary duties. *Id.* at 371; accord *Bryan*, 58 F.3d at 942.

3. The D.C., Second, and Seventh Circuits have taken an even more capacious view of fiduciary duties. In these circuits, the government need not ground asserted duties in *any* law—whether positive law or a federal-common-law strain of pre-*McNally* decisions—but instead may prosecute breaches of duties stated in *private* codes of conduct.

The Second Circuit was an early champion of the view that "the employment relationship, by itself," could establish the right of honest services, even when no "state or federal statute" imposes a fiduciary duty. *United States* v. *Von Barta*, 635 F.2d 999, 1007 (2d Cir. 1980); see *Margiotta*, 688 F.2d at 124. Relying on *Von Barta*, the D.C. Circuit aligned itself with the Second Circuit in allowing the breach of a "company-wide policy" to support a conviction even without a violation of "state or federal law." *United States* v. *Lemire*, 720 F.2d 1327, 1332, 1336-1337 (D.C. Cir. 1983); see *United States* v. *Sun-Diamond Growers of California*, 138 F.3d 961, 973 n.13 (D.C. Cir. 1998) (holding that the enactment of Section 1346 "revive[d]" *Lemire* standard). The Seventh Circuit, too, has "declined" to adopt the positive-law "limiting principle" from *Brumley* and *Murphy* while holding that "other sources can create a fiduciary obligation," including "employee

handbook[s]." *United States* v. *Sorich*, 523 F.3d 702, 712 (7th Cir. 2008).

Skilling did not lead the Second Circuit to reconsider its expansive approach. Instead, the court endorsed the Ninth Circuit's rejection in *Weyhrauch* of any requirement that the defendant have committed an "underlying violation of state law" and affirmed an honest-services conviction where the jury instructions permitted liability for a breach of United Nations rules without any violation of positive law or even of general-law agency principles. *United States* v. *Bahel*, 662 F.3d 610, 632-633 (2d Cir. 2011).

The decision below is the next step in the slow march of this theory's expansion. The Second Circuit reiterated that private "codes of ethics" alone supply the necessary fiduciary duty—no matter the content of "local law." App., *infra*, 18a. And the court then put that approach on steroids by allowing FIFA's and CONMEBOL's ethics rules to create a right of honest services even when the officials' foreign countries don't recognize the concept of such fiduciary duties. *Id.* at 30a-32a.

In short, the Second Circuit (like the D.C. and Seventh Circuits) allows private ethics codes and employer handbooks to speak fiduciary duties into existence where neither positive law nor even a federal-common-law survey of pre-*McNally* cases creates any legal obligation. This conflict cries out for resolution by this Court.

B. The Second Circuit Erred In Allowing A Private Code Of Conduct To Create Federal Criminal Liability

The Second Circuit's willingness to deem payments to be bribes or kickbacks based on violations of private

codes of conduct defies this Court's precedents requiring clear and meaningful limits on honest-services fraud.

1. Section 1346 is rife with the potential for abuse, no matter what fiduciary duties can open the door to a federal prosecution for perceived dishonesty. But if there is to be any fair notice that a commercial transaction implicates the right of honest services, the recipient's acceptance of the payment must involve a breach of a fiduciary duty grounded in positive law.

The Third and Fifth Circuits' approach beats out all others on text and compatibility with constitutional demands. Their interpretation gives effect to Congress's reference to "the *right* of honest services"—which presumes a preexisting duty to provide such services. 18 U.S.C. § 1346 (emphasis added); see *Murphy*, 323 F.3d at 117. As proponents and opponents alike agree, requiring a positive-law duty also would ensure a "clear outer limit" that increases "fair notice" and curtails "how much control federal prosecutors have." *Weyhrauch*, 548 F.3d at 1244-1245; see *Murphy*, 323 F.3d at 116; *Brumley*, 116 F.3d at 734.

To be clear, a positive-law fiduciary duty alone doesn't trigger federal criminal liability. The breach of the fiduciary duty still must fall within the "core applications of the honest-services doctrine" that Congress codified after *McNally*. *Percoco*, 598 U.S. at 328 (quoting *Skilling*, 561 U.S. at 410). State or foreign law cannot simply slap a fiduciary label on a relationship that falls outside traditional principles of agency law and then let federal prosecutors get to work. Cf. *id.* at 329-330.

2. The two alternatives adopted by other circuits, including the Second Circuit, defy this Court's re-

peated admonition to the lower courts that the "outer boundaries" of honest-services fraud must not be left "ambiguous." *McNally*, 483 U.S. at 360. That command is a constitutional imperative to steer honest-services fraud clear of "a vagueness shoal." *Skilling*, 561 U.S. at 368. As a result, "'[t]he intangible right of honest services' must be defined with the clarity typical of criminal statutes." *Percoco*, 598 U.S. at 328. The federal-common-law approach and the private-code-of-conduct approach both fail that test miserably.

The federal-common-law approach is a task that federal courts neither should nor adequately can perform. This Court "long ago abjured" any "power to define new federal crimes." *Skilling*, 561 U.S. at 415 (opinion of Scalia, J.) (citing *United States* v. *Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812)). It is one thing to say that Congress salvaged a bribery-and-kickback core from "pre-*McNally* case law." *Id.* at 409 n.43 (majority opinion). But it is quite another to say that Section 1346 birthed "a federal common law of fiduciary relationships." *Householder*, 137 F.4th at 502 (Thapar, J., concurring). Pity the public who must assemble the puzzle pieces of pre-*McNally* cases and make a lawyer's best guess where the federal courts might take the right of honest services next.

Some courts have pointed to a footnote in *Skilling* noting that the "existence of a fiduciary relationship, under any definition of that term, was usually beyond dispute" in cases involving "employee-employer" relationships. 561 U.S. at 407 n.41; see, *e.g.*, *United States* v. *Nouri*, 711 F.3d 129, 137 n.1 (2d Cir. 2013). But that footnote stated only that such relationships *could* give rise to a fiduciary duty—not that those relationships are fiduciary in all potential manifestations. This Court also has recognized that "to say that

a man is a fiduciary" begs the question: "What obligations does he owe as a fiduciary?" *SEC* v. *Chenery Corp.*, 318 U.S. 80, 85-86 (1943). Whatever the desirability of "uniform federal fiduciary standards," those "standards should not be supplied by judicial extension" of federal common law into the criminal sphere. Cf. *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462, 480 (1977).

If the pre-*McNally* case law had any core fiduciary duty that existed independent of positive law, that duty applied only to public officials. Honest-services prosecutions typically targeted "bribery of public officials" and only slowly extended to "recreant employee[s]." *Skilling*, 561 U.S. at 401 (citations omitted). Unlike for public officials, state law and federal statutes also impose well-defined fiduciary duties in the private context. *E.g.*, 29 U.S.C. § 1104. The pre-*McNally* precedent on fiduciary duties to private entities is far too thin to justify replacing preexisting fiduciary duties with an ever-evolving set of the federal courts' own making.

Allowing private ethics codes and employer handbooks to create fiduciary duties that trigger a right of honest services is the worst of all worlds. This Court has refused to interpret criminal statutes to turn on "the drafting practices of private parties," which "would inject arbitrariness into the assessment of criminal liability." *Van Buren* v. *United States*, 593 U.S. 374, 395-396 (2021). But the Second Circuit's approach endorses just that. Private organizations can unilaterally impose duties, no matter whether they have any force of law. And those private duties, as here, could create criminal liability for *third parties* to the employment relationship who may have no notice of the private rules prohibiting the payment. The Second

Circuit's rule also invites the government to repackage breaches of private agreements that are "traditionally left to state contract and tort law" as federal fraud offenses, right after the Court shut the door to a similar theory for traditional property fraud. *Ciminelli* v. *United States*, 598 U.S. 306, 315-316 (2023). The scope of honest-services fraud should be shrinking—not growing to absorb theories recently extinguished by *Van Buren* and *Ciminelli*.

Section 1346 lacks the clarity *Percoco* demands if federal courts can create fiduciary duties in common-law fashion or if employers can establish them by private fiat. In every case, the prosecutor can charge the (often, as here, undisputed) payment as a bribe or kickback, leaving it up to "a jury to determine whether the facts adduced at trial establish the existence of a fiduciary relationship between the relevant parties." App., *infra*, 33a. This Court doesn't "construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *McDonnell* v. *United States*, 579 U.S. 550, 576 (2016) (citation omitted). If the experience under the honest-services statute has proved anything, it is that such an assumption would be quite unfounded.

II. THE SECOND CIRCUIT DEFIED THIS COURT'S DECISIONS IN EXTENDING HONEST-SERVICES FRAUD TO FOREIGN COMMERCIAL BRIBERY

The government has long advocated an open-ended understanding of honest-services fraud that maximizes its prosecutorial discretion. During one of the trio of arguments leading up to the *Skilling* decision, the government defended its prosecution of conflicts of interest that employees should have disclosed under employment agreements. The Court's pointed questioning revealed to shock and hilarity in the

courtroom that the government's boundless definition of an employee's duty of honest services to his employer could turn most of the "150 million workers in the United States" into federal criminals. Tr. of Oral Arg. at 30:7-15, *Black*, *supra* (No. 08-876). Unsurprisingly, the Court rejected that third, amorphous category, cutting down Section 1346 to the bribery-and-kickback core "recognized in Courts of Appeals' decisions before *McNally*." *Skilling*, 561 U.S. at 404.

For all the excesses before *McNally*, no court even dreamed of exporting honest-services fraud to breaches of foreign fiduciary duties. Congress's codification of the pre-*McNally* core thus could not have conferred an unheard-of right of honest services on foreign employers. Yet the Second Circuit held below that private codes of conduct expose not only over 150 million American workers, but also billions of people around the world, to potential federal criminal liability. As during the *Black* argument, that conclusion doesn't pass the laugh test.

A. This Court Has Interpreted § 1346 To Codify Only An Established Core Of Pre-*McNally* Cases

Without permission from Congress or this Court, the lower courts invented honest-services fraud. Decisions starting in the 1940s expanded the mail- and wire-fraud statutes from schemes to obtain money or property to "scheme[s] to defraud the public." *Skilling*, 561 U.S. at 400 (citation omitted). Most of these cases concerned "bribery of public officials," while some extended the theory of honest-services fraud to domestic commercial bribery. *Id.* at 401 (citation omitted). When the issue finally reached this Court, it put an end to the experimentation and reimposed the traditional requirement that the government prove a

scheme to obtain money or property. *McNally*, 483 U.S. at 357-361.

Congress swiftly responded by expanding wire and mail fraud to include "a scheme or artifice to deprive another of *the* intangible right of honest services." 18 U.S.C. § 1346 (emphasis added). As this Court explained, the definite article "the" confirms that "Congress was recriminalizing mail- and wire-fraud schemes to deprive others of *that* 'intangible right of honest services,' which been protected before *McNally*, not *all* intangible rights of honest services whatever they might be thought to be." *Skilling*, 561 U.S. at 404-405 (citation omitted).

At the same time, Congress codified only "core applications of the honest-services doctrine" that existed before *McNally*. *Skilling*, 561 U.S. at 410. That core-applications requirement applies not only to the scheme's conduct (bribes or kickbacks) but also to the fiduciary-duty element. In *Percoco*, the Court rejected the Second Circuit's "vague" pre-*McNally* standard that a fiduciary relationship exists whenever a person on whom others rely exercises control over the pertinent decision. 598 U.S. at 329-330 (citing *Margiotta*, 688 F.2d at 122). Courts instead must identify the well-defined "'core' of pre-*McNally* honest-services case law." *Id.* at 328.

B. The Second Circuit Erred In Projecting Honest-Services Fraud Across The Globe

The intangible right of honest services derives its meaning only by reference to the judicial decisions that breathed life into that theory of fraud before *McNally*. In rejecting the need to ground the prosecution of foreign commercial bribery in pre-*McNally* decisions, the Second Circuit contradicted this Court's

precedent, flouted the presumption against extraterritoriality, and made a hash out of the statutory scheme.

1. *Skilling* and *Percoco* establish that Section 1346 does not reach foreign commercial bribery, as the district court held. App., *infra*, 94a. Again, Congress resurrected only "core applications" of pre-*McNally* cases. *Percoco*, 598 U.S. at 328 (quoting *Skilling*, 561 U.S. at 410). Even a "smattering of pre-*McNally* decisions" can't justify recognizing the right of honest services for "an ill-defined category of circumstances." *Id.* at 328-329. And there were zero pre-*McNally* cases—not even a smattering—recognizing that foreign employers had a right of honest services from foreign employees. App., *infra*, 23a. Because Congress couldn't codify a right that didn't yet exist, FIFA and CONMEBOL don't possess "*that* 'intangible right of honest services, which had been protected before *McNally*.'" *Skilling*, 561 U.S. at 405 (citation omitted); see *United States* v. *Abdelaziz*, 68 F.4th 1, 30 (1st Cir. 2023) (rejecting another novel theory of honest-services fraud that "no pre-*McNally* case" had adopted).

The Second Circuit considered the "methodology" of "looking to pre-*McNally* case law" to be "unduly restrictive" and instead relied on post-*McNally* precedent. App., *infra*, 23a; see *id.* at 25a (citing *Bahel*, 662 F.3d at 616). Restrictive or not, that methodology is this Court's—and formerly the Second Circuit's. *Skilling*, 561 U.S. at 404-405 (citing *United States* v. *Rybicki*, 354 F.3d 124, 137-138 (2d Cir. 2003) (en banc)). This Court adopted that methodology *precisely* because of the need to restrict the "uncertain breadth" of Section 1346. *Percoco*, 598 U.S. at 329. After all, honest services is not a familiar term with a rich "common-law pedigree." *Kousisis* v. *United States*, 145 S. Ct.

1382, 1392 (2025). The phrase doesn't mean anything in the abstract, untethered from pre-*McNally* cases.

The message of *Percoco* was that the courts of appeals, foremost the Second Circuit, should pump the brakes on honest-services fraud. The extension of Section 1346 to foreign commercial bribery is the equivalent of running a red light.

2. The presumption against extraterritoriality confirms that the Second Circuit erred in extending Section 1346 to foreign commercial bribery. Congress legislates against a baseline "presumption that United States law governs domestically but does not rule the world." *Kiobel* v. *Royal Dutch Petroleum Co.*, 569 U.S. 108, 115 (2013) (citation omitted). To enforce the presumption, this Court applies a "two-step framework" that asks first "whether the statute gives a clear, affirmative indication that it applies extraterritorially" and, if not, "whether the case involves a domestic application of the statute" based on "the statute's 'focus.'" *RJR Nabisco, Inc.* v. *European Community*, 579 U.S. 325, 337 (2016).

The Second Circuit agreed that Congress had not overcome the presumption but erred in blessing these prosecutions based on the use of domestic wires. App., *infra*, 168a-174a. In its view, the focus of Section 1343 is "the use of the wires in furtherance of the schemes to defraud," and the focus of Section 1346 "has no bearing on [the] extraterritoriality analysis." *Id.* at 172a. This Court rejected a materially identical only-one-focus rule in *RJR Nabisco*. There, the Second Circuit had asserted that the only question under the Racketeer Influenced and Corrupt Organizations Act was whether the predicate violation occurred domestically or involved an extraterritorial statute. 579 U.S. at 346. This Court held, however, that the presump-

tion against extraterritoriality "separately appl[ied]" to the cause of action and required a plaintiff to prove "a *domestic* injury to its business or property" even when the predicate violation complied with the presumption against extraterritoriality. *Ibid.*

Here, too, the presumption against extraterritoriality separately applies to Section 1346 and requires the government to prove a breach of a domestic fiduciary duty. There is no reason to believe that, in restoring the pre-*McNally* core, Congress granted organizations in Zürich, Switzerland, and Luque, Paraguay, a newly minted right of honest services owed by employees in Paraguay, Bolivia, Colombia, Venezuela, Peru, and Ecuador. App., *infra*, 5a, 7a.

3. The Second Circuit's expansion of Section 1346 to foreign commercial bribery allows the government to circumvent limits in other federal statutes.

To begin with, this Court kept honest-services fraud from being "stretched out of shape" by borrowing "from federal statutes proscribing—and defining—similar crimes." *Skilling*, 561 U.S. at 412 (citing 18 U.S.C. §§ 201(b), 666(a)(2); 41 U.S.C. § 52(2)). But those provisions criminalize only bribes of domestic public officials, as well as bribes and kickbacks to entities receiving federal funds. 18 U.S.C. §§ 201(a), 666(b), (d); 41 U.S.C. § 52(4). Under the decision below, honest-services fraud eclipses those parallel provisions.

The Second Circuit also overrode the limits on those statutes that do reach abroad. When Congress addressed foreign bribery in the FCPA, it adopted a targeted prohibition (with a maximum five-year sentence) of bribes to officials of foreign governments and public international organizations that the United States has joined by treaty. 15 U.S.C. §§ 78dd-1 to

78dd-3; see 22 U.S.C. § 288. And when Congress recently authorized the prosecution of foreign officials who solicit bribes, it again limited the prohibition on foreign bribery to public officials, this time with a maximum 15-year sentence. 18 U.S.C. § 1352.

Reading Section 1346 as though Congress silently blessed the global expansion of honest-services fraud creates an "entirely inexplicable regime" for both public and commercial bribery. *Snyder*, 603 U.S. at 13. Whenever a U.S. bank wires a payment to a foreign public official, the government could pursue a 20-year sentence against both the payor and payee that far exceeds the penalties available under the statutes that expressly address public corruption abroad. 18 U.S.C. § 1343. Extending honest-services fraud to foreign commercial bribery also creates new criminal liability that Congress has thus far seen fit not to impose. The Second Circuit has made the Judiciary the first branch of the federal government to criminalize purported breaches of foreign employment relationships.

At the end of the day, Congress "must speak more clearly than it has" if it wishes to authorize prosecution of foreign commercial bribery as honest-services fraud. *Skilling*, 561 U.S. at 411 (citation omitted).

III. BOTH QUESTIONS MUTUALLY REINFORCE THE NEED FOR THIS COURT'S REVIEW

The circuits' deep division on the proper source of fiduciary duties has stymied uniformity on the most critical question under Section 1346: "What is the criterion of guilt?" *Householder*, 137 F.4th at 499 (Thapar, J., concurring) (quoting *Skilling*, 561 U.S. at 421 (opinion of Scalia, J.)). In this case, as in many, no one disputes the existence of the payments, which were customary when competing for sports media

rights in South America. See p. 7, *supra*. But the acceptance of money is a bribe or kickback—instead of a payment for services—only when the recipient owes those services to another as a fiduciary to a principal. *Skilling*, 561 U.S. at 407. Because the breach of a fiduciary duty is the key element separating lawful payments from unlawful bribes and kickbacks, this Court's intervention is all the more necessary.

Permitting honest-services fraud to vacation abroad exacerbates the problems created by the Second Circuit's rule that private codes of conduct establish fiduciary duties that trigger a right of honest services. Because many foreign countries do not prohibit commercial bribery or recognize fiduciary duties in the sense of the "Anglo-American common law," ethics codes and employer handbooks couldn't possibly put the world's population on fair notice of potential criminal liability in federal court. App., *infra*, 27a (citation omitted). U.S. companies also already spend hundreds of millions of dollars in complying with the FCPA. See Mike Koehler, *Foreign Corrupt Practices Act Ripples*, 3 Am. U. Bus. L. Rev. 391, 395-401 (2014). And even though Congress chose not to cover foreign commercial bribery in the FCPA, U.S. companies now will bear new compliance costs, down to surveying an "impenetrable jungle" of private ethics policies and employer handbooks. *Skilling*, 561 U.S. at 407 (citation omitted).

The Second Circuit also is an extreme outlier. No other court of appeals has even addressed whether Section 1346 encompasses foreign commercial bribery—perhaps because the government has not dared to test the waters elsewhere. But now the government has a home base to prosecute foreign honest-services fraud whenever New York, the world's financial hub, happens to facilitate a dollar-denominated wire trans-

fer between parties anywhere on Earth. Effectively, the Second Circuit has appointed the United States Attorneys for the Eastern and Southern Districts of New York as international ethics watchdogs. Federal prosecutors stand ready to root out violations of UN regulations, *Bahel*, 662 F.3d at 633-634, and FIFA's ethics code, App., *infra*, 31a. Before the next prosecution—say, of kickbacks to Middle Eastern officials who breach OPEC rules—this Court should decide whether Congress created that global posting in Section 1346.

This petition is an ideal vehicle to review both questions. The government proceeded exclusively on an honest-services theory at trial, forgoing any attempt to prove property fraud. App., *infra*, 39a n.3. Both questions are fully preserved, thoroughly ventilated, and outcome determinative: The district court granted judgments of acquittal based on the second question presented, *id.* at 100a, and the Second Circuit decided the first question presented as an alternative ground for affirming those judgments, *id.* at 30a-33a. The government also never tried to prove that FIFA's and CONMEBOL's codes restated "analogous" positive-law duties imposed by the respective foreign countries. *Id.* at 27a. Nor did the court of appeals identify a single pre-*McNally* decision involving foreign commercial bribery that Congress could have codified in Section 1346. *Id.* at 23a. This Court should take this clean opportunity—once again—to restrain the Second Circuit's wayward expansion of honest-services fraud.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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