

Nos. 25-390 & 25-396

IN THE

Supreme Court of the United States

FULL PLAY GROUP, S.A.,
Petitioner,

v.

UNITED STATE OF AMERICA,
Respondent.

HERNAN LOPEZ,
Petitioner,

v.

UNITED STATE OF AMERICA,
Respondent.

**On Petitions for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit**

**BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF
CRIMINAL DEFENSE LAWYERS
IN SUPPORT OF PETITIONER**

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INTERESTS OF AMICUS CURIAE¹

Amicus is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. The National Association of Criminal Defense Lawyers (NACDL) was founded in 1958. It has a nationwide membership of over 12,000 and an affiliate membership of almost 40,000. NACDL's members include private criminal defense lawyers, public defenders, military counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and private criminal defense lawyers. The American Bar Association recognizes NACDL as an affiliated organization and awards it full representation in its House of Delegates.

NACDL has an interest in ensuring that federal criminal statutes are drafted with sufficient clarity to provide fair notice and to permit consistent application by courts and practitioners alike. Ambiguity in statutes undermines both the rule of law and the ability of individuals to conform their conduct to legal norms. In this respect, NACDL emphasizes the importance of the rule of lenity, which serves as a vital interpretive safeguard – requiring that unresolved statutory ambiguities be construed in favor of the accused to preserve due process and legislative accountability.

¹ Under this Court's Rule 37.6, counsel for *amicus curiae* state that no counsel for a party authored this brief in whole or in part, and that no person other than *amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Counsel of record received notice of *amicus*'s intent to file this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

NACDL's members are tired of courts treating the rule of lenity as the caboose in the long train of statutory interpretation.² The Court has throughout its existence cited and lauded the rule of lenity and yet in recent years it has seldom applied the rule. That is unusual given Congress's proclivity to draft statutes that reflect compromises and are therefore less than a "model of clarity." NACDL's members therefore often invoke the rule of lenity repeatedly, but to little avail.

The decision below reflects exactly how much can go wrong when the rule of lenity is sidelined. And it does so in its application of an often invoked and easily misinterpreted statute, 18 U.S.C. § 1346, which criminalizes a deprivation of "honest services." The approach adopted by the Second Circuit would sanction prosecution of foreign commercial bribery by foreign private sector employees who violate foreign, and private, codes of conduct even while acting consistently with their own nation's laws. This case therefore provides an excellent vehicle for resuscitating lenity as an interpretive tool and curbing an inappropriate expansion of § 1346.

ARGUMENT

I. In § 1346, Congress left the definition of "honest services fraud" open-ended.

When Congress enacted § 1346, it did not define a crime. Rather it dropped a phrase into the U.S. Criminal Code and left the meaning to guesswork. The statute says only that the term "scheme or artifice to defraud" includes a "scheme or artifice to deprive

² See Watty Piper, *The Little Engine That Could* (1930).

another of the intangible right of honest services.” No definitions, no elements, no boundaries.

The attempts of the federal courts to patch the hole left by Congress’ incomplete drafting have led to chaos. See *Percoco v. United States*, 598 U.S. 319, 333 (2023) (“Honest-services fraud and this Court’s vagueness jurisprudence are old friends.”). In this congressionally created vacuum, enterprising and aggressive prosecutors have expanded the reach of “honest services” fraud well beyond the bounds of any fair reading of the statute, overlooking the mandate in two centuries of this Court’s decisions to apply lenity, not severity, in setting the outer bounds of chargeable criminal conduct.

II. Because § 1346 is ambiguous at best, courts must apply the rule of lenity in construing its scope.

A. The rule of lenity protects constitutional principles.

The rule of lenity protects two important constitutional principles: (1) due process and fair warning for those subject to the laws enacted by Congress, and (2) separation of powers between the branches of our government. “First, ‘a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible, the line should be clear.’” *United States v. Bass*, 404 U.S. 336, 348 (1971) (citing *McBoyle v. United States*, 283 U.S. 25, 27 (1931) (Holmes, J.)). “The purposes underlying the rule of lenity—to promote fair notice to those subject to the criminal laws, to minimize the risk of selective or arbitrary enforcement, and to maintain the proper balance between Congress, prosecutors, and courts—

are certainly served by its application in this case.”
United States v. Kozminski, 487 U.S. 931, 952, (1988)

Here the breadth of § 1346 is patently unclear. If courts in the United States cannot agree on what activity or actors are covered by § 1346, foreign actors engaging in commercial activity at private companies cannot reasonably be on notice their conduct might subject them to criminal prosecution under federal fraud statutes. For example, this Court has observed that § 1346 as applied to *public* officials is not unconstitutionally vague because the requirement that the public official have undertaken an “official act” saves the honest services statute. *McDonnell v. United States*, 579 U.S. 550, 580 (2016). But there is no such requirement for *private* actors and the federal courts (and thus juries as well) have struggled over what private “fiduciary duties” qualify as “honest services” for employees. See, e.g., *United States v. Lusk*, 2017 WL 508589, at *9 (S.D. W. Va. Feb. 7. 2017) (“The fiduciary duty requirement implicates a troubling analysis that has divided federal courts throughout the country”); see also Form Criminal Pattern Jury Instructions (11th Cir. rev. Sept. 2015) at 37, <https://tinyurl.com/yf9fw95z> (“a strict duty of loyalty ordinarily is not part of private sector relationships, and thus it is not enough to prove that a private sector defendant breached the duty of loyalty alone” and also noting disagreements over the requirement for a “materiality” element). Thus, lenity must play a role in interpreting the statute to protect their right to due process.

Second, the rule ensures the strict separation of powers between Congress’s authority to make law, the Executive’s power to prosecute, and the Judiciary’s power to implement punishment for violations of law. “Federal crimes, ‘are solely creatures of statute.’”

Liparota v. United States, 471 U.S. 419, 424, (1985) (citing *United States v. Hudson*, 11 U.S. (7 Cranch) 32 (1812)). “Due respect for the prerogatives of Congress in defining federal crimes prompts restraint in this area, where we typically find a ‘narrow interpretation’ appropriate.” *Dowling v. United States*, 473 U.S. 207, 213 (1985); see also *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221–22 (1952) (“But when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite. We should not derive criminal outlawry from some ambiguous implication.”). “When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.” *Bell v. United States*, 349 U.S. 81, 83 (1955); *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820) (“[P]enal laws are to be construed strictly”). The rule of lenity, moreover, “places the weight of inertia upon the party that can best induce Congress to speak more clearly and keeps courts from making criminal law in Congress’s stead.” *United States v. Santos*, 553 U.S. 507, 514 (2008). The branch most accountable to the will of the people must speak clearly before subjecting unsuspecting individuals to federal criminal prosecution and conviction in the courts.

B. The Second Circuit’s construction of § 1346 turns the rule of lenity on its head.

The Second Circuit’s opinion makes two major leaps from the core understanding of § 1346. First, it ignores this Court’s, and its own, recent counsel of restraint. The court of appeals should have “decline[d] further invitations to invent rather than interpret this law.” *Percoco*, 598 U.S. at 337–38 (Gorsuch, J., concurring in

a case arising out of the Second Circuit). Even the Second Circuit had recently recognized that “whether a foreign employee’s duty to his foreign employer qualifies as an actionable element under § 1346 is a question that remains unsettled, *at best*.” *United States v. Napout*, 963 F.3d 163, 183–84 (2d Cir. 2020) (emphasis added). Yet, the Second Circuit here affirmed § 1346 liability, despite its inability to identify a single prior case on point. The panel below dismissed the cautions in *Napout* as “dicta” and found liability by “dissect[ing] the schemes before us into their salient components,” focusing on malleable concepts such as “involve[ment]” with and “significant ties” to the United States. See *United States v. Lopez*, 143 F.4th 99, 111, 113 (2d Cir. 2025). The Second Circuit’s approach thus gives § 1346 “an indeterminate breadth,” *Percoco*, 598 U.S. at 328, that “vastly expands federal jurisdiction without statutory authorization.” *Ciminelli v. United States*, 598 U.S. 306, 315 (2023).

Second, the decision here sweeps in private, foreign actors who cannot be presumed to be aware of the illegality of the actions under “honest services” statutes in the United States. Such circumstances make a mockery of the requirement for “fair notice.” *Id.* And here there were no attempts to cure this fair notice problem by, for example, requiring “proof that the defendant was aware that his conduct was unlawful,” as Justice Kavanaugh proposed in his concurrence in *Wooden v. United States*, 595 U.S. 360, 379 (2022) (Kavanaugh, J., concurring).

Further, expanding the scope of § 1346 to encompass private actors who violate a foreign employer’s often amorphous codes of conduct violates the principle that “no citizen should be held accountable for a violation of a statute whose commands are uncertain, or

subjected to punishment that is not clearly prescribed.” *Santos*, 553 U.S. at 514. Many corporate codes of conduct contain opaque clauses guaranteeing a “diverse work force” or the office to be a “safe space,” and under the Second Circuit’s reading of § 1346, each such clause would create a legal duty. Further, “because of the seriousness of criminal penalties, and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity.” *Bass*, 404 U.S. at 348. See also, *Dubin v. United States*, 599 U.S. 110, 134 (2023) (Gorsuch, J., concurring) (“[T]he Constitution prohibits the Judiciary from resolving reasonable doubts about a criminal statute’s meaning by rounding up to the most punitive interpretation its text and context can tolerate.”). At the end of the day, “the tie must go to the defendant.” *Santos*, 553 U.S. at 514.

What lenity then requires in cases like this one is the *most restrictive* reading of § 1346. Accordingly, where the defendants are private actors engaged in activities in foreign jurisdictions, all the above-described disagreements over the scope of the statute, and perhaps several others, would have to be resolved in the defendant’s’ favor. Anything less would be inconsistent with any reasonable conception of fair notice.

III. Allowing the Second Circuit’s decision to stand would create a legal minefield for businesspeople worldwide.

The Second Circuit encompasses New York City, an international hub for finance and business. Many of the nation’s financial crimes are prosecuted there. The Second Circuit’s decision thus authorizes prosecution of businesspeople all over the world for violating

“honest services” laws in the United States that might be quite different from their own laws and potentially in tension or conflict with those laws. If the only prerequisite for investigation and prosecution under federal fraud statutes is an infringement of a foreign private company’s code of conduct, the outer bounds of § 1346 are endless. The looming threat of such investigations and prosecutions will not only chill financial dealings with the United States, but also dramatically increase compliance costs.

At bottom, the government’s enterprising theory contravenes a fundamental tenet at our nation’s founding: “As the framers understood, subjecting . . . men to punishment for things which, when they were done, were breaches of no law . . . has been, in all ages, the favorite and most formidable instrument of tyranny.” *Wooden* 595 U.S. at 390–91 (2022) (Gorsuch, J., concurring) (citation modified). When a statute contains “little guidance and reasonable doubts about its application,” it “should be resolved in favor of liberty.” *Id.* at 397.

CONCLUSION

For the reasons above and in the petition, the Court should grant the petition.

Respectfully submitted,

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