

No. _____

In the
Supreme Court of the United States

HERNAN LOPEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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September 30, 2025

QUESTIONS PRESENTED

The so-called honest-services statute, 18 U.S.C. §1346, is a notoriously vague statute that has required this Court’s repeated intervention to rein in ambitious prosecutors. At least four Justices have concluded that the statute is unconstitutionally vague. A majority has worked creatively to preserve a narrow constitutional core of prosecutions, but the Second Circuit has not gotten the message. In *Percoco v. United States*, 598 U.S. 319 (2023), the Court reversed the Second Circuit and emphasized that the core was indeed narrow and requires more than just a “smattering” of decisions predating *McNally v. United States*, 483 U.S. 350 (1987). The district court here took the lesson of *Percoco* to heart and dismissed this novel and misguided effort to use §1346 to reach foreign commercial bribery—conduct that no federal criminal statute that is actually focused on bribery at home or abroad reaches. The Second Circuit, by contrast, reversed and made clear that it would continue to apply its pre-*Percoco* case law unless and until instructed otherwise (again) by this Court. This Court should provide the necessary instruction either by making clear that §1346 does not reach foreign commercial bribery or by abandoning the judicial effort to try to save §1346 from vagueness altogether.

The questions presented are:

1. Whether the honest-services statute criminalizes foreign commercial bribery.
2. Whether the honest-services statute is unconstitutionally vague.

PARTIES TO THE PROCEEDING

Petitioner (defendant-appellee below) is Hernan Lopez. Respondent (appellant below) is the United States of America. Full Play Group, S.A. (co-defendant in the district court) qualifies as a party under Supreme Court Rule 12.6.

STATEMENT OF RELATED PROCEEDINGS

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

United States v. Jeffrey Webb,
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United States v. Eduardo Li,
No. 15-cr-252-PKC-RML-2 (Mar. 29, 2019)

United States v. Julio Rocha,
No. 15-cr-252-PKC-RML-3

United States v. Costas Takkas,
No. 15-cr-252-PKC-RML-4 (Dec. 12, 2017)

United States v. Jack Warner,
No. 15-cr-252-PKC-RML-5

United States v. Eugenio Figueredo,
No. 15-cr-252-PKC-RML-6

United States v. Rafael Esquivel,
No. 15-cr-252-PKC-RML-7

United States v. Jose Maria Marin,
No. 15-cr-252-PKC-RML-8 (Mar. 30, 2020)

United States v. Nicolas Leoz,
No. 15-cr-252-PKC-RML-9

United States v. Alejandro Burzaco,
No. 15-cr-252-PKC-RML-10 (June 2, 2023)

United States v. Aaron Davidson,
No. 15-cr-252-PKC-RML-11

United States v. Hugo Jinkis,
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United States v. Mariano Jinkis,
No. 15-cr-252-PKC-RML-13

- United States v. Jose Margulies*,
No. 15-cr-252-PKC-RML-14 (Feb. 5, 2020)
- United States v. Alfredo Hawit*,
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- United States v. Rafael Salguero*,
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- United States v. Hector Trujillo*,
No. 15-cr-252-PKC-RML-20 (May 14, 2018)
- United States v. Reynaldo Vasquez*,
No. 15-cr-252-PKC-RML-21 (Oct. 28, 2022)
- United States v. Juan Angel Napout*,
No. 15-cr-252-PKC-RML-22 (Mar. 29, 2019)
- United States v. Manuel Burga*,
No. 15-cr-252-PKC-RML-23 (Dec. 26, 2017)
- United States v. Carlos Chavez*,
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United States v. Ricardo Teixeira,
No. 15-cr-252-PKC-RML-30

United States v. Full Play Group, S.A.,
No. 15-cr-252-PKC-31 (Sept. 12, 2023)

United States v. Hernan Lopez,
No. 15-cr-252-PKC-32 (Sept. 12, 2023)

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PETITION FOR WRIT OF CERTIORARI

This case concerns the latest effort by the Second Circuit to push the boundaries of the honest-services statute. *See* 18 U.S.C. §1346. In recent years, the Second Circuit has aggressively interpreted that statute to encompass all manner of domestic conduct, prompting this Court to intervene and course-correct. *See, e.g., Percoco v. United States*, 598 U.S. 319 (2023). Undeterred, the Second Circuit has now expanded the honest-services statute to cover commercial bribery in foreign sovereign territory. This latest expansion well-illustrates the liberty-endangering aspects of §1346 in the hands of federal prosecutors and the Second Circuit. When Congress criminalized commercial bribery, it stopped at the water's edge. When Congress criminalized foreign bribery, it stopped with foreign governmental officials. The proposition that Congress nonetheless criminalized all manner of commercial bribery worldwide through the words “honest services” beggars all belief and gives the lie to the notion that we do not have common-law crimes in this country. Correctly understood, §1346 does not reach foreign commercial bribery, but if §1346 really does extend that far, then it is past time for this Court to declare this malleable statutory text unconstitutionally vague.

The honest-services statute occupies a single sentence. It provides that, for purposes of the mail- and wire-fraud statutes, “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” 18 U.S.C. §1346. Congress enacted the statute in 1988 in response to this Court’s decision holding that the text

of the mail- and wire-fraud statutes did not criminalize the “ambiguous” concept of honest-services fraud. See *McNally v. United States*, 483 U.S. 350 (1987). Simply codifying an ambiguous phrase did not actually clarify anything, and courts have struggled to apply the statute ever since.

This Court revisited the issue in *Skilling v. United States*, 561 U.S. 358 (2010). Three Justices would have ended the honest-services experiment then and there by declaring §1346 unconstitutionally vague. The majority, however, opted to try to salvage the statute by confining its scope to “core” pre-*McNally* applications—namely, bribery and kickback schemes involving a breach of a fiduciary duty by the bribe or kickback recipient. That salvage operation left unresolved numerous questions regarding the critical fiduciary-duty element, and some courts—notably the Second Circuit—seized on that uncertainty by injecting both breadth and ambiguity into §1346. Accordingly, this Court revisited the statute once again in *Percoco* and unanimously reversed the Second Circuit while emphasizing that the government must establish the fiduciary-duty element with far more than just a “smattering” of pre-*McNally* decisions (with a fourth Justice signaling that §1346 was vague beyond repair).

The district court faithfully applied *Percoco* and dismissed this novel effort to stretch §1346 to reach foreign commercial bribery. As that court explained, there is not a single case in the pre-*McNally* case law involving foreign commercial bribery and a breach of a duty owed by a foreign non-governmental employee

to a foreign non-governmental employer, dooming the government's prosecution.

The Second Circuit, however, had other ideas and reversed and reinstated petitioner's conviction. The court of appeals did not deny the total absence of cases involving foreign commercial bribery in the pre-*McNally* case law, but it dismissed that conspicuous void as irrelevant. The court deemed the search for such pre-*McNally* precedent "unduly restrictive," and it vowed to look to its own post-*McNally* precedent unless and until told otherwise (again) by this Court.

The Second Circuit's decision illustrates all that is wrong with the current state of §1346 law. Congress has not been shy about criminalizing commercial bribery domestically or official bribery abroad, but it has never seen fit to criminalize foreign commercial bribery. The reasons for that reticence are obvious, as the customs for commercial gift-giving vary wildly and the potential for interference with foreign sovereign prerogatives is patent. Despite all that, the Second Circuit has now empowered prosecutors within the circuit to scour the globe in search of foreign commercial bribery that runs afoul of private corporate handbooks. And because all it takes to establish jurisdiction is a wire coming into New York, the decision below installs federal prosecutors in New York as the world's policemen. This Court should grant review and either rein in this massive expansion of §1346 or declare an end to the honest-services experiment once and for all.

OPINIONS BELOW

The Second Circuit's opinion is reported at 143 F.4th 99 and reproduced at App.1-33. The district

court’s opinion granting a judgment of acquittal is reported at 690 F.Supp.3d 5 and reproduced at App.34-107. The district court’s pre-*Percoco* opinion denying the motion to dismiss the indictment is unreported but available at 2021 WL 5038765 and reproduced at App.108-149.

JURISDICTION

The Second Circuit entered its judgment on July 2, 2025. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Relevant statutory and constitutional provisions are included in the appendix.

STATEMENT OF THE CASE

A. Legal Background

In 1872, Congress enacted the original version of the mail-fraud statute—the predecessor of today’s mail- and wire-fraud statutes—to prohibit the use of the mails to advance “any scheme or artifice to defraud.” *See Skilling*, 561 U.S. at 399. Congress aimed “to protect the people from schemes to deprive them of their money or property”—*i.e.*, plans concocted by “thieves, forgers, and rascals generally” to “deceiv[e] and fleec[e] the innocent people in the country.” *McNally*, 483 U.S. at 356.

In 1909, Congress amended the mail-fraud statute to prohibit “any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises.” *Skilling*, 561 U.S. at 399. Although this amendment “gave further indication that the statute’s purpose is

protecting property rights,” *McNally*, 483 U.S. at 357, the “disjunctive phrasing” led the courts of appeals to conclude that “the term ‘scheme or artifice to defraud’ ... include[d] deprivations not only of money or property, but also of intangible rights,” *Skilling*, 561 U.S. at 400, such as the right to have others “perform their duties honestly,” *McNally*, 483 U.S. at 358. Under this honest-services theory, “a recreant employee—public or private—could be prosecuted under the mail-fraud statute if he breached his allegiance to his employer by accepting bribes or kickbacks in the course of his employment.” *Skilling*, 561 U.S. at 401 (alterations omitted). Then, after Congress enacted the wire-fraud statute in 1952 to add “the same language in relevant part” as the mail-fraud statute, this honest-services theory crept its way into the interpretation of that statute too. *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

While the courts that embraced the honest-services theory agreed about its existence, the consensus ended there. They “could not agree” on what the honest-services theory encompassed, which precipitated “clashes over everything from who owes a duty of honest services to what sources of law may give rise to that duty to what sort of actions constitute a breach of it.” *Percoco*, 598 U.S. at 333-34 (Gorsuch, J., concurring). In response to this confusion, this Court “stopped the development of the intangible-rights doctrine in its tracks” in 1987 in *McNally*. *Skilling*, 561 U.S. at 401. As *McNally* observed, the mail-fraud statute noticeably “does not refer” to honest-services fraud, and so the Court construed it as “limited in scope to the protection of property rights.” 483 U.S. at 356, 360. Rather than read “ambiguous”

and vague “boundaries” into the statute, the Court put the ball in Congress’ court: “If Congress desires to go further, it must speak more clearly than it has.” *Id.*

Congress spoke the next year, albeit without adding clarity, by codifying the very phrase that had produced judicial confusion. The resulting statute provides in full: “For the purposes of this chapter,” which includes the mail- and wire-fraud statutes, “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” 18 U.S.C. §1346. This amendment did little to resolve the difficulties highlighted in *McNally*. Among other problems, “Congress did not address *McNally*’s concern that the phrase ‘honest-services fraud’ is unworkably vague”; “[n]othing in the new law attempted to resolve when the duty of honest services arises, what sources of law create that duty, or what amounts to a breach of it”; “[n]or did the new law cross-reference any portion of the federal criminal code that might have lent clarity to the concept.” *Percoco*, 598 U.S. at 334 (Gorsuch, J., concurring).

Such shortcomings vexed the lower courts and necessitated this Court’s intervention again 15 years ago in *Skilling*. There, a six-judge majority admitted that a “vagueness challenge” to §1346 “has force,” but nonetheless determined that it could “salvage[]” the statute “by confining its scope to the core pre-*McNally* applications.” *Skilling*, 561 U.S. at 405, 408. The Court recognized that “honest-services decisions preceding *McNally* were not models of clarity or consistency,” but it concluded that the “solid core” of pre-*McNally* cases involved “offenders who, in violation of a fiduciary duty, participated in bribery or

kickback schemes,” with the “bribes or kickbacks supplied by a third party who had not been deceived.” *Id.* at 404-05, 407. Accordingly, if a defendant’s conduct fits within “the bribe-and-kickback core of the pre-*McNally* case law,” *Skilling* authorizes the government to prosecute the defendant for mail or wire fraud “without transgressing constitutional limitations.” *Id.* at 408-09. But if the prosecution is not “prototypical” under pre-*McNally* standards, it lies beyond §1346’s legitimate sweep. *Id.* at 413.

Three Justices rejected this self-described “salvage[]” operation and would have ended the honest-services experiment then and there. In a concurring opinion, Justice Scalia, joined by Justices Thomas and Kennedy, concluded that §1346 is irretrievably “vague” and “violates the Due Process Clause of the Fifth Amendment.” *Skilling*, 561 U.S. at 415 (Scalia, J., concurring in part). Justice Scalia questioned whether the Court could “replace[] a vague criminal standard that Congress adopted with a more narrow one (included within the vague one),” but faulted the majority for failing to “solve the most fundamental indeterminacy: the character of the ‘fiduciary capacity’ to which the bribery and kickback restriction applies.” *Id.* at 421-22.

Confusion regarding §1346 persisted in the wake of *Skilling*, forcing this Court to revisit the statute again. Most recently, in *Percoco*, 598 U.S. 319, the Court addressed the circumstances under which a private citizen who allegedly solicits bribes owes a fiduciary duty to the public. In rejecting the Second Circuit’s fiduciary-duty test as “too vague,” the Court emphasized that “the intangible right of honest

services’ must be defined with the clarity typical of criminal statutes and should not be held to reach an ill-defined category of circumstances.” *Id.* at 328, 330. Thus, to satisfy the fiduciary-duty element—just like the bribery-or-kickback element—the fiduciary duty “must be defined” “in concrete terms” that explicate the duty “with sufficient definiteness that ordinary people can understand what conduct is prohibited,” which requires more than “a smattering of pre-*McNally* decisions.” *Id.* at 328-31.

In a concurring opinion, Justice Gorsuch, joined by Justice Thomas, observed that “the problem runs deeper”: “To this day, no one knows what ‘honest-services fraud’ encompasses.” *Id.* at 333 (Gorsuch, J., concurring). Although courts have spent decades “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.” *Id.* at 337. The only viable solution is to hold §1346 unconstitutionally vague and put the onus on Congress to “set things right by revising §1346 to provide the clarity it desperately needs.” *Id.* at 338.

On the same day that the Court issued *Percoco*, it issued *Ciminelli v. United States*, 598 U.S. 306 (2023), which involved the wire-fraud statute. In *Ciminelli*, the Court unanimously reversed the Second Circuit and warned against interpretations of the federal fraud statutes that “vastly expand[] federal jurisdiction without statutory authorization.” *Id.* at 315.

B. Factual & Procedural Background

1. The Fédération Internationale de Football Association (FIFA) is the international body governing organized soccer. *See* App.3. FIFA is a private entity organized under Swiss law and headquartered in Zurich. *See* App.3. FIFA's members span the globe with over 200 member associations, each of which represents organized soccer in a particular nation or territory. *See* App.3.

Membership in FIFA requires national or territorial soccer federations to first join one of six continental confederations. *See* App.3. As relevant here, the South American confederation is the Confederación Sudamericana de Fútbol (CONMEBOL). *See* App.3. CONMEBOL is a private organization headquartered in Paraguay, with leadership hailing from numerous South American countries, including Bolivia, Colombia, Venezuela, Peru, Ecuador, and Paraguay. *See* App.3-4.

While FIFA organizes the most well-known soccer tournament in the world—the World Cup—the continental confederations host popular tournaments of their own. *See* App.3-4. In particular, CONMEBOL hosts the annual Copa Libertadores tournament, which involves South American club teams playing in South America. *See* App.4. And like private sports leagues in the United States, CONMEBOL sells the rights to broadcast its games to television and radio networks. *See* App.5.

South America has different cultural norms and customs of gift-giving than the United States. Commercial bribery, for example, is not a crime in Paraguay, where CONMEBOL is headquartered, or in

many countries in the region. *See* CA2.Dkt.79.1 at 9. In fact, what U.S. prosecutors might label “bribes” are called “private payments.” *See* CA2.SA.633. Such private payments are neither illegal nor uncommon in South America’s commercial enterprises. At the same time, some employers in the region include aspirational statements in corporate policies and handbooks purporting to prohibit or discourage the acceptance of such payments.

This case concerns efforts by federal prosecutors to target individuals and entities linked to such private payments half-a-world away. Between 2000 and 2015, an Argentine-Uruguayan company named Full Play Group, S.A. (Full Play) allegedly assisted an Argentine-Brazilian joint venture named T&T Sports Marketing, Ltd. (T&T) to transmit payments to members of CONMEBOL’s leadership team in exchange for obtaining the media rights for the Copa Libertadores. *See* App.5-6. In 2011, Fox International Channels—a division of Twenty-First Century Fox with 4,000 employees worldwide—indirectly purchased 75% of the economic rights in T&T. *See* App.6-7. At that time, petitioner served as the CEO of Fox International Channels. *See* App.6-7. Although T&T’s Argentine half carefully concealed the private payments in connection with contracts consummated before 2013, the government believed—based entirely on information from an Argentine businessman who embezzled millions—that petitioner “perpetuated, protected, and hid the bribes” through 2014. *See* App.6-7.

2. Although neither Paraguay, Argentina, nor Brazil criminalize commercial bribery, federal

prosecutors in the Eastern District of New York rushed to fill that gap by obtaining an indictment charging petitioner and his direct report, Carlos Martinez (a former president of Fox International Channels' Latin America affiliate), with conspiring with Full Play to commit honest-services wire fraud. *See* App.8. The indictment asserted that petitioner, Martinez, and Full Play “conspire[d] to devise a scheme and artifice to defraud ... CONMEBOL,” including by using bribes to deprive CONMEBOL of its “rights to honest and faithful services.” App.39. According to the government, CONMEBOL officials breached fiduciary duties by accepting the bribes because FIFA introduced a “code of ethics” in 2004 stating that officials should display “absolute loyalty” not only to FIFA, but also the continental confederations, and should not accept bribes. App.3, 24, 63-65. The government noted that CONMEBOL had introduced a similar code, albeit only in 2013, after the execution of the relevant contracts. *See* App.65.

In response to this overreach, petitioner moved to dismiss the indictment, arguing in pertinent part that no pre-*McNally* precedent supported extending the honest-services statute to encompass foreign commercial bribery. *See* App.120-28. The district court denied the motion based on its then-understanding that *Skilling* and Second Circuit precedent endorsed prosecuting all bribery—domestic or foreign, public or private—under §1346. *See* App.120-28.

3. The case proceeded to trial. At the close of the government's evidence, petitioner orally moved for

acquittal, *see* Fed. R. Crim. P. 29(a), and the district court reserved decision. *See* App.9. The jury then deliberated for four days, ultimately convicting petitioner and Full Play while acquitting Martinez. *See* App.9, 35. As one juror later justified that outcome, petitioner “was the CEO, so he should have known better.” John Annese, *Full Play sports marketing and former Fox executive Hernan Lopez guilty in soccer bribery case*, Daily News (Mar. 10, 2023), <https://perma.cc/VT8R-KJJF>.¹

After the trial, petitioner renewed his motion for acquittal, *see* Fed. R. Crim. P. 29(c), arguing that §1346 does not encompass foreign commercial bribery. In September 2023—following this Court’s recently issued decisions in *Percoco* and *Ciminelli*—the district court issued a 55-page opinion granting petitioner a judgment of acquittal. As the court recognized, just as *Skilling* focused on pre-*McNally* caselaw to determine “the *type of conduct* that can give rise to a §1346 prosecution” (*i.e.*, bribes and kickbacks), *Percoco* required focusing on pre-*McNally* caselaw to determine “the *source of the fiduciary duty* that, if breached, gives rise to such prosecution.” App.92. In other words, *Percoco* clarified that a §1346 prosecution turns in substantial part on “whether a fiduciary duty exists,” which in turn “depends on whether the duty was recognized pre-*McNally*.” App.96.

In light of that clarification, the district court concluded that the government had failed to identify a

¹ The jury also convicted petitioner of a related money-laundering conspiracy charge, *see* App.9, which rises and falls with the honest-services fraud conspiracy conviction, *see* App.104.

cognizable fiduciary duty. As the court explained, “not even a ‘smattering of pre-*McNally* decisions’” support a §1346 prosecution arising from a fiduciary relationship between a foreign employer and its foreign employees. App.98. Hence, because “[n]either the parties nor the Court have been able to identify a single pre-*McNally* case applying honest services wire fraud to foreign commercial bribery,” the court reversed its pretrial ruling and found that “the honest services wire fraud statute does not encompass foreign commercial bribery.” App.96-98. The court described that result as consistent with *Ciminelli* too, which had cautioned against “vastly expand[ing] federal jurisdiction without statutory authorization.” App.93, 96-97.

4. The government appealed, and the Second Circuit reversed. The court of appeals acknowledged that the “violation of a fiduciary duty” is “an element of honest services fraud.” App.16. The court also agreed that no pre-*McNally* honest-services cases involved a breach of a fiduciary duty involving a foreign employee of a foreign non-governmental employer. *See* App.21-23. But the court found the absence of such precedent immaterial, positing that it is “unduly restrictive” to search for “the specific sort of fiduciary relationship at issue ... in pre-*McNally* case law.” App.22. According to the court, in honest-services cases, it suffices that “the conduct at issue ... involve[s] bribery and/or kickbacks” and “an employer-employee relationship” of any kind. App.19. Because this case involved “bribery,” and because “FIFA and CONMEBOL had express rules” in their “codes of ethics” “proscribing the use of an employment position for personal gain and imposing

on officials a duty of ‘absolute loyalty,’” the court deemed petitioner’s conduct covered by §1346. App.23-27.

In so holding, the Second Circuit dismissed *Percoco* and *Ciminelli* as inapposite and instead sought guidance from its own post-*McNally* precedent. See App.20-21. Indeed, while the Second Circuit acknowledged that “[i]ntellectually curious jurists” might consider what *Percoco* and *Ciminelli* “signal[ed],” it would look instead to its own earlier decisions. App.21 (alteration original, emphasis omitted). Furthermore, although the court acknowledged that Congress has used “surgical precision” when addressing foreign bribery, it dismissed that practice, because “the wire fraud statute is not a bribery statute” (notwithstanding that *Skilling* had limited §1346’s coverage to bribery and kickbacks). App.27-28. The court dismissed international comity concerns, positing that the domestic use of the wires eliminates such concerns. See App.28. The court therefore vacated the judgment of acquittal, instructed the district court to reinstate the jury’s verdict, and remanded for further proceedings. See App.33.

REASONS FOR GRANTING THE PETITION

The Second Circuit’s decision boldly pushes the already-amorphous boundaries of the honest-services statute into new frontiers, as it draws the integrity of every foreign employment and business relationship into the supervisory domain of federal prosecutors in New York and converts employee-handbook violations across the globe into potential federal felonies. This Court has granted certiorari before to curb the Second

Circuit's excesses in this area, and there are even more compelling reasons to do so here. The notion that Congress considered and dismissed the massive foreign comity implications of criminalizing foreign commercial bribery via the words "honest services" is hard to take seriously. But if §1346 is really so capacious that it reaches foreign commercial bribery, then it is well past time to end the liberty-depriving honest-services experiment once and for all. Either way, certiorari is amply warranted.

Congress has not been shy about expressly criminalizing commercial bribery at home and official bribery abroad. But Congress has never seen fit to criminalize foreign commercial bribery. That reticence makes perfect sense. The customs and norms of foreign nations when it comes to commercial gift-giving are quite literally all over the map. And the notion that U.S. prosecutors would police transactions that are perfectly lawful where they occur based on corporate codes that may be both ambiguous and aspirational creates enormous potential for diplomatic friction and uncertainty. The one thing that is certain is that Congress did not take the momentous step of criminalizing foreign commercial bribery just by adding the words "honest services" to the statute books, particularly when no pre-*McNally* case had made that leap.

Instead, this Court has construed §1346 to simply reinstate the bribe-and-kickback core of the pre-*McNally* case law. That case law requires the government to prove a breach of a fiduciary duty, and as *Percoco* confirmed, the source of the fiduciary duty must have a firm foothold in the pre-*McNally* case law.

As the district court recognized, those principles make this case remarkably straightforward, as no pre-*McNally* case involved foreign commercial bribery or a foreign non-governmental employee's breach of a fiduciary duty to a foreign non-governmental employer. Even the Second Circuit recognized the complete absence of any such pre-*McNally* precedent. Petitioner thus is entitled to the judgment of acquittal that he obtained two years ago. The Second Circuit arrived at the opposite conclusion only by freeing itself of the burden of examining pre-*McNally* case law entirely. That is not an option available to lower courts.

But if §1346 really is malleable enough to capture foreign commercial bribery, then the time has come to end the long-running honest-services experiment and invite Congress to do more than codify enigmatic words. Courts have struggled with the honest-services doctrine for the better part of a century. Having assessed those judicial struggles, four members of this Court have concluded that Congress' effort to codify that doctrine in §1346 produced a hopelessly vague statute. This case proves the point. If the honest-services statute encompasses breaches of fiduciary duties by South American private employees that arise from Swiss-drafted employee codes of conduct, then §1346 has no meaningful constraints.

Regardless of whether the Court cabins or discards the honest-services statute, this Court's intervention is urgently required. Anyone who engages in foreign commerce now faces a significant risk of decades in federal prison if their overseas conduct is connected to the breach of a duty by a

foreign commercial counterpart arising from employee handbooks that may be no more than aspirational. They also face a significant risk of burdensome civil suits, as wire fraud is a predicate offense under the Racketeer Influenced and Corrupt Organizations Act (RICO). And the Nation faces a significant risk of international blowback as federal investigators meddle in foreign commerce regulated by foreign sovereigns. Nor will these problems solve themselves. Virtually every wire transaction passes through New York City, and New York-based prosecutors do not lack ambition, so there is no realistic prospect that the government will need to press its expansive theory of honest-services fraud outside the Second Circuit. Only this Court can restore order.

I. The Second Circuit’s Decision Below Is Egregiously Wrong.

A. The Honest-Services Statute Does Not Criminalize Foreign Commercial Bribery.

1. Congress is not unattuned to the dangers of bribery. To the contrary, Congress has passed a variety of statutes targeting bribery at home and abroad. But they all share at least one notable feature: None criminalizes foreign commercial bribery.

The traditional office of bribery statutes is to criminalize payments to public officials. As this Court recently put it, “[a]s a general matter, bribes are payments made or agreed to before an official act in order to influence the official with respect to that future official act”—and “American law generally treats bribes as inherently corrupt and unlawful.”

Snyder v. United States, 603 U.S. 1, 5 (2024). Consistent with that understanding, Congress has long codified wide-ranging prohibitions on bribes to federal officials. *See* 18 U.S.C. §201(b). And for nearly as long, Congress has prohibited most domestic state and local officials from participating in bribery schemes too. *See* 18 U.S.C. §666. At the same time, however, Congress and this Court have taken pains to ensure that those statutes do not criminalize activity accepted by cultural norms. For instance, Congress narrowed §666 just two years after originally enacting it—and just two years before enacting the honest-services statute—“to avoid its possible application to acceptable commercial and business practices.” H.R. Rep. No. 99-797, at 30 (1986). This Court, in turn, unanimously required that an “official act” involve discrete discharges of meaningful government action to avoid criminalizing a broad and vague range of customary interactions between government officials and the public. *See McDonnell v. United States*, 579 U.S. 550 (2016). And more recently, this Court construed §666 narrowly to avoid criminalizing gratuities that are acceptable under local laws and customs. *See Snyder*, 603 U.S. 1.

Although some federal statutes do extend to commercial bribery, they have a limited reach and are targeted at domestic activity that implicates distinct federal government interests. The Anti-Kickback Statute, for example, prohibits the solicitation or receipt of a “bribe” in exchange for referrals or purchases connected to a “federal health care program.” 42 U.S.C. §1320a-7b. The Eliminating Kickbacks in Recovery Act prohibits a “bribe” in exchange for referrals to recovery homes, clinical

treatment facilities, or clinical testing laboratories. 18 U.S.C. §220. And the Travel Act prohibits using travel or facilities of commerce for the purpose of furthering an “unlawful activity,” including “bribery ... in violation of the laws of the State in which committed or of the United States.” 18 U.S.C. §1952(b).

Furthermore, while Congress has targeted the bribery of foreign officials by U.S. companies in narrowly circumscribed situations, it has never criminalized foreign *commercial* bribery. The Foreign Corrupt Practices Act (FCPA) prohibits bribery payments that involve the “use of the mails or any means or instrumentality of interstate commerce” and that are directed towards a “foreign official,” which is a term defined to include “any officer or employee of a foreign government ... or of a public international organization.” 15 U.S.C. §78dd-1 to -3. And the more recently enacted Foreign Extortion Prevention Act (FEPA) supplements the FCPA by targeting the “demand” side of foreign bribery schemes involving foreign officials. *See* 18 U.S.C. §1352(b).

Those statutes all stop short of criminalizing foreign commercial bribery. That is no accident. To the contrary, Congress has explicitly considered proposals that would target foreign commercial payments, and it has explicitly rejected them. *See, e.g.,* S. Rep. No. 94-1031, at 6-7 (1976). As one scholar explained, “Congress learned of” “many payment recipient categories” in the lead-up to enacting the FCPA—including a “number of questionable foreign commercial payments,” such as “those made to induce a non-government customer’s purchasing decisions”—but “Congress chose not to capture payments to such

recipients in its definition of ‘foreign official’ or otherwise in the FCPA.” Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 Ohio St. L.J. 929, 1010 (2012).

The reasons for that reticence are obvious. Foreign commercial gift-giving practices and the laws regulating them are incredibly diverse. “[C]ommercial bribery[] garners wildly inconsistent treatment from governments across the world,” and “[n]umerous countries with relatively powerful national economies ... do not criminalize private bribery” at all. Jeffrey R. Boles, *The Two Faces of Bribery: International Corruption Pathways Meet Conflicting Legislative Regimes*, 35 Mich. J. Int’l L. 673, 675, 684-85 (2014). As a result, any step by Congress to impose U.S. notions of sound business practices in foreign countries creates enormous “potential for international friction,” *RJR Nabisco v. Eur. Cmty.*, 579 U.S. 325, 347 (2016), as it would “place under federal superintendence a vast array of conduct traditionally policed by” foreign sovereigns, *Ciminelli*, 598 U.S. at 315-16.

2. The honest-services statute does not fill the intentional gap left by this array of statutes. It provides in full: “For the purposes of this chapter [that includes the mail- and wire-fraud statutes], the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” 18 U.S.C. §1346. There is zero indication that, in adding those words to the U.S. Code after *McNally*, Congress intended to criminalize foreign commercial bribery or to tackle all the difficult judgment calls in taking that step.

This Court has already determined that Congress had a limited objective in mind in enacting §1346: the “reinstatement of the honest-services doctrine” as it existed before *McNally*. *Skilling*, 561 U.S. at 408. While the boundaries of that doctrine are opaque and subject to considerable doubt, one thing is clear: The honest-services doctrine that Congress sought to restore in §1346 had nothing to do with foreign commercial bribery. Exactly none of the pre-*McNally* case law involved foreign commercial bribery, let alone wrestled with the difficulties of criminalizing wide swaths of commercial activity in jurisdictions with wholly disparate approaches to commercial bribery.

While it is clear that Congress did not intend to tackle any of the thorny issues implicated by criminalizing foreign commercial bribery worldwide, it is less clear exactly what conduct it actually intended to reach. In an effort to give some clarity to the statute, this Court has limited it to the kind of “bribery or kickback schemes” that occupy the “vast majority” of pre-*McNally* precedent, in which a “third party who had not been deceived” supplied the side payments. *Id.* at 404, 407. Because a valid §1346 prosecution must involve bribery or kickbacks, the Court in *Skilling* readily concluded that Jeffrey Skilling “did not commit honest-services fraud”: “The Government did not, at any time, allege that Skilling solicited or accepted side payments from a third party.” *Id.* at 413.

As *Skilling* also explained, however, the vast majority of pre-*McNally* honest-services cases involved not only bribes or kickbacks, but were further limited to a “violation of a fiduciary duty” by the

individual receiving the bribe or paying the kickback—a significant limitation from the *Skilling* majority’s perspective that provided additional clarity by bringing §1346 further into alignment with the other federal bribery statutes. *Id.* at 407. As *Percoco* confirmed, the source of that duty must fall within the pre-*McNally* core too. Hence, a fiduciary duty that appears in only a “smattering of pre-*McNally* decisions” does not suffice for the government to pursue §1346 charges. *Percoco*, 598 U.S. at 328-29. Rather, the fiduciary duty “must be defined” in the pre-*McNally* case law “with the clarity typical of criminal statutes.” *Id.* at 328, 331. That is why this Court reversed in *Percoco*: The Second Circuit’s “too vague” conception of fiduciary duties had no grounding in the pre-*McNally* core and failed to “define the intangible right of honest services with sufficient definiteness that ordinary people can understand what conduct is prohibited, or in a manner that does not encourage arbitrary and discriminatory enforcement.” *Id.* at 330-31.

3. All that should have made this an exceedingly straightforward case. Here, the Second Circuit has ordered a reinstatement of petitioner’s honest-services conviction on the theory that he became involved in a preexisting bribery scheme that caused various South American officials to beach their fiduciary duties to a private organization in Paraguay (CONMEBOL) arising from language in a private “code of ethics” drafted in Switzerland (FIFA) and/or Paraguay (CONMEBOL). But as the district court recognized, there is not a single case preceding *McNally*—*not one*—in which the government sought to deploy the mail- or wire-fraud statutes to go after foreign

commercial bribery in which foreign non-governmental employees breached fiduciary duties owed to foreign non-governmental employers. See App.98-100. Under *Skilling* and *Percoco*, that should be the end of the matter. Indeed, *Skilling* concluded that conduct fell outside of the pre-*McNally* core due to its “relative infrequency” in the pre-*McNally* case law. 561 U.S. at 410. *A fortiori*, conduct that is literally nonexistent in the pre-*McNally* case law should be a non-starter. By giving the green light to the government’s overreach, the Second Circuit has once again “vastly expand[ed] federal jurisdiction without statutory authorization”—just what this Court told the court below *not* to do a few Terms ago. *Ciminelli*, 598 U.S. at 315.

But if any doubt existed about whether §1346 encompasses foreign commercial bribery—even though it is undoubtedly true that foreign commercial bribery cases are wholly absent from the pre-*McNally* case law—the tie would go to petitioner on at least two grounds.

First, this Court has long applied a presumption against the extraterritorial application of United States laws. See *RJR Nabisco*, 579 U.S. at 335. Yet literally nothing in the enactment of §1346 suggests that Congress expressly intended to reach a wide swath of commercial conduct abroad, especially conduct not criminalized in the jurisdiction where it actually transpired. Consistent with that understanding, it never even occurred to Justice Scalia that prosecutors could deploy §1346 to capture foreign commercial bribery when enumerating a list of “extreme results” that flow from the unrestrained use

of the statute. *United States v. Sorich*, 129 S.Ct. 1308, 1309 (2009) (Scalia, J., dissenting from denial of certiorari).

Second, this Court has declared that “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.” *Cleveland v. United States*, 531 U.S. 21, 25 (2000). And applying the rule of lenity “is especially appropriate in construing §1346 because ... mail and wire fraud are predicate offenses under [RICO] and the money laundering statute.” *Skilling*, 561 U.S. at 410-11 (brackets and citations omitted). Petitioner’s conviction thus is illegitimate from any angle.

B. The Court of Appeals’ Contrary Reasoning Is Indefensible.

The Second Circuit’s contrary reasoning is flawed across the board. While the district court rightly recognized that this prosecution is impossible to square with this Court’s decisions in *Percoco* and *Ciminelli*, see App.72-73, 90-104, the court of appeals began its analysis by reading each of those decisions as narrowly as possible and indicating that whatever questions might be raised by “intellectually curious jurists,” it would incuriously rely on outmoded circuit precedent unless and until told otherwise by this Court, App.21. That is just a more explicit version of the dismissive approach that prompted this Court to grant certiorari and unanimously reverse in *Percoco* and *Ciminelli*.

The Second Circuit first set *Percoco* aside because it “did not address commercial actors or employment relationships like those at issue here.” App.21. That misses the forest for the trees. As already explained,

a violation of a fiduciary duty is a necessary element of honest-services fraud, *see Skilling*, 561 U.S. at 407, and *Percoco* articulated the broader “lesson” that courts must bear “in mind” when addressing whether there is a cognizable fiduciary duty sufficient for an honest-services prosecution—*viz.*, that “[t]he intangible right of honest services must be defined with the clarity typical of criminal statutes and should not be held to reach an ill-defined category of circumstances simply because of a smattering of pre-*McNally* decisions.” 598 U.S. at 328-29. That is hardly a lesson applicable only in the “the context of duties to the public, specifically in the unique context where the defendant did not actually hold public office,” App.21—just as *Skilling* is not a good-for-securities-cases-only decision. On the contrary, it is a lesson that applies in *all* §1346 cases, and it is one that fatally undermines the government’s prosecution here given the absence of even a smattering of foreign-commercial-bribery cases in the pre-*McNally* case law. *See* App.74.

The Second Circuit dispatched *Ciminelli* as “further afield” on the ground that it “addressed the scope of §1343” (the wire-fraud statute), “not §1346” (the honest-services statute). App.21. That is certainly a distinction, but not a meaningful one. After all, the whole point of §1346 is to clarify language in §1343—*i.e.*, “scheme or artifice to defraud.” And *Ciminelli* reprimanded the Second Circuit for deploying §1343 to “vastly expand[] federal jurisdiction without statutory authorization.” 598 U.S. at 315. Contrary to the court of appeals’ suggestion, that is not some gratuitous musing for “[i]ntellectually curious jurists” and “law professors”

to ponder, while courts need only consider *Ciminelli*'s "concrete holding[]" that the right-to-control theory of property fraud is invalid under §1343. App.21 (emphasis omitted). Instead, it is the *ratio decidendi* of this Court's opinion and provides critical guidance to courts in discharging their duty of ensuring that the governed have clear notice about what kind of conduct constitutes a federal felony. *Bucklew v. Precythe*, 587 U.S. 119, 136 (2019) ("[J]ust as binding as [a] holding is the reasoning underlying it.").

The problems with the decision below do not end there. The Second Circuit accepted the premise that "[n]o pre-*McNally* case involved commercial bribery that allegedly deprived a foreign private employer of the honest services of its foreign employees." App.22. But the court insisted that it is "unduly restrictive" to focus on pre-*McNally* case law when deciding whether a "*particular scheme* is criminalized by §1346." App.22. According to the court, although pre-*McNally* case law is relevant for determining "the *general* conduct and duties encompassed by §1346"—*i.e.*, bribery or kickback schemes accompanied by a breach of a fiduciary duty—this Court has purportedly "[n]ever held that pre-*McNally* decisions are the only sources that inform [the] analysis of §1346." App.22-23 (emphasis added). As a result, the inconvenient fact that a particular fiduciary relationship appears in no "more than a 'smattering of pre-*McNally* cases'"—or (as here) not at all—is supposedly irrelevant, as nothing prevents courts from searching for the relevant fiduciary relationships in cases issued many decades after *McNally*. App.22-25 (citing *United States v. Bahel*, 662 F.3d 610 (2d Cir. 2011), a case decided 24 years after *McNally* and involving U.N.

officials in Manhattan as the sole support for the proposition that “the foreign identity of the officials and their employers does not remove the schemes from §1346’s reach”).

That gets matters exactly backwards. This Court in *Skilling* could hardly have made itself any clearer that it could “salvage[]” §1346 only “by confining its scope to the core pre-*McNally* applications.” 561 U.S. at 408. And the Court did so because “[r]eading the statute to proscribe a wider range of offensive conduct ... would raise the due process concerns underlying the vagueness doctrine.” *Id.* A rule that allows §1346 liability to turn on an “amorphous category of cases” spanning the entirety of the pre- and post-*McNally* eras thus is the very rule that *Skilling* sought to avoid when announcing its date-restricted “limiting construction” of the statute. *Id.* at 410. Such a rule also eviscerates the limiting construction that *Percoco* just reaffirmed with respect to §1346’s fiduciary-duty element. *See* 598 U.S. at 328-29 (noting that “*Skilling* was careful to avoid giving §1346 an indeterminate breadth that would sweep in any conception of ‘intangible rights of honest services’ recognized by some courts prior to *McNally*” and applying that “lesson” to the fiduciary-duty element of a §1346 claim).

The Second Circuit’s other reasoning fares no better. Although it acknowledged the FCPA and FEPA, it dismissed both statutes as inconsequential because they are “bribery statutes,” whereas the wire-fraud statute supposedly “is not.” App.27. But *Skilling* used the bribery and kickback statutes to give §1346 a constitutionally permissible scope. *Skilling*,

561 U.S. at 412. As limited by *Skilling*, what remains of the honest-services statute is a bribery and kickback statute, which explains why this Court has stated that the honest-services statute and the bribery statutes “proscrib[e] ... and define[] ... similar crimes.” *Id.* The government agrees with that assessment. *See, e.g.,* U.S. Dep’t of Just., *Report to Congress on the Activities of the Public Integrity Section for 2023*, at 1-2 (2023), <https://perma.cc/SRL8-QHZ4>. If the bribery statutes can give content to the amorphous concept of honest services, it is not clear why the territorial and other limits of those same statutes are irrelevant.

In reality, the FCPA and FEPA and the prohibitions on commercial bribery that stop at the water’s edge are all highly relevant. As the Second Circuit did not and could not deny, Congress has never criminalized foreign commercial bribery and used “surgical precision” in the FCPA and FEPA to address a narrow vein of “foreign [official] bribery.” App.27. Given that practice, the most natural inference is that the sparse text of the honest-services statute does *not* encompass any species of foreign bribery, let alone foreign commercial bribery left untouched by the FCPA and FEPA. Congress has demonstrated in the FCPA and FEPA that it “knows how” to target foreign bribery “when it so desires”—and that it does so with explicit language to that effect. *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 384 (2013). Indeed, this Court applied a similar analysis to cabin the text of §666 in *Snyder*. *See* 603 U.S. at 11-12 (looking to “the defining characteristics of” §201 to help ascertain the limits of §666). Given the potential breadth and vagueness of §1346’s “honest services” language, there is an even greater need to consider the scope of related statutes.

Indeed, to look to criminal prohibitions on bribery and kickbacks to avoid overbreadth and vagueness problems with the honest-services language and then ignore the limits on the reach of the bribery and kickback statutes as the Second Circuit did here is to ignore the whole point of *Skilling*.

The inference that §1346 does not *sub silentio* encompass foreign commercial bribery is particularly strong given international-comity concerns. Confronted with that obstacle, the Second Circuit blithely dismissed any risk of international friction from its holding that §1346 encompasses foreign commercial bribery because “limitations on the international application of the wire and mail fraud statutes already exist”—*i.e.*, those statutes require a “domestic” use of the mails or wires. App.28. But that purported limitation is illusory. Under the court of appeals’ logic, every international transaction running through New York City qualifies as a permissible domestic application of the wire-fraud statute. Indeed even an email through a New York City server would provide a sufficient hook for the government to declare foreign nationals in breach of their fiduciary duties in foreign jurisdictions and to brand them as providers of dishonest services—even when there is no “violation of local law” and even if the foreign jurisdictions do not recognize Anglo-American concepts of fiduciary duties in the first place. App.26. The prospect for international friction is hardly eliminated by a wire reaching New York.

There is no need for §1346 to serve as the basis for international incidents or discord. The better course

is to recognize that §1346 simply does not criminalize foreign commercial bribery.

C. If the Honest-Services Statute Is Expansive Enough to Criminalize Foreign Commercial Bribery, It Is Unconstitutionally Vague.

As the foregoing demonstrates, a proper application of this Court’s precedents confirms that §1346 does not reach foreign commercial bribery. But if the statute truly is capacious enough to capture foreign commercial bribery and to convert breaches of duties arising from materials as varied and amorphous as foreign-employee handbooks into federal felonies, that would only prove that *Skilling*’s limiting construction has failed to provide meaningful limits on prosecutors or meaningful notice to the governed, and so the time has come to end the honest-services experiment once and for all.

“It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). That principle exists to ensure that “ordinary people can understand what conduct is prohibited” and to guard against “arbitrary and discriminatory enforcement” by prosecutors and judges. *Kolender v. Lawson*, 461 U.S. 352, 357-58 (1983). In the latter sense, the void-for-vagueness doctrine is “a corollary of the separation of powers—requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not.” *Sessions v. Dimaya*, 584 U.S. 148, 156 (2018) (plurality op.); see also *United States v.*

Hudson, 11 U.S. (7 Cranch) 32 (1812) (rejecting the notion of judge-made common-law crimes).

“Honest-services fraud and this Court’s vagueness jurisprudence are old friends.” *Percoco*, 598 U.S. at 333 (Gorsuch, J., concurring in the judgment). Indeed, when the lower courts first began misreading the mail- and wire-fraud statutes to encompass honest-services fraud, the doctrine “provide[d] no ‘ascertainable standard of guilt,’” and the courts failed to “conclusively settl[e] what was in and what was out.” *Skilling*, 561 U.S. at 416, 420 (Scalia, J., concurring in part). When this Court confronted the honest-services theory itself for the first time—in *McNally*—it concluded that the theory is “ambiguous.” 483 U.S. 360. Then, after Congress responded to *McNally* by codifying the concept of honest-services fraud in §1346 without clarifying its meaning, vagueness concerns remained. Justice Scalia expressed serious concerns that “§1346 is nothing more than an invitation for federal courts to develop a common-law crime of unethical conduct.” *Sorich*, 129 S.Ct. at 1310 (Scalia, J., dissenting from denial of certiorari). Furthermore, every Justice in *Skilling* agreed that a vagueness challenge to the statute at least had “force,” *Skilling*, 561 U.S. at 405, as Congress did not attempt to eliminate the ambiguities that *McNally* identified or otherwise “clarif[y]” what the ambiguous doctrine covered, *Percoco*, 598 U.S. at 334 (Gorsuch, J., concurring). And although a majority of the Court in *Skilling* adopted a “Mr. Fix-it mentality” and trimmed the honest-services doctrine to apply to bribery and kickback schemes involving breaches of fiduciary duties, that still did “not solve the most fundamental

indeterminacy”—“the character of the ‘fiduciary capacity’ to which the bribery and kickback restriction applies”—which left “the criterion of guilt” indeterminate. 561 U.S. at 421 (Scalia, J., concurring in part).

In the years since *Skilling*, courts have made little progress in resolving that indeterminacy. As Judge Thapar recently has explained, courts have “struggled” to determine “what kind of fiduciary relationship suffices,” and they are “unsure” about the “source of law” in which to ground the fiduciary relationship. *United States v. Householder*, 137 F.4th 454, 501-02 (6th Cir. 2025) (Thapar, J., concurring). And as Justice Gorsuch summarized matters in *Percoco*, “even 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 felony conviction and decades in federal prison.” 598 U.S. at 337 (Gorsuch, J., concurring).

“It has been said that the life of the law is experience.” *Johnson v. United States*, 576 U.S. 591, 601 (2015). Many decades of experience with honest-services fraud proves that this is a “failed enterprise.” *Id.* at 602; *cf. Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 407 (2024) (“Experience has ... shown that *Chevron* is unworkable.”). And this case vividly illustrates the problem. If what saves §1346’s honest-services prohibition from vagueness is its limitation to a pre-*McNally* core, and if courts are free to stretch that pre-*McNally* core to reach foreign commercial bribery and to convert private employee codes and handbooks into the dividing lines between felonies and

acceptable practice, then that limitation does not save the statute from fatal vagueness. Indeed, when the private parties inject ambitious standards like “absolute loyalty” into employee handbooks, they do so without any pretense that they are writing with the clarity demanded by criminal codes. As this Court has recognized, “[a]n interpretation that stakes so much on a fine distinction controlled by the drafting practices of private parties” cannot help but “inject arbitrariness into the assessment of criminal liability,” *Van Buren v. United States*, 593 U.S. 374, 395-96 (2021).

“When Congress passes a vague law, the role of courts under our Constitution is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again.” *United States v. Davis*, 588 U.S. 445, 448 (2019). Four Justices have already crossed that bridge with respect to §1346. If the decision below is even close to correct about the outer boundaries of §1346, then now is the time for a majority to follow suit.

II. This Case Is An Ideal Vehicle To Resolve These Exceptionally Important Issues.

This case is important on multiple levels. For companies and executives who engage in foreign commerce, the consequences of the Second Circuit’s decision are difficult to overstate. Due to the FCPA, companies have historically conducted extensive diligence on foreign transactions involving foreign government officials, given the crippling financial and reputational costs of FCPA violations. *See, e.g., Michael S. Diamant et al., FCPA Enforcement Against U.S. and Non-U.S. Companies*, 8 Mich. Bus. &

Entrepreneurial L. Rev. 353, 358 (2019) (“Since 2004, the *average* cost of a corporate FCPA enforcement action exceeded \$20 million in all but three years.”). But as long as the decision below remains standing, companies will have to expend considerable resources to examine *all* foreign transactions and to somehow scour the employee handbooks of every foreign business counterparty to ensure that no part of their arrangement could arguably cause one of the foreign employees to violate a fiduciary duty to the foreign employer. If they trip up, the consequences are potentially devastating. Individuals who violate the honest-services statute face the prospect of decades in prison. *See* 18 U.S.C. §1343. Nor are missteps hard to imagine. Unlike in the FCPA context, where the government at least provides compliance resources, *see, e.g.,* U.S. Dep’t of Just., *A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2d ed. 2020), *available at* <https://perma.cc/LES3-7553> (“[A] detailed compilation of information and analysis regarding the [FCPA] and related enforcement” reflecting “extensive efforts by experts at DOJ and SEC”), there is zero guidance in the honest-services context, and prosecutions can arise in an unpredictable fashion—with no actual wire fraud necessary, as this conspiracy prosecution underscores.

Honest-services wire fraud is not only a crime in and of itself, however, but a launching pad for other charges, including the conspiracy and money laundering charges that ensnared petitioner. Perhaps most troubling, wire fraud is a predicate offense under RICO. *See* 18 U.S.C. §1961(1). RICO empowers both the government and private parties to press claims against perceived offenders, *see id.* §§1962-63, and

especially in its civil application, it is widely considered one of the most “abused” statutes—indeed, “an uncontrollable behemoth,” Matt Moore, *RICO Run Amok: The Supreme Court Sends A Message*, 63 UMKC L. Rev. 185 (1994). Hence, as a result of the decision below, those engaged in foreign commerce face a risk not only of severe criminal liability whenever a prosecutor perceives virtually any form of global corporate dishonesty, but also the prospect of burdensome lawsuits by disgruntled employees and enterprising plaintiff’s lawyers seeking treble damages and attorney’s fees. See 18 U.S.C. §1964(c). Needless to say, all that will massively increase costs and unfairly disadvantage U.S. businesses operating in foreign jurisdictions, all without any consideration of local laws or customs.

And the consequences of the decision below are only magnified precisely because it comes from the Second Circuit. In addition to serving as the home to some of the country’s most creative and ambitious prosecutors, the Second Circuit is the center of world finance. Virtually every international transaction involves a wire running through New York City at some point or another. The Second Circuit’s willingness to ignore this Court’s direction and embrace §1346 prosecutions arising from alleged foreign commercial bribery thus effectively short-circuits further percolation on the statutory question. The next time that there is a high-profile incident capturing foreign headlines, it is entirely predictable that it will end up being litigated in the Southern or Eastern District of New York, whichever wins the race to file first. See *Sorich*, 129 S.Ct. at 1310 (Scalia, J., dissenting from denial of certiorari) (explaining that

§1346 “invites abuse by headline-grabbing prosecutors”). And as this case proves, the Second Circuit is not prepared to act as a meaningful constraint on prosecutorial overreach or even apply the lessons that this Court’s precedents teach “curious jurists.” App.21. If the message of *Percoco* and *Ciminelli* are not reaching the Second Circuit, this Court has little choice but to intervene once again.

Nor is the importance of this case limited just to the countless companies involved in foreign commerce. Courts and all Americans alike have a strong interest in whether §1346 is constitutional at all. And none of the broader implications of this case should obscure the fact that petitioner’s liberty is on the line here. In short, for numerous reasons, there is a pressing need for this Court’s review.

Nor are there any obstacles that would complicate the Court’s review. The parties thoroughly litigated the question whether §1346 encompasses foreign commercial bribery below; both the district court and the Second Circuit passed on it in lengthy opinions; and it is outcome-determinative here as evidenced by the district court’s judgment of acquittal. And to the extent that this Court wishes to consider §1346’s continued vitality, it is hard to imagine a better case in which to do so than this one, which is premised on the theory that petitioner deprived a Paraguayan private soccer organization of the “honest services” of its South American-based employees due to language in a code of ethics drafted in Zurich. If §1346 has such an extraordinary reach, then it is plainly unconstitutional. One way or the other, this Court should correct the prosecutorial overreach in this case.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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September 30, 2025

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Appendix A

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Nos. 23-7183(L), 23-7186(Con)

UNITED STATES OF AMERICA,
Appellant,

v.

HERNÁN LOPEZ, FULL PLAY GROUP, S.A.,
Defendants-Appellees.

Argued: Jan. 8, 2025
Decided: July 2, 2025

Before: Walker, Robinson, and Merriam,
Circuit Judges.

OPINION

John M. Walker, Jr., *Circuit Judge.*

Following a lengthy trial, Defendants-Appellees Hernán Lopez, a top executive at Twenty-First Century Fox, and Full Play Group, S.A., a South American sports marketing company, were each convicted of conspiracy to commit honest services wire fraud in connection with their involvement in a notorious FIFA corruption scandal. Each Defendant then moved under Rule 29(c) of the Federal Rules of

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Criminal Procedure for a judgment of acquittal, principally arguing that, as a matter of statutory construction, honest services wire fraud under 18 U.S.C. § 1346 did not criminalize their conduct.

Although the district court (Chen, *J.*) had previously denied pre-trial motions to dismiss the indictment that raised similar arguments, it granted Defendants' post-trial motions. The district court reasoned that, following the Supreme Court's decisions in *Percoco v. United States*, 598 U.S. 319 (2023), and *Ciminelli v. United States*, 598 U.S. 306 (2023), honest services fraud did not encompass Defendants' conduct and therefore the evidence adduced at trial was insufficient to sustain Defendants' convictions.

For the reasons that follow, we hold that the district court erred in concluding that Defendants' conduct did not fall within the ambit of § 1346. We therefore VACATE the judgments of the district court and REMAND for further proceedings consistent with this opinion.

BACKGROUND

I. Factual Background

A. Relevant People and Organizations

Defendant Lopez, an American citizen and resident, held, until 2016, top executive positions at Twenty-First Century Fox ("Fox"), an American media conglomerate. He ran Fox's Latin American division until he was promoted to run Fox's entire international division. Defendant Full Play is a private sports marketing company incorporated in Uruguay with its principal office in Argentina.

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The Fédération Internationale de Football Association (“FIFA”) is the international body governing organized soccer. FIFA is a nonprofit entity organized under Swiss law and headquartered in Zurich, Switzerland. It comprises over 200 member associations, each representing organized soccer in a particular nation or territory, including the United States. To become a member of FIFA, an association must first join one of six continental confederations, which include the Confederación Sudamericana de Fútbol (“CONMEBOL”) (the South American confederation), headquartered in Paraguay, and the Confederation of North, Central American, and Caribbean Association Football (“CONCACAF”), headquartered in the United States.

As a condition of membership in FIFA, member associations agree to be bound by FIFA’s statutes and code of ethics. FIFA’s written code of ethics was introduced in 2004 and prohibits officials (defined to include executives of FIFA, its continental confederations, and member associations) from accepting bribes or otherwise abusing their positions of power for personal gain. The code also imposes on officials a duty of “absolute loyalty” to FIFA. Gov. App’x 114. Many confederations, including CONMEBOL, have also adopted their own ethics codes that prohibit officials from using their positions to obtain personal benefits and require “absolute loyalty” to CONMEBOL, FIFA, and the associations. *Id.* at 567. CONMEBOL’s code of ethics was adopted in 2013.

Both FIFA and the continental confederations host and own the broadcast and media rights to

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popular international soccer tournaments. For example, FIFA hosts the World Cup tournament, the most watched sporting event in the world,¹ in which teams from all six confederations compete every four years for the title of world champion. CONMEBOL hosts the Copa América tournament, another popular quadrennial event with teams from each of CONMEBOL's ten South American countries plus invited teams from outside the region. CONMEBOL also hosts the Copa Libertadores, an annual tournament involving the region's club teams. Additionally, the six confederations each organize World Cup qualifier matches (where teams compete to qualify for the World Cup), and individual national associations organize matches between national or club teams, referred to as "friendlies." Gov. App'x 463.

¹ According to FIFA, the 2022 Men's World Cup final reached an average live audience of 571 million viewers across the globe. Felix Richter, *Super Bowl Pales in Comparison to the Biggest Game in Soccer*, STATISTA (Feb. 6, 2025), <https://www.statista.com/chart/16875/super-bowl-viewership-vs-world-cup-final/#:~:text=Speaking%20of%20football%2C%20soccer%2C%20i.e.,international%20audience%20of%2062.5%20million> [https://perma.cc/G9FS-CYWP]. This popularity is not unique to men's soccer. Women's soccer is also very popular around the world, with the most recent Women's World Cup final, held in 2023, drawing a global live audience of 67.6 million viewers and reaching over 222 million people across various platforms. *See FIFA Women's World Cup Australia & New Zealand 2023: Global engagement and audience detailed report*, FIFA, <https://digitalhub.fifa.com/m/efa90ed1ddbe3bf/original/FIFA-Women-s-World-Cup-Australia-New-Zealand-2023-Global-Engagement-Audience-Detailed-Report.pdf> at 18, 19 (last visited June 12, 2025) [https://perma.cc/N5PH-4A9L].

FIFA, CONCACAF, CONMEBOL, and the individual member associations typically contract with sports marketing companies, such as Full Play, to transfer the highly lucrative rights to their soccer events. Those companies then sell the rights to television and radio networks, which broadcast games, as well as to sponsors and licensees.

B. The Schemes

Corruption in international soccer is not new. It was rampant for decades before the events at issue here. This case concerns Lopez's and Full Play's participation in bribery schemes for the media rights to the Copa América and the Copa Libertadores tournaments, as well as World Cup qualifiers and friendlies.

The government adduced evidence that, between 2009 and 2015, Full Play bribed the federation presidents of Paraguay, Bolivia, Colombia, Venezuela, Peru, and Ecuador (known as the "Group of Six") in exchange for the media rights to their federations' respective World Cup qualifiers and friendly matches, some of which were played in the United States. Full Play used United States dollars and bank accounts to fund these bribes.

Between 2010 and 2015, Full Play also bribed the Group of Six and CONMEBOL officials in connection with the Copa América tournament.² And, between

² The government submitted evidence that Full Play had also promised a \$10 million bribe to the head of CONCACAF in connection with the Copa América Centenario—a 2016 soccer tournament organized by CONMEBOL and CONCACAF among South American, Central American, and North American national teams, hosted in the United States—but Full Play's

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2000 and 2015, Full Play helped another media company, T&T Sports Marketing, Ltd. (“T&T”),³ transmit millions of dollars in bribes to the Group of Six in connection with Copa Libertadores media rights, so that Full Play could further solidify its relationships with the officials. Many of these payments were wired through United States bank accounts.

To conceal these bribes from authorities, Full Play used code names on ledgers and encouraged bribe recipients to move their bank accounts from American banks to overseas banks. Evidence also showed that Full Play’s owners met in the United States to discuss how to make their illegal payments appear legitimate.

As for Lopez, the government alleged that he was involved only in the Copa Libertadores scheme. It submitted that he had studied T&T’s Copa Libertadores media rights contracts and understood that T&T was likely paying bribes to secure those contracts, which he identified as being undervalued and containing unusually long terms. In 2011, after Lopez confirmed with the head of Torneos y Competencias, Alejandro Burzaco, that T&T was indeed using bribery to obtain media rights, Lopez’s division of Fox acquired 75% of the economic rights to T&T. Lopez intervened in the due diligence process for

owners were indicted before the tournament took place and before any payments were made.

³ T was a joint venture of Fox and Torneos y Competencias, an Argentinian sports media company. The government alleged that T&T was used “as a pass-through vehicle” to purchase Copa Libertadores media rights from CONMEBOL, after which the rights were sold to Fox at cost. Gov. App’x at 166.

the acquisition to ensure that auditors' red flags did not stymie the deal.

For the next three years, Lopez "perpetuated, protected, and hid the bribes," which were funded by Fox. Gov. Br. at 24. Throughout this time, Lopez held meetings in the United States with coconspirators to effectuate the scheme. The government's evidence also demonstrated how Lopez exploited his relationship with bribed executives to benefit his own career. In late 2011, for example, Lopez obtained from a top FIFA executive inside information to help Fox outbid a competitor for the broadcasting rights to the 2018 and 2022 World Cups.

In 2014, Lopez attempted to cover up the bribes by bringing whistleblower allegations to Fox, resulting in an audit that he was, in large part, able to control. Later, with Carlos Martinez (a subordinate to Lopez) and Burzaco, he devised a contract to minimize the paper trail of bribes traceable to Fox while maintaining payments to soccer executives, but the government's first indictment was unsealed before the contract was finalized.

II. Procedural Background

A. Initial Indictment and 2017 Trial

In May 2015, the government indicted numerous FIFA, CONMEBOL, and CONCACAF officials, as well as sports marketing executives, for their alleged participation in bribery schemes. Many defendants pleaded guilty.

In November 2017, trial proceeded against three defendants, Juan Ángel Napout (former CONMEBOL president and Paraguayan soccer executive), José

Maria Marin (former president of the Brazilian national association), and Manuel Burga (Peruvian soccer executive); Napout and Marin were convicted, and we affirmed the convictions on appeal. *See United States v. Napout*, 963 F.3d 163, 168, 190 (2d Cir. 2020).

On March 18, 2020, the grand jury returned a third superseding indictment, adding charges against Full Play, Lopez, and Martinez. The indictment charged Lopez and Full Play with, *inter alia*, wire fraud conspiracy and substantive wire fraud arising out of the Copa Libertadores scheme. The indictment also charged Full Play with additional counts of wire fraud conspiracy and wire fraud arising out of the bribery schemes to obtain media rights to the World Cup qualifiers, friendly matches, and Copa América.

B. Motions to Dismiss the Indictment

Before trial, Full Play and Lopez each moved to dismiss the indictment on several grounds, including that the honest services wire fraud charges were unconstitutionally vague as applied to them. *See United States v. Full Play Grp., S.A.*, No. 15-CR-252, 2021 WL 5038765, at *4 (E.D.N.Y. Oct. 29, 2021). The district court denied the motions. *Id.* at *1, *15.

The district court had “no trouble rejecting Defendants’ ... vagueness arguments” in view of *Skilling v. United States*, 561 U.S. 358 (2010), “as well as Second Circuit precedent both before and after *Skilling*.” *Full Play Grp.*, 2021 WL 5038765, at *6. It reasoned that the schemes at issue—*i.e.*, bribery schemes—were, under *Skilling*, undoubtedly covered by the honest services fraud statute, 18 U.S.C. § 1346. *Id.* The district court further rejected Defendants’ argument that the alleged breaches of fiduciary duty

were not cognizable under § 1346. *Id.* at *7 (“As a general principle, ‘[t]he “existence of a fiduciary relationship” between an employee and employer is “beyond dispute,” and the violation of that duty through the employee’s participation in a bribery or kickback scheme is within the core of actions criminalized by § 1346.” (quoting *United States v. Nouri*, 711 F.3d 129, 137 n.1 (2d Cir. 2013))). Lastly, the district court rejected Defendants’ argument that § 1346 was not intended to reach foreign bribery schemes. *Id.* In so doing, it relied on *United States v. Bahel*, 662 F.3d 610 (2d Cir. 2011), which upheld the honest services fraud conviction of a foreign employee of the United Nations who had accepted bribes from a foreign vendor. *Id.*

C. 2023 Trial

Trial commenced in January 2023. After the government rested its case, Defendants orally moved for acquittal under Federal Rule of Criminal Procedure 29(a), and the district court reserved decision. On March 9, 2023, a jury found Full Play and Lopez guilty on all counts tried against them, including conspiracy to commit honest services wire fraud.⁴

D. Post-Trial Rule 29 Motions

After trial, Lopez and Full Play renewed their motions for acquittal pursuant to Federal Rule of Criminal Procedure 29(c), arguing that the evidence

⁴ Defendants were also charged with, and convicted of, money laundering conspiracy. And although Defendants were charged with substantive fraud and racketeering, the government ultimately did not proceed to trial on those counts.

presented at trial was insufficient to sustain their convictions. This time, the district court granted their motions. *United States v. Full Play Grp., S.A.*, 690 F. Supp. 3d 5, 8 (E.D.N.Y. 2023); *see also* Special App’x 1-55.

The district court concluded that “§ 1346 does not criminalize the conduct alleged in this case and that therefore the evidence at trial was insufficient to sustain Defendants’ convictions under that statute.” *Full Play Grp.*, 690 F. Supp. 3d at 25. It observed that *Ciminelli v. United States*, 598 U.S. 306 (2023), and *Percoco v. United States*, 598 U.S. 319 (2023), two Supreme Court decisions issued while the Rule 29 motions were being briefed, “signal[led] limits on the scope of the honest services wire fraud statute.” *Full Play Grp.*, 690 F. Supp. 3d at 8. It further reasoned that there was an absence of cases decided before *McNally v. United States*, 483 U.S. 350 (1987),⁵ that applied honest services wire fraud to foreign commercial bribery⁶; that this court viewed as unsettled the question of “whether a foreign

⁵ As discussed further below, *McNally* held that the federal mail fraud statute, 18 U.S.C. § 1341, was confined to the protection of property rights and thus did not reach the intangible right to honest services. 483 U.S. at 356. *McNally* was later abrogated by the enactment of § 1346.

⁶ The district court defined “foreign commercial bribery” as the “bribery of foreign employees of foreign non-government employers,” *Full Play Grp.*, 690 F. Supp. 3d at 37, and the parties use that phrase in the same sense here, *see* Gov. Br. at 6 (recognizing that district court used the term to mean bribery of a foreign employee of a foreign employer); Lopez Br. at 24 (same); Full Play Br. at 45 (same). We adopt the same meaning of this phrase when using it in this opinion.

employee's duty to his foreign employer qualifies as an actionable element under § 1346"; that *Ciminelli* and *Percoco* strongly discouraged expanding the reach of the federal wire fraud statutes; and that no Second Circuit precedent compelled the conclusion that the conduct at issue fell within the scope of § 1346. *Id.* at 33-37 (quoting *Napout*, 963 F.3d at 184).

Judgments of acquittal as to Lopez and Full Play were entered on September 12, 2023. The government timely appealed.

DISCUSSION

On appeal, the government challenges the district court's posttrial Rule 29 ruling on the basis that the district court erred in determining, as a matter of law, that § 1346 does not cover foreign commercial bribery. Defendants argue that the ruling was correct. They also assert that acquittal is warranted for additional reasons not reached by the district court: that (1) the government failed to prove a fiduciary duty giving rise to honest services fraud liability; and (2) the government failed to prove a conspiracy to deceive CONMEBOL.

For the reasons set forth below, we agree with the government and hold that § 1346, as construed by the Supreme Court and this court, encompasses Defendants' conduct. We further reject Defendants' argument that the government failed to prove a breach of fiduciary duty. We leave for the district court to decide in the first instance whether the evidence presented by the government was sufficient to prove a conspiracy to deceive CONMEBOL.

Standard of Review

“We review *de novo* a district court’s grant of a Rule 29 motion based on a finding that the trial evidence was insufficient to support the jury’s verdict, applying the same standard the district court applies in review of the evidence.” *United States v. Landesman*, 17 F.4th 298, 319 (2d Cir. 2021). A defendant challenging the sufficiency of the evidence bears a heavy burden, and we must view the evidence presented in the light most favorable to the government and draw all permissible inferences in the government’s favor. *Id.* A “jury verdict must be upheld if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *United States v. Guadagna*, 183 F.3d 122, 130 (2d Cir. 1999) (internal quotation marks omitted).

Questions related to the interpretation of a criminal statute are reviewed *de novo*. *Napout*, 963 F.3d at 178.

I. Whether Defendants’ Conduct Falls Within the Scope of § 1346

The government argues that the district court’s Rule 29 ruling was mistaken in multiple respects. It primarily contends that, in determining that foreign commercial bribery falls outside the ambit of § 1346, the district court failed to follow binding precedent of this court and the Supreme Court, including *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003) (en banc), *Skilling v. United States*, 561 U.S. 358 (2010), *United States v. Bahel*, 662 F.3d 610 (2d Cir. 2011), and *United States v. Napout*, 963 F.3d 163 (2d Cir. 2020). Relatedly, the government argues that the district court erred in its interpretation and

application of *Percoco*, 598 U.S. at 319, and *Ciminelli*, 598 U.S. at 306, neither of which controls here nor abrogates binding precedent.

In response, Lopez and Full Play argue that, because foreign commercial bribery was not clearly established as honest services fraud before *McNally v. United States*, 483 U.S. 350 (1987), and because the nature of the requisite fiduciary duty is unsettled law, the conduct here cannot be criminalized under § 1346, especially in light of *Percoco* and *Ciminelli*'s warnings against expanding the reach of the wire fraud statutes beyond Congress's express commands.

We agree with the government. Accordingly, we conclude that the district court erred in holding that Lopez and Full Play's conduct was not within the bounds of § 1346.

A. Legal Background

We think it useful to provide an overview of the development of the honest services fraud doctrine and a discussion of certain cases relied upon by the parties.

Until 1987, federal courts read both the mail fraud statute, 18 U.S.C. § 1341, and the wire fraud statute, 18 U.S.C. § 1343, to encompass "schemes to deprive another of the intangible right of honest services" in addition to schemes to obtain money or property. *Rybicki*, 354 F.3d at 133 (internal quotation marks omitted).

Over time, the honest services doctrine became applicable to four general categories of defendants: [1] government officials who defraud the public of their own honest services; [2] elected officials and campaign

workers who falsify votes and thereby defraud the electorate of the right to an honest election; [3] private actors who abuse fiduciary duties by, for example, taking bribes; and [4] private actors who defraud others of certain intangible rights.

Id. (internal quotation marks omitted) (brackets in original).

Then, in 1987, the Supreme Court decided *McNally*, holding that the mail fraud statute was confined to the protection of property rights and thus did not reach honest services or other intangible rights. 483 U.S. at 356, 360. In so holding, the Court explained that it refused to “construe the statute in a manner that leaves its outer boundaries ambiguous,” and noted that “[i]f Congress desires to go further, it must speak more clearly than it has.” *Id.* at 360.

Thereafter, Congress did speak more clearly. In 1988, it enacted 18 U.S.C. § 1346, which clarified that, for the purposes of, among others, the mail and wire fraud statutes, 18 U.S.C. §§ 1341 and 1343, “the term ‘scheme or artifice to defraud’ includes a scheme or artifice to deprive another of the intangible right of honest services.” Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4508 (1988).

Congress did not define “the intangible right of honest services,” but case law has since provided guidance and guardrails for courts interpreting the statute’s reach. This court addressed § 1346 in *Rybicki*, in which the defendants—lawyers who had been convicted of mail and wire fraud for paying claims adjusters employed by insurance companies to expedite the settlement of their clients’ claims—

challenged § 1346 on vagueness grounds. 354 F.3d at 128. Upon rehearing *en banc*, we rejected the defendants' challenge and held that their conduct fell "squarely within the meaning of 'scheme or artifice to deprive another of the intangible right of honest services' as distilled from the pre-*McNally* private sector cases." *Id.* at 142. Notably, the court viewed pre-*McNally* case law as "pertinent," but not binding "in the *stare decisis* sense." *Id.* at 145.

A few years later, in *Skilling*, the Supreme Court construed § 1346 to reach only schemes that involved bribery or kickbacks, concluding that "[r]eading the statute to proscribe a wider range of offensive conduct ... would raise the due process concerns underlying the vagueness doctrine." 561 U.S. at 408. The Court reasoned that "Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Courts of Appeals' decisions before *McNally*," and the "vast majority" of those decisions "involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes." *Id.* at 404, 407 (internal quotation marks and citation omitted). "[B]y confining [the statute's] scope to the core pre-*McNally* applications," the Court "salvaged" "Congress' reversal of *McNally* and reinstatement of the honest-services doctrine" without "transgressing constitutional limitations." *Id.* at 408-09.

Applying its construction of § 1346, *Skilling* overturned the conviction of Enron's CEO, Jeff Skilling, who had been convicted of honest services wire fraud on the theory that he manipulated and issued false statements regarding Enron's publicly reported financial results, thereby depriving Enron

and its shareholders of his honest services. *Id.* at 369. Because the government had *not* alleged that Skilling solicited or accepted payments in exchange for making such misstatements, the Court determined that Skilling's conduct was beyond the reach of § 1346. *Id.* at 413-14. The Court also implicitly acknowledged that the violation of a fiduciary duty was an element of honest services fraud. *Id.* at 407; *see also United States v. Mangano*, 128 F.4th 442, 470 (2d Cir. 2025) ("As a result of [*Skilling's*] construction, a violation of a fiduciary duty is an element of honest services fraud." (internal quotation marks and citation omitted)).

Shortly after *Skilling*, we decided *Bahel*, in which the defendant, a foreign employee of the United Nations who, in contravention of the organization's rules, had accepted bribes from a foreign vendor. 662 F.3d at 617. The defendant argued that his conviction for use of mail or wires to further honest services fraud on this ground exceeded the scope of § 1346. *Id.* at 632. We disagreed. Notably, we rejected Bahel's argument that he could not be prosecuted for honest services fraud because "none of the pre-*McNally* cases extended an 'honest services' theory of fraud to an international setting involving foreign nationals," observing that neither *Skilling* nor *Rybicki* had limited § 1346 based on the identity of the actors involved in the scheme. *Id.* (alterations accepted) (internal quotation marks omitted). We further noted that this court had not construed § 1346 to exclude bribery of foreign officials in foreign countries, and that, in any event, the conduct at issue (1) took place within the territorial United States and (2) victimized "an organization headquartered in the United States,

entitled to defendant's honest services in the United States, and receiving its largest financial contributions from the United States." *Id.* Finally, we rejected the contention that a violation of local law was required for a breach of fiduciary duty. *Id.* at 633.

As mentioned above, in 2020, we affirmed the honest services fraud convictions of two defendants—Napout and Marin—who had been prosecuted as part of the same investigation at issue here. *Napout*, 963 F.3d at 190. We rejected the defendants' argument that § 1346 was unconstitutionally vague as applied to them. *Id.* at 181-84. Having determined that the vagueness challenge had to be reviewed for plain error, thereby requiring the defendants to show an error that was "clear under current law," we concluded that their challenge could not succeed because "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." *Id.* at 183-84. We also rejected the defendants' contention that there was insufficient evidence to establish the existence of a fiduciary duty, observing that "the government's evidence was easily sufficient to prove that FIFA and CONMEBOL's respective codes of ethics expressly provided that persons bound by those codes, including, *inter alia*, that 'all' soccer 'officials,' such as Marin and Napout, had 'a fiduciary duty to FIFA and the confederations such as CONMEBOL,' and were required to 'act with absolute loyalty' to them." *Id.* at 185 (alterations accepted).⁷

⁷ In a concurrence, Judge Hall opined that even on *de novo* review, he would have concluded that § 1346 was not unconstitutionally vague as applied to the defendants because

More recently, in *Percoco*, the Supreme Court addressed the fiduciary duty element of § 1346. 598 U.S. at 319. The question in *Percoco* was whether a private citizen who had influence over government decision-making, but who did not hold public office, could be convicted of honest services wire fraud. Although the Court declined to hold that a person outside public employment could *never* have a fiduciary duty to the public, the Court found that the jury instructions before it, which “told the jury that Percoco owed a duty of honest services to the public if (1) he dominated and controlled any governmental business and (2) people working in the government actually relied on him because of a special relationship he had with the government,”⁸ were too vague. *Id.* at 330 (internal quotation marks omitted).

On the same day that it issued *Percoco*, the Supreme Court issued *Ciminelli*, which did not address honest services wire fraud but warned against

they, “by virtue of their relationship with FIFA and CONMEBOL, had a fiduciary duty not to accept bribes or kickbacks, a duty that was explicitly laid out by the two associations’ respective codes of conduct,” and “the element of honest services in § 1346 encompasses ‘the obligations of loyalty and fidelity that inhere in the employment relationship.’” *Napout*, 963 F.3d at 190- 92 (Hall, *J.*, concurring) (quoting *Skilling*, 561 U.S. at 417 (Scalia, *J.*, concurring)).

⁸ The jury instructions were based on this court’s decision in *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), which outlined two tests for determining when a private person owes a fiduciary duty to the general citizenry: “(1) whether others relied upon the accused because of his special relationship in the government and (2) whether he exercised de facto control over governmental decisions.” *Percoco*, 598 U.S. at 326-27 (internal quotation marks omitted) (alterations accepted).

“expand[ing] federal jurisdiction without statutory authorization.” 598 U.S. at 315 (holding invalid this court’s “right-to-control” theory of wire fraud).

We draw several conclusions from the cases discussed above. *First*, for § 1346 to apply, the conduct at issue must involve bribery and/or kickbacks. *See Skilling*, 561 U.S. at 409.

Second, the requisite fiduciary relationship cannot be determined based on a test for dominance and control or reliance, *see Percoco*, 598 U.S. at 330, but an employer-employee relationship, or a similar relationship, is a well-accepted example of a fiduciary relationship that falls within the scope of § 1346, *see Skilling*, 561 U.S. at 407 n.41 (listing employer-employee relationship as example of fiduciary duty that was usually “beyond dispute” in pre-*McNally* cases); *Rybicki*, 354 F.3d at 126-27 (including “relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers” as example of fiduciary duty); *see also Nouri*, 711 F.3d at 137 n.1 (“The existence of a fiduciary relationship between an employee and employer is beyond dispute, and the violation of that duty through the employee’s participation in a bribery or kickback scheme is within the core of actions criminalized by § 1346.” (internal quotation marks omitted)).

Third, a violation of local law is not required to establish a breach of a fiduciary duty, *see Bahel*, 662 F.3d at 633, and an employee’s violation of his employer’s codes of conduct—including the exact codes at issue here—may establish such a breach, *see Napout*, 963 F.3d at 184-85 (violation of FIFA and CONMEBOL codes of ethics); *see also Rybicki*, 354

F.3d at 127 (employers had “written polic[ies] that prohibited the [employees] from accepting any gifts or fees and required them to report the offer of any such gratuities”); *Bahel*, 662 F.3d at 617 (United Nations rules, including duty to avoid using position for personal gain, informed “contours of the duty Bahel owed to his employer”).

Fourth, the presence of foreign defendants or an international component to a scheme does not categorically remove an offense from the ambit of § 1346. *See Bahel*, 662 F.3d at 632 (rejecting argument that schemes involving “an international setting involving foreign nationals” are beyond reach of § 1346).

B. Application of § 1346 to Lopez and Full Play

As an initial matter, we note that the district court plainly relied on *Percoco* and *Ciminelli* as the basis for its departure from its prior rejection of nearly identical arguments regarding the scope of § 1346 raised in Defendants’ motions to dismiss the indictment. *See Full Play Grp.*, 690 F. Supp. 3d at 8 (“Although before trial the Court rejected some of the same legal arguments Defendants now renew in their post-trial motions, because of intervening Supreme Court decisions signaling limits on the scope of the honest services wire fraud statute, the Court grants Defendants’ motions and vacates their convictions.”), 36 (“In light of the Supreme Court’s guidance in *Ciminelli* and *Percoco*, this Court is compelled to reverse its previous ruling regarding § 1346’s scope.”). Neither *Percoco* nor *Ciminelli*, however, controls this case.

Percoco considered fiduciary duties under § 1346 in the context of duties to the public, specifically in the unique context where the defendant did not actually hold public office. 598 U.S. at 322. It did not address commercial actors or employment relationships like those at issue here. *Ciminelli* was even further afield—it addressed the scope of § 1343, not § 1346. 598 U.S. at 308. Indeed, counsel for Full Play conceded at oral argument that *Ciminelli* and *Percoco* did not change the landscape of the honest services fraud doctrine for purposes of this case. Oral Arg. Recording at 47:40-49:00.

Intellectually curious jurists, and certainly law professors, can debate whether *Percoco* and *Ciminelli* “signal[ed] limits on the scope of the honest services wire fraud statute.” *Full Play Grp.*, 690 F. Supp. 3d at 8 (emphasis added). But in adjudicating the case before us, we must focus on the concrete holdings of the cases that currently bind us rather than on “signals” that may forecast future decisions. *See In re Grand Jury Subpoenas Dated Sept. 13, 2023*, 128 F.4th 127, 140 (2d Cir. 2025) (“[A] Court of Appeals should follow the case which directly controls.” (internal quotation marks omitted)). Here, those concrete holdings lead us to conclude that Defendants’ conduct falls within the scope of § 1346.

1. Precedent Does Not Require a Pre-McNally Factual Twin

We do not view precedent as requiring us to find a pre-*McNally* case factually identical to this one to conclude that the conduct here falls under § 1346.

Lopez and Full Play essentially contend that because they cannot find exact replicas of the fact

pattern we are confronted with here—including the specific sort of fiduciary relationship at issue here—in pre-*McNally* case law, foreign commercial bribery of the sort with which they were charged is not encompassed by § 1346. *See, e.g.*, *Lopez Br.* at 2 (“No pre-*McNally* case involved commercial bribery that allegedly deprived a foreign private employer of the honest services of its foreign employees.”). But such a methodology is unduly restrictive. To be sure, the Supreme Court endorsed the approach of looking to pre-*McNally* case law to determine the general conduct and duties encompassed by § 1346. *See Skilling*, 561 U.S. at 404 (looking “to the doctrine developed in pre-*McNally* cases in an endeavor to ascertain the meaning of the phrase ‘the intangible right of honest services’” and confining § 1346 to the “core” conduct covered by those cases); *see also Percoco*, 598 U.S. at 328 (“*Skilling* was careful to avoid giving § 1346 an indeterminate breadth that would sweep in any conception of ‘intangible rights of honest services’ recognized by some courts prior to *McNally*.”). Neither the Supreme Court nor this court, however, has held that whenever a *specific fact pattern* cannot be located in virtually identical form in pre-*McNally* case law, it is not covered by § 1346.

Percoco observed that a “smattering of pre-*McNally* decisions” is insufficient to transform an “ill-defined category of circumstances” into situations that trigger “[t]he intangible right of honest services.” 598 U.S. at 328-29. It does not follow that more than a “smattering of pre-*McNally* cases” is *necessary* to establish that a *particular scheme* is criminalized by § 1346. Neither the Supreme Court nor this court has ever held that pre-*McNally* decisions are the only

sources that inform our analysis of § 1346. Indeed, we have recognized well-accepted fiduciary duties as falling within the scope of § 1346 without looking to pre-*McNally* case law for factual analogies. *See, e.g., United States v. Avenatti*, 81 F.4th 171, 194 n.27 (2d Cir. 2023) (stating that defendant “cannot ... argue that he lacked notice that, as an attorney, he owed a fiduciary duty to his client” and citing *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) (en banc), for proposition that attorney-client relationship was “hornbook fiduciary relationship”).

Rather than investigate whether pre-*McNally* case law contains perfectly analogous foreign commercial bribery prosecutions, we find it more useful to dissect the schemes before us into their salient components and look at each separately to determine whether any component takes the scheme outside the scope of § 1346. Such components include the conduct at issue; the players involved in the scheme; where the scheme took place; and the nature of the fiduciary duty that was purportedly breached. Although the district court similarly disentangled the relevant issues, *see Full Play Grp.*, 690 F. Supp. 3d at 33, unlike the district court, we conclude that this approach inexorably leads to the conclusion that Defendants’ schemes are properly encompassed by § 1346.

2. Defendants’ Conduct is Covered by § 1346

Defendants do not dispute that Lopez and Full Play’s conduct, *i.e.*, engaging in bribery, is an example of the core conduct proscribed by § 1346. Nor do they argue that certain international elements of the

schemes, such as Full Play's foreign citizenship or the fact that certain conduct occurred abroad, *in themselves* place Defendants' activities beyond the reach of § 1346. The crux of Defendants' argument, rather, is that the fiduciary duty that was breached—the bribed foreign officials' duties to their foreign employers—is not cognizable under § 1346.

We disagree. The fiduciary nature of the relationship between the bribed officials and their respective organizations, *i.e.*, an employer-employee relationship, is one that is commonly recognized, including by pre-*McNally* cases, as “beyond dispute.” *See Skilling*, 561 U.S. at 407 n.41; *Nouri*, 711 F.3d at 137 n.1; *see also Rybicki*, 354 F.3d at 126-27 (recognizing fiduciary duty where defendant and victim were “in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers”). And, like the United Nations in *Bahel*, *see* 662 F.3d at 617, FIFA and CONMEBOL had express rules proscribing the use of an employment position for personal gain and imposing on officials a duty of “absolute loyalty.” Gov. App'x 114, 567. Indeed, Defendants do not dispute that an employer-employee relationship is a well-recognized fiduciary relationship that falls within the scope of § 1346; they argue instead that a *foreign* employee's duty to his *foreign* employer does not yield a cognizable duty under the honest services doctrine.

Yet *Bahel* counsels that the foreign identity of the officials and their employers does not remove the schemes from § 1346's reach. There, like here, the bribed official was a foreign national and the victim was a multinational organization with global

operations. 662 F.3d at 616. And there, like here, there was relevant misconduct within the United States contributing to the breach of duty. Moreover, *Bahel* explicitly observed “that fraud actionable under Section 1346 is limited to the nature of the offenses prosecuted in the pre-*McNally* cases (*i.e.*, bribery and kickback schemes)—not the identity of the actors involved in those cases.” *Id.* at 632.

Defendants attempt to distinguish *Bahel* by focusing on its dicta regarding the United Nations being “headquartered in the United States, entitled to defendant’s honest services in the United States, and receiving its largest financial contributions from the United States” and pointing out that CONMEBOL is headquartered in Paraguay. Lopez Br. at 37 (quoting *Bahel*, 662 F.3d at 632); Full Play Br. at 51-52 (same).⁹ But *Bahel* does not hold that the headquarters of an organization is dispositive. In any event, the victim of the Copa América Centenario scheme, CONCACAF, *is* headquartered in the United States. And, although FIFA and CONMEBOL are not based in the United States, the United States Soccer Federation is involved with both organizations: it is a member of FIFA and has hosted tournaments and games connected to both FIFA and CONMEBOL, such as the

⁹ Defendants argue that this case should be analogized instead to *United States v. Giffen*, which held that a United States citizen’s bribing of a Kazakhstani government official fell outside the scope of § 1346. 326 F. Supp. 2d 497, 505-06 (S.D.N.Y. 2004). Aside from its lack of precedential value, *Giffen* is factually distinguishable. There, the bribed official breached a duty to a foreign public. *Id.* at 506-07. Here, the bribed officials breached a duty to international organizations with significant ties to the United States.

Copa América Centenario, a joint CONCACAF-CONMEBOL tournament, and friendlies with CONMEBOL teams.

Lopez and Full Play also argue that it would be improper to recognize a fiduciary duty where relevant foreign laws may not recognize such duties. *See* Lopez Br. at 38 (“[T]here is no ... hornbook law establishing a fiduciary relationship between foreign employers and their foreign employees—American hornbooks and Restatements do not apply in Paraguay.”), 45 (“There is no reason to believe that Paraguay, a civil-law country, recognizes any sort of fiduciary duty akin to what courts have created as a matter of Anglo-American common law.”). As discussed above, however, our cases have indicated that an analogous violation of local law is not required to establish a breach of fiduciary duty. *See, e.g., Bahel*, 662 F.3d at 633; *see also Napout*, 963 F.3d at 191 (Hall, *J.*, concurring).

Finally, Defendants and the district court read much into our statement in *Napout* 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.” 963 F.3d at 184. *Napout*, however, was addressing a vagueness challenge on plain error review, and made clear that the defendants had “pointed [the court] to no authority directly supporting their position” that there was no cognizable breach of fiduciary duty (and thus failed to establish an error that was clear under current law). *Id.* Taken in context, this statement does not undercut our conclusion that there exists a cognizable fiduciary duty here. In fact, the statement implied that, at

worst, the law *foreclosed* the defendants' argument that there was no cognizable breach, as Judge Hall opined in concurrence. *See id.* at 191 (Hall, *J.*, concurring).

We conclude, therefore, that the nature of Defendants' conduct (bribery), coupled with the character of the relationship between the bribed officials and the organizations to whom they owed a duty of loyalty (employer-employee relationships), place the schemes presumptively within the scope of § 1346. Further, the foreign identity of certain organizations and officials does not remove the schemes from the ambit of § 1346, especially where, as here, relevant conduct occurred in the United States, for the benefit of United States- based executives and organizations (*e.g.*, Lopez and Fox), and the victims were multinational organizations with global operations and significant ties to the United States.

3. Defendants' Other Arguments

Lopez and Full Play argue that the limited scope of domestic bribery statutes, 18 U.S.C. §§ 201 and 666, in combination with Congress's "surgical precision" when extending other criminal statutes to foreign commercial bribery, indicates that § 1346 does not cover foreign commercial bribery. Lopez Br. at 27-30 (discussing the Foreign Corrupt Practices Act and the Foreign Extortion Prevention Act). But the wire fraud statute is not a bribery statute, and although we may look to the bribery statutes to shed light on what Congress meant by "bribery" or "kickback" in the wire fraud context, *see Skilling*, 561 U.S. at 412, that does not mean that we should read the statutes in a like manner. Further, we have specifically observed that

the wire fraud “statute reaches *any* scheme to defraud involving money or property, [regardless of] whether the scheme ... involves foreign victims and governments.” *United States v. Trapilo*, 130 F.3d 547, 552 (2d Cir. 1997) (“[W]hat is proscribed is [the] use of the telecommunication systems of the United States in furtherance of a scheme” to defraud, and the “identity and location of the victim ... are irrelevant.”).

Lopez and Full Play also argue that “principles of international comity counsel against interpreting vague statutes to cover internal domestic affairs of foreign nations.” Lopez Br. at 32. Yet limitations on the international application of the wire and mail fraud statutes already exist. Statutes are presumed to have only domestic application, and this court has explained “that in order for incidental domestic wire transmissions not to haul essentially foreign allegedly fraudulent behavior into American courts, ‘the use of the ... wires must be essential, rather than merely incidental, to the scheme to defraud.’” *Napout*, 963 F.3d at 179 (quoting *Bascuñán v. Elsaca*, 927 F.3d 108, 122 (2d Cir. 2019)).¹⁰

* * *

In sum, we hold that the schemes at issue here fall under § 1346 and that, therefore, the district court erred in holding that foreign commercial bribery is

¹⁰ The district court, in its pre-trial ruling on the motions to dismiss, rejected Defendants’ argument that this case presented an impermissible extraterritorial application of the wire fraud statute. *Full Play Grp.*, 2021 WL 5038765, at *8 n.5. In its decision on the Rule 29 motions, the district court noted that it still rejected this argument, and the parties do not raise the issue of extraterritoriality in this appeal.

excluded from § 1346's reach as a matter of law and vacating Defendants' convictions.¹¹

In so holding, we do not purport to establish a bright line rule for what qualifies as honest services wire fraud under § 1346, nor do we speculate as to where the outer bounds of the statute may lie. We look only at the facts before us to determine that, under binding precedent of this court and the Supreme Court, Defendants' conduct falls within the statute's purview.

II. Whether the Government Failed to Prove a Fiduciary Duty

Lopez and Full Play argue, in the alternative, that even if their conduct falls within the scope of § 1346, they should be acquitted because the government failed to prove a fiduciary duty. They ground this argument in two principal points: (1) the foreign jurisdictions at issue in this case do not recognize a general fiduciary duty to employers and (2) the organizations' respective codes of ethics, as mere corporate policies, cannot establish the requisite fiduciary duty.

This argument was raised below but, because it was unnecessary to decide it given the district court's ruling, the district court did not reach it. Although "[i]t is this Court's usual practice to allow the district court to address arguments in the first instance," *Dardana Ltd. v. Yuganskneftegaz*, 317 F.3d 202, 208 (2d Cir.

¹¹ In light of the above, we need not reach the government's argument that the district court failed to construe the evidence in the light most favorable to the government or that the government is entitled to a new trial.

2003), we think it is prudent to consider this argument here because the issue is closely tied to the question the district court did address, the scope of § 1346, and there is no need for fact finding or complex evidentiary analysis. *Cf. AXA Versicherung AG ex rel. Albingia Versicherungs AG v. N.H. Ins. Co.*, 348 F. App'x 628, 630-31 (2d Cir. 2009) (summary order) (remanding, where consideration of evidence was necessary, to allow district court, which was “intimately familiar with the full scope of ... evidence[,] ... the opportunity to address [the issue] in the first instance”).

Our decision in *Napout* is instructive.¹² There, we held that evidence demonstrating soccer officials' acceptance of bribes in violation of FIFA and CONMEBOL's respective codes of conduct was sufficient to prove a breach of fiduciary duty for an honest services fraud conviction. 963 F.3d at 185. We observed that the FIFA and CONMEBOL codes “expressly provided that persons bound by those codes, including, *inter alia*, that all soccer officials, such as [the *Napout* defendants], had a fiduciary duty to FIFA and the confederations such as CONMEBOL, and were required to act with absolute loyalty to them.” *Id.* (internal quotation marks omitted) (alterations accepted). Importantly, we explicitly

¹² Lopez and Full Play argue that the holding of *Napout* does not survive *Percoco*, because *Napout* did not consider whether FIFA and CONMEBOL's codes of ethics satisfy *Percoco*'s “mandate” to define honest services “with the clarity typical of criminal statutes.” Lopez Br. at 53 (quoting *Percoco*, 598 U.S. at 328). We are not persuaded. As we have already explained, it is our view that *Percoco* did not change the legal landscape relevant to this case. *Napout*'s sufficiency analysis thus remains instructive.

rejected the relevance of foreign law for establishing the breach of fiduciary duty. *See id.* at 184-85 (“The appellants were not prosecuted for breaching a fiduciary duty created by Paraguayan law—or Brazilian, Swiss or U.S. law, for that matter.”).

Here too, the relevant fiduciary duties were established by the bribed officials’ relationships to FIFA, the continental confederations, and the individual national associations, not the laws of foreign countries. And, the contours of those duties were informed by the ethical codes to which the bribed officials were bound. *See Bahel*, 662 F.3d at 617 (“U.N. rules ... inform[ed] the contours of the duty Bahel owed to his employer”). The FIFA code of ethics explicitly defined “official” to include executives of FIFA, its continental confederations, and its member associations, Gov. App’x 94-95, and prohibited those officials from accepting bribes, *id.* at 110. CONMEBOL’s code also bound executives of member associations and prohibited them from the same conduct. *Id.* 565-67. The government’s evidence thus easily sufficed to establish that the respective codes established a fiduciary duty that bound the bribe recipients, and that such duty was breached when the bribe recipients violated the codes.

Lopez and Full Play argue that the FIFA codes cannot supply the relevant duty here because “[t]he FIFA code could not have created a fiduciary duty between CONMEBOL and its employees;” “FIFA’s continental confederations (e.g., CONMEBOL) are not members of FIFA;” and there was no “evidence suggesting FIFA’s code applied to regional events such as the Copa Libertadores, organized by regional

authorities rather than FIFA itself.” Lopez Br. at 54. These arguments are easily rejected. The FIFA code bound not only executives of FIFA, but also executives of the continental confederations and member associations. And the FIFA code does not limit its application to only those events that it directly organizes. The evidence therefore was sufficient to prove that the bribed officials here violated FIFA’s code of conduct by engaging in bribery connected to the Copa Libertadores, Copa América, and the World Cup qualifiers and friendlies, thereby breaching their fiduciary duty to FIFA.

Lopez and Full Play’s concern regarding the arbitrariness that would stem from “allowing criminal sanctions to flow from violations of employment policies” is not cause for alarm. Lopez Br. at 51. It is not the per se violation of an employment policy that triggers criminal liability. Rather, the existence of such policies is relevant to assessing whether a fiduciary duty exists—it does not “delegate[] lawmaking power to private parties,” as Defendants contend. *Id.* at 52. And, ultimately, it remains the province of a jury to determine whether the facts adduced at trial establish the existence of a fiduciary relationship between the relevant parties.

III. Whether the Government Failed to Prove a Conspiracy to Deceive CONMEBOL

Defendants raise an additional alternative argument in support of affirming the district court’s Rule 29 ruling: that the government failed to prove a conspiracy to deceive CONMEBOL. Although raised below, the district court did not address this

argument, given its (erroneous) holding that Defendants' conduct was not criminalized by § 1346.

We leave this issue to be addressed by the district court in the first instance on remand. *See Dardana*, 317 F.3d at 208; *AXA Versicherung AG*, 348 F. App'x at 631-32.

CONCLUSION

For the foregoing reasons, we **VACATE** the judgments of acquittal as to Lopez and Full Play and **REMAND** with instructions to reinstate the jury's verdict and conduct further proceedings consistent with this opinion, including deciding whether to grant relief under Rule 29 on the basis that the evidence presented by the government was insufficient to prove a conspiracy to deceive CONMEBOL.

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Appendix B

**UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK**

Nos. 15-cr-252 (S-3)

UNITED STATES OF AMERICA,

v.

HERNÁN LOPEZ, FULL PLAY GROUP, S.A.,

Defendants.

Filed: Sept. 1, 2023

MEMORANDUM & ORDER

PAMELA K. CHEN, United States District Judge:

Defendants Full Play Group, S.A. (“Full Play”), an Argentine sports marketing company, and Hernán Lopez (“Lopez”), the former Chief Executive Officer (“CEO”) of Fox International Channels (“FIC”), are among dozens of individuals and entities charged in an almost decade-long prosecution targeting corruption in international soccer. The wide-ranging prosecution has resulted in the convictions of dozens of former officials of the Fédération Internationale de Football Association (“FIFA”) and affiliated continental and regional soccer confederations, such as la Confederación Sudamericana de Fútbol (“CONMEBOL”) and the Confederation of North, Central America and Caribbean Association Football

(“CONCACAF”), as well as executives and employees of certain sports broadcasting and media rights companies, along with the companies themselves.

Here, Defendants Full Play and Lopez (collectively, “Defendants”) were charged with being participants in an intricate scheme to pay bribes and kickbacks to CONMEBOL officials for the purpose of obtaining the broadcasting and marketing rights for popular regional soccer tournaments. Specifically, Full Play was charged with several wire-fraud and money-laundering schemes related to the Copa Libertadores and Copa América soccer tournaments, and various “friendly” matches (“friendlies”) and World Cup qualifiers amongst South American national teams; and Lopez was charged as a co-conspirator in the wire-fraud and money-laundering counts related to the Copa Libertadores scheme. On March 9, 2023, a jury found Full Play and Lopez guilty on all counts charged against them after a seven-week trial. teams; and Lopez was charged as a co-conspirator in the wire-fraud and money-laundering counts related to the Copa Libertadores scheme. On March 9, 2023, a jury found Full Play and Lopez guilty on all counts charged against them after a seven-week trial.¹

Defendants Full Play and Lopez now move under Federal Rule of Criminal Procedure 29 (“Rule 29”) for judgments of acquittal. Although before trial the Court rejected some of the same legal arguments Defendants now renew in their post-trial motions,

¹ A third defendant, Carlos Martinez (“Martinez”), was charged with the same counts as Lopez, but was acquitted by the jury on all counts.

because of intervening Supreme Court decisions signaling limits on the scope of the honest services wire fraud statute, the Court grants Defendants' motions and vacates their convictions.

BACKGROUND

I. Initial Indictments and 2017 Trial

This case began in May 2015 with the indictment of nine FIFA officials and five sports media executives for their alleged participation in bribery schemes related to international soccer tournaments. (*See generally* Sealed Indictment, Dkt. 1.) Six months later, in November 2015, the grand jury returned a superseding indictment charging additional defendants. (*See generally* Sealed Indictment, Dkt. 102.) In the few years that followed, many of the charged defendants chose to cooperate with the Government and/or plead guilty. *United States v. Napout*, 963 F.3d 163, 170 (2d Cir. 2020). In June 2017, in anticipation of trial, the Government obtained a second superseding indictment pertaining only to defendants Juan Ángel Napout, Manuel Burga, and José Maria Marin. (*See generally* Superseding Indictment (S-2), Dkt. 604; Government Letter re S-2 Indictment, Dkt. 603.)

On November 6, 2017, Napout, Burga, and Marin proceeded to a jury trial before this Court. (*See* 11/6/2017 Minute Entry.) After six weeks of trial, Napout was convicted of the racketeering conspiracy and wire fraud conspiracy counts, but acquitted on the money laundering conspiracy counts; and Marin was convicted on all counts, except for one money laundering conspiracy count. (*See* 12/22/2017 Minute Entry; Verdict Sheet, Dkt. 873.) Burga was acquitted

on all counts against him. (See Dkts. 871, 874.) Napout and Marin challenged their convictions, principally arguing that they were convicted based on impermissible extraterritorial applications of the wire fraud statutes. *See generally United States v. Napout*, 332 F. Supp. 3d 533 (E.D.N.Y. 2018); *Napout*, 963 F.3d 163. This Court denied their post-trial motions for acquittal and new trials, *Napout*, 332 F. Supp. 3d at 575, and the Second Circuit affirmed, *Napout*, 963 F.3d at 190.

II. Third Superseding Indictment

On March 18, 2020, the grand jury returned a third superseding indictment, adding charges against Defendants Full Play, Lopez, and Martinez. (Sealed Superseding Indictment (S-3) (“S-3 Indictment” or “the Indictment”), Dkt. 1337.) Like the previous indictments, the S-3 Indictment alleged a wide-ranging racketeering conspiracy, spanning “a period of more than 20 years,” that involved various schemes to solicit, pay, and receive bribes and kickbacks “in connection with the sale of media and marketing rights to various soccer tournaments and events” around the world. (S-3 Indictment, Dkt. 1337, ¶ 63.) Full Play, a South American sports media and marketing company, was charged in the overarching Racketeer Influenced and Corrupt Organizations (“RICO”) conspiracy and several of the wire-fraud and money-laundering schemes underlying the RICO conspiracy, including ones connected with the Copa Libertadores (“Copa Libertadores #2 Scheme”), the Copa América (“Copa América Scheme”), and various friendly and World Cup qualifier matches (“World Cup Qualifiers/Friendlies Scheme”). (*Id.* ¶¶ 19-20, 113-15,

129-35, 146-56.) Lopez and Martinez, both United States citizens who were executives at FIC, a subsidiary of Twenty-First Century Fox, Inc. (“Fox”), were charged as co-conspirators with Full Play in the counts related to the Copa Libertadores #2 Scheme—but not in any of the other counts in the S-3 Indictment, including the RICO count. (*See id.* ¶¶ 21-22, 129-35.)

Prior to Defendants’ trial, the Government decided not to proceed to trial on the RICO count as to Full Play (Dkt. 1756) and the substantive wire fraud counts as to Full Play, Lopez, and Martinez (Dkt. 1864). Consequently, only Defendants’ conspiracy counts for honest services wire fraud and money laundering remained. (*See generally* Dkt. 1868 (Government’s proposed trial indictment “edited to omit counts from the [Third Superseding] Indictment that are irrelevant to the trial”).)

A. Copa Libertadores #2 Scheme

With respect to the Copa Libertadores #2 Scheme, the wire fraud conspiracy charge in the S-3 Indictment alleged:²

² The Government produced an S-3 Indictment for Defendants’ trial that contained only the charges remaining against them and the allegations relevant to Defendants and those charges. (*See* Tr. Indictment, Dkt. 1868-1.) Other than being edited and renumbered to include only the defendants going to trial, the language of the relevant counts in the Trial Indictment was identical to the S-3 Indictment. (*Compare, e.g.*, S-3 Indictment, Dkt. 1337, ¶ 130 (charging Count Nine, wire fraud conspiracy related to the Copa Libertadores #2 Scheme against 13 defendants) *with* Tr. Indictment, Dkt. 1868-1, ¶ 34 (charging Count One, wire fraud conspiracy related to the Copa

In or about and between 2000 and 2015, both dates being approximate and inclusive, within the Eastern District of New York and elsewhere, the defendants FULL PLAY, HERNAN LOPEZ, and CARLOS MARTINEZ, together with others, did knowingly and intentionally conspire to devise a scheme and artifice to defraud FIFA and CONMEBOL and their constituent organizations, including to deprive FIFA and CONMEBOL and their constituent organizations of their respective rights to honest and faithful services through bribes and kickbacks, and to obtain money and property by means of materially false and fraudulent pretenses, representations and promises, and for the purpose of executing such scheme and artifice, to transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce, writings, signs, signals, pictures and sounds, to wit: wire transfers, telephone calls and emails, contrary to Title 18, United States Code, Section 1343.

(Title 18, United States Code, Sections 1349 and 3551 et seq.)

(Tr. Indictment, Dkt. 1868-1, ¶ 34.)³ The Indictment detailed 11 fraudulent wire transfers between March

Libertadores #2 Scheme against Full Play, Lopez, and Martinez).)

³ Section 1343 of the federal criminal code—the wire fraud statute—provides that “[w]hoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money

20, 2015 and May 26, 2015 that Full Play, Lopez, Martinez, and their co-conspirators “did transmit and cause to be transmitted” in furtherance of the alleged scheme. (Dkt. 1337, ¶ 133.)

B. Copa América Scheme

As to the Copa América Scheme, the S-3 Indictment alleged that between 2010 and 2015, Full Play and others agreed to pay tens of millions of dollars in bribes to CONMEBOL officials to secure the media and marketing rights to the 2015, 2019, and 2023 editions of the Copa América, as well as the Copa América Centenario held in 2016 in the United States.

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,” is guilty of a felony offense. 18 U.S.C. § 1343. Notably, § 1343 does not reference schemes and artifices to defraud by depriving organizations of “their respective rights to honest and faithful services.” *Id.* Rather, as discussed *infra* Discussion Section I.A.2, honest services wire fraud was created when Congress enacted 18 U.S.C. § 1346, which provides that the term “‘scheme or artifice to defraud’ [for purposes of § 1343] includes a scheme or artifice to deprive another of the intangible right of honest services.” 18 U.S.C. § 1346. Section 1343 therefore can be violated either through a scheme to deprive an organization of honest services, or a scheme to obtain the property of another through false representations. Although the Indictment appears to allege both forms of wire fraud under § 1343 as objects of the § 1349 conspiracy charge (and does not explicitly reference § 1346) (*see* Tr. Indictment, Dkt. 1868-1, ¶ 34), the Government sought to prove an honest services wire fraud conspiracy only at trial (*see* Dkt. 1869, at 33-40 (Government’s proposed jury charges defining “wire fraud” using the “elements of honest services wire fraud”)), and does not argue differently now.

(See *id.* ¶¶ 81-85, 150-54.) The S-3 Indictment specified six fraudulent wire transfers between April 27, 2015 and May 26, 2015 that Full Play and its co-conspirators “did transmit and cause to be transmitted” in furtherance of the alleged scheme. (*Id.* ¶ 154.)

C. World Cup Qualifiers/Friendlies Scheme

Lastly, the S-3 Indictment alleged that between 2007 and 2015, Full Play and its owners, Hugo and Mariano Jinkis, engaged in a scheme to pay bribes and kickbacks to the presidents of various soccer federations within CONMEBOL in exchange for media rights to certain World Cup qualifying matches and certain friendly matches. (*Id.* ¶ 79.)

III. Pre-Trial Rulings

On July 23, 2021, Defendants Full Play, Lopez, and Martinez filed motions to dismiss the S-3 Indictment under Federal Rule of Criminal Procedure 12(b)(3). (Dkts. 1594, 1595.) Defendants moved for dismissal on three grounds: (1) the honest services wire fraud charges were unconstitutionally vague as applied to Defendants; (2) the Indictment impermissibly sought to apply the wire-fraud statute extraterritorially; and (3) the Indictment did not sufficiently allege an offense. *United States v. Full Play Grp., S.A.*, No. 15-CR-252 (PKC), 2021 WL 5038765, at *4 (E.D.N.Y. Oct. 29, 2021) (citing Dkts. 1594-1, 1595-1). The Court’s previous ruling regarding Defendants’ first argument, the vagueness challenge,

is relevant to this Memorandum and Order and is summarized below.⁴

By written decision issued on October 29, 2021, the Court denied Defendants' motions in their entirety. (*Id.*) At the time, the Court "ha[d] no trouble rejecting Defendants' [] vagueness arguments" because "although jurists may continue to debate the source and scope of the fiduciary duties encompassed by § 1346, at least when it comes to bribery and kickback schemes—such as the ones alleged here[]—those debates are academic." *Id.* at *6. Specifically, the Court disagreed with Defendants' attempt to differentiate *foreign* private sector bribery from *domestic* private sector bribery, in large part, because the Second Circuit had "rejected a substantively indistinguishable argument" in *United States v. Bahel*. *Id.* at *7 (citing *United States v. Bahel*, 662 F.3d 610, 616-17 (2d Cir. 2011)). The Court explained that in *Bahel*, "a foreign national employee of the United Nations" "argued that he could not be prosecuted for honest-services fraud under § 1346 because 'none of the pre-*McNally* cases extended an "honest-services" theory of fraud to an international setting involving foreign nationals[.]'" *Id.* (quoting *Bahel*, 662 F.3d at 632). But "[t]he Circuit found this argument unavailing, concluding that § 1346 'is limited to the *nature of the offenses* prosecuted in the pre-*McNally* cases (i.e., bribery and kickback schemes)—not the *identity of the actors* involved in those cases.'" *Id.*

⁴ Defendants' second argument regarding extraterritoriality is not re-raised in their present motions and therefore the issue is largely not discussed herein. *See also infra* Discussion Section I.C.

(quoting *Bahel*, 662 F.3d at 632) (emphasis added). The Court agreed with the *Bahel* panel, *id.*, and denied Defendants' vagueness challenge along with the rest of Defendants' dismissal arguments, *id.* at *15 ("Defendants' motions to dismiss the S-3 Indictment (Dkts. 1594, 1595) are denied in their entirety.").

IV. Trial

Jury selection began on January 12, 2023 (1/12/2023 Minute Entry), and trial started the following week, on January 17, 2023. Over of the course of the approximately seven-week trial, the Government called 14 witnesses and introduced voluminous documents concerning international soccer, FIFA and CONMEBOL, the broadcasting market for international soccer, the alleged bribery schemes, and Defendants' roles in those schemes. Defendants mounted a vigorous defense, calling 11 witnesses, introducing voluminous documents in opposition to the Government's theory of the case, and made numerous trial-dispositive motions. Indeed, between Full Play, Lopez, and Martinez, the defense made near-daily motions for mistrial and severance the first two weeks of trial. (*See, e.g.*, Tr. 80 (Martinez moving for mistrial on day one); Tr. 112-16 (Martinez and Lopez moving for mistrial and severance from Full Play on day one); Tr. 250-51 (Lopez and Full Play moving for severance and mistrial on day two); Tr. 1435 (Martinez moving for mistrial on day six); Tr. 1513 (Lopez moving for mistrial on day seven); Tr. 1941-42 (Martinez moving for mistrial on day eight); Tr. 2389 (Martinez moving to sever from Full Play on day nine).)

Viewed in the light most favorable to the Government, *United States v. Eppolito*, 543 F.3d 25, 45 (2d Cir. 2008), the evidence at trial established the following facts.⁵

A. 1999-2008: The Formation of the Bribery Scheme

In 1999, Torneos y Competencias (“Torneos”), a sports media company owned by Luis Nofal (“Nofal”), and Traffic Group (“Traffic”), a sports media company owned by Jose Hawilla, formed a company called T&T Sports Marketing Ltd. (“T&T Cayman”). (Tr. 375-76; GX 1609; GX 150-T.) T&T Cayman bought television rights for various South American soccer tournaments—including the Copa Libertadores, the Copa Sudamericana, and the Recopa Sudamericana—

⁵ The centerpiece of the Government’s case against Defendants was the testimony of Alejandro Burzaco (“Burzaco”), a cooperating witness who had pleaded guilty in 2015 to multiple offenses relating to his extensive role in various bribery schemes involving the television rights for South American soccer. (*See* Minute Entry for Burzaco Change of Plea Hr’g, Dkt. 90.) Though English is not his first language, Burzaco testified without an interpreter. Burzaco was the only witness who testified about Lopez’s knowledge of, and role in, the Copa Libertadores bribery scheme. Burzaco was on the stand for nearly eleven days. Burzaco was also a key witness in the *Napout* trial in 2017. *See Napout*, 332 F. Supp. 3d at 561 (describing Burzaco as “one of the government’s key witnesses”). While Defendants argue that the jurors could not have credited Burzaco’s testimony, such credibility determinations are for the jury, and not the Court, to make, *United States v. Cote*, 544 F.3d 88 (2d Cir. 2008), and here the jury had ample opportunity to assess Burzaco’s testimony over the course of his eleven days of testimony. For purposes of Defendants’ motions, the Court therefore views Burzaco’s testimony in the light most favorable to the Government. *United States v. Riggi*, 541 F.3d 94, 108 (2d Cir. 2008).

from CONMEBOL and resold them. (Tr. 376:7-8.) Around 2002, T&T Cayman re-negotiated its contract with CONMEBOL and began paying bribes in exchange for rights that were far cheaper than market value and would be “renew[ed] well before they were going to mature to involve any competitor.” (Tr. 391-92; Tr. 332:7-15; 393:10-17.) Each contract securing the rights also included a “macroeconomic clause” requiring T&T Cayman and CONMEBOL to renegotiate the price of the rights in good faith in the event that macroeconomic conditions in the region improved.⁶ (See, e.g., GX 150-T.)

In 2002, Traffic sold its 50% stake in T&T Cayman to Fox Pan-American Sports (“FPAS”), a company comprised of three owners: Liberty Media Corporation (“Liberty Media”), Hicks, Muse, Tate & Furst (“Hicks Muse”), and Fox Sports. (Tr. 380.)⁷ Thus, as of 2002, T&T Cayman was jointly owned by Torneos and FPAS, each with a 50% stake. Burzaco, who had already been involved with T&T Cayman as an adviser “putting together the partners in the FPAS” joint venture in 2001, became Torneos’s CEO in 2006. (Tr. 334:13-15; 347:23-24.) He was informed

⁶ This so-called macroeconomic clause provided: “The parties agree that if, during the term of the agreement, through the 2018 edition, the macroeconomic conditions in the region change substantially from the current conditions (*for these purposes, offers from third-parties are not considered as an improvement*), the parties agree to renegotiate, in good faith, the current financial terms of the agreement.” (GX 154-T (emphasis added).) The italicized portion was added to the macroeconomic clause in 2008.

⁷ Liberty Media subsequently sold its small share to Hicks Muse, leaving Hicks Muse with 62% of FPAS by 2005. (GX 1609.)

of the bribes by his predecessor, Torneos-founder Luis Nofal, in 2004. (Tr. 392:2.)

In 2005, FPAS came to own 75% of T&T Cayman, but retained just 50% of the voting interest, a decision that, according to Burzaco, was intended to limit FPAS's exposure to liability for T&T Cayman's illegal activities. (Tr. 381:12-15.) Starting in 2005, the Copa Libertadores tournament was aired on Fox in all of the Spanish-speaking South and Central American countries, whereas the "two most important matches" of each week were shown in Brazil on a "free-to-air" channel owned by TeleGlobo ("Globo"). (Tr. 383-84.)

From the time FPAS acquired a 75% share of T&T Cayman in 2005, until 2009, the flow of media rights and payments was as follows. T&T Cayman served primarily as a pass-through entity for the rights: it bought the Copa Libertadores rights from CONMEBOL at a relatively low price and resold them at "a very small or insignificant or no margin" to FPAS. (Tr. 385:15-21.) Torneos's core business was producing the tournaments so that T&T Cayman would have a "full finished product" to sell to its clients, principally FPAS. (Tr. 402:23-24.) FPAS bought the fully produced tournaments from T&T Cayman and resold them to other media companies, which aired the tournaments locally. (Tr. 407.) Additionally, although most Spanish-speaking media rights were sold to FPAS, the most valuable matches in Brazil—the two weekly, primetime "free-to-air" matches—were sold by T&T Cayman to another company, T&T Sports Marketing B.V. ("T&T Netherlands"), to be resold at a significant mark-up to Globo. (Tr. 386.) T&T Cayman sold these Brazilian

“free-to-air” rights to T&T Netherlands at an extremely low price—just \$900,000 for rights that T&T Netherlands turned around and sold to Globo for \$7.2 million—as compensation for T&T Netherlands’s small margins, and as a “break fee” for a merger that never occurred between FPAS and Torneos. (Tr. 447-48.) Despite its name, T&T Netherlands did not have any corporate relationship to T&T Cayman, and was not a subsidiary of Torneos. Instead, it was a separate company originally created and wholly owned by Luis Nofal. When Burzaco bought all of Torneos’s shares in 2005, he co-owned T&T Netherlands as a joint venture with Nofal, and came to own it entirely when Nofal passed away in 2008. According to Burzaco, he primarily used the money generated by the sale of the Brazilian “free-to-air” rights to Globo to pay bonuses for Torneos employees, and to pay certain club teams to participate in the tournaments. (Tr. 409, 417-18, 448.)

Meanwhile, from 2005 to 2008, T&T Cayman paid bribes to the “six most relevant executives of CONMEBOL” to secure the Copa Libertadores media rights: Nicolas Leoz (“Leoz”), Ricardo Teixeira (“Teixeira”), Julio Grondona (“Grondona”), Eduardo DeLuca (“DeLuca”), Romer Osuna (“Osuna”), and Eugenio Figueredo (“Figueredo”), using two mechanisms.⁸ (Tr. 393:20-394:3.) First, the largest

⁸ Leoz was President of CONMEBOL, DeLuca was General Secretary, Osuna was Treasurer, and Figueredo was First Vice President. Grondona and Teixeira were included because they were the presidents of the two largest national football associations in CONMEBOL, Argentina and Brazil. (Tr. 393:20-394:3.)

share of the bribes was paid via sham contracts between T&T Cayman and companies called Spoart, Valente, and Somerton (also known as the “Lazaro contracts”) for services that were not actually performed. (Tr. 399, 457.) Second, a smaller portion of bribes were paid out of CONMEBOL’s own treasury. (Tr. 399.) Beginning in 2008, T&T Netherlands also began paying bribes through a contract with Somerton. (Tr. 452.)

Nofal’s close personal relationship with Grondona, President of the Argentine Football Association (“AFA”) and Senior Vice President of FIFA, was crucial to the partnership between T&T Cayman and the CONMEBOL Executive Committee. (Tr. 361-62, 364:1-3.) When Burzaco became CEO of Torneos in 2006, he took “charge of supervising the relationship with ... the CONMEBOL officials,” as well as with Hicks Muse and Fox in their collective management of T&T Cayman. (Tr. 357.) When Nofal became sick, Burzaco stepped into Nofal’s relationship with Grondona, and took “a more active presence” in paying the bribes to the CONMEBOL officials. (Tr. 364, 393:5-7.)

B. The Group of Six

In 2009, the Argentine government pressured Grondona to nationalize the rights, held at the time by Torneos, for Argentina’s first division club soccer league. (Tr. 571-73.) Grondona obliged and terminated Torneos’s rights. (*Id.*) Burzaco, shaken by Torneos’s substantial loss of revenue and worried that the Argentine government would use Grondona’s influence to threaten Torneos’s access to the Copa Libertadores, Copa Sudamericana, and Recopa rights,

took steps to reinforce its claim to those lucrative tournaments. (Tr. 574:23-574:12.) Torneos had not been bribing Grondona for the AFA rights—and understood from a conversation with Grondona one week before the AFA rights were nationalized—that T&T Cayman’s bribes to Grondona for the Copa Libertadores rights could help protect FPAS’s claim to those rights against future threats from the Argentine government. (Tr. 577:19-580:2.) Even so, Burzaco could not be sure that the bribes to Grondona were sufficient to keep the CONMEBOL Executive Committee from nationalizing the Copa Libertadores rights and sought to reinforce T&T Cayman’s claim to the Copa Libertadores rights by establishing a contingency plan. (Tr. 581:21-582:2.) So, in October 2009, Burzaco and Nofal met with Hugo and Mariano Jinkis, the owners of Defendant Full Play, a sports media company, looking for help. (Tr. 582:3-583:17.) The Jinkises had an active bribery scheme with six members of the CONMEBOL Executive Committee, known as the “Group of Six”⁹—a different group than the six CONMEBOL officials that T&T Cayman was already bribing—to maintain Full Play’s access to various World Cup qualifying and friendly matches. (Tr. 585:3-7; 595:1-11.) The Jinkises promised Burzaco and Nofal that they (the Jinkises) would not seek to buy the Copa Libertadores rights, and further “committed to speak with” the Group of Six about establishing a bribe scheme with Torneos, “in order to

⁹ The Group of Six was comprised of Luis Chiriboga (Ecuador), Rafael Esquivel (Venezuela), Luis Bedoya (Colombia), Manuel Burga (Peru), Juan Ángel Napout (Paraguay), and Carlos Chavez (Bolivia). (Tr. 585.)

have six votes out of 10 countries[,]” in case Grondona was pressured by the Argentine government to terminate the Copa Libertadores and Copa Sudamericana rights contracts. (Tr. 595:24-596:3.)

Soon after this meeting with the Jinkises, Rafael Esquivel, President of the Venezuelan Football Association, told Burzaco that this “Group of Six” members felt left out of the bribe payments that Grondona, Leoz, and the others had been receiving, and that the Group of Six “would need to start collecting a bribe.” (Tr. 603:5-13.) Each of these six presidents began receiving \$400,000 per year in 2010 from T&T Cayman. (Tr. 605.) These officials joined the other six CONMEBOL officials—Teixeira, Leoz, Grondona, DeLuca, Osuna, and Figueredo—in receiving bribes from T&T Cayman. (Tr. 619.) Only two CONMEBOL Executive Committee members, Harold Mayne-Nicholls of Chile and Sebastian Bauza of Uruguay, did not receive bribes. (*Id.*)

C. 2009-11: Lopez Joins the Bribery Scheme; Fox Acquires FPAS

Lopez and Burzaco were aware of each other as early as 2003 through Lopez’s indirect involvement with the Copa Libertadores as a senior employee at FIC. (Tr. 524.) In 2008, Lopez and Burzaco began discussing Fox’s plans to acquire Hicks Muse’s share of FPAS. (Tr. 525; *see, e.g.*, GX 1821.) By 2009, Lopez was elevated to FIC’s CEO, and his working relationship with Burzaco grew.

In 2010, Lopez persisted in pursuing FIC’s acquisition of FPAS and launching a Fox Sports channel in Brazil. (Tr. 650.) Lopez and Burzaco met numerous times that year. In February 2010, Lopez

approached Burzaco in the lobby of a Fort Lauderdale hotel and told Burzaco that “after ... so many months already analyzing FPAS, [Lopez determined that] there is some type of special arrangement with [the] executives” and that Burzaco therefore had “to trust [Lopez] because he need[ed] that information to solidify [his and Burzaco’s] relationship together.” (Tr. 651, 652:17-23.) During that conversation, Burzaco disclosed that T&T Cayman was paying bribes to CONMEBOL executives. On cross-examination, Burzaco clarified that he “didn’t ask [Lopez] to be [his] partner” and did not know what Lopez expected to get by joining the scheme. (Tr. 2032:8-10.)

Later that year, while in New York City for a T&T Cayman board meeting, Burzaco told Lopez more about the bribery mechanisms. (Tr. 653:25-654:4.) Lopez “said [the bribes were] benefiting Fox[;] ... that’s why they wanted to buy 100 percent of FPAS.” (Tr. 655:9-10.) In June 2010, Lopez replaced Fox executive David Sternberg as an FPAS-appointed director of T&T Cayman. (Tr. 669:23-670:2.) By December 2010, Lopez was aware of the three mechanisms by which FPAS was paying bribes: (1) by funneling additional bribe money for the Group of Six into the existing CONMEBOL contract; (2) through the Lazaro sham contracts; and (3) most recently, through T&T Netherlands. (Tr. 688-89.) In October 2011, as Fox’s acquisition of FPAS was being finalized, Burzaco informed Grondona of his counterpart at Fox, i.e., Lopez, and conveyed Lopez’s request to Grondona for assistance regarding Fox’s bid for the English-language rights to the 2018 and 2022 World Cups. (Tr. 776, 779:24-781:7.) After Fox’s successful World Cup bid, Lopez asked Burzaco whether he could set up a

meeting with Grondona so that Lopez could thank Grondona personally for his help. (GX 1882-T.)

Fox's acquisition of FPAS was finalized in November 2011. With the acquisition came numerous assurances from Fox executives, including Lopez and his superiors, that Torneos's business with Fox would continue as it had before, or even grow. (GX 2173; Tr. 821-22.) That month, Burzaco met with Lopez and Martinez at a Dean & DeLuca coffee shop near Fox's offices in New York City. (Tr. 815:7-14.) At the meeting, Lopez told Burzaco that Martinez (as head of FIC in Latin America) would be Burzaco's principal point of contact moving forward. (Tr. 841-42.) Lopez also asked Burzaco, now that Fox owned the majority stake of T&T Cayman via FPAS—and in light of Fox's increased vigilance regarding bribery following the "News of the World" scandal in 2011—whether they needed to "tidy up" the bribe-paying mechanisms. (Tr. 816:18-22.) Burzaco identified cleaning up the sham Lazaro contracts as a priority.

D. The October 2012 CONMEBOL Executive Committee Meeting

Throughout 2012, the relationship between Torneos and Fox—and between Burzaco and Martinez—chilled as Burzaco felt that Fox was marginalizing or undermining Torneos. For example, Burzaco rebuffed an e-mail from Martinez that indicated that both Lopez and Martinez wanted Martinez to directly participate in the Copa Libertadores negotiations with CONMEBOL officials, because Burzaco believed that the CONMEBOL officials would look at him as though he was "coming from a different planet" if he included the American

executives in negotiations involving bribes. (Tr. 892, 885:20-25.) In addition, instead of the mutual collaboration and growth between Torneos and Fox that Burzaco had been led to believe would follow Fox's acquisition of FPAS, Fox was actually reducing Torneos's business. For example, after Burzaco relinquished Torneos's exclusive right to produce Fox's soccer broadcasts in Brazil a year earlier—a concession made in exchange for a “promise to produce in other regions and enlarge the number of hours of production” overall—Martinez asked for a second release of exclusivity. (Tr. 868:17-869:19; 922:6-10; 925:4-23; GX 1906-T.) Even worse from Burzaco's perspective, while Fox relied on Burzaco to negotiate a further extension of their below-market-rate Copa Libertadores rights with CONMEBOL, Fox would not commit to automatically renewing its existing service agreements with Torneos—business on which hundreds of Torneos employees' jobs depended. (Tr. 1027:9-10.) To Burzaco, this felt “like a betrayal story.” (Tr. 928:3; GX 1923-T.)

Burzaco also believed that Fox was taking an unreasonable approach to the extension negotiations for the Copa Libertadores rights. CONMEBOL was seeking a price increase on the then-current Copa Libertadores contract pursuant to the macroeconomic clause. While Burzaco saw granting that increase as a given—especially in light of what he believed to be the deflated price T&T Cayman was paying for the rights and their skyrocketing value—Martinez and Lopez were only willing to pay the macroeconomic increase in exchange for an extension of the rights through 2022. (Tr. 982; 1007; 1015.) They also wanted to negotiate a macroeconomic increase that lasted all the

way until 2018, rather than re-negotiating the increase again for the 2016 through 2018 period, as was standard. (Tr. 2192-93.)

Burzaco thought that Fox's unwillingness to grant the macroeconomic increase without the extension opened T&T Cayman up to competition. As of August 2012, most of the bribes were being paid through the Lazaro sham contracts or directly out of CONMEBOL—both of which came primarily from the money FPAS paid for the Copa Libertadores rights. (Tr. 1035.) Therefore, FPAS's desire to keep suppressing the price it was paying also reduced the amount of money available for bribes to the CONMEBOL Executive Committee. At the time, Paco Casal, CEO of the Uruguayan sports media company GolTV, was actively trying to poach T&T Cayman's Copa Libertadores rights by organizing meetings with all of the CONMEBOL executives (Tr. 915-16), outbidding T&T Cayman (Tr. 1074), organizing clubs that felt that they were being shortchanged by CONMEBOL, and threatening legal action. Luis Bedoya, one of the Group of Six, did not want to do business with Casal, even though Casal was offering a much higher price than Fox, because Casal's company, Globo, was having trouble making payments. (Tr. 4720.)¹⁰ Other Uruguayans on the Executive Committee, however, were interested in Casal's overtures, and the clubs who felt that they were being shortchanged by the Fox deal were also putting pressure on CONMEBOL officials to consider Casal's proposals. (*Id.*)

¹⁰ Bedoya was the only CONMEBOL official to testify at trial.

It was in the context of this uncertainty that Burzaco took steps to formulate a “Plan B” in advance of the CONMEBOL Executive Committee meeting (“October 2012 Executive Committee meeting”). Burzaco sought and received approval from Torneos’s board—in particular, Bruce Churchill of DirectTV—for Torneos to guarantee CONMEBOL’s macroeconomic increases from 2013 to 2018, and to secure the 2019-2022 extension for Torneos rather than T&T Cayman. (Tr. 1059-60; 1082.) This would enable Torneos to negotiate with Fox from a stronger position—as the holder of the lucrative Copa Libertadores rights—for Torneos’s crucial service agreements with Fox. (Tr. 1060:5-12.) Burzaco still hoped that “Plan A”—i.e., Fox maintaining the status quo arrangement by either guaranteeing Torneos the service agreements for the 2019-2022 Copa Libertadores rights extension or putting the extension off for later and simply paying the macroeconomic increase CONMEBOL was owed—would work out. However, Burzaco was also prepared to enter the CONMEBOL Executive Committee meeting with a contingency plan, i.e., “Plan B.” (1059:10-1060:12.) Martinez conveyed Fox’s final position just days before the Executive Committee meeting: Fox would “honor the macroeconomic clause” and pay an additional \$77 million between 2013 and 2018, but only if CONMEBOL extended T&T Cayman’s exclusive rights to the Copa Libertadores until 2022. (Tr. 1058.) Fox was silent on whether the service agreements between Fox and Torneos would continue for the 2019-2022 Copa Libertadores rights extension. (Tr. 1057:23-1058:10.)

Burzaco unilaterally put “Plan B” in motion at the October 2012 Executive Committee Meeting. He negotiated the macroeconomic increase at the price permitted by Fox and extended the rights in the name of TyC International, a wholly-owned subsidiary of Torneos. (Tr. 2203.) Burzaco additionally negotiated an agreement for the Copa Libertadores “international rights” (broadcasting rights for the Copa Libertadores outside North and South America), that he believed would strengthen T&T Cayman’s position against outside threats from Paco Casal while also benefiting Fox. (GX 164-T; Tr. 1121-22.) Fox had long desired the Copa Libertadores international rights, but was unable to contract for them with CONMEBOL due to the “automatic” extension Jose Hawilla and Traffic had enjoyed with respect to those rights as a condition of the 2002 sale of Traffic’s share of T&T Cayman to FPAS. Burzaco also explained to the CONMEBOL Executive Committee that Torneos and Full Play would take over international distribution from Traffic and give 70% of the revenues to CONMEBOL. (Tr. 1096; GX 164-T.) Now that Torneos and Full Play were going to assume Traffic’s rights, Burzaco planned to “sit down [with Fox] and ... read all the service agreements” in order “to decide on the territories that Fox [would be] operating internationally outside the Americas with an arm’s length negotiation and give them priority to acquire those rights.” (Tr. 1083:1-6.)¹¹ Despite this plan,

¹¹ On cross-examination, Burzaco reiterated his intention to use the rights extended in Torneos’s name as leverage in subsequent negotiations with Fox:

Burzaco had arranged prior to the October 2012 Executive Committee meeting for DirectTV “to buy the [Copa Libertadores] rights after 2018 in case Fox would [not] pay whatever the necessary price would be.” (Tr. 2210:7-9.) According to Bedoya, even though Torneos was buying the extension, the CONMEBOL Executive Committee expected that the arrangement proposed by Burzaco “was just to keep the situation as it was” while fostering an agreement that would result in Traffic withdrawing a lawsuit it had filed against certain CONMEBOL officers the year prior in Miami. (Tr. 4728-29; Tr. 1185:19-1186:13.) Burzaco and the CONMEBOL officials never discussed whether Fox or

Q: Plan B was that if Fox didn't agree to keep the services agreements the same with Torneos, you were going to take the extension for your company and cut Fox out, right?

A: Incorrect.

Q: That was the plan right?

A: Incorrect.

Q: Well, that's what you did.

A: Incorrect... Incorrect because that you are taking out of the context of everything we did and how we went to the Board and what was our final intention, which is reaching an agreement, extending the service agreements, and that Fox keeps having the very important business of distributing the rights without T&T having a margin[;] ... the Plan B was meant to purchase the rights directly through Torneos to have a stronger negotiating power with Fox, and the same way Fox was using ... the extension request not to honor its obligations under T&T Cayman to award Torneos the service agreements.

(Tr. 2133:15-22, 2133:24-2134:17.)

another company would ultimately broadcast the Copa Libertadores games in the future at the October 2012 Executive Committee meeting. (Tr. 4729.)

Although Burzaco did not extend the rights in the name of T&T Cayman because he felt “betrayed by our partner Fox” and because of his fiduciary duty to Torneos, he always intended to exchange the 2019 to 2022 Copa Libertadores rights for the Torneos service agreements. (Tr. 1102-03.) Both Martinez and Lopez wrote Burzaco the next day, October 25, 2012, to approve the macroeconomic increase after seeing a press release about the agreement. (GX 1952-T.) Burzaco forwarded an email from Martinez approving the macroeconomic increase to other Torneos executives, writing “We are doing well, right? Poker has shown me how to read my enemies ...” (GX 1954-T.) But Burzaco did not actually view Lopez and Martinez as his enemies; rather, he saw them as his “counterparties in a business situation that was taking a hard stance for demanding an extension” in exchange for paying a previously obligated payment. (Tr. 1628.)

It is unclear when exactly Burzaco told Lopez and Martinez that he had extended the rights in Torneos’s name, not T&T Cayman’s. He did not do so in response to Lopez and Martinez’s emails approving the macroeconomic increase because he worried that saying so “in black and white ... would put us at a risk of [a] lawsuit when our final intention was to reach an agreement.” (Tr. 2208:22-24.) Burzaco testified that he informed them at some undefined point in 2013, before November of that year. (Tr. 1111.) In response, Lopez was “annoyed” and “not happy” (Tr. 1111:24, 1113:2-

3.) Martinez did not seem annoyed, and was willing to return to the negotiating table regarding the Copa Libertadores rights and related Torneos service agreement extensions after learning that the rights had been extended under Torneos's name. (Tr. 1112-13.)

E. 2013: Collaborating on the Swap Agreement

Soon after the October 2012 Executive Committee meeting—but before Burzaco's Fox counterparts learned of Torneos's assumption of the Copa Libertadores 2019-2022 rights extension—Burzaco perceived a thaw in their previously chilly relationship. Burzaco, Lopez, and Martinez focused on “cleaning up T&T Cayman” by engineering a so-called “Swap Agreement.” (GX 284-T). First, they cancelled the sham Valente and Somerton contracts, retaining only the agreement with Spoart, which, though also fraudulent, *did* perform some services and was therefore “a more digestible vehicle to have in T&T Cayman books.” (Tr. 1122.) The loss of the Valente and Somerton contracts as bribe-paying vehicles was compensated for by eliminating the \$900,000 payment T&T Netherlands had been making to T&T Cayman for the Brazil free-to-air rights, and using those funds to pay bribes. (*Id.*) Thus, from the time the Swap Agreement was executed until the end of the conspiracy, “a hundred percent of the bribes” were paid through T&T Netherlands. (Tr. 1987:8-11.) Burzaco also collaborated with Lopez regarding Fox's acquisition of Asian soccer rights and assisted Martinez with securing worldwide rights for Fox for the Copa Centenario soccer tournament. (Tr. 1163-65.)

When Traffic initiated a lawsuit in Florida against CONMEBOL and its officers based on CONMEBOL's termination of Traffic's contract for the 2015 Copa América, Burzaco discussed the lawsuit with Lopez since Burzaco thought that the lawsuit increased the risk of American enforcement against their bribery schemes. (Tr. 1186-87.)

In 2013, Burzaco, Martinez, and Lopez began discussing an agreement between Fox and Torneos for transfer of the Copa Libertadores 2019-2022 rights extension to Fox. By November 2013, Burzaco had discussed such an agreement with Martinez. (Tr. 1276:7-11.) Burzaco also discussed his plan to sell the 2019-2022 Copa Libertadores rights to Fox Sports with Eugenio Figueredo, First Vice President of CONMEBOL's Executive Committee. (GX 2000-T; Tr. 393:20-394:3, 1271-75.)

F. 2014-15: Negotiations for the Copa Libertadores 2019-2022 Rights

In the summer of 2014, Grondona passed away, and Juan Ángel Napout became President of CONMEBOL. (Tr. 1315-16.) That September, Lopez—at Burzaco's urging—organized a meeting of Lopez, Burzaco, Martinez, Napout, and Bedoya at a Greek restaurant in Miami Beach. (Tr. 1326-27.) The purpose of the meeting was "restructuring the contractual relationship between CONMEBOL and [T&T Cayman]" to reinforce Torneos and FPAS's relationship with CONMEBOL in the aftermath of Grondona's death. (*Id.*, Tr. 1323:23-25.) They discussed eliminating T&T Cayman from the scheme, such that Fox would pay CONMEBOL directly for the Copa Libertadores rights. (Tr. 1323-24; GX 2024-T;

GX 2041-T.) The Brazil free-to-air rights would continue to be handled as they had been, given by T&T Cayman to T&T Netherlands to be resold to Globo, while the “international rights” would be exploited in the existing partnership between Full Play and Torneos. Burzaco testified that although bribes were not openly discussed at the meeting (Tr. 2281:24-2182:1), they were clearly in the subtext—that is, the Brazilian “free-to-air” rights, which had become so central to the bribe-paying arrangement, would remain intact and fully funded by Fox. (Tr. 1324-25.)

Burzaco spoke with Martinez and Lopez over the phone in advance of this meeting regarding all of these details: eliminating T&T Cayman, allowing FPAS to contract directly with CONMEBOL for the Copa Libertadores rights, and maintaining the T&T Netherlands-Globo arrangement. (Tr. 1327-28.) Burzaco admitted that, at the meeting with Napout and Bedoya, he “was trying [to get] Fox to pay more money closer to market price [for the Copa Libertadores extension rights] but not as much money as possible which would be an infinite amount.” (Tr. 2284 (citing 3500-AB-31A, at 6).) However, Burzaco testified that he did so for the long-term sustainability of the relationship between Torneos, Fox, and CONMEBOL. (Tr. 2285:23-25 (“I thought that this is going to be more sustainable in the long run if Fox pays something closer to market price.”), Tr. 2286:11-12 (“I was trying [to get] Fox to close the deal but not so, not so out of market conditions.”).) During his testimony, Bedoya corroborated that the September 2014 meeting was convened in part to negotiate the rights extensions with Fox. (Tr. 4763-65.)

In January 2015, Martinez met with Burzaco in Buenos Aires to further discuss the audit being conducted by Fox (in the wake of the News of the World scandal) and the restructuring that had been discussed at the September 2014 meeting with Napout and Bedoya in Miami Beach. Martinez was “concerned” because his decision to approve the 2012 “swap agreement” had come under scrutiny during the audit, and another senior Fox executive, Peter Rice, had heard from a Globo executive that the real value of the Globo rights T&T Cayman assigned for free to T&T Netherlands was \$16 million per year. (Tr. 1361, 1365-66.) Martinez represented that the elimination of T&T Cayman was a “must condition” if Fox was to preserve its relationship with Torneos moving forward. (Tr. 1362-63.) Crucially, this new arrangement would allow Fox to “never have to speak about bribes going forward,” because the bribes would all be paid out of T&T Netherlands rather than through a combination of T&T Netherlands and FPAS payments to CONMEBOL. (Tr. 1363:15-16.) T&T Netherlands’s budget would be augmented so that it could pay more bribes: the Copa América rights would be assigned alongside the Brazilian free-to-air rights to T&T Netherlands rather than shared with FPAS. (Tr. 1362-63.) Further, since Torneos would lose its 25% interest in T&T Cayman, Martinez “was willing to extend all the service agreements and even compensate” Torneos as much as \$10 million per year. (Tr. 1361-62.)

In April 2015, Burzaco met Lopez and Martinez at a hotel in the Bahamas, where a CONCACAF meeting was to occur. At the time, Burzaco thought that Lopez might “be a cooperator of the Government in some sort

of sense.” (Tr. 3305:17-20 (Burzaco: “I was seeing a cooperator or someone recording me in many places.”).) After hearing for months about mounting corruption investigations, including being questioned as a possible “mole” by FIFA official Jeffrey Webb, Burzaco “was suspicious of many people at the same time.” (Tr. 3306:1-2.) On May 14, 2015, Martinez sent Burzaco a draft contract for the 2019-2022 Copa Libertadores rights that reflected their earlier negotiations, including (1) Fox contracting directly with CONMEBOL for the Copa Libertadores media rights, (2) reasonable production service terms for Torneos, and (3) re-assignment of the “international rights” for the Copa Libertadores from Traffic to Torneos. (GX 2100-T; Tr. 1386-88.)

G. Government’s Evidence Regarding Source of Fiduciary Duty

The Government’s theory as to the source of the CONMEBOL executives’ fiduciary duty to CONMEBOL is that they were bound by the FIFA Code of Ethics and the later-enacted CONMEBOL Code of Ethics not to accept bribes. (Tr. 7214:23-7215:16.) Lara Sian Elliott, legal counsel at FIFA, testified that, according to the August 2010 FIFA Statutes, CONMEBOL officials were bound by FIFA’s Code of Ethics, which was regularly revised and re-issued. (Tr. 269-272, 273:17-19; 276:7-9; 287:5-288:6; GX 1265.)¹² The 2004 FIFA Code of Ethics (“2004

¹² The August 2010 FIFA Statutes provide in relevant part that “[t]he bodies and Officials must observe the Statutes, regulations, decisions and Code of Ethics of FIFA in their activities” (Art. 7.1); that FIFA members must “ensure that their own members comply with the Statutes, regulations, directives, and decisions

FIFA Code”) was disseminated to FIFA member associations and confederations in November of that year. (Tr. 288:9-24; GX 1215.) Specifically, the 2004 FIFA Code established that “[o]fficials and members of bodies shall discharge their duties especially, with regard to FIFA, its associations and the confederations, with[] absolute loyalty,” and explicitly prohibited “[p]ersons bound by [the] code” from accepting bribes “or any other benefit in return for violating their duties in the interest of third-parties.” (Tr. 288:9-290:21; 291:2-9; 292:21-292:5; GX 1215.) The 2006, 2009, and 2012 FIFA Codes of Ethics were also disseminated with the same provisions mandating the officials’ loyalty to FIFA and the confederations, and prohibiting bribery (Tr. 293:2-294:24; 297:21-299:1; 314:20-315:6; GX 1224-26), and the more general FIFA Code of Conduct promulgated in 2012 outlined a “zero tolerance” policy for bribery. (Tr. 295:1-297:20; GX 1223.)

The Government also introduced evidence that CONMEBOL officials were aware that they were bound by the FIFA Codes of Ethics. Luis Bedoya testified that he began receiving the FIFA Code of Ethics from the time he became president of the Colombian Federation of Soccer (“CFS”) in 2006, and that he had a duty to FIFA, CONMEBOL, and the CFS to comply with the code and not to accept bribes. (Tr. 4669:1-25; 4868:13-4869:16; 5036:13-24.) Bedoya also testified that CONMEBOL first promulgated a

of FIFA bodies” (Art. 13.1(d)); and that each confederation, including CONMEBOL (Art. 20.1(a)), must “comply with and enforce compliance with the Statutes, regulations and decisions of FIFA” (Art. 20.3). (GX 1265.)

code of ethics, which included in relevant part: (1) a duty of “absolute loyalty” to “CONMEBOL, FIFA, the confederations, the associations, the leagues and the clubs,” (2) a prohibition against conflicts of interest, and (3) prohibited CONMEBOL officials from accepting gifts, money, or bribes of any kind, in December 2013.¹³ (Tr. 4870:3-4876:24; 5038:2-5041:12; GX 1310-T.)

H. Jury Charge Regarding Honest Services Fraud

At Defendants’ trial, the Court instructed the jury regarding honest services fraud, in relevant part, as follows:

I will now define wire fraud, which is alleged to be the object of the conspiracies charged in Counts One, Three, and Five of the Indictment. The federal wire fraud statute, Title 18, United States Code, Section 1343 provides that:

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

¹³ The Court recognizes that CONMEBOL’s code of ethics was promulgated after the occurrence of many of the scheme’s major events. (*See* Full Play Mot., Dkt. 1946-1, at 5 (“The [G]overnment introduced evidence regarding the existence of a CONMEBOL Code of Ethics, which was adopted in December 2013 ... By this time, all three contracts to which Full Play Group is a signatory with CONMEBOL had been executed.”); Tr. 5040:25-5041:12.)

interstate or foreign commerce, any writings, signals, pictures or sounds for the purpose of executing such scheme or artifice shall be [guilty of a crime].

The term “scheme or artifice to defraud” includes a scheme or artifice to deprive another of the intangible right of honest services. Honest services fraud is limited to schemes involving bribes or kickbacks. These laws were passed by Congress to protect against the various fraudulent schemes that could be devised by individuals through the use of interstate wires.

....

I will now explain further each element of wire fraud.

First Element: Scheme or Artifice to Defraud

The first element of wire fraud is that the Defendant knowingly devised or participated in a scheme or artifice to defraud FIFA, CONCACAF, CONMEBOL, or their constituent organizations, as specified in the relevant charge, of their intangible right of honest services by means of false or fraudulent pretenses, representations, or promises. A “scheme” is any plan or course of action formed with the intent to accomplish some purpose. Thus, to find each Defendant guilty of this offense, you must find that the Defendant was involved in a fraudulent scheme to deprive the victim soccer organization of honest services through bribes or kickbacks. *In this case, the*

Government has alleged that the various soccer organizations, including FIFA, CONMEBOL, and CONCACAF, and their constituent organizations, were deprived of their intangible right to the honest services of their officials through bribes or kickbacks. Therefore, the Government must prove that a defendant was involved in a fraudulent scheme to deprive these organizations of honest services through bribes or kickbacks.

“Fraud” is a general term that embraces all the various means that human ingenuity can devise and that are resorted to by an individual to gain an advantage over another by false pretenses, suggestions, or suppression of the truth. Such a scheme includes one to defraud the soccer organization by an officer, employee, or person in a relationship that gives rise to a fiduciary duty, that is, where the person owes a duty of honest and loyal service to the soccer organization; in other words, where there is a trusting relationship in which the person acts for the benefit of the soccer organization and the organization relied on the individual to carry out his or her job duties for the benefit of the organization. Whether each soccer official had a fiduciary duty to a soccer organization, the source of that fiduciary duty, and what that fiduciary duty required or prohibited, is a question of fact for you to determine. In 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. In determining the source and scope of a fiduciary duty, you may not take into consideration general moral or ethical beliefs.

The Government argues that the Defendants in this case knowingly and intentionally engaged in schemes to have soccer officials breach their fiduciary duties to FIFA and other specified soccer organizations through the distribution and payment (by Defendants) and the receipt (by the soccer officials) of bribes or kickbacks. Bribery and kickbacks involve the exchange of a thing or things of value for official action by an official, in other words, a quid pro quo (a Latin phrase meaning “this for that” or “these for those”). Bribery and kickbacks also include offers and solicitations of things of value in exchange for official action. Bribery and kickbacks also include the official’s acceptance, solicitation, or agreement to accept a thing of value in exchange for official action, regardless of whether or not the payor actually provides the thing of value, and regardless of whether or not the official ultimately performs the official action or intends to do so.

....

Second Element: Participation in Scheme with Intent

The second element of wire fraud is that the Defendant devised or participated in the scheme knowingly and with specific intent to defraud. The definitions of knowingly and

intentionally here are the same as the definitions that I gave you earlier. As I said before, the terms “knowingly” and “intentionally” are distinct and essential elements under the law.

“Intent to defraud” means to act knowingly and with the specific intent to deceive, for the purpose of depriving the soccer organization or organizations of their right to the honest services of their officials—i.e., their right to the official’s faithful performance of his or her fiduciary duties to the organization, including the duty to not accept personal payments in exchange for official acts on behalf of the organization. The Government need not prove that the Defendant intended to cause economic or pecuniary harm or that any such harm actually resulted from the fraud. Whether a person acted knowingly, intentionally, and with intent to defraud is a question of fact for you to determine, like any other fact question. The question involves one’s state of mind.

Direct proof of knowledge and fraudulent intent is almost never available. It would be a rare case where it could be shown that a person wrote or stated that as of a given time in the past he or she committed an act with fraudulent intent. Such direct proof is not required.

....

(Dkt. 1963, at 36-38, 41 (emphases added).)

V. Verdict

At the close of the trial, the jury deliberated for four days, returning a verdict on March 9, 2023, that convicted Full Play and Lopez on all counts and acquitted Martinez on all counts. (3/9/2023 Minute Entry; Verdict Sheet, Dkt. 1964.) Specifically, the jury found Full Play guilty of wire fraud conspiracy and money laundering conspiracy related to the Copa Libertadores, Copa América, and World Cup Qualifiers/Friendlies Schemes, and Lopez guilty of wire fraud conspiracy and money laundering conspiracy related to the Copa Libertadores #2 Scheme. (Verdict Sheet, Dkt. 1964.)

VI. Full Play's and Lopez's Rule 29 Motions

On February 23, 2023, Full Play moved for a judgment of acquittal pursuant to Rule 29. (Full Play Mot. for Acquittal ("Full Play Mot."), Dkt. 1946.) On April 21, 2023, Lopez filed his Rule 29 motion for acquittal. (Def. Hernan Lopez Mot. for J. of Acquittal ("Lopez Mot."), Dkt. 1987.) In addition to a judgment of acquittal, Lopez requests a "conditional" grant of a new trial in the event the Court grants his Rule 29 motion and the acquittal is later vacated or reversed. (Lopez Mot., Dkt. 1987-1, at 18.) The Government filed an omnibus memorandum in opposition to both Defendants' Rule 29 motions on June 2, 2023. (Govt.'s Mem. Opp'n to Defs.' Mots. for J. of Acquittal ("Govt. Opp'n"), Dkt. 1999.) Defendants filed their reply briefs on June 16, 2023. (Def. Hernan Lopez's Reply ("Lopez Reply"), Dkt. 2002; Reply Mem. on Behalf of Def. Full Play Group ("Full Play Reply"), Dkt. 2003.)

LEGAL STANDARD

Federal Rule of Criminal Procedure 29 requires the Court to “enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction.” Fed. R. Crim. P. 29(a). “The test for sufficiency ... is whether a rational jury could conclude beyond a reasonable doubt that a defendant is guilty of the crime charged.” *Eppolito*, 543 F.3d at 45 (quotation omitted). The Court must make this determination viewing “the evidence against a particular defendant in a light that is most favorable to the government ... and with all reasonable inferences ... resolved in favor of the government.” *Id.*

Defendants challenging the sufficiency of the evidence after they were convicted “face a heavy burden, as the standard of review is exceedingly deferential to the jury’s apparent determinations.” *United States v. Khalupsky*, 5 F.4th 279, 287 (2d Cir. 2021) (quoting *United States v. Flores*, 945 F.3d 687, 710 (2d Cir. 2019). “It is well established that the government is entitled to prove its case solely through circumstantial evidence; and when the offense at issue is conspiracy, deference to the jury’s findings is especially important ... because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court.” *Flores*, 945 F.3d at 710 (internal citations and quotations omitted). Still, a court reviewing a Rule 29 motion “must also be satisfied that the inferences are sufficiently supported to permit a rational juror to find that [each] element ... is established beyond a reasonable doubt.” *United States v. Triumph Cap. Grp., Inc.*, 544 F.3d 149, 159 (2d Cir.

2008). “[I]t is the task of the jury, not the court, to choose among competing inferences that can be drawn from the evidence.” *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003).

“It is also well established that it is the province of the jury and not of the court to determine whether a witness who may have been inaccurate, contradictory and even untruthful in some respects was nonetheless entirely *credible in the essentials* of his testimony.” *Flores*, 945 F.3d at 710-11 (internal citation and quotation omitted) (emphasis in original). “A jury is entitled to believe part and disbelieve part of the testimony of any given witness.” *Id.* (collecting cases). “All issues of credibility, including the credibility of a cooperating witness, must be resolved in favor of the jury’s verdict.” *Riggi*, 541 F.3d at 108. Ultimately, the Court must “uphold the challenged convictions if *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Khalupsky*, 5 F.4th at 287-88 (quoting *Flores*, 945 F.3d at 710).

DISCUSSION

I. There Was Insufficient Evidence to Convict Defendants Because § 1346 Does Not Encompass Foreign Commercial Bribery

Lopez argues that after the Supreme Court’s decisions in *Percoco* and *Ciminelli*,¹⁴ this Court must hold that § 1346’s scope does not extend to foreign

¹⁴ *Percoco v. United States*, 598 U.S. 319 (2023); *Ciminelli v. United States*, 598 U.S. 306 (2023).

commercial bribery.¹⁵ (See Lopez Reply, Dkt. 2002, at 2-6.) After extensive consideration, the Court agrees. The Supreme Court’s latest wire fraud decisions—especially *Percoco*—and the absence of precedent applying honest services wire fraud to foreign commercial bribery, requires this Court to find that § 1346 does not criminalize the conduct alleged in this case and that therefore the evidence at trial was insufficient to sustain Defendants’ convictions under that statute.

¹⁵ Importantly, the Court does not construe this argument as a “vagueness” challenge, which as the Government correctly points out is not procedurally proper in a Rule 29 motion. (Govt. Opp’n, Dkt. 1999, at 38 (citing *United States v. Kelly*, 609 F. Supp. 3d 85, 138 (E.D.N.Y. 2022)).) Although Lopez framed this argument in his opening Rule 29 brief as such (*see* Lopez Mot., Dkt. 1987-1, at 10 (“At a minimum, interpreting § 1346 to encompass commercial bribery of foreign residents employed by foreign organizations would render the statute unconstitutionally vague.”)), Defendants’ opening briefs were filed before the Supreme Court’s decisions in *Percoco* and *Ciminelli*. (*See* Dkts. 1987-1 (filed April 21, 2023), 1946-1 (filed February 23, 2023); *Percoco*, 598 U.S. 319 (issued May 11, 2023); *Ciminelli*, 598 U.S. 306 (issued May 11, 2023).) Indeed, Lopez predicted that the *Percoco* decision would likely affect the outcome of his motion. (*See* Lopez Mot., Dkt. 1987-1, at 11.) The Court does find that *Percoco* and *Ciminelli* create the basis for sufficiency-of-the-evidence challenges that are properly addressed in a Rule 29 motion. *See United States v. Nordlicht*, No. 16-CR-640 (BMC), 2023 WL 4490615, at *6 (E.D.N.Y. July 12, 2023) (“The Court grants this motion under Rule 29 rather than Rule 33 because it concludes, in light of *Ciminelli*, that the evidence at [the trial] was insufficient to sustain [the defendants’] convictions for conspiracy to commit wire fraud.”).

A. The History of § 1346 is Devoid of Foreign Commercial Bribery

1. Pre-*McNally* (pre-1987)

“Before 1987, ‘all Courts of Appeals had embraced’ the view that” [the federal wire and mail fraud statutes] proscribe what came to be known as ‘honest services fraud.’” *Percoco*, 598 U.S. at 326 (quoting *Skilling v. United States*, 561 U.S. 358, 401 (2010)). The majority of these pre-1987 honest services cases involved public employees who “had accepted a bribe or kickback in exchange for dishonest conduct that did not necessarily cause ... a financial loss[,]” but “was found to constitute mail or wire fraud because it deprived the relevant government unit (and thus, by extension, the public) of the right to receive honest services.” *Id.*

2. *McNally* (1987) and § 1346’s Enactment (1988)

But in 1987, the Supreme Court “rejected the entire concept of honest-services fraud” in *McNally v. United States* and held that the mail fraud statute was “limited in scope to the protection of property rights.” *Id.* at 327 (citing *McNally v. United States*, 483 U.S. 350 (1987)).¹⁶ “Congress responded swiftly” by passing

¹⁶ In *McNally*, a state public official, Howard P. “Sonny” Hunt, who exercised *de facto* control over selecting the state’s insurance agent, devised a scheme with an insurance agent whereby the agent shared its commissions with insurance agencies selected by Hunt, including one company which was owned partially by Hunt. 483 U.S. at 352-53. As a result of this self-dealing scheme, Hunt, along with the other co-conspirators, were convicted of substantive mail fraud, based on the theory that § 1341, the “mail fraud statute[,] proscribes schemes to defraud citizens of their

18 U.S.C. § 1346, clarifying that the term “scheme or artifice to defraud” in the mail fraud statute, 18 U.S.C. § 1341, and wire fraud statute, 18 U.S.C. § 1343, *did* include “a scheme or artifice to deprive another of the intangible right of honest services.” *Skilling*, 561 U.S. at 402 (citing 18 U.S.C. § 1346). However, Congress did not define or elaborate on what the “intangible right of honest services” encompassed and thus the doctrine’s scope remained ambiguous. *See Kelly v. United States*, 140 S. Ct. 1565, 1571 (2020) (explaining that “the vagueness of th[e] language” in § 1346 compelled the Supreme Court to adopt a subsequent “limiting construction” to preserve its constitutionality); *Percoco*, 598 U.S. at 333 (“Honest-services fraud and this Court’s vagueness jurisprudence are old friends.”) (Gorsuch, J., concurring).

intangible rights to honest and impartial government.” *Id.* at 355. The Sixth Circuit affirmed the conviction, holding “that Hunt [had a] fiduciary [duty as a public official to the public] because he ‘substantially participated in governmental affairs and exercised significant, if not exclusive, control over awarding the workmen’s compensation insurance contract to [the insurance agent] and the payment of monetary kickbacks to [Hunt and McNally’s company].’” *Id.* at 355-56 (citation omitted). The Supreme Court reversed, reasoning, in part, that “[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government.” *Id.* at 356. Ultimately, the Court concluded, “[r]ather than construe the [mail fraud] statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials, we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has.” *Id.* at 360.

3. *Skilling* (2010)

In *Skilling*, the Supreme Court addressed whether § 1346 was unconstitutionally vague. A six-Justice majority held that the statute could be “salvaged” by limiting its scope to “criminalize[] only the bribe-and-kickback core of the pre-*McNally* case law.” 561 U.S. at 408-09.¹⁷ In doing so, the Court specifically rejected the government’s proposal to include “undisclosed self-dealing by a public official or private employee” in the honest services doctrine—despite the existence of pre-*McNally* cases upholding the theory. *Skilling*, 561 U.S. at 409-10; *see also id.* (noting that “the Government asserts, ‘the pre-*McNally* cases involving undisclosed self-dealing were abundant’” (citing Br. for United States 2930-31)). The Court reasoned that to meet the constitutional

¹⁷ *Skilling* involved an alleged honest services wire fraud conspiracy by Enron Corporation’s (“Enron”) chief executive officer Jeffrey Skilling and others to prop up Enron’s stock prices by overstating the company’s financial health via public reports. The indictment in *Skilling* alleged, *inter alia*, that the defendants had “engaged in a wide-ranging scheme to deceive the investing public, including Enron’s shareholders, ... about the true performance of Enron’s businesses by: (a) manipulating Enron’s publicly reported financial results; [] (b) making public statements and representations about Enron’s financial performance and results that were false and misleading”; and (c) that “Skilling and his co-conspirators, ... [had] ‘enriched themselves as a result of the scheme through salary, bonuses, grants of stock and stock options, other profits, and prestige’”; and lastly, (d) that “Skilling had sought to ‘depriv[e] Enron and its shareholders of the intangible right of [his] honest services.’” 561 U.S. at 369 (internal citations omitted). The Supreme Court held that “[b]ecause Skilling’s alleged misconduct entailed no bribe or kickback, it does not fall within § 1346’s proscription.” *Id.* at 368.

requirements of due process, § 1346 could not include the “amorphous category” of non-disclosure cases because the lower courts “had reached no consensus on which [non-disclosure] schemes qualified.” *Id.* at 410. Moreover, “the familiar principle” in which “ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity” reinforced excluding the non-disclosure schemes from § 1346’s scope. *Id.* at 410-11 (quoting *Cleveland v. United States*, 531 U.S. 12, 25 (2000)). The majority then famously pronounced: “As to fair notice, whatever the school of thought concerning the scope and meaning of § 1346, it has always been as plain as a pikestaff that bribes and kickbacks constitute honest-services fraud[.]” *Id.* at 412 (citation and quotation marks omitted).

Justice Scalia, writing for three Justices in a concurrence, forcefully disagreed that limiting § 1346 to only bribery and kickback schemes would cure the statute of vagueness. *See id.* at 415-25 (Scalia, J., concurring). Specifically, he cautioned that merely clarifying “what *acts* constitute a breach of the ‘honest services’ obligation under the pre-*McNally* law” did not “solve the most fundamental indeterminacy: the *character* of the ‘fiduciary capacity’ to which the bribery and kickback restriction applies.” *Id.* at 421 (Scalia, J., concurring) (emphasis added). The majority rejected his concerns, explaining that “[t]he existence of a fiduciary relationship [in pre-*McNally* bribery and kickback cases] ... was usually beyond dispute” and further, provided the following examples of such relationships: public officials to the public, employees to employers, and union officials to union members. *Id.* at 407, n.41.

4. *Bahel* (2011)

Immediately after *Skilling*, the Second Circuit addressed a challenge to § 1346 determining whether “honest services fraud is effectively limited to the identity of the actors prosecuted in the pre-*McNally* caselaw.” *Bahel*, 662 F.3d at 632. As previously discussed, in *Bahel*, the defendant-appellant, Sanjaya Bahel, argued that “Section 1346 c[ould] not apply to foreign employees of the U.N.... [because in pre-*McNally* jurisprudence,] Section 1346 ha[d] only been applied to government or private sector employees, not employees of international organizations ... [and] th[erefore] he, as a foreign national, c[ould] not be prosecuted for honest services fraud under Section 1346.” *Id.* at 632. The Second Circuit rejected this argument, ruling that § 1346 is limited by “the *nature of the offenses* prosecuted in the pre-*McNally* cases (i.e., bribery and kickback schemes)—not the *identity of the actors* involved in those cases.” *Id.* (emphasis added). Thus, “on the facts of th[e] case,” § 1346 covered Bahel’s conduct because his kickback scheme “f[ell] firmly within the ambit of the *type of conduct* that violates the right to honest services[.]” *Id.* at 633 (emphasis added).

Bahel also pointed to *United States v. Giffen*, in which a U.S. citizen was charged with honest services fraud for bribing a Kazakhstani government official and thus depriving Kazakh citizens of their government’s honest services. *Id.* at 632 (citing *United States v. Giffen*, 326 F. Supp. 2d 497 (S.D.N.Y. 2004)). In *Giffen*, the district court dismissed the honest service charges because there was a “total absence of ... precedent supporting the Government’s *overseas*

application of the intangible rights theory.” *Id.* (emphasis added) (quoting *Giffen*, 326 F. Supp. 2d at 506). But the *Bahel* panel distinguished *Giffen*’s holding, explaining that unlike in *Giffen*, “the conduct at issue in [*Bahel*] took place within the territorial United States, and the victim was—not a foreign government’s citizen—but the United Nations, an organization headquartered in the United States, entitled to defendant’s honest services in the United States, and [that] receiv[ed] its largest financial contributions from the United States.” *Id.*

5. *Napout* (2020)

Closer to home and more recently, the defendants in the 2017 trial in this case challenged their honest services wire fraud convictions before the Second Circuit, arguing that (1) § 1346 could not be applied extraterritorially; and (2) that the statute was unconstitutionally vague as applied to them. *See Napout*, 963 F.3d at 178 (“On appeal, the appellants principally contend that their convictions for conspiracy to commit honest services wire fraud were based upon impermissible extraterritorial applications of the wire fraud conspiracy statute.”); *id.* at 181 (“The appellants next contend that § 1346 is unconstitutionally vague as applied to them.”). Regarding the first question, the Second Circuit, in affirming this Court, held that § 1346’s extraterritorial application was permissible as long as the appellant-defendants used the domestic wires “*in furtherance of a scheme to defraud*,” and moreover, that the wire usage was “essential, rather than merely incidental” to the scheme. *Id.* at 180 (citing *Bascuñán v. Elsaca*, 927 F.3d 108, 122 (2d Cir. 2019)).

Accordingly, the *Napout* panel determined that § 1346 was appropriately applied to appellant-defendants' scheme because the "use of wires in the United States ... was integral to the transmission of the bribes [at] issue" based on sufficient trial evidence showing the bribe payments were "generated by wire transfers originating in the United States" and received in U.S. bank accounts. *Id.* at 181.

The Second Circuit then turned to the question of whether § 1346 was unconstitutionally vague as applied to the appellant-defendants, who contended that there was a lack of "fair notice" that the fiduciary duty they, as foreign employees, owed to their foreign employers, FIFA and CONMEBOL, could qualify as a 'source of the fiduciary obligation,' whose breach ... would constitute honest services wire fraud." *Id.* at 181 (internal citation omitted). The Circuit did not resolve the question on the merits, but rather only reviewed the issue for plain error because the appellants had not presented their vagueness challenge below. *Id.* at 181-83.

To analyze clear error, the Circuit had to determine if appellants-defendant' operative legal question was "settled" enough for an erroneous application of the law to be "clear." *See id.* at 183 ("Our decision here is determined by application of plain error's second requirement: that 'for an error to be plain, it must, at a minimum, be clear under current law,' which means that 'we typically will not find such error where the operative legal question is unsettled, including where there is no binding precedent from the Supreme Court or this Court.'") (brackets omitted) (quoting *United States v. Whab*, 355 F.3d 155, 158 (2d

Cir. 2004)). That is, the Circuit had to determine if there was any Supreme Court or Second Circuit precedent that clearly answered the question: does § 1346 encompass foreign commercial bribery? The Second Circuit concluded that there was not. Indeed, the panel expressly found 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.*” *Id.* at 184 (emphasis added); *see also id.* at 183 (“There are undoubtedly ‘lingering ambiguities in § 1346,’ ... including questions as to what may serve as ‘the *source* of the fiduciary obligation’ that can sustain a conviction under the statute.” (quoting *Skilling*, 561 U.S. at 417 (Scalia, J., concurring))); *id.* at 184 (explaining that neither the panel nor the appellants had found any “authority directly supporting their position”).¹⁸ Accordingly, the *Napout* panel held that “because it is not ‘clear under current law,’ that § 1346 is unconstitutionally vague as applied to the appellants, the district court did not commit plain error in concluding that it is not.”¹⁹ *Id.* at 184.

¹⁸ Although not relevant to the Court’s analysis of Defendants’ Rule 29 motions, the Court notes the paradoxical outcome when plain error review is applied to previously unraised vagueness challenges. The practical effect appears to be that courts of appeals can avoid analyzing whether a law is unconstitutionally vague precisely because that law is too vague to review for clear error.

¹⁹ The Court notes that the panel’s reference to the Court “concluding” that § 1346 was not unconstitutionally vague is a bit of a misnomer, since that issue was not before the Court in the trial proceedings below. *See Napout*, 963 F.3d at 182 (panel

The late Second Circuit Judge Peter W. Hall, who was on the *Napout* panel, concurred to add that he would “hold that § 1346 encompasses the duty that existed between the [appellant- defendants] and their employers, FIFA and CONMEBOL” because “the heart of the fiduciary relationship [is] reliance, and de facto control and dominance[.]” *id.* at 191 (quoting *United States v. Halloran*, 821 F.3d 321, 338 (2d Cir. 2016)), and such “characteristics are obviously inherent in employer-employee relationships—including the relationships in this case.” *Id.* (Hall, J., concurring). In response, the majority explicitly noted that “[t]he filing of the concurrence should not be construed as disagreement by the other panel members with the analysis contained therein, but rather reflects their view that the issue need not be addressed under the plain error review in which we engage.” *Id.* at 184 n.19. Thus, the Second Circuit did not address the merits of whether § 1346 encompasses foreign commercial bribery in *Napout*.

6. *Ciminelli* and *Percoco* (2023)

On May 11, 2023, after Defendants’ opening Rule 29 briefs had been filed—but before the Government’s opposition—the Supreme Court issued *Ciminelli* and *Percoco*, both stemming from Second Circuit affirmances of wire fraud convictions and both addressing the scope of the federal wire fraud statutes. The Supreme Court reversed and remanded in both cases. *See Ciminelli*, 598 U.S. at 317; *Percoco*, 598 U.S. at 333.

agreeing with Government that “*Napout* did not raise his vagueness challenge in the district court”).

a. *Ciminelli* rejects the longstanding “right-to-control” theory under § 1343.

In *Ciminelli*, the Supreme Court struck down “the Second Circuit’s longstanding ‘right to control’ theory of fraud,” in which “a defendant is guilty of wire fraud if he schemes to deprive the victim of ‘potentially valuable economic information’ ‘necessary to make discretionary economic decisions.’” 598 U.S. at 308-09 (quoting *United States v. Percoco*, 13 F.4th 158, 170 (2d Cir. 2021)). In the underlying case, the defendant, Louis Ciminelli (“Ciminelli”), paid an associate of former New York Governor Andrew Cuomo hundreds of thousands of dollars annually to obtain state-funded contracts for Ciminelli’s construction company, LPCiminelli. *Id.* at 309-10. As a result of the scheme, the nonprofit that was administering Cuomo’s “Buffalo Billions” initiative, Fort Schuyler Management Corporation, awarded LPCiminelli “the marquee \$750 million ‘Riverbend project’ in Buffalo.” *Id.* at 310. Ultimately, Ciminelli and several others were indicted by a federal grand jury on 18 counts, including wire fraud in violation of 18 U.S.C. § 1343 and conspiracy to commit wire fraud in violation of 18 U.S.C. § 1349. *Id.* The district court instructed the jury, pursuant to the right-to-control theory, that “the term ‘property’ in § 1343 ‘includes intangible interests such as the right to control the use of one’s assets.’” *Id.* at 311 (internal citation omitted). That is, the “jury could ... find that [Ciminelli] harmed Fort Schuyler’s right to control its assets if Fort Schuyler was ‘deprived of potentially valuable economic information that it would consider valuable in deciding how to use its assets.’” *Id.* (citation omitted). The jury found

Ciminelli guilty of wire fraud and conspiracy to commit wire fraud, and the Second Circuit affirmed relying solely on the right-to-control theory. *Id.*

On review, the Supreme Court reversed the conviction, holding that “[the] so-called ‘right to control’ is not an interest that has ‘long been recognized as property’ when the wire fraud statute [§ 1343] was enacted.” *Id.* at 314 (quoting *Carpenter v. United States*, 484 U.S. 19, 26 (1987)). The Court further criticized the theory for “vastly expand[ing] federal jurisdiction without statutory authorization.” *Id.* at 315. In its rebuke, the Court repeatedly underscored its previous “admonition that ‘[f]ederal prosecutors may not use property fraud statutes to set standards of disclosure and good government for state and local officials” and further cautioned against “criminaliz[ing] traditionally civil matters and federaliz[ing] traditionally state matters.” *Id.* at 316 (quoting *Kelly*, 140 S. Ct. at 1574); *see also id.* at 315-16 (“The theory thus makes a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law—in flat contradiction with our caution that, ‘absent a clear statement by Congress,’ courts should ‘not read the mail and wire fraud statutes to place under federal superintendence a vast array of conduct traditionally policed by the States.’” (brackets omitted) (quoting *Cleveland*, 531 U.S. at 27)); *id.* at 312 (“[T]he fraud statutes do not vest a general power in ‘the Federal Government ... to enforce (its view of) integrity in broad swaths of state and local policymaking.’” (quoting *Kelly*, 140 S. Ct. at 1574)).

b. *Percoco* instructs that a “smattering” of pre-*McNally* cases is insufficient to validate an honest services fraud theory.

On the same day, the Supreme Court issued its decision in *Percoco*, addressing “whether a private citizen with influence over government decision-making can be convicted for [honest services] wire fraud on the theory that he or she deprived the public of its ‘intangible right of honest services.’” 598 U.S. at 322 (citing 18 U.S.C. §§ 1343, 1346). In the underlying case, Joseph Percoco (“Percoco”), former-Governor Cuomo’s longtime Executive Deputy Secretary, was charged with, *inter alia*, two counts of conspiring to commit honest services wire fraud in connection with actions he took during an eight-month “hiatus” from his government position. *See id.* at 322-23. The scheme began in July 2014, when Empire State Development (“ESD”), a state agency, informed Steven Aiello that his real-estate company was required to enter an expensive “Labor Peace Agreement” with local unions in order to receive state funding for a lucrative project. *Id.* at 323. “Aiello reached out to Percoco through an intermediary so that Percoco could ‘help [him] with th[e] issue[.]’” *Id.* (citation omitted). Percoco agreed to help and Aiello’s company paid him \$35,000 between August and October 2014. *Id.* On December 3, 2014, “mere days” before rejoining Governor Cuomo’s office, Percoco “called a senior official at ESD and urged him to drop the labor-peace requirement.” *Id.* The very next day, ESD dropped the requirement and informed Aiello that the labor-peace agreement was no longer necessary. *Id.*

At Percoco's trial, the jury was instructed that Percoco could be found guilty of depriving the public of the honest services of its officials if the jury concluded that Percoco "dominated and controlled any governmental business" and that "people working in the government actually relied on him because of a special relationship he had with the government." *Id.* at 324-25 (citation omitted). The jury convicted Percoco of the honest services wire fraud charges and the Second Circuit affirmed on appeal, explaining that "the 'fiduciary-duty [jury] instruction' given by the trial judge 'fi[t] comfortably' with, and in fact restated, the understanding of honest-services fraud that the Second Circuit had adopted many years earlier in *United States v. Margiotta*, 688 F.2d 108 (1982)"—a pre-*McNally* case. *Id.* at 325 (citing *Percoco*, 13 F.4th at 194).

In Percoco's petition to the Supreme Court, he argued that "a private citizen cannot be convicted of depriving the public of honest services." *Id.* at 329. But the Supreme Court declined to adopt such a broad, *per se* rule, reasoning that a private individual *can* "enter into agreements that make them agents of the government," who would then "owe[] a fiduciary obligation to the principal[.]" *Id.* at 329-30. Nevertheless, the Court reversed Percoco's conviction, finding that the *Margiotta* standard and thus the trial court's jury instructions were unconstitutionally vague. *See id.* at 330 ("Percoco challenges the *Margiotta* theory that underlay the jury instructions in this case, and we must therefore decide whether those instructions are correct. We hold that they are not."). As discussed, *Margiotta*, and consequently the *Percoco* jury instructions, defined the test for when a

private individual owes a fiduciary duty to the public as follows: Percoco “owed a duty of honest services to the public if (1) he ‘dominated and controlled any governmental business’ and (2) ‘people working in the government actually relied on him because of a special relationship he had with the government.’” *Id.* (citing 2 App. 511; *Margiotta*, 688 F.2d at 122).

To reach this conclusion, the Court analyzed whether the Second Circuit was correct in finding that Congress had “effectively reinstated” *Margiotta* when enacting § 1346. *See id.* at 328. The Supreme Court relied on *Skilling* to guide that analysis:

Skilling’s teaching is clear. “[T]he intangible right of honest services” must be defined with the clarity typical of criminal statutes and should not be held to reach an ill-defined category of circumstances simply because of a *smattering* of pre-*McNally* cases. With this lesson in mind, we turn to the question whether the [*Margiotta*] theory endorsed by the lower courts in this case gave § 1346 an uncertain breadth that raises “the due process concerns underlying the vagueness doctrine.”

Id. at 328-29 (emphasis added) (citing *Skilling*, 561 U.S. at 408). Applying *Skilling*, the Supreme Court ruled that “*Margiotta*’s standard is too vague” and that the Second Circuit had erred in concluding *Margiotta* was still good law after *McNally*. *Id.* at 330; *see also id.* at 328 (“*Skilling*’s approach informs our decision in this case. Here, the Second Circuit concluded that ‘Congress effectively reinstated the *Margiotta*-theory cases . . .’ [b]ut *Skilling* was careful

to avoid giving § 1346 an indeterminate breadth that would sweep in any conception of ‘intangible rights of honest services’ recognized by *some* courts prior to *McNally*.” (emphasis added) (citation omitted)). Indeed, the Court pointed out that *Skilling* itself was a case rejecting § 1346’s application to “undisclosed self-dealing” schemes because “the pre-*McNally* lower court decisions involving such conduct were ‘inconsisten[t].’” *Id.* (quoting *Skilling*, 561 U.S. at 410). Therefore, the lower courts could not anchor their endorsement of the *Margiotta* theory on the basis that *Margiotta* was

in the safe harbor of pre-*McNally*, honest services cases.²⁰ Rather, the Court cautioned, “the intangible right of honest services’ must be defined with the clarity typical of criminal statutes and should not be held to reach an ill-defined category of circumstances simply because of a *smattering of pre-McNally decisions*.” *Id.* at 328-29 (emphasis added). Applying this standard, the Court held that “*Margiotta* does not (and thus the jury instructions did not) define ‘the intangible right of honest services’ ‘with sufficient definiteness that ordinary people can understand what conduct is prohibited,’ or ‘in a manner that does not encourage arbitrary and discriminatory enforcement.’” *Id.* at 331 (internal quotation marks

²⁰ See *Percoco*, 13 F.4th at 195-96 (noting Second Circuit’s approval of *Margiotta* and reasoning that because “*McNally* directly overruled a Sixth Circuit case . . . that leaned heavily on *Margiotta*’s reliance-and-control theory . . ., it stands to reason that Congress effectively reinstated the *Margiotta*-theory cases by adopting statutory language that covered the theory” when it enacted § 1346).

omitted) (ultimately quoting *Skilling*, 561 U.S. at 402-03).

In his concurrence, Justice Gorsuch agreed with the majority's finding that the *Percoco* jury instructions were too vague to pass constitutional muster, but wrote separately to caution that "the problem runs deeper than that because no set of instructions could have made things any better[.]" and "[t]o this day, no one knows what 'honest-services fraud' encompasses." *Id.* at 333 (Gorsuch, J., concurring); see also *id.* at 337 ("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." (Gorsuch, J., concurring)). He blamed Congress for the uncertainty, but also criticized the courts and prosecutors for exacerbating the statute's uneven application:

Under our system of separated powers, the Legislative Branch must do the hard work of writing federal criminal laws. Congress cannot give the Judiciary uncut marble with instructions to chip away all that does not resemble David. ... The Legislature must identify the conduct it wishes to prohibit. And its prohibition must be knowable in advance—not a lesson to be learned by individuals only when the prosecutor comes calling or the judge debuts a novel charging instruction. Perhaps Congress will someday set things right by revising § 1346 to provide the clarity it desperately needs. Until then,

this Court should decline further invitations to invent rather than interpret this law.

Id. at 337-38 (Gorsuch, J., concurring) (citations omitted). Reminiscent of Justice Scalia’s concurrence in *Skilling*,²¹ Justice Gorsuch lamented the Supreme Court’s efforts to define honest services wire fraud, including the majority’s decision in *Percoco*:

In the end, we may now know a little bit more about when a duty of honest services does not arise, but we still have no idea when it *does*. It’s a situation that leaves prosecutors and lower courts in a bind. They must continue guessing what kind of fiduciary relationships this Supreme Court will find sufficient to give rise to a duty of honest services.

Id. at 336 (Gorsuch, J., concurring).

Today, this Court finds itself in just such a bind.

**B. After Ciminelli and Percoco, § 1346
Cannot Be Construed to Encompass
Foreign Commercial Bribery**

**1. The Court’s Parsing of the § 1346
Jurisprudence**

The Court pauses to explain its understanding of the landscape of § 1346 case law from pre-*McNally* through *Percoco*. As reflected in the earlier discussion (*see supra* Discussion Section I.A), decisions

²¹ *See Skilling*, 561 U.S. at 421 (cautioning that merely clarifying “what acts constitute a breach of the ‘honest services’ obligation under the pre-*McNally* law” does not “solve the most fundamental indeterminacy: the *character* of the ‘fiduciary capacity’ to which the bribery and kickback restriction applies” (Scalia, J., concurring) (emphasis added)).

interpreting § 1346 have variously, and sometimes confusingly, parsed honest services fraud with respect to four different issues: (1) the *defendant's identity*, see *Bahel*, 662 F.3d at 632 (rejecting defense argument that honest services fraud “is effectively limited to the identity of the actors prosecuted in the pre-*McNally* caselaw,” and finding that “fraud actionable under Section 1346 is limited to the nature of the offenses prosecuted in the pre-*McNally* cases (i.e., bribery and kickback schemes)—not the identity of the actors involved in those cases.”); (2) the *type of conduct* that can give rise to honest services fraud, see *Skilling*, 561 U.S. at 409-12 (rejecting government’s theory that “undisclosed self-dealing by a public official or private employee” constituted honest services fraud under § 1346, and finding that bribes and kickbacks are at the “core” of honest services fraud); (3) *the source of the fiduciary duty* that was breached (or sought to be breached) by the fraud scheme, see *Percoco*, 598 U.S. at 330 (“[T]he intangible right of honest services’ codified in § 1346 plainly does not extend a duty to the public to all private persons[.]”); and (4) the *location of the bribery scheme*, see *Giffen*, 326 F. Supp. 2d at 506 (finding that “Congress did not intend that the intangible right to honest services encompass bribery of foreign officials in foreign countries”); *Bahel*, 662 F.3d at 632 (rejecting defense’s reliance on *Giffen* because the fraud in *Bahel* was perpetrated against the United Nations, located in New York).

The Court finds these distinctions useful to explain why *Skilling*’s proclamation, that “it has always been ‘as plain as a pikestaff that’ bribes and kickbacks constitute honest-services fraud,” 561 U.S. at 412 (citation omitted), does not save the § 1346

prosecution in this case. Although *Skilling* clarified the *type of conduct* that can give rise to a § 1346 prosecution (category two above), it did not address the *source of the fiduciary duty* that, if breached, gives rise to such prosecution (category three above). That is what *Percoco* has now done.²²

The Court notes that earlier this week, the Second Circuit considered for the first time, in *United States v. Avenatti*, whether *Ciminelli* and *Percoco* required the vacating of a Section 1346 conviction. 2023 WL 5597835, at *18 n.27. In that case, the defendant, Michael Avenatti, argued that (1) “*Ciminelli* rejected a theory of liability that, like the one pursued here, ‘criminalizes traditionally civil matters and federalizes traditionally state matters[.]’” and that (2) “*Percoco* ... reaffirm[ed] that § 1346 cannot reach what was alleged here—‘undisclosed self-dealing by ... a private employee[.]’” Appellant’s May 16, 2023 28(j) Letter at 2, *United States v. Avenatti*, No. 21-1778, 2023 WL 5597835 (2d Cir. Aug. 30, 2023) (internal

²² The Court makes a related note with respect to these distinctions. Defendants previously argued in their motions to dismiss, relying on *Giffen*, that § 1346 did not extend to bribery of “foreign officials in foreign countries,” *Giffen*, 326 F. Supp. 2d at 506—which the Court construed as an argument about the location of the alleged wire fraud conspiracy (category four above). The Court rejected that argument, to the extent that it challenged § 1346 as being applied extraterritorially, *Full Play Grp., S.A.*, 2021 WL 5038765, at *8 n.5, and still does so now. However, *Percoco* would seem to support *Giffen*’s finding that the “absence of . . . precedent supporting the Government’s overseas application of the intangible rights theory,” *Giffen*, 326 F. Supp. 2d. at 505, doomed the § 1346 prosecution because a foreign official’s duty to his government cannot be the source of the fiduciary duty for an honest services wire fraud prosecution.

citations omitted). Finding *Ciminelli* and *Percoco* distinguishable, the Second Circuit rejected both arguments. As to *Ciminelli*, the panel found that the case had “no bearing on Avenatti’s sufficiency challenge to his conviction for honest-services fraud” because *Ciminelli* was a “rejection of a ‘right-to-control theory’ of ‘property’ for purposes of satisfying the loss-of-property element of *traditional fraud*[.]” *Avenatti*, 2023 WL 5597835, at *18 n.27 (emphasis added).²³

As to *Percoco*, the panel distinguished it on two grounds: first, that the defendant “*does not*—and cannot—argue that he lacked notice that ... he owed a fiduciary duty to his client [as an attorney,]” *see supra* pp. 42-43 (source of fiduciary duty)²⁴; and second, that

²³ As discussed, despite Defendants having been convicted of honest services fraud rather than traditional fraud, the Court finds *Ciminelli* to be relevant—albeit not controlling—to the Court’s analysis of the issues for the reasons explained above. *See supra* note 3 (noting that the Government charges Defendants under § 1343, not § 1346); *see infra* note 27 (“Although *Ciminelli* did not involve honest services wire fraud under § 1346, the Court finds the decision relevant because of its criticisms of prosecutions under § 1343 (which § 1346 augments)[.]”).

²⁴ Although the panel did not rely on pre-*McNally* precedent or cite to any honest services cases involving a fiduciary duty between a lawyer and his client, *see Avenatti*, 2023 WL 5597835, at *18 n.27 (citing *United States v. Chestman*, 947 F.2d 551, 568 (2d Cir. 1991) (finding that a husband did not have a fiduciary duty to his wife in the context of a securities fraud prosecution—which relied in part on language from *Margiotta*, which *Percoco* expressly overruled)), such pre-*McNally* authority exists, albeit not specifically in the context of wire fraud prosecutions. *See, e.g., Chestman*, 947 F.2d at 568 (securities fraud decision noting that “[t]he common law has recognized that some associations are inherently fiduciary” including “those existing between attorney and client, executor and heir”), *Haft v. Farkas*, 498 F.2d

the defendant was charged and convicted under a bribery scheme—not an “undisclosed self-dealing” scheme, *see id.* (type of conduct). *Avenatti*, 2023 WL 5597835, at *18 n.27 (emphasis added) (internal citations omitted). The *Avenatti* panel then went on to analyze the defendant’s sufficiency challenge, which focused on whether the *type of conduct* (category two) that *Avenatti* had engaged in satisfied the quid pro quo and “intent to defraud” elements of honest services wire fraud. *See id.* at *18-21. Thus, in *Avenatti*, the defendant argued that the *type of conduct* he engaged in did not constitute honest services wire fraud under *Percoco*, and the panel rejected his argument because “solicit[ing] a bribe from Nike” clearly fell within the type of conduct proscribed by *Percoco* and *Skilling*, i.e., bribery and/or kickback schemes. *Id.* at *17, 18 n.27, 21.

Here, by contrast, Defendants have specifically argued that the *source of the fiduciary duty*, *see supra*

587, 589 (2d Cir. 1974) (in an attorney disciplinary matter, noting that “[w]e start with a few basic premises. In New York, as elsewhere, in addition to his other duties and obligations, a lawyer is bound to conduct himself as a fiduciary or trustee occupying the highest position of trust and confidence . . .”), *Spector v. Mermelstein*, 485 F.2d 474, 479 (2d Cir. 1973) (in a negligence and violation of fiduciary duty case, upholding judgment that the defendant attorney breached his fiduciary duty to his client because it is a “basic principle” that such a breach occurs when an attorney “negligently or willfully withholds from his[/her] client information material to the client’s decision”); *cf. United States v. Scanlon*, 753 F. Supp. 2d 23, 28 (D.D.C. 2010) (post-*Skilling* case finding “support for the existence of a fiduciary relationship between [the attorney defendant] and his clients in both the facts and the law” in an honest services wire fraud prosecution).

pp. 42-43 (category three), that they were convicted of conspiring to breach cannot give rise to honest services wire fraud. (Full Play Mot., Dkt. 1946-1, at 8; Lopez Mot., Dkt. 1987-1, at 9.) Moreover, in contrast to the Circuit’s conclusion in *Avenatti* that an attorney-client relationship is a “hornbook” fiduciary duty under § 1346, *see* 2023 WL 5597835, at *18 n.27,²⁵ as discussed, the Circuit has expressly held that whether a foreign employer-employee relationship is a source for a fiduciary duty under § 1346 “is a question that remains unsettled, at best[,]” Napout, 963 F.3d at 184.²⁶ Thus, the Court finds that the *Avenatti* panel

²⁵ The *Avenatti* panel noted that in *Skilling*, the Supreme Court “concluded that persons engaged in [fraudulent] schemes [to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived] had sufficient notice of the unlawfulness of their conduct to avoid constitutional vagueness concerns.” 2023 WL 5597835, at *17 n.26. To the extent this observation suggests a view that whenever bribery or kickbacks are involved, a fiduciary duty is necessarily breached, this Court believes that *Percoco* rebuts that reading. Instead, *Percoco* requires that the fiduciary duty’s existence (source of the duty) be established separately from the bribery or kickbacks scheme (type of conduct); and moreover, that the existence of the fiduciary duty must be established by more than a “smattering” of pre-*McNally* cases. *Percoco*, 598 U.S. at 328-29; *see also id.* at 330 (“[T]he intangible right of honest services’ codified in § 1346 plainly does not extend a duty to the public to *all* private persons, and whether the correct test was applied in this case returns us to *Margiotta*.”).

²⁶ Based on *Avenatti*, the Court anticipates that the Second Circuit may view *Percoco* as merely clarifying who qualifies as a *public* official (and thus owes a duty to the *public*) for the purposes of § 1346. *See Avenatti*, 2023 WL 5597835, at *18 n.27 (describing *Percoco* as ruling that trial court’s § 1346 jury instruction “was unconstitutionally vague in stating the standard for determining when a private person owes a fiduciary

did not address the issues raised in this case, and like *Ciminelli*, is relevant—but not authoritative in guiding its analysis of the present issues.

2. Application

In light of the Supreme Court’s guidance in *Ciminelli*²⁷ and *Percoco*, this Court is compelled to

duty to the *public*” and distinguishing *Avenatti*’s case because “[n]o fiduciary duty to the *public* is at issue in this case”) (emphasis added). But this Court views *Percoco* as holding more broadly that whether a fiduciary duty exists, regardless of it being to the public or a private entity, depends on whether the duty was recognized pre-*McNally*—which is not the case with foreign commercial bribery. *See Napout*, 963 F.3d at 184 (opining 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”).

²⁷ Although *Ciminelli* did not involve honest services wire fraud under § 1346, the Court finds the decision relevant because of its criticisms of prosecutions under § 1343 (which § 1346 augments), that “vastly expand[] federal jurisdiction without statutory authorization,” 598 U.S. at 315; and which “use property fraud statutes to set standards of disclosure and good government for state and local officials,” *id.* at 316 (quoting *Kelly*, 140 S. Ct. at 1574); and cautions against applying § 1343 to “criminaliz[e] traditionally civil matters and federaliz[e] traditionally state matters[,]” *id.* *See also id.* at 315-16 (“The theory makes a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law—in flat contradiction with our caution that, absent a clear statement by Congress, courts should ‘not read the mail and wire fraud statutes to place under federal superintendence a vast array of conduct traditionally policed by the States.’” (brackets omitted) (quoting *Cleveland*, 531 U.S. at 27)); *id.* at 312 (“[T]he fraud statutes do not vest a general power in ‘the Federal Government . . . to enforce (its view of) integrity in broad swaths of state and local policymaking.’” (quoting *Kelly*, 140 S. Ct. at 1574)). This Court also finds that the Supreme Court’s issuance of *Ciminelli*

reverse its previous ruling regarding § 1346's scope,²⁸ and find that the honest services wire fraud statute does not encompass foreign commercial bribery as charged against Defendants. While the Court recognizes that, in creating § 1346, Congress may have intended to criminalize conduct that deprives foreign organizations of their employees' honest services, the question before this Court is whether such conduct violates § 1346 as interpreted by the Supreme Court in *Skilling* and now as further clarified in *Percoco*.

In *Percoco*, the Supreme Court was focused on the nature and source of the fiduciary duty that could—or could not—give rise to a § 1346 honest services wire fraud charge. The Court held that the Second Circuit had erroneously affirmed a jury instruction advising that the defendant could be found to have a duty to provide honest services to the public while not serving as a public official, if he had “dominated and controlled any government business” and if “the government actually relied on him because of a special relationship he had with the government.” *Percoco*, 598 U.S. at 324-25. In rejecting the Second Circuit's reasoning that “Congress effectively reinstated the *Margiotta*-theory

in tandem with *Percoco* strongly suggests the Court's view that the scope of wire fraud offenses under both statutes must be narrowed and more clearly defined to avoid unconstitutional vagueness.

²⁸ See *Full Play Grp., S.A.*, 2021 WL 5038765, at *7 (“[T]he Court rejects the argument that the alleged breaches of fiduciary duties in this case are as a matter of law incognizable under § 1346, even if the alleged duties may arise from relationships between foreign private employees and their foreign private employers.”).

cases by adopting statutory language [in § 1346] that covered the theory[.]" *id.* at 328, the Court issued an emphatic directive:

Skilling's teaching is clear. "[T]he intangible right of honest services" must be defined with the clarity typical of criminal statutes and should not be held to reach an ill-defined category of circumstances simply because of a smattering of pre-*McNally* decisions.

Id. at 328-29.²⁹

Here, there is not even a "smattering of pre-*McNally* decisions" (nor post-*McNally* decisions, for that matter) that support the application of § 1346 to foreign commercial bribery. Neither the parties nor the Court have been able to identify a single pre-*McNally* case applying honest services wire fraud to foreign commercial bribery, i.e., bribery of foreign employees of foreign non-government employers. (*See* Lopez Reply, Dkt. 2002, at 3 ("We are not aware of any prior prosecution, either pre- or post-*McNally* ... for honest services fraud in which the scheme to defraud

²⁹ The Court further cautioned that "the pre-*McNally* record . . . is clearest when the Government seeks to prosecute actual public officials." *Id.* at 329; *see also id.* ("Most of the pre-*McNally* honest-services prosecutions, including what appears to be the first case to adopt that theory, involved actual public officials."); *cf. United States v. McGeehan*, 584 F.3d 560, 569 (3d Cir. 2009) ("Although the literal language of § 1346 extends to private sector schemes, enforcement of an intangible right to honest services in the private sector arguably has a weaker justification because relationships in the private sector generally rest upon concerns and expectations less ethereal and more economic than the abstract satisfaction of receiving 'honest services' for their own sake." (internal citations and quotation marks omitted)).

involved depriving a foreign non-government employer of the honest services of its foreign employee(s).”); Govt. Opp’n, Dkt. 1999, at 44 n.6 (noting that, “[t]o date, no Court of Appeals or Supreme Court opinion has suggested that the fraudulent scheme as opposed to the wire use must be domestic”).) Indeed, as discussed, the Second Circuit in reviewing the *Napout* convictions concluded 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.” *See Napout*, 963 F.3d at 184; *see also id.* (acknowledging that neither the appellants nor the Circuit could find any “authority directly supporting” the idea that foreign commercial bribery fell outside the scope of § 1346). This absence of authority, when viewed in light of the Supreme Court’s strongly worded rebukes in *Percoco* and *Ciminelli* against expanding the federal wire fraud statutes, compels this Court to find that § 1346 does not apply to foreign commercial bribery. *See Skilling*, 561 U.S. at 410 (“Further dispelling doubt on this point is the familiar principle that ‘ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity.’” (citing *Cleveland*, 531 U.S. at 25)). Indeed, Defendants’ convictions are the casualties of the “‘fundamental indeterminacy’ in honest-services-fraud theory,” despite decades of jurisprudence that has struggled to “explain[] what kinds of fiduciary relationships are sufficient to trigger a duty of honest services in the first place.” *Percoco*, 598 U.S. at 335 (Gorsuch, J., concurring); *see also id.* at 334 (“Nothing in [§ 1346] attempted to resolve when the duty of honest services arises, what sources of law create that

duty, or what amounts to a breach of it.” (Gorsuch, J., concurring)).

C. The Government’s Objections Fail to Address *Percoco*, *Ciminelli*, and the Absence of Pre-*McNally* Cases

The Government’s opposition is largely grounded in arguments about why § 1346 is not unconstitutionally vague as applied to Defendants (*see generally* Govt. Opp’n, Dkt. 1999, at 38-53), which the Court will not analyze here because the issue is procedurally improper at this stage. *See Kelly*, 609 F. Supp. at 138. Nonetheless, the Court addresses the Government’s anti-vagueness arguments as they relate to the issue of § 1346’s scope and explain why they do not overcome the Supreme Court’s directives in *Percoco* and *Ciminelli*, and the Second Circuit’s holding in *Napout*.

First, the Government erroneously claims that Defendants are trying to relitigate the extraterritorial reach of the wire fraud statutes. (*See* Govt. Opp’n, Dkt. 1999, at 44 (“Vagueness claims are not a device by which [] Defendants may relitigate their unsuccessful arguments about the extraterritorial reach of wire fraud statutes.”).) But the Government appears to conflate the issue of *where* the conduct occurred with *what* fiduciary duty existed. Indeed, in *Napout*, the Second Circuit analyzed the two questions separately—ruling that where the scheme occurred was not an issue as long as the use of the *domestic* wires was “essential” and “integral” to the scheme, *Napout*, 963 F.3d at 180-81, and separately examining and finding that “whether a foreign employee’s duty to his foreign employer qualifies as an actionable

element under § 1346 [was] a question that [was] unsettled, at best” (*id.* at 184). *See also id.* at 184 n.19 (explaining the majority’s “view that the issue [of § 1346’s application to foreign commercial bribery] need not be addressed under ... plain error review”).

Second, the Government argues that the Court should reject any distinction between foreign and domestic commercial bribery, claiming that “the wrongfulness of commercial bribery is self-evident” (Gov’t Opp’n, Dkt. 1999, at 49), and relies on various bodies of law supporting an employer-employee fiduciary relationship. (*See, e.g., id.* at 49 n.10 (“Private-sector bribery is obviously fraudulent as a civil matter. ... Separately, criminal private-sector bribery bans exist around the world.” (citations omitted)); *id.* at 50 (citing common law sources regarding an agent’s fiduciary duty to his/her principal); *id.* at 52 (“Any common-sense, common-law understanding of corporate structures and governance leads to the conclusion that a president shall not take bribes.”); *id.* (“Leaving aside the common-law authorities, a reasonable person in the Defendants’ position could glean the relevant duties from the ethical codes promulgated by the soccer organizations.”).) However, none of the Government’s appeals to common law, state law, civil law, foreign law, or codes of conduct, overcome the basic fact that there is no precedential authority to support the application of *this* federal criminal statute, § 1346, to foreign commercial bribery, which the Supreme Court has now made clear in *Percoco* is required. *See Percoco*, 598 U.S. at 328-29 (“[T]he intangible right of honest services’ ... should not be held to reach an ill-defined category of circumstances simply because of a

smattering of pre-*McNally* decisions.” (citation omitted)); *Ciminelli*, 398 U.S. at 316 (striking down the Second Circuit’s “right-to-control theory,” in part, because it “criminalizes traditionally civil matters and federalizes traditionally state matters”); *id.* at 315-16 (“The theory thus makes a federal crime of an almost limitless variety of deceptive actions traditionally left to state contract and tort law” (quoting *Cleveland*, 531 U.S. at 27)); *cf. Kelly*, 140 S. Ct. at 1571 (finding that defendants did not commit property fraud because “[t]he upshot” of *Skilling*’s limit of § 1346 to bribery and kickback schemes “is that federal fraud law leaves much public corruption to the States (or their electorates) to rectify”).³⁰ Absent this precedent, the Court interprets *Percoco* as precluding the application of § 1346 to foreign commercial bribery.

Lastly, the Government’s repeated appeals to the late Judge Hall’s *Napout* concurrence³¹ are unavailing for several reasons. First and foremost, this Court cannot rely on Judge Hall’s concurrence as guiding precedent for the scope of § 1346 when the *Napout* majority expressly chose not to rule on the issue. *See Napout*, 963 F.3d at 184; *see also id.* at 183-84 (explaining that *Rybicki*’s holding regarding § 1346’s

³⁰ The Court notes that the Government’s opposition brief does not address *Ciminelli*’s application to Defendants’ motions.

³¹ *See, e.g., Gov’t Opp’n*, Dkt. 1999, at 45 (“Whatever concerns a different prosecution may present, fiduciary duties protected by 18 U.S.C. § 1346 are ‘obviously inherent in employer-employee relationships—including the relationships in this case.’” (citing Judge Hall’s concurrence)); *id.* at 51 (“As Judge Hall noted, a heartland example of such a source is the ‘employment relationship’ set forth between the soccer presidents, [sic] ‘FIFA and CONMEBOL.’”).

application to domestic employer-employee fiduciary duties “[a]lthough not necessarily dispositive of the appellants’ argument ... provides *possible* guidance” (emphasis added) (citing *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003))). Furthermore, Judge Hall’s concurrence was written before the Supreme Court’s *Percoco* opinion. Judge Hall principally based his finding that § 1346 encompassed foreign commercial bribery on the assumption that foreign employment relationships, like domestic employment relationships, must include “reliance, and de facto control and dominance.” *Id.* at 191 (Hall, J., concurring). Specifically, he reasoned:

Defendants-Appellants’ argument that the statute does not apply to foreign employment relationships fares no better under our more recent precedent. “*At the heart of the fiduciary relationship lies reliance, and de facto control and dominance.*” These characteristics are obviously inherent in employer-employee relationships—including the relationships in this case.

Id. (Hall, J., concurring) (emphasis added) (quoting *Halloran*, 821 F.3d at 338). However, the Supreme Court rejected the *Percoco* jury instructions precisely because a fiduciary-duty test rooted in “dominance”, “control”, and “reliance” is “too vague.” *See Percoco*, 598 U.S. at 330 (“[T]he [*Percoco*] trial judge told the jury that Percoco owed a duty of honest services to the public if (1) he ‘*dominated and controlled* any governmental business’ and (2) ‘people working in the government *actually relied on him* because of a special relationship he had with the government.’ But

[this] standard is too vague.” (emphasis added)). Thus, although the Second Circuit *may* choose to adopt Judge Hall’s reasoning when it reaches the merits of this issue, their analysis will possibly be impacted by *Percoco*. Moreover, regardless of the Second Circuit’s eventual ruling, at this moment, the Court has no precedential authority to rely on to hold that § 1346 covers foreign employment relationships.³²

* * *

In sum, the Court concludes that in light of *Percoco*, the evidence at trial was insufficient to sustain Defendants’ honest services wire fraud convictions under § 1346 because the statute does not apply to foreign commercial bribery schemes. As a result, Defendants’ convictions for money laundering, predicated on their honest services wire fraud convictions, also cannot be sustained. The Court therefore grants Defendants’ motions to acquit on all counts of conviction.³³

³² To the extent the Court relied heavily on *Bahel* in denying Defendants’ motions to dismiss, the Court does not believe that *Bahel* is implicitly overruled by *Percoco*, because the facts of *Bahel* are distinguishable. In *Bahel*, the defendant had a fiduciary duty to his U.S.-headquartered employer, the United Nations. 662 F.3d at 632. Even assuming that the United Nations is a commercial (versus public) entity, “more than a smattering” of pre-*McNally* precedent supports the application of § 1346 to the “domestic” bribery scheme charged in that case. *See, e.g., id.* at 633 (citing *United States v. Hasenstab*, 575 F.2d 1035 (2d Cir. 1978), to support the conclusion that “Bahel’s conduct falls firmly within the ambit of the type of conduct that violates the right to honest services”).

³³ The Court notes that it is premature to opine on this Memorandum and Order’s effect on the convictions of defendants

II. Lopez's Conditional Request for New Trial is Denied

In the event that the Court's judgment of acquittal is later vacated or reversed, Lopez asks the Court to conditionally grant his motion for a new trial pursuant to Rule 29(d)(1). (Lopez Mot., Dkt. 1987-1, at 18.) Rule 29(d)(1) provides, in relevant part:

(1) Motion for a New Trial. If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

Fed. R. Crim. P. 29(d)(1). Rule 29(d)(3) additionally provides:

(A) Grant of a Motion for a New Trial. If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) Denial of a Motion for a New Trial. If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial

in this case who have previously pled guilty or been convicted under § 1346. However, the Court stays all upcoming sentencings in this case until appellate review, if any, is concluded.

court must proceed as the appellate court directs.

Fed. R. Crim. P. 29(d)(3).

The same standard that governs whether to grant a new trial under Rule 33 applies to determining whether to conditionally grant a new trial under Rule 29(d). *See, e.g., United States v. Finnerty*, 474 F. Supp. 2d 530, 545 (S.D.N.Y. 2007) (applying Rule 33 standard in conditional granting of new trial under Rule 29(d)(1)); *United States v. Davis*, No. 13-CR-923 (LAP), 2017 WL 3328240, at *24 (S.D.N.Y. Aug. 3, 2017) (same). Under Rule 33, the Court may “vacate any judgment and grant a new trial if the interest of justice so requires.” Fed. R. Crim. P. 33(a).

Here, if the Court’s judgment of acquittal is reversed or vacated by the Second Circuit, it would presumably be on the ground that § 1346 *does* encompass foreign commercial bribery, at which point, the Circuit would either review *de novo* Lopez’s other arguments in support of his Rule 29 motion, or remand to this Court to do so. If the Circuit rejects on *de novo* review all of Lopez’s other Rule 29 arguments—thereby affirming his conviction—no new trial would be warranted. If, on the other hand, the Circuit were to remand to this Court to review Lopez’s other arguments and the Court were to find the evidence sufficient, no new trial would occur. Conversely, if the Court were to find the evidence insufficient (and Lopez thereby acquitted) on remand, it would be the Government, not Lopez, who would potentially seek a new trial. Thus, at this stage, the Court will not conditionally grant a new trial because there is no circumstance under which it would be in Lopez’s

interest, or in the interest of justice, for a new trial to automatically occur in the event that the Circuit reverses or vacate the Court's acquittal of Defendants' convictions.

CONCLUSION

For the above reasons, Full Play's and Lopez's motion for a judgment of acquittal is granted but Lopez's request for a new trial, in the event this judgment is vacated or reversed, is denied.

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Appendix C

**UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK**

Nos. 15-cr-252 (S-3)

UNITED STATES OF AMERICA,

v.

HERNÁN LOPEZ, FULL PLAY GROUP, S.A.,

Defendants.

Filed: Oct. 29, 2021

MEMORANDUM & ORDER

PAMELA K. CHEN, United States District Judge:

Defendants Full Play Group, S.A. (“Full Play”), Hernan Lopez, and Carlos Martinez move for dismissal of the indictment under Federal Rule of Criminal Procedure 12(b)(3), as well as for a bill of particulars under Federal Rule of Criminal Procedure 7(f).¹ (*See* Dkts. 1553, 1554, 1594, 1595.) Additionally, Defendants Full Play and Martinez have renewed motions for severance under Federal Rule of Criminal Procedure 14(a). (*See* Dkts. 1593, 1594.)

¹ A fourth defendant, Reynaldo Vazquez, also filed a motion for a bill of particulars. (*See* Dkt. 1555.) Defendant Vazquez has since pleaded guilty to the charges against him, and his motion has been dismissed as moot. (*See* 8/24/2021 Docket Order.)

On September 17, 2021, the Court held oral argument and partially ruled on the various motions. In the context of the bill-of-particulars motion, the Court directed the Government “to provide for each Defendant a list ‘specifying the transactions[—]for example, the marketing contracts, broadcasting contracts, tournament hosting designations, etc.[—]that the Government will seek to prove were tainted by an unlawful conspiracy of which’ that Defendant was a part.” (9/17/2021 Minute Entry (quoting *United States v. Hawit*, No. 15-CR-252 (PKC), 2017 WL 663542, at *11 (E.D.N.Y. Feb. 17, 2017)).) The Court also directed the Government to “provide the year(s) when Defendants Lopez and Martinez are alleged to have become aware of the Copa Libertadores #2 scheme” in which they are charged. (*Id.*) The Court denied Full Play’s and Martinez’s renewed motions for severance and denied the motions to dismiss to the extent that they sought dismissal based on an argument that the charges are impermissible extraterritorial applications of the wire-fraud and wire-fraud-conspiracy statutes. (*Id.*) The Court reserved decision on the remainder of the motions to dismiss and motions for a bill of particulars.

For the reasons discussed below, those remaining portions of Defendants’ motions to dismiss and motions for a bill of particulars are hereby denied.

BACKGROUND

I. FIFA Prosecution

This case commenced on May 20, 2015, when a grand jury in this District returned an indictment charging 14 defendants with racketeering conspiracy under the Racketeer Influenced and Corrupt

Organizations (“RICO”) Act, various wire-fraud and money-laundering conspiracies, and other crimes relating to alleged bribery and kickback schemes connected to international organized soccer. (*See generally* Dkt. 1.) Six months later, on November 25, 2015, the grand jury returned a superseding (“S-1”) indictment charging additional defendants. (*See generally* Dkt. 102.)

In 2017, this Court presided over a jury trial of three defendants named in the S-1 indictment: Juan Ángel Napout, José Maria Marin, and Manuel Burga. Prior to the 2017 trial, only one of those defendants, Napout, moved for a bill of particulars. (*See generally* Napout’s Motion for Bill of Particulars (“Napout Mot.”), Dkt. 490.) Napout—who was charged with wire-fraud and money-laundering conspiracies related to the CONMEBOL Copa Libertadores,² wire-fraud and money-laundering conspiracies related to the CONMEBOL/CONCACAF Copa América Centenario,³ and the overarching RICO conspiracy

² CONMEBOL, which stands for “Confederación Sudamericana de Fútbol,” is a continental soccer confederation for most of South America. *United States v. Webb*, No. 15-CR-252 (PKC), 2020 WL 6393012, at *2 n.1 (E.D.N.Y. Nov. 1, 2020). The Copa Libertadores is an annual club-team tournament in South America. *Id.* at *1.

³ CONCACAF, which stands for “Confederation of North, Central American and Caribbean Association Football,” is a continental soccer confederation for North America, Central America, the Caribbean, and three South American countries. *Webb*, 2020 WL 6393012, at *2 n.1. The United States and two of its overseas territories, Puerto Rico and the U.S. Virgin Islands, are members of CONCACAF. *Id.* The Copa América is a quadrennial South American national-team tournament, which celebrated its centennial (*i.e.*, centenario) in 2016 with a special

(see S-1 Indictment, Dkt. 102, ¶¶ 362-64, 378-81, 501-04)—requested a bill of particulars specifying “details about any involvement in, or acts he [was] alleged to have committed,” in furtherance of the charged conspiracies, including: (i) “any information regarding any bribe solicited and/or received”; (ii) “any transaction” evidencing such a bribe; (iii) “any use of wire facilities and/or financial institutions in the United States or elsewhere used to make or receive any bribe”; (iv) “any conduct engaged in to prevent detection of the illegal activities”; and (v) “any documentary evidence” supporting any of the criminal acts asserted against Napout (Napout Mot., Dkt. 490, at 1-2). Napout also requested the identities and aliases of unindicted co-conspirators. (*Id.* at 2.)

The Court determined that Napout was entitled to a bill of particulars “specifying the transactions—for example, the marketing contracts, broadcasting contracts, tournament hosting designations, etc.—that the Government will seek to prove were tainted by an unlawful conspiracy of which Napout was a part.” *United States v. Hawit*, No. 15-CR-252 (PKC), 2017 WL 663542, at *11 (E.D.N.Y. Feb. 17, 2017). The Court reasoned that without such information, Napout was being “accused of having committed unlawful acts in connection with a category of transactions” without sufficient notice of the “specific transactions falling within that category [that were] alleged to have been tainted by unlawful conduct.” *Id.* The Court otherwise denied Napout’s motion “as seeking information beyond that required to prepare a

tournament held in the United States and in which the United States participated. *See id.* at *1; S-1 Indictment, Dkt. 102, ¶ 17.

defense,” explaining that the Federal Rules of Criminal Procedure did not permit Napout to use a motion for a bill of particulars to obtain information regarding witnesses and documents that the Government intended to present at trial. *Id.* The Court also determined that, as long as the Government complied with the Court’s order to specify the allegedly tainted transactions, Napout would “have sufficient information to prepare a defense even without identification of the unnamed co-conspirators,” because such co-conspirators, “according to the Government, were involved in conspiracies affecting the same transactions.” *Id.*

In response to the Court’s decision, the Government filed a bill of particulars listing “particular tournaments, tournament editions, and related contracts” allegedly tainted by Napout’s conduct and that of each of the other defendants before the Court at the time. (*See* Dkt. 550.) The Court found that this bill of particulars sufficiently complied with its order. *See United States v. Napout (Napout I)*, No. 15-CR-252 (PKC), 2017 WL 11441519, at *2 (E.D.N.Y. Aug. 11, 2017); *see also United States v. Napout (Napout II)*, No. 15-CR-252 (PKC), 2017 WL 4083571, at *8-9 (E.D.N.Y. Sept. 13, 2017) (observing that “this case is not rocket science,” and rejecting Napout’s argument that the Government was required to disclose more specific information regarding its intended racketeering evidence). Thus, when Napout sought a second bill of particulars, the Court denied that request, emphasizing “the Government’s compliance with” the Court’s order on Napout’s first bill-of-particulars motion and “the extensive

discovery” already provided. *Napout I*, 2017 WL 11441519, at *2.

Following a six-week jury trial that included testimony from 28 government witnesses and introduction of voluminous documentary evidence, the jury returned guilty verdicts with respect to Napout and Marin.⁴ (See Verdict Sheet as to Napout & Marin, Dkt. 873.) Both defendants appealed. (Notice of Appeal as to Napout, Dkt. 1017; Notice of Appeal as to Marin, Dkt. 1027.) In challenging their convictions, Napout and Marin principally argued that their convictions were based on impermissible extraterritorial applications of the wire-fraud-conspiracy statute and that the honest-services-fraud statute was unconstitutionally vague as applied to them. *United States v. Napout (Napout III)*, 963 F.3d 163, 170 (2d Cir. 2020). Neither defendant raised any issues regarding the bill of particulars, or otherwise argued that they had been prejudiced by a lack of information necessary to preparing a defense. See *generally id.* at 178-90.

The Second Circuit squarely rejected Napout and Marin’s extraterritoriality argument with respect to the wire-fraud counts. *Id.* 178-81. Following its recent decision in *Bascuñán v. Elsaca*, 927 F.3d 108 (2d Cir. 2019), the Circuit held that the “focus” of the wire-

⁴ Napout was convicted of the RICO conspiracy charge and wire-fraud conspiracy charges but acquitted of the money-laundering conspiracy charges. (See Verdict Sheet as to Napout & Marin, Dkt. 873.) Marin was convicted of all charges except one of the money-laundering conspiracy charges. (See *id.*) Burga, who was charged only in the RICO conspiracy, was acquitted. (Verdict Sheet as to Burga, Dkt. 874.)

fraud statute is “not merely a ‘scheme to defraud,’ but more precisely, *the use of the ... wires in furtherance of a scheme to defraud.*” *Id.* at 179 (alterations in original) (quoting *Bascuñán*, 927 F.3d at 122). The Circuit accordingly concluded that Napout’s and Marin’s convictions were not based on impermissible extraterritorial applications of the wire-fraud statute, given that the use of the wires alleged in the counts of conviction occurred in the United States and were essential, not merely incidental, to the schemes at issue. *Id.* at 180-81. The Circuit, moreover, rejected Napout and Marin’s contention that the “focus” of honest-services wire fraud is the “bad-faith breach of a fiduciary duty owed to the scheme’s victim,” concluding that since honest-services wire fraud is a type of wire fraud, the “focus” for purposes of the extraterritoriality analysis was not affected just because Napout and Marin had been convicted of conspiracy to commit honest-services wire fraud as opposed to another type of wire fraud. *Id.* at 179-80.

The Second Circuit also rejected Napout and Marin’s argument that the crime of honest-services fraud was unconstitutionally vague as applied to them, but because Napout and Marin had not raised the issue before this Court, the Circuit reviewed that issue for plain error. *Id.* at 183-84. Finding that it was unsettled whether the honest-services-fraud statute criminalizes a foreign employee’s breach of a fiduciary duty owed to a foreign employer, the Circuit determined that there was no plain error. *Id.* Judge Hall concurred, but filed a separate opinion saying that, had the issue been properly presented, he would have concluded on *de novo* review that the honest-services-fraud statute was not unconstitutionally

vague as applied. *Id.* at 190-92 (Hall, J., concurring). In Judge Hall’s view, “when the government proves that a defendant-employee has concealed information that is material to the conduct of his employer’s business, it has proven the defendant has breached a fiduciary duty to his employer and has thus deprived the employer of his honest services.” *Id.* at 191 (Hall, J., concurring).

All in all, the Circuit affirmed Napout’s and Marin’s convictions. *See id.* at 190.

II. Current Proceedings

On March 18, 2020, the grand jury returned a third superseding (“S-3”) indictment, adding charges against Defendants Full Play, Lopez, and Martinez. (*See* Dkt. 1337.) Full Play, Lopez, and Martinez were arraigned on the charges in the S-3 Indictment on April 9, 2020. (4/9/2020 Minute Entry.)

Like the previous indictments, the S-3 Indictment alleges a wide-ranging racketeering conspiracy, spanning “a period of more than 20 years,” that involved various schemes to solicit, pay, and receive bribes and kickbacks “in connection with the sale of media and marketing rights to various soccer tournaments and events” around the world. (S-3 Indictment, Dkt. 1337, ¶ 63.) As the S-3 Indictment alleges,

[t]he conduct engaged in by various members of the conspiracy included, among other things: the use of sham contracts, invoices and payment instructions designed to create an appearance of legitimacy for illicit payments; the use of various mechanisms, including trusted intermediaries, bankers,

financial advisors and currency dealers, to make and facilitate the making of illicit payments; the creation and use of shell companies, nominees and numbered bank accounts in tax havens and other secretive banking jurisdictions; the active concealment of foreign bank accounts; the use of cash; the purchase of real property and other physical assets; and obstruction of justice.

(*Id.* ¶ 61.)

Full Play, a South American sports media and marketing company, is charged in the overarching RICO conspiracy and several of the wire-fraud and money-laundering schemes underlying the RICO conspiracy, including ones connected with the Copa Libertadores (“Copa Libertadores #2 Scheme”), the Copa América (“Copa América Scheme”), and various World Cup qualifier and friendly matches contested by South American national teams (“World Cup Qualifiers/Friendlies Scheme”). (*Id.* ¶¶ 19-20, 113-15, 129-35, 146-56.) Lopez and Martinez, both United States citizens who were executives at Fox International Channels, a subsidiary of Twenty-First Century Fox, Inc. (“Fox”), are charged as co-conspirators with Full Play in the counts related to the Copa Libertadores #2 Scheme—but not in any of the other counts in the S-3 Indictment, including the RICO count. (*See id.* ¶¶ 21-22, 129-35.)

With respect to the Copa Libertadores #2 Scheme, the S-3 Indictment alleges that between 2005 and 2015, Full Play, Lopez, and Martinez, together with other named and unnamed co-conspirators, “agreed to pay, did pay and facilitated the concealment of annual

bribe and kickback payments” to 14 named CONMEBOL officials in exchange for media rights to the Copa Libertadores. (*Id.* ¶ 73.) The S-3 Indictment provides details of 11 allegedly fraudulent wire transfers between March 20, 2015 and May 26, 2015 that Full Play, Lopez, Martinez, and their co-conspirators “did transmit and cause to be transmitted” in furtherance of the alleged scheme. (*Id.* ¶ 133.) Such details include specifics regarding the amount, intended beneficiaries, and locations of the relevant transferor and transferee bank accounts. (*See id.*)

Additionally, the S-3 Indictment alleges that Lopez and Martinez, along with others, “relied on loyalty secured through the payment of bribes to certain CONMEBOL officials in connection with the Copa Libertadores to advance the business interests of Fox beyond the Copa Libertadores.” (*Id.* ¶ 74.) As an example of such derivative benefits, the S-3 Indictment alleges that Lopez and Martinez “obtain[ed] confidential information from Co-Conspirator #1 regarding bidding for the rights to broadcast the 2018 and 2022 World Cup tournaments in the United States.” (*Id.* ¶ 74.) “Co-Conspirator #1,” according to the S-3 Indictment, “was a high-ranking official of FIFA, CONMEBOL, and AFA, the Argentinian soccer federation.” (*Id.* ¶ 55.)

As to the Copa América Scheme, the S-3 Indictment alleges that between 2010 and 2015, Full Play and others agreed to pay tens of millions of dollars in bribes to CONMEBOL officials to secure the media and marketing rights to the 2015, 2019, and 2023 editions of the Copa América, as well as the Copa

América Centenario held in 2016 in the United States. (*See id.* ¶¶ 81-85, 150-54.) The S-3 Indictment specifies six allegedly fraudulent wire transfers between April 27, 2015 and May 26, 2015 that Full Play and its co-conspirators “did transmit and cause to be transmitted” in furtherance of the alleged scheme. (*Id.* ¶ 154.)

Further, the S-3 Indictment alleges that between 2007 and 2015, Full Play and its owners, Hugo and Mariano Jinkis, engaged in a scheme to pay bribes and kickbacks to the presidents of various soccer federations within CONMEBOL in exchange for media rights to certain World Cup qualifying matches and certain friendly matches. (*Id.* ¶ 79.)

To date, the Government has made 14 separate discovery productions to Defendants, amounting to nearly 19 million pages of discovery. (*See* Government’s Opposition to Defendants’ Motions for a Bill of Particulars (“Govt. BoP Opp.”), Dkt. 1576, at 13; Memorandum in Support of Martinez and Lopez’s Motion for a Bill of Particulars (“Martinez & Lopez BoP Mem.”), Dkt. 1554-1, at 11-12.) Although discovery remains ongoing, all Defendants have moved to dismiss the S-3 Indictment and for a bill of particulars. Defendants Full Play and Martinez have also renewed motions to sever Full Play’s trial from that of Martinez and Lopez, despite the Court’s November 1, 2020 denial of a similar severance motion. *See Webb*, 2020 WL 6393012, at *4-8. As discussed, the Court held oral argument on the various motions on September 17, 2021. (*See* 8/17/2021 Scheduling Order; 9/17/2021 Minute Entry.)

DISCUSSION

I. Motions to Dismiss

Federal Rule of Criminal Procedure 12 “authorizes defendants to challenge the lawfulness of a prosecution on purely legal, as opposed to factual, grounds.” *United States v. Benitez-Dominguez*, 440 F. Supp. 3d 202, 205 (E.D.N.Y. 2020) (quoting *United States v. Ahmed*, 94 F. Supp. 3d 394, 404 (E.D.N.Y. 2015)). In evaluating a motion to dismiss the indictment, “[a] court must accept the facts alleged in the indictment as true and determine only whether the indictment is valid on its face.” *United States v. Nunez*, 375 F. Supp. 3d 232, 238 (E.D.N.Y. 2018) (internal quotation marks, alterations, and citation omitted).

Defendants present three arguments for dismissal of the S-3 Indictment: (1) the charges of honest-services fraud must be dismissed as unconstitutionally vague as applied to Defendants; (2) the S-3 Indictment impermissibly seeks to apply the wire-fraud statute extraterritorially; and (3) the S-3 Indictment does not sufficiently allege an offense. (See *generally* Memorandum of Law in Support of Full Play’s Motion to Dismiss and for Severance (“Full Play MTD Mem.”), Dkt. 1594-1; Memorandum of Law in Support of Martinez and Lopez’s Motion to Dismiss (“Martinez & Lopez MTD Mem.”), Dkt. 1595-1.) At oral argument on September 17, 2021, the Court rejected Defendants’ extraterritoriality arguments as foreclosed by the Second Circuit’s decision affirming Napout’s and Marin’s convictions in this case. (See 9/17/2021 Minute Entry (citing *Napout III*, 963 F.3d

at 178-81).) Defendants’ other asserted grounds for dismissal also fail.

A. Vagueness

“The void-for-vagueness doctrine derives from the constitutional guarantee of due process[.]” *Mannix v. Phillips*, 619 F.3d 187, 197 (2d Cir. 2010). “[T]he Government violates this guarantee by taking away someone’s life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.” *Johnson v. United States*, 576 U.S. 591, 595 (2015) (citation omitted); *see also Napout III*, 963 F.3d at 181 (“The [void-for-vagueness] doctrine addresses concerns about (1) fair notice and (2) arbitrary and discriminatory prosecutions.” (citation omitted)). In the context of an as-applied vagueness challenge, “the challenge cannot succeed if *the defendant’s* conduct ‘is clearly proscribed by the statute.’” *United States v. Houtar*, 980 F.3d 268, 273-74 (2d Cir. 2020) (quoting *United States v. Rybicki*, 354 F.3d 124, 129 (2d Cir. 2003) (en banc)). “[C]larity at the requisite level may be supplied by judicial gloss on an otherwise uncertain statute.” *United States v. Lanier*, 520 U.S. 259, 266 (1997) (citations omitted); *see also United States v. Smith*, 985 F. Supp. 2d 547, 588 (S.D.N.Y. 2014) (“Importantly, it is not only the language of a statute that can provide the requisite fair notice; judicial decisions interpreting that statute can do so as well.” (collecting cases)).

The crime of honest-services fraud traces its origins not to any express act of Congress but rather to judicial decisions that interpreted the federal mail-

fraud and wire-fraud statutes, 18 U.S.C. §§ 1341 and 1343, “to criminalize not only schemes for obtaining money or property, but also schemes to deprive another of the intangible right of honest services.” *See Rybicki*, 354 F.3d at 133 (internal quotation marks and citation omitted). In 1987, however, the Supreme Court put a stop to the judicially created intangible rights doctrine, holding that the mail-fraud statute—and by implication the wire-fraud statute—did not reach “schemes ‘designed to deprive individuals, the people, or the government of intangible rights, such as the right to have public officials perform their duties honestly.’” *See id.* at 134 (quoting *McNally v. United States*, 483 U.S. 350, 358 (1987)). Congress reacted swiftly, enacting what is now 18 U.S.C. § 1346. *See id.* This statute, which “reinstated the ‘intangible rights’ doctrine,” *id.* (citation omitted), provides:

For the purposes of this chapter [18 U.S.C. § 1341 *et seq.*], the term “scheme or artifice to defraud” includes a scheme or artifice to deprive another of the intangible right of honest services.

18 U.S.C. § 1346.

Following its enactment, § 1346 was “invoked to impose criminal penalties upon a staggeringly broad swath of behavior,” and the lower federal courts “spent two decades attempting to cabin the breadth of § 1346 through a variety of limiting principles” without any meaningful consensus. *Sorich v. United States*, 129 S. Ct. 1308, 1309 (2009) (Scalia, J., dissenting from the denial of certiorari).

Then, in 2010, the Supreme Court decided *Skilling v. United States*, 561 U.S. 358 (2010), and

squarely addressed a vagueness challenge to § 1346. A six-Justice majority of the Court held that § 1346 “encompass[es] only bribery and kickback schemes,” and thus, “is not unconstitutionally vague.” 561 U.S. at 412. In arriving at this holding, the majority started by observing that “Congress intended § 1346 to refer to and incorporate the honest-services doctrine recognized in Courts of Appeals’ decisions before *McNally* derailed the intangible-rights theory of fraud.” *Id.* at 404. The majority acknowledged that these pre-*McNally* decisions “were not models of clarity or consistency,” *id.* at 405, but it also recognized an identifiable “core” to the honest-services doctrine—that is, “[t]he ‘vast majority’ of the [pre-*McNally*] honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes[.]” *id.* at 407 (citations omitted). Accordingly, the majority determined that § 1346 “can and should be salvaged by confining its scope to the core pre-*McNally* applications,” and therefore, “§ 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law.” *Id.* at 408-09.

The majority then explicitly addressed both prongs of the vagueness doctrine. First, the majority found no fair notice concerns, considering that “it has always been ‘as plain as a pikestaff that’ bribes and kickbacks constitute honest-services fraud, and the statute’s *mens rea* requirement further blunts any notice concern.” *Id.* at 412 (internal citations omitted). Second, the majority perceived “no significant risk” that § 1346, limited to only bribery and kickback schemes, would be arbitrarily enforced, given that the statute’s “prohibition on bribes and kickbacks draws

content not only from the pre-*McNally* case law, but also from federal statutes proscribing—and defining—similar crimes.” *Id.* (citations omitted). The majority concluded: “A criminal defendant who participated in a bribery or kickback scheme, in short, cannot tenably complain about prosecution under § 1346 on vagueness grounds.” *Id.* at 413.

Justice Scalia, writing for three Justices, vehemently disagreed. In Justice Scalia’s view, limiting § 1346 only to bribery and kickback schemes “require[d] not interpretation but invention,” because such a limiting construction of § 1346 was not “fairly possible.” *Id.* at 422-23 (Scalia, J., concurring in part and concurring in the judgment). More specifically, Justice Scalia fundamentally disagreed that the pre-*McNally* case law could be pared down to a “core” of bribery and kickback schemes. For example, as he explained, “[n]one of the ‘honest services’ cases, neither those pertaining to public officials nor those pertaining to private employees, defined the nature and content of the fiduciary duty central to the ‘fraud’ offense,” and “[t]here was not even universal agreement concerning the *source* of the fiduciary obligation—whether it must be positive state or federal law or merely general principles, such as the ‘obligations of loyalty and fidelity’ that inhere in the ‘employment relationship.’” *Id.* at 417 (Scalia, J., concurring in part and concurring in the judgment) (internal citations omitted). Therefore, in Justice Scalia’s view, “[t]he pre-*McNally* cases provide[d] no clear indication of what constitutes a denial of the right of honest services.” *Id.* at 420 (Scalia, J., concurring in part and concurring in the judgment). Justice Scalia, moreover, took issue with the

majority's conclusion that § 1346 was not unconstitutionally vague, because even cabinining the statute's reach to bribery and kickback schemes "would not solve the most fundamental indeterminacy: the character of the 'fiduciary capacity' to which the bribery and kickback restriction applies." *Id.* at 421 (Scalia, J., concurring in part and concurring in the judgment).

Despite Justice Scalia's great concern regarding this "most fundamental indeterminacy"—that is, the source and scope of fiduciary duties actionable under § 1346—the *Skilling* majority was not so troubled. As it noted, "debates" regarding the source and scope of the fiduciary duty at issue "were rare in bribe and kickback cases." *See id.* at 407 n.41. In such cases, "[t]he existence of a fiduciary relationship, under any definition of that term, was usually beyond dispute[.]" *Id.* The Second Circuit similarly has acknowledged Justice Scalia's concerns regarding the "lingering ambiguities in § 1346," but has remained unpersuaded that the statute is vague as applied to defendants who participate in bribery or kickback schemes. *See, e.g., United States v. Halloran*, 821 F.3d 321, 337-39 (2d Cir. 2016). Indeed, the Circuit has made clear that "fraud actionable under Section 1346 is limited to the nature of the offenses prosecuted in the pre-*McNally* cases (i.e., bribery and kickback schemes)—not the identity of the actors involved in those cases." *United States v. Bahel*, 662 F.3d 610, 632 (2d Cir. 2011) (citations omitted).

In light of the majority decision in *Skilling*, as well as Second Circuit precedent both before and after *Skilling*, the Court has no trouble rejecting

Defendants' present vagueness arguments. Martinez and Lopez contend that "courts continue to struggle to define the contours of when a sufficient fiduciary duty exists," and "[t]he inherent vagueness of § 1346 is exacerbated in this case," given that the relevant fiduciary duties, codified in FIFA's and its constituent members' codes of ethics, "allegedly exist between foreign private citizens and foreign private organizations." (Martinez & Lopez MTD Mem., Dkt. 1595-1, at 9; *see also* S-3 Indictment, Dkt. 1337, ¶ 7.) But the starting premise of this argument has been soundly rejected. "[W]hatever the school of thought concerning the scope and meaning of § 1346, it has always been as plain as a pikestaff that bribes and kickbacks constitute honest-services fraud." *Skilling*, 561 U.S. at 412 (internal quotation marks and citation omitted). In other words, although jurists may continue to debate the source and scope of the fiduciary duties encompassed by § 1346, at least when it comes to bribery and kickback schemes—such as the ones alleged here (*see, e.g.*, S-3 Indictment, Dkt. 1337, ¶¶ 63, 65, 73, 84)—those debates are academic.

In any event, the Court rejects the argument that the alleged breaches of fiduciary duties in this case are as a matter of law incognizable under § 1346, even if the alleged duties may arise from relationships between foreign private employees and their foreign private employers. As a general principle, "[t]he 'existence of a fiduciary relationship' between an employee and employer is 'beyond dispute,' and the violation of that duty through the employee's participation in a bribery or kickback scheme is within the core of actions criminalized by § 1346." *United States v. Nouri*, 711 F.3d 129, 137 n.1 (2d Cir. 2013)

(quoting *Skilling*, 561 U.S. at 407-08 & n.41); *see also Napout III*, 963 F.3d at 184 (explaining that the Second Circuit in *Rybicki*, sitting en banc, “concluded that the theory of honest services fraud applies to ‘an officer or employee of a private entity’ or ‘a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers’” (quoting *Rybicki*, 354 F.3d at 141-42)); *Napout III*, 963 F.3d at 191 (Hall, J., concurring) (concluding that Napout’s and Marin’s duty to FIFA and CONMEBOL not to accept bribes or kickbacks, as explicitly laid out by the two associations’ respective codes of conduct, fell squarely within § 1346’s ambit). Section 1346, moreover, equally reaches bribers and bribees, even if it is only the bribees who have the fiduciary relationship. *See United States v. Urciuoli*, 613 F.3d 11, 17-18 (1st Cir. 2010) (citing *Skilling*, 561 U.S. at 406-07) (observing that those who do the bribing “take part in a scheme” within the meaning of § 1346 just as much as those accepting the bribes, and “of the nine circuit cases that *Skilling* cites as exemplars of ‘core’ honest service[s] fraud cases, two involve convictions of individuals who bribed another to violate his fiduciary duties”). Whether there actually exists a fiduciary duty “is a fact-based determination that must ultimately be determined by a jury properly instructed on this issue.” *United States v. Harper*, No. 13-CR-601 (RJD), 2015 WL 6029530, at *3 (E.D.N.Y. Oct. 15, 2015) (quoting *United States v. Milovanovic*, 678 F.3d 713, 723 (9th Cir. 2012) (en banc)).

At oral argument, relying principally on *United States v. Giffen*, 326 F. Supp. 2d 497 (S.D.N.Y. 2004), a pre-*Skilling* case where a district court determined that § 1346 was unconstitutionally vague as applied to

a United States citizen who bribed government officials from the Republic of Kazakhstan, Martinez and Lopez emphasized that § 1346 was intended simply to reinstate the pre-*McNally* case law, and nothing in that body of law or § 1346 itself indicates that the statute reaches foreign bribery. But, in *United States v. Bahel*, the Second Circuit rejected a substantively indistinguishable argument. There, a foreign national employee of the

United Nations (“U.N.”) who worked in the U.N.’s Procurement Division was convicted of several counts of honest-services fraud for accepting kickbacks and bribes in exchange for helping a longtime friend secure contracts as a U.N. supplier. 662 F.3d at 616-17. On appeal, Bahel argued that he could not be prosecuted for honest-services fraud under § 1346 because “none of the pre-*McNally* cases extended an ‘honest-services’ theory of fraud to an international setting involving foreign nationals[.]” *Id.* at 632 (alterations omitted). The Circuit found this argument unavailing, concluding that § 1346 “is limited to the nature of the offenses prosecuted in the pre-*McNally* cases (i.e., bribery and kickback schemes)—not the identity of the actors involved in those cases.” *Id.* The Circuit also expressly found *Giffen* “unhelpful to Bahel’s position.” *Id.* Moreover, in the prior appeal here, Napout extensively cited and discussed *Giffen*, along with a district court case discussed in *Giffen*, *United States v. Lazarenko*, No. 00-CR-284 (MJJ), 2004 WL 7334086 (N.D. Cal. May 7, 2004). *See generally* Brief for Defendant-Appellant Napout, *Napout III*, No. 18-2820-cr (2d Cir. Feb. 8, 2019), ECF No. 82. Yet, in holding that there was no plain error as to the vagueness issue, the Second Circuit did not cite either

case, simply saying instead that “[t]he appellants have pointed us to no authority directly supporting their position ... , other than two pre-*Skilling* district court cases which they acknowledge are ‘not directly analogous to this case.’” *Napout III*, 963 F.3d at 184 (alterations omitted) (quoting *Napout Br.* at 42). Thus, the Court finds Martinez and Lopez’s reliance on *Giffen* to be misplaced.

Their reliance on the Supreme Court’s decisions in *Johnson v. United States*, 576 U.S. 591 (2015), *Sessions v. Dimaya*, 138 S. Ct. 1204 (2018), and *United States v. Davis*, 139 S. Ct. 2319 (2019), is similarly misplaced. (See Reply Memorandum in Further Support of Martinez and Lopez’s Motion to Dismiss, Dkt. 1622, at 3-5.) Martinez and Lopez use these cases to argue that the Supreme Court “has shown recently that it will not hesitate to invalidate criminal statutes that are hopelessly vague.” (*Id.* at 3.) But this argument does nothing more than presume that § 1346 is as “hopelessly vague” as the various residual clauses at issue in *Johnson* and its progeny. More fundamentally, this argument ignores *Skilling*’s unequivocal declaration: “A criminal defendant who participated in a bribery or kickback scheme, in short, cannot tenably complain about prosecution under § 1346 on vagueness grounds.” 561 U.S. at 413. That includes Martinez and Lopez, who may not so complain here.

Nor may Full Play. Full Play’s vagueness challenge differs slightly from Martinez and Lopez’s, but it is no more compelling. Full Play argues that *Skilling* expressly established a “national standard,” 561 U.S. at 411, not an international one, and even if

this “national standard” could be extended to foreign nations, “the indictment bases the fiduciary duties on private employer codes of ethics that do not, as a matter of law [in Uruguay, Argentina, or Paraguay], create fiduciary duties whose breach is criminal.” (Full Play MTD Mem., Dkt. 1594-1, at 1; *see also id.* at 5-10.) In essence, Full Play argues that § 1346 is “vague” as applied because the laws in South America governing employer-employee relationships do not criminalize private-sector bribery. To the extent that this is a proper vagueness challenge, the Second Circuit has indicated that it is meritless. *See Bahel*, 662 F.3d at 632-33. Indeed, in arriving at its conclusion in *Bahel*, the Second Circuit rejected the notion that honest-services fraud requires an underlying violation of local law. *See id.* at 633 (“[W]e reject the contention that absent a showing of a violation of New York statute or a duty imposed by New York law, a defendant may not be found guilty of using the mails in furtherance of a scheme to defraud on the basis of a breach of a fiduciary duty to the citizenry.” (quoting *United States v. Margiotta*, 688 F.2d 108, 124 (2d Cir. 1982))).

Accordingly, Defendants’ arguments that § 1346 is unconstitutionally vague as applied to them do not provide grounds to dismiss the S-3 Indictment.⁵

⁵ As the above discussion in this section indicates, although many of Defendants’ arguments wear the guise of a vagueness challenge, they are in fact arguments that the honest-services fraud charges in this case are impermissible extraterritorial applications of the statute. In other words, many of Defendants’ arguments implicate not so much the issues of fair notice and arbitrary enforcement as the general principle that “United States law governs domestically but does not rule the world.” *See*

B. Sufficiency of the Pleadings

In addition to seeking to dismiss the S-3 Indictment on extraterritoriality and vagueness grounds, Defendants argue that the S-3 Indictment should be dismissed for failure to allege sufficient facts to state an offense. (See Martinez & Lopez MTD Mem., Dkt. 1595-1, at 15-22; Full Play MTD Mem., Dkt. 1594-1, at 11-18.) “A defendant faces a high standard in seeking to dismiss an indictment” for insufficient pleading, “because an indictment need provide the defendant only a plain, concise, and definite written statement of the essential facts constituting the offense charged.” *United States v. Taveras*, 504 F. Supp. 3d 272, 277 (S.D.N.Y. 2020) (quoting *United States v. Smith*, 985 F. Supp. 2d 547, 561 (S.D.N.Y. 2014)). The rule is that an indictment “is sufficient as long as it (1) ‘contains the elements of the offense charged and fairly informs a defendant of the charge against which he must defend,’ and (2) ‘enables the defendant to plead an acquittal or conviction in bar of future prosecutions for the same offense.’” *United States v. Wedd*, 993 F.3d 104, 120 (2d Cir. 2021)

RJR Nabisco, Inc. v. European Cmty., 136 S. Ct. 2090, 2100 (2016) (quoting *Microsoft Corp. v. AT & T Corp.*, 550 U.S. 437, 454 (2007)). As noted, the Second Circuit has squarely decided that the charges in this case are not impermissible extraterritorial applications of the wire-fraud statute, because the purported use of wires occurred in the United States and was essential, rather than merely incidental, to the alleged schemes. *Napout III*, 963 F.3d at 180-81. Several other circuits have similarly concluded that the “focus” of the wire-fraud statute is the misuse of the wires, not the alleged scheme to defraud. See *United States v. Hussain*, 972 F.3d 1138, 1143-44 (9th Cir. 2020); *United States v. McLellan*, 959 F.3d 442, 469 (1st Cir. 2020).

(alterations omitted) (quoting *United States v. Alfonso*, 143 F.3d 772, 776 (2d Cir. 1998)). Indeed, “an indictment need do little more than to track the language of the statute charged and state the time and place (in approximate terms) of the alleged crime.” *United States v. Yannotti*, 541 F.3d 112, 127 (2d Cir. 2008) (quoting *Alfonso*, 143 F.3d at 776).

1. Martinez and Lopez’s Sufficiency Arguments

Martinez and Lopez contend that the wire-fraud charges against them⁶ must be dismissed because the S-3 Indictment does not adequately allege that: (1) they had a specific intent to defraud and they materially deceived; (2) they knowingly participated in a scheme to defraud; (3) there exists a fiduciary duty covered by the honest-services-fraud statute that they breached; and (4) there was a *quid pro quo*. (Martinez & Lopez MTD Mem., Dkt. 1595-1, at 15-22.) These arguments are without merit.

With respect to specific intent and material deception, the S-3 Indictment alleges that Martinez and Lopez, along with others, “did knowingly and

⁶ The wire-fraud statute provides, in relevant part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be [guilty of a crime].

18 U.S.C. § 1343.

intentionally devise a scheme and artifice to defraud FIFA and CONMEBOL and their constituent organizations ... by means of materially false and fraudulent pretenses, representations and promises,” and the S-3 Indictment goes on to identify 11 specific wire transfers, with dates, in furtherance of the alleged scheme. (S-3 Indictment, Dkt. 1337, ¶¶ 132-33.) Additionally, the S-3 Indictment alleges that Martinez and Lopez, along with others, “engaged in conduct designed to prevent the detection of their illegal activities, to conceal the location and ownership of proceeds of those activities and to promote the carrying on of those activities,” including: (i) “the use of sham contracts, invoices and payment instructions designed to create an appearance of legitimacy for illicit payments”; (ii) “the use of various mechanisms, including trusted intermediaries, bankers, financial advisors and currency dealers, to make and facilitate the making of illicit payments”; (iii) “the creation and use of shell companies, nominees and numbered bank accounts in tax havens and other secretive banking jurisdictions”; (iv) “the active concealment of foreign bank accounts”; (v) “the use of cash”; (vi) “the purchase of real property and other physical assets”; and (vii) “obstruction of justice.” (*Id.* ¶ 61). Further, with respect to the Copa Libertadores #2 Scheme particularly, the S-3 Indictment alleges that “[a]t various times in or about and between 2005 and 2015,” Martinez and Lopez, along with others, “agreed to pay, did pay and facilitated the concealment of annual bribe and kickback payments” to 14 CONMEBOL officials. (*Id.* ¶ 73.) These allegations are more than sufficient. *See United States v. Avenatti*, 432 F. Supp. 3d 354, 361 (S.D.N.Y. 2020) (concluding that a

particular honest-services wire-fraud charge was legally sufficient given that it “track[ed] the language of 18 U.S.C. §§ 1343 and 1346, apprise[d] [the defendant] of the nature of the accusation against him, and ... provide[d] notice generally of where and when the crime occurred[.]”)

Likewise, the S-3 Indictment sufficiently alleges Martinez’s and Lopez’s knowing participation. (*See* S-3 Indictment, Dkt. 1337, ¶ 132 (alleging that Martinez and Lopez, “together with others, did knowingly and intentionally devise a scheme and artifice to defraud”); ¶ 73 (alleging that Martinez and Lopez “agreed to pay, did pay and facilitated the concealment of annual bribes and kickback payments to certain high-ranking CONMEBOL officials”).)

Lopez and Martinez argue that the S-3 Indictment “is completely silent as to any fiduciary duty that was either owed or breached by” them, and that the S-3 Indictment does not “explicitly allege that [they] caused somebody else to breach a fiduciary duty.” (Martinez & Lopez MTD Mem., Dkt. 1595-1, at 20.) But, as discussed, Martinez and Lopez did not need to have breached their own fiduciary duty to be guilty of honest-services fraud. *See Urciuoli*, 613 F.3d at 17-18). And their latter argument is baseless because the S-3 Indictment does allege that they caused others to breach a fiduciary duty. (*See* S-3 Indictment, Dkt. 1337, ¶ 60 (“Hernan Lopez [and] Carlos Martinez ... participated in the corruption of the enterprise by conspiring with and aiding and abetting their co-conspirators in the abuse of their positions of trust and the violation of their fiduciary duties.”); ¶ 132 (“Hernan Lopez [and] Carlos

Martinez ... , together with others, did knowingly and intentionally devise a scheme and artifice to defraud FIFA and CONMEBOL and their constituent organizations, including to deprive FIFA and CONMEBOL and their constituent organizations of their respective rights to honest and faithful services through bribes and kickbacks”).)

As to the issue of a *quid pro quo*, the S-3 Indictment alleges that “the defendants and their co-conspirators corrupted the enterprise by engaging in various criminal activities, including fraud, bribery and money laundering, in pursuit of personal and commercial gain” (S-3 Indictment, Dkt. 1337, ¶ 60), and that “[b]y conspiring to enrich themselves through bribery and kickback schemes relating to the sale of media and marketing rights to various soccer tournaments and events, among other schemes, the defendants deprived FIFA, the confederations and their constituent organizations ... of the full value of those rights” (*id.* ¶ 62). With respect to the Copa Libertadores #2 Scheme specifically, the S-3 Indictment alleges that Defendants paid and facilitated bribes to certain CONMEBOL officials “in exchange for the officials’ support of T&T as the holder of the rights to the Copa Libertadores and other soccer events.” (*Id.* ¶ 73.) These allegations are sufficient. Indeed, the Second Circuit has observed that the alleged schemes in this case involve “relatively straightforward *quid pro quo* transactions.” *Napout III*, 963 F.3d at 181.

Martinez and Lopez’s arguments for dismissal of the wire-fraud conspiracy and money-laundering conspiracy charges against them are also meritless.

They argue that the wire-fraud conspiracy charge is insufficient because it does not provide information about the nature of their participation or when they allegedly joined the conspiracy. (Martinez & Lopez MTD Mem., Dkt. 1595-1, at 22-24.) But the S-3 Indictment belies this argument. (See S-3 Indictment, Dkt. 1337, ¶ 73 (charging that “[a]t various times in or about and between 2005 and 2015,” Martinez and Lopez, along with others, “agreed to pay, did pay and facilitated the concealment of annual bribe and kickback payments” to 14 CONMEBOL officials “in exchange for the officials’ support of T&T as the holder of the rights to the Copa Libertadores and other soccer events”).) Moreover, the Court has directed the Government to provide the years when Martinez and Lopez allegedly became aware of the Copa Libertadores #2 Scheme, and the Government has done so. (See 9/17/2021 Minute Entry; October 1, 2021 Bill of Particulars, Dkt. 1636, at 2-3.)

As for the money-laundering conspiracy charge, Martinez and Lopez summarily argue that it must be dismissed “for many of the same reasons” as the wire-fraud conspiracy charges against them. (Martinez & Lopez MTD Mem., Dkt. 1595-1, at 24.) They also argue that the Government “fail[ed] to allege any specific intent or agreement.” (*Id.* at 25.) These contentions are without merit. The S-3 Indictment alleges that between 2000 and 2015, Martinez and Lopez,

together with others, did knowingly and intentionally conspire to transport, transmit and transfer monetary instruments and funds, to wit: wire transfers, from places in the United States to and through places

outside the United States and to places in the United States from and through places outside the United States, with the intent to promote the carrying on of specified unlawful activity, to wit: wire fraud[.]

(Dkt. 1337, ¶ 135.) This tracks the language of the statute, which is sufficient.⁷ *See Wedd*, 993 F.3d at 120; *Yannotti*, 541 F.3d at 127. Moreover, as discussed, Martinez and Lopez’s arguments as to the sufficiency of the wire-fraud charges are meritless.

2. Full Play’s Sufficiency Arguments

Full Play argues that the charges against it must be dismissed because CONMEBOL and CONCACAF could not have been deceived or defrauded, and thus there is no “victim.” (*See Full Play MTD Mem.*, Dkt. 1594-1, at 11-18.) First, to the extent this argument turns on factual issues to be determined at trial, it is not a basis to dismiss the indictment at this stage. *See Wedd*, 993 F.3d at 121 (“At the indictment stage, we do not evaluate the adequacy of the facts to satisfy the elements of the charged offense. That is something we do after trial.”); *United States v. Laurent*, 861 F. Supp. 2d 71, 110 (E.D.N.Y. 2011) (“A technically sufficient

⁷ The relevant statute provides:

Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States with the intent to promote the carrying on of specified unlawful activity [shall be guilty of a crime].

18 U.S.C. § 1956(a)(2)(A).

indictment [] ‘is not subject to dismissal on the basis of factual questions, the resolution of which must await trial.’” (quoting *Alfonso*, 143 F.3d at 776-77)). Second, to the extent Full Play argues that CONMEBOL and CONCACAF could not have been defrauded as a matter of law because its highest officials participated in the alleged schemes, this argument is misplaced. See *Rybicki*, 354 F.3d at 141-42 (“[S]ection 1346, when applied to private actors, means a scheme or artifice to use the mails or wires to enable *an officer* or employee of a private entity (or a person in a relationship that gives rise to a duty of loyalty comparable to that owed by employees to employers) purporting to act for and in the interests of his or her employer (or of the other person to whom the duty of loyalty is owed) secretly to act in [their] own interests instead, accompanied by a material misrepresentation made or omission of information disclosed to the employer or other person.” (emphasis added)).

* * *

In sum, all of Defendants’ arguments for dismissal of the S-3 Indictment fail. Defendants’ motions to dismiss are accordingly denied.

II. Motions for Bill of Particulars

Federal Rule of Criminal Procedure 7(f) allows a defendant to seek a bill of particulars to enable the defendant “to prepare for trial, to prevent surprise, and to interpose a plea of double jeopardy should [the defendant] be prosecuted a second time for the same offense.” *United States v. Bortnovsky*, 820 F.2d 572, 574 (2d Cir. 1987) (per curiam) (citations omitted); see also *United States v. Shkreli*, No. 15-CR-637 (KAM),

2016 WL 8711065, at *4 (E.D.N.Y. Dec. 16, 2016) (noting that the purpose of a bill of particulars is threefold) (citation omitted). Defendants have the burden of showing that “the information sought is necessary” and that they “will be prejudiced without it.” *Shkreli*, 2016 WL 8711065, at *4 (internal quotation marks omitted) (quoting *United States v. Fruchter*, 104 F. Supp. 2d 289, 312 (S.D.N.Y. 2000)).

“[A] bill of particulars is not necessary where the government has made sufficient disclosures concerning its evidence and witnesses by other means.” *United States v. Walsh*, 194 F.3d 37, 47 (2d Cir. 1999) (citations omitted). A bill of particulars, moreover, is not a mechanism to compel the Government to disclose “the manner in which it will attempt to prove the charges, the precise manner in which a defendant committed the crime charged, or to give a preview of its evidence and legal theories.” *United States v. Taylor*, 17 F. Supp. 3d 162, 179 (E.D.N.Y. 2014) (quoting *United States v. Muhammad*, 903 F. Supp. 2d 132, 137 (E.D.N.Y. 2012)). In other words, a bill of particulars “may not be used by the defense as a fishing expedition or to force the government to reveal all its evidence before trial.” *Id.* at 178. At the same time, if information is necessary to the defendant’s ability to prepare an adequate defense, “it is of no consequence” that such information may also disclose evidence or the theory of the prosecution. *United States v. Barnes*, 158 F.3d 662, 665 (2d Cir. 1998). “The decision of whether or not to grant a bill of particulars rests within the sound discretion of the district court.” *Bortnovsky*, 820 F.2d at 574; *see also Walsh*, 194 F.3d at 47 (noting that a decision on a bill of particulars “is reviewed for an

abuse of discretion” (citing *Barnes*, 158 F.3d at 665-66)).

Defendants’ motions in this case make a variety of requests. Martinez and Lopez seek a bill of particulars that identifies the following information regarding the Copa Libertadores #2 Scheme, the only scheme in which they are alleged to have participated: (i) the date each of them became a member of the alleged wire-fraud conspiracy in connection with the scheme; (ii) the date on which two or more persons entered into an agreement with respect to the alleged wire-fraud conspiracy; (iii) the particulars of how each of them obtained confidential information from Co-Conspirator #1 regarding bidding for the U.S. broadcasting rights to the 2018 and 2022 World Cup tournaments; (iv) the specific acts (or omissions) that each of them performed (or did not perform) to cause the transmission of the 11 charged acts of wire fraud; (v) the date each of them became a member of the alleged money-laundering conspiracy in connection with the scheme; and (vi) the date on which two or more persons entered into an agreement with respect to the alleged money-laundering conspiracy. (Martinez and Lopez’s Motion for a Bill of Particulars (“Martinez & Lopez BoP Mot.”), Dkt. 1554, at 1-3.) Full Play’s motion broadly seeks a bill of particulars specifying “details about any involvement in, or acts [Full Play] or its agents are alleged to have committed, in furtherance of the conspiracies with which [Full Play] is charged” and the “identities, including aliases and code names, of unspecified, unindicted co-conspirators.” (Full Play’s Motion for Bill of Particulars (“Full Play BoP Mot.”), Dkt. 1553, at 1.) The “details” that Full Play seeks include “any

unspecified wire transfers, tournament editions, and marketing, broadcasting, or other contracts, that the [G]overnment will seek to prove were tainted” by the various alleged conspiracies. (Memorandum in Support of Full Play’s Motion for a Bill of Particulars (“Full Play BoP Mem.”), Dkt. 1553-1, at 2.) Full Play also seeks identification of “the unspecified ‘World Cup qualifying matches and friendly matches’ for which [Full Play] allegedly paid bribes and kickbacks,” as well as the “unspecified ‘soccer officials’ to whom [Full Play] allegedly paid or facilitated payment of bribes as kickbacks.” (*Id.* at 2.)

Consistent with its prior decision with respect to Napout’s motions for a bill of particulars, the Court has ordered the Government “to provide for each Defendant a list ‘specifying the transactions[—]for example, the marketing contracts, broadcasting contracts, tournament hosting designations, etc.[—]that the Government will seek to prove were tainted by an unlawful conspiracy of which’ that Defendant was a part.” (9/17/2021 Minute Entry (quoting *Hawit*, 2017 WL 663542, at *11).) As the Court found in *Napout*, Defendants here are “accused of having committed unlawful acts in connection with a category of transactions,” *i.e.*, contracts for the media rights to various soccer tournaments and matches, “without being given notice of which specific transactions falling within that category are alleged to have been tainted by unlawful conduct” implicating Defendants specifically. *See Hawit*, 2017 WL 663542, at *11. Moreover, neither the prior bill of particulars filed with respect to the defendants in 2017 nor the record of the 2017 trial sufficiently discloses the particular transactions that are alleged to have been tainted by

conduct implicating Defendants here specifically.⁸ Additionally, in light of the particular facts and circumstances of the charges against Defendants Martinez and Lopez, including the nature of the relevant contracts and the expansive period over which the Copa Libertadores #2 Scheme allegedly operated, the Court has found it appropriate in this case to require the Government to “provide the year(s) when Defendants Lopez and Martinez are alleged to have become aware of” that scheme. (9/17/2021 Minute Entry.) On October 1, 2021, the Government filed a bill of particulars in accordance with these rulings. (*See* Dkt. 1636.)

To the extent that Defendants request anything more particular or detailed, those requests are denied as seeking information beyond that necessary to prepare a defense. To start, the Court denies Martinez’s and Lopez’s requests for the dates on which the conspiracies charged as part of the Copa Libertadores #2 Scheme were formed. (*See* Martinez & Lopez BoP Mot., Dkt. 1554, at 1-2 (requests #3, 10).) “As a general rule, a defendant is not entitled to receive details of the government’s conspiracy allegations in a bill of particulars,” including “details regarding the date on which the conspiracy was formed.” *United States v. Urso*, 369 F. Supp. 2d 254, 272 (E.D.N.Y. 2005) (citations omitted). The reason is

⁸ As Martinez and Lopez point out, during the course of the six-week trial, which generated over 5,500 transcript pages, they were referenced a total of seven times, most of which consisted of their names being mentioned in passing. (*See* Reply in of Support of Martinez and Lopez’s Motion for Bill of Particulars, Dkt. 1586, at 8-9, 9 n.5.)

that the Government “is not required to prove exactly when or how a conspiracy was formed or when or how a particular defendant joined the scheme.” *United States v. Nachamie*, 91 F. Supp. 2d 565, 574 (S.D.N.Y. 2000) (quoting *United States v. Matos-Peralta*, 691 F. Supp. 780, 791 (S.D.N.Y. 1988)). Therefore, “requests ... for particulars as to when, where, how, and with whom each individual defendant joined an alleged conspiracy have almost uniformly been denied.” *United States v. Bin Laden*, 92 F. Supp. 2d 225, 242 (S.D.N.Y. 2000) (internal quotation marks and citation omitted); see also *United States v. Wilson*, 493 F. Supp. 2d 364, 372 (E.D.N.Y. 2006) (“easily” denying a request that included particulars on “date(s) and location(s) of any related meetings [defendant] attended, the dates [defendant] and the other defendants last participated in the conspiracies, and the nature of overt acts committed by [defendant] in furtherance of the conspiracies and with whom he did so”).

For similar reasons, the Court also denies Martinez’s and Lopez’s requests for the particulars of how they obtained confidential information from Co-Conspirator #1 and how they caused the transmission of the allegedly fraudulent wire transfers in 2015, to the extent that those requests go beyond requesting the particular transactions that the Government alleges were tainted by Martinez’s and Lopez’s alleged participation in the Copa Libertadores #2 Scheme. (See Martinez & Lopez BoP Mot., Dkt. 1554, at 1-2 (requests #4, 5, 6, 7).) In light of the nature of the allegations and the information already provided in the S-3 Indictment regarding Co-Conspirator #1 and the 11 allegedly fraudulent wire transfers, the Court

does not find that additional information pertaining to where, when, how, and with whom is necessary to preparing a defense, and instead crosses the line into merely fishing for detail on how the Government intends to present and prove its case. *Cf. Taylor*, 17 F. Supp. 3d at 179 (“The court cannot compel the Government to disclose through a bill of particulars ‘the manner in which it will attempt to prove the charges, the precise manner in which a defendant committed the crime charged, or to give a preview of its evidence and legal theories.’” (quoting *Muhammad*, 903 F. Supp. 2d at 137)).

Likewise, to the extent that it goes beyond the particulars that the Court has already ordered the Government to provide, the Court denies Full Play’s request for “details about any involvement in, or acts [Full Play] or its agents are alleged to have committed, in furtherance of the conspiracies” with which Full Play is charged. (*See* Full Play BoP Mot., Dkt. 1553, at 1.) As part of this broad request, Full Play seeks, for example, (1) “any information regarding any bribes paid (money or property), to whom it was paid, who else was involved and/or present and the date”; (2) specifics about “any transaction or series of transactions in any form deposited into or wired from any of [Full Play’s] accounts evidencing the alleged bribes”; and (3) “any wire facilities and/or financial institutions in the United States or elsewhere used to make or receive any alleged bribes or kickbacks.” (Full Play BoP Mem., Dkt. 1553-1, at 7.) These broad requests go beyond what is necessary for Full Play to understand the charges against it, which center around obtaining media rights to soccer tournaments through various illegal schemes. Indeed, the Court

previously denied almost exactly the same requests by Napout as falling within the realm of “information beyond that required to prepare a defense.” *See Hawit*, 2017 WL 663542, at *11; *see also* Napout Mot., Dkt. 490, at 1-2 (requesting, among other things, (1) “any information regarding any bribe solicited and/or received in any form (money or property), from whom it was solicited and/or received, who else was involved and/or present and the date”; (2) “any transaction in any form deposited into or wired from any of [Napout’s] accounts evidencing such bribe”; and (3) “any use of wire facilities and/or financial institutions within the United States or elsewhere used to make or receive any bribe”). Full Play contends that it is in a unique position because it is “a corporate defendant who could have acted through potentially a long list of possible employees and agents, nearly all of [whom] are no longer accessible to [it] for the purpose of obtaining access to information regarding its prior day-to-day business operations.” (Full Play BoP Mem., Dkt. 1553-1, at 10; *see also* Reply in Further Support of Full Play’s Motion for Bill of Particulars, Dkt. 1587, at 6 (“It is ... necessary for the government to identify the individuals it will assert acted illegally on [Full Play]’s behalf.”).) But based on the information in the S-3 Indictment (*see, e.g.*, Dkt. 1337, ¶¶ 60-64, 70-74, 79-85, 100-03) and the Court’s own experience in presiding over this case, the Court rejects Full Play’s argument that it needs all the details it is requesting to understand the charges against it and prepare a defense. Indeed, while Martinez and Lopez were peripheral figures in the 2017 trial, Full Play and its owners, the Jinkises, featured prominently at the trial. Further, Full Play provides no support for the

notion that, as a corporate defendant, it is entitled to more details or notice than individual defendants, who face the additional grave risk of being deprived of their liberty.

Full Play also seeks the identities of “unspecified, unindicted co-conspirators,” as well as “information regarding the unspecified ‘soccer officials’ to whom [Full Play] allegedly paid or facilitated payment of bribes and kickbacks.” (Full Play BoP Mot., Dkt. 1553, at 1; *see also* Full Play BoP Mem., Dkt. 1553-1, at 2.) “There is no clear rule in the Second Circuit as to when a bill of particulars for unindicted co-conspirators should be granted.” *United States v. Kahale*, 789 F. Supp. 2d 359, 372 (E.D.N.Y. 2009) (citing *Nachamie*, 91 F. Supp. 2d at 572); *see also United States v. Barrett*, 153 F. Supp. 3d 552, 572 (E.D.N.Y. 2015) (“[T]here are no hard and fast rules for whether the government must turn over the identities of unindicted coconspirators.”) (citations omitted). Courts in this circuit have typically analyzed a set of six factors to determine whether to compel the government to disclose identities of unindicted co-conspirators:

- (1) the number of co-conspirators; (2) the duration and breadth of the alleged conspiracy; (3) whether the government otherwise has provided adequate notice of the particulars; (4) the volume of pretrial disclosure; (5) the potential danger to coconspirators and the nature of the alleged criminal conduct; and (6) the potential harm to the Government’s investigation.

Barrett, 153 F. Supp. 3d at 572 (quoting *Kahale*, 789 F. Supp. 2d at 372); *accord Nachamie*, 91 F. Supp. 2d at 572. Previously, the Court determined that the Government in this case need not disclose the identities of unnamed co-conspirators with respect to Napout, as long as the Government complied with the Court’s order to disclose the particular allegedly tainted transactions, because such unnamed co-conspirators, “according to the Government, were involved in conspiracies affecting the same transactions.” *Hawit*, 2017 WL 663542, at *11. Balancing the factors here compels the same conclusion, if not more so, given the extensive evidence presented at the 2017 trial relating to the identities of Full Play’s co-conspirators. So long as the Government specifies the transactions that it will seek to prove were tainted by an unlawful conspiracy of which Full Play (or any other Defendant here) was a part, which the Government has done (*see* Dkt. 1636), the Court finds that the identities of unnamed, unindicted co-conspirators are not necessary for Full Play (or the other Defendants) to understand the charges against them and prepare adequately for trial.⁹ Therefore, Full Play’s request for the identities of unnamed, unindicted co-conspirators, including unnamed “soccer officials,” is denied.

III. Renewed Motions for Severance

The Court denied Full Play’s and Martinez’s renewed motions for severance at oral argument on

⁹ In addition, the Court is mindful, given the history of this case and events that transpired during the 2017 trial, that there may be strong safety-related reasons for not disclosing the identities of particular individuals.

September 17, 2021 (*see* 9/17/2021 Minute Entry), but for completeness, the Court provides the following written explanation of its ruling.

Rule 14(a) permits a court to sever offenses or defendants “[i]f the joinder of offenses or defendants ... appears to prejudice a defendant.” Fed. R. Crim. P. 14(a). Given the “preference in the federal system for joint trials of defendants who are indicted together,” a severance should be granted only where “there is a serious risk that a joint trial would compromise a specific trial right of one of the defendants, or prevent the jury from making a reliable judgment about guilt or innocence.” *Zafiro v. United States*, 506 U.S. 534, 537, 539 (1993); *see also United States v. Page*, 657 F.3d 126, 129 (2d Cir. 2011) (“[T]he defendant [must] demonstrate[] that the failure to sever [would] cause[] him substantial prejudice in the form of a miscarriage of justice.” (quoting *United States v. Blakney*, 941 F.2d 114, 116 (2d Cir. 1991))); *United States v. Ventura*, 724 F.2d 305, 312 (2d Cir. 1983) (“We have held repeatedly that, absent a showing of substantial prejudice, defendants who are jointly indicted should be jointly tried.”) (citations omitted). “Even where a defendant shows a risk of prejudice, “less drastic measures” than severance, “such as limiting instructions, often will suffice to cure any risk of prejudice.” *Zafiro*, 506 U.S. at 539 (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)). “Rule 14 leaves the determination of risk of prejudice and any remedy that may be necessary to the sound discretion of the district courts.” *Id.* at 541.

The Court previously denied a motion to sever Full Play’s trial from that of Martinez and Lopez.

Webb, 2020 WL 6393012, at *4-8. Full Play presently renews its argument that a joint trial will result in “double prosecution,” *i.e.*, from the Government and from Martinez and Lopez, who will “highlight [Full Play]’s guilt while noting the comparatively limited evidence of [their] role in the alleged bribery schemes[,] causing an inevitable prosecutorial echo chamber.” (Full Play MTD Mem., Dkt. 1594-1, at 22; *see also* Reply in Further Support of Full Play’s Motion to Dismiss and for Severance, Dkt. 1620, at 10 (“[C]o-defendants intend to deploy a ‘Blame Full Play Defense[.]’”).) Martinez, like before, argues that a joint trial will cause spillover prejudice. He contends that his (and Lopez’s) defense “is not, in any way, aligned with that of Full Play” because he and Lopez “were completely unaware of any bribery scheme and are in no position to refute its existence.” (Martinez’s Motion for Severance, Dkt. 1593, at 2.)

The Court finds no reason to reconsider its prior decision. To start, as the Court previously determined, “Full Play’s ‘double-prosecution’ theory rests on the fundamentally flawed premise that a reminder that certain evidence pertains only to Full Play is akin to a charge that Full Play is guilty.” *Webb*, 2020 WL 6393012, at *5. Indeed, “[m]ere ‘fingerpointing’ does not require severance.” *United States v. Casamento*, 887 F.2d 1141, 1154 (2d Cir. 1989) (citation omitted). Further, despite Full Play’s characterization of Martinez’s (and Lopez’s) defense as a “Blame Full Play Defense,” there remains no indication that Martinez or Lopez plan to present evidence that Full Play is guilty. Indeed, it would make no sense for Martinez and Lopez to do so, because Full Play’s guilt does not imply Martinez’s and Lopez’s lack of guilt.

Martinez also provides no basis for the Court to reconsider its prior rejection of Martinez's contention of spillover prejudice. As the Court previously explained, "[w]here the alleged RICO enterprise involves underlying crimes *of a similar nature*, courts in this circuit have found insufficient prejudice to grant severance, even with respect to defendants not charged in the alleged overarching RICO enterprise." *Webb*, 2020 WL 6393012, at *7 (emphasis added) (collecting cases). Moreover, Martinez's attempt at casting his defense as antagonistic to that of Full Play is unavailing. That Martinez will argue that he did not know about the alleged bribery scheme does not indicate or suggest that Full Play is guilty, or that Martinez is "blaming" Full Play. Defendants will proceed to trial jointly.

CONCLUSION

For the above reasons, Defendants' motions to dismiss the S-3 Indictment (Dkts. 1594, 1595) are denied in their entirety. Defendants' motions for a bill of particulars (Dkts. 1553, 1554) are granted to the extent described at the September 17, 2021 oral argument; the motions are otherwise denied. As the Court ruled at oral argument, Full Play's and Martinez's renewed motions for severance are denied.

SO ORDERED.

/s/ Pamela K. Chen

Pamela K. Chen

United States District Judge

Dated: October 29, 2021

Brooklyn, New York

App-150

Appendix D

**UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF NEW YORK**

Nos. 15-cr-252 (S-3)

UNITED STATES OF AMERICA,

v.

HERNÁN LOPEZ, FULL PLAY GROUP, S.A.,

Defendants.

Filed: Sept. 12, 2023

JUDGMENT OF AQUITTAL

The Court having vacated the jury's guilty verdicts as to Defendant Hernan Lopez on Counts 9 and 21 of the Superseding (S-3) Indictment, pursuant to Federal Rule of Criminal Procedure 29, by Memorandum & Order issued on September 1, 2023, IT IS ORDERED that the Defendant, is acquitted, discharged, and any bond exonerated.

s/Hon. Pamela K. Chen
Signature of Judge

...

9/12/2023
Date

Appendix E

**RELEVANT CONSTITUTIONAL AND
STATUTORY PROVISIONS**

U.S. Const. amend. V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

**18 U.S.C. §1343. Fraud by wire, radio, or
television**

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. If the violation occurs in relation to, or involving any benefit authorized, transported, transmitted, transferred, disbursed, or paid in connection with, a presidentially declared major disaster or emergency (as those terms are defined in section 102 of the Robert T. Stafford

Disaster Relief and Emergency Assistance Act (42 U.S.C. 5122)), or affects a financial institution, such person shall be fined not more than \$1,000,000 or imprisoned not more than 30 years, or both.

18 U.S.C. §1346. Definition of “scheme or artifice to defraud”

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.