Nos. 25-390, 25-396

IN THE

Supreme Court of the United States

FULL PLAY GROUP, S.A.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

HERNAN LOPEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* DUE PROCESS INSTITUTE AND CATO INSTITUTE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the honest-services statute is unconstitutionally vague.

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INTEREST OF AMICI CURIAE[1]

Due Process Institute is a nonprofit, bipartisan public interest organization that seeks to ensure procedural fairness in the criminal justice system. Protecting the right of individuals to receive constitutionally adequate notice of which actions are subject to criminal liability is among Due Process Institute's top priorities. Because the honest services statute, 18 U.S.C. § 1346, fails to provide such notice, Due Process Institute has decided to submit this brief.

The Cato Institute is a nonpartisan public policy research foundation founded in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Project on Criminal Justice was founded in 1999 and focuses in particular on the scope of substantive criminal liability, the proper and effective role of police in their communities, the protection of constitutional and statutory safeguards for criminal suspects and defendants, citizen participation in the criminal justice system, and accountability for law enforcement officers. This case interests Cato because vague criminal laws lead to the arbitrary use of government power and the violation of individual liberties.

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[1] Under Sup. Ct. R. 37.6, counsel for amici curiae state that no counsel for a party authored this brief in whole or in part, and that no person other than amici or their counsel made a monetary contribution to the preparation or submission of this brief. Under Sup. Ct. R. 37.2, counsel gave notice to all parties of intent to file this brief at least ten days before the due date for the brief.

SUMMARY OF ARGUMENT

For almost four decades, the federal courts have struggled to make intelligible the honest services statute, 18 U.S.C. § 1346. This Court joined that effort in *Skilling v. United States*, 561 U.S. 358 (2010), and again in *Percoco v. United States*, 598 U.S. 319 (2023). Despite these attempts, to this day "there is no good answer" to "what 'fiduciary duty' suffices to make someone guilty of honest services fraud." *United States v. Householder*, 137 F.4th 454, 501 (6th Cir. 2025) (Thapar, J., concurring).

Section 1346 provides no "ascertainable standard of guilt" and thus violates due process. *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). Further efforts by the courts to make the statute intelligible will involve "not interpretation but invention." *Skilling*, 561 U.S. at 422 (Scalia, Thomas, and Kennedy, JJ., concurring in the judgment). Such "invention" would violate the ban on federal common law crimes and trample the due process guarantee of fair warning--the principle that the point at which conduct becomes criminal "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." *Percoco*, 598 U.S. at 337-38 (Gorsuch and Thomas, JJ., concurring in the judgment).

The Court should declare § 1346 unconstitutionally vague, at least as applied to private persons, and leave it to Congress to produce a

statute that defines the offense "with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

ARGUMENT

I. THE COURTS HAVE FAILED TO GIVE MEANING TO THE PHRASE "HONEST SERVICES."

Spawned more than eighty years ago, *e.g., Shushan v. United States*, 117 F.2d 110, 115 (5th Cir. 1941), the honest services mail and wire fraud theory has plagued federal courts ever since. In 1987, this Court jettisoned that theory. *McNally v. United States*, 483 U.S. 350 (1987). Congress revived it the next year with a single sentence: "For the purposes of this chapter [including mail and wire fraud], 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.

Section 1346 solved one problem with the honest services theory--its lack of statutory basis--but did nothing to cure the fundamental vagueness of the phrase "honest services." In 2010, this Court tried to do what Congress had not. To give the statute some ascertainable meaning, it limited "honest services" to what the Court described as its pre-*McNally* "core" of bribes and kickbacks. *Skilling v. United States*, 561 U.S. 358, 409 (2010). Although the Court acknowledged that there was "force" to the contention

that § 1346 was impermissibly vague, given that "honest-services decisions preceding *McNally* were not models of clarity or consistency," *id.* at 405, it nonetheless concluded that the bribe-and-kickback limitation narrowed the statute sufficiently to make it intelligible.

But as Justice Scalia, joined by Justices Thomas and Kennedy, observed, the cure was as bad as the disease. To begin, the Court's effort to find a bribe-and-kickback "core" of pre-*McNally* cases was "not interpretation but invention." *Id.* at 422 (Scalia, Thomas, and Kennedy, JJ., concurring in the judgment). In fact, the concurrence concluded, whatever Congress intended when it enacted § 1346, it undoubtedly meant to encompass more than bribes and kickbacks in the phrase "honest services"--although what that "more" included was impossible to discern. Quoting *United States v. Reese*, 92 U.S. 214, 221 (1876), the concurrence declared that "[t]o limit this statute in the manner now asked for [to bribes and kickbacks] would be to make a new law, not to enforce an old one. This is no part of our duty," *Skilling*, 561 U.S. at 425.

The concurrence identified a second fundamental problem with the Court's approach to the honest services statute: the indeterminacy of the requirement that the defendant breach, or cause the breach of, a fiduciary duty. Neither the source nor the scope of such a duty was ascertainable, particularly in cases involving private persons rather than government officials. After reviewing the sprawl of lower court opinions on the fiduciary duty essential to liability for honest services fraud, the concurrence

concluded that the Court's bribe-and-kickback formulation does not

> suffice to eliminate the vagueness of the statute. It would solve (perhaps) the indeterminacy of what acts constitute a breach of the "honest services" obligation under the pre-*McNally* law. But it would not solve the most fundamental indeterminacy: the character of the "fiduciary capacity" to which the bribery and kickback restriction applies. Does it apply only to public officials? Or in addition to private individuals who contract with the public? Or to everyone, including the corporate officer here? The pre-*McNally* case law does not provide an answer. Thus, even with the bribery and kickback limitation the statute does not answer the question, "What is the criterion of guilt?"

Id. at 421.

The *Skilling* concurrence proved prescient. In the fifteen years since that decision, the courts of appeals have remained fragmented on the fiduciary duty requirement. As the Petition in *Full Play Group, S.A. v. United States*, No. 25-390, demonstrates, the circuits are deeply split on the issue. *Full Play Group* Pet. at 14-15, 17-22.

This Court again grappled with the honest services statute in *Percoco v. United States*, 598 U.S. 319 (2023). The district court in *Percoco* instructed

the jury that the defendant, a private citizen, "could be found to have had a duty to provide honest services to the public during the time when he was not serving as a public official if the jury concluded, first, that 'he dominated and controlled any governmental business' and, second, that 'people working in the government actually relied on him because of a special relationship he had with the government.'" *Id.* at 324-25 (quoting jury instruction). Percoco argued that a private citizen can never owe a duty of honest services to the public. The Court rejected this proposed rule, but it found that the jury instructions--based on the Second Circuit's decision in *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982)--were "too vague." *Percoco*, 598 U.S. at 330. The Court did not, however, provide a more concrete standard, thus leaving the source and scope of the necessary fiduciary duty undefined.

Concurring in the judgment, Justices Gorsuch and Thomas agreed with the majority that the jury instructions were vague. But, the concurrence observed,

> the problem runs deeper than that because no set of instructions could have made things any better. To this day, no one knows what "honest-services fraud" encompasses. And the Constitution's promise of due process does not tolerate that kind of uncertainty in our laws—especially when criminal sanctions loom.

Id. at 333 (Gorsuch and Thomas, JJ., concurring in the judgment). The concurrence concluded that the

majority opinion did not solve the vagueness problem: "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*." *Id.* at 336 (emphasis in original).

In the wake of *Percoco*, disarray persists in the courts of appeals over the meaning of "honest services." After surveying the courts' differing views on the source and scope of the required fiduciary duty, Judge Thapar recently observed that "there is no good answer" to "what 'fiduciary duty' suffices to make someone guilty of honest services fraud." *United States v. Householder*, 137 F.4th 454, 501 (6th Cir. 2025) (Thapar, J., concurring).

Against this backdrop, we turn to the crucial questions that we urge the Court to address: Is the honest services statute vague; and, if so, should this Court and the lower courts continue their "rescue mission," *Percoco*, 598 U.S. at 335 (Gorsuch and Thomas, JJ., concurring in the judgment), by developing honest services law on a case-by-case basis in common law fashion, or should courts leave to Congress the task of making the statute intelligible.

II. THE HONEST SERVICES STATUTE IS VAGUE.

This Court has long held that a criminal statute must provide an "ascertainable standard of guilt." *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 89 (1921). As a matter of due process, "a penal statute [must] define the criminal offense with sufficient definiteness that ordinary people can

understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *see, e.g., Skilling*, 561 U.S. at 412. Under this principle, a criminal provision must pass two tests: it must provide fair warning to potential violators, and it must cabin the discretion of the police, prosecutors, and juries. Section 1346 flunks both.

To pass the first test, a criminal statute must provide "'fair warning . . . to the world in language that the common world will understand, of what the law intends to do if a certain line is passed.'" *United States v. Aguilar*, 515 U.S. 593, 600 (1995) (quoting *McBoyle v. United States*, 283 U.S. 25, 27 (1931)); *see also M. Kraus & Bros. v. United States*, 327 U.S. 614, 621 (1946) (provision must be "explicit and unambiguous in order to sustain a criminal prosecution"); *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939) ("No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids.").

The honest services statute does not come close to meeting these standards. Judges have struggled for decades, before and after this Court's decisions in *Skilling* and *Percoco*, to give concrete meaning to the phrase "honest services." "[O]rdinary people," *Kolender*, 461 U.S. at 357--people, in other words, without legal training--are necessarily left to "speculate as to the meaning" of the statute, *Lanzetta*, 306 U.S. at 453.

The *Skilling* majority concluded that its bribe-and-kickback limitation made the meaning of the honest services statute "'plain as a pikestaff.'" *Skilling*, 561 U.S. at 412 (quoting *Williams v. United States*, 341 U.S. 97, 101 (1951)). But the past fifteen years of prosecutions under § 1346 have shown that to be wishful thinking. "Ordinary people" may well know what conduct constitutes a bribe or a kickback, but what they (together with judges and lawyers) cannot discern is the source and scope of the fiduciary duty necessary for that conduct to constitute a violation of § 1346.

The prosecutorial discretion component of the vagueness doctrine focuses on a separate interest from the fair warning component: the systemic importance of clearly drawn criminal statutes as a means of preventing the government from arbitrarily targeting and convicting individuals. Thus, even if a statute provides fair warning, it may nonetheless be impermissibly vague if it fails adequately to restrain official discretion. *See, e.g., City of Chicago v. Morales*, 527 U.S. 41, 56 (1999) (plurality opinion). "Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.'" *Kolender*, 461 U.S. at 358 (quoting *Smith v. Goguen*, 415 U.S. 566, 575 (1974)). In that event, the statute violates due process "not because it provides insufficient notice, but because it does not provide sufficient minimal standards to guide law enforcement officers." *Morales*, 527 U.S. at 72 (Breyer, J., concurring) (quotation omitted).

The honest services statute fails this test as well, despite the *Skilling* majority's contrary prediction. 561 U.S. at 412-13. As the history of cases under § 1346 since *Skilling* demonstrates, prosecutors have taken advantage of the statute's "standardless sweep" to bring inventive prosecutions, of which *Percoco* and this case are exemplars. *Skilling*'s bribe-and-kickback limitation placed some constraints on prosecutors' imagination, but the indeterminacy of the fiduciary duty requirement still allows the government to police an astonishing array of commercial behavior--including, in this case, foreign commercial bribery.

Judicial oversight provides only a limited check on prosecutorial discretion under § 1346. This Court can only review a tiny fraction of honest services prosecutions. The courts of appeals exercise more frequent review but have shown themselves unwilling to impose meaningful limits on the honest services statute absent guidance from this Court and are in any event deeply split. And most federal criminal prosecutions result in guilty pleas, meaning that theories of prosecution in those cases never reach the courts of appeals and might not even receive meaningful district court review. That leaves the wise exercise of prosecutorial discretion as the principal constraint on the use of § 1346--but this Court has long held that it "cannot construe a criminal statute on the assumption that the Government will 'use it responsibly.'" *McDonnell v. United States*, 579 U.S. 550, 576 (2016) (quoting *United States v. Stevens*, 559 U.S. 460, 480 (2010)).

For these reasons, the honest services statute is vague, at least as applied to private citizens such as Petitioner. The statute provides no "ascertainable standard of guilt" and thus violates due process. *L. Cohen Grocery Co.*, 255 U.S. at 89.

III. CONGRESS, NOT THE COURTS, SHOULD REWRITE SECTION 1346 TO MAKE IT INTELLIGIBLE.

As the *Skilling* majority observed, under some circumstances an otherwise vague statute can be saved by a reasonable limiting interpretation. *Skilling*, 561 U.S. at 405-09; *see, e.g., United States v. Lanier*, 520 U.S. 259, 267-68 (1997). On the other hand, the Court "may impose a limiting construction on a statute only if it is readily susceptible to such a construction. We will not rewrite a law to conform it to constitutional requirements, for doing so would constitute a serious invasion of the legislative domain and sharply diminish Congress's incentive to draft a narrowly tailored law in the first place." *Stevens*, 559 U.S. at 481 (cleaned up); *see, e.g., Reese*, 92 U.S. at 221 ("It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of the government.").

The *Stevens* principle controls here. The *Skilling* majority concluded that its bribe-and-kickback limitation on § 1346 was a reasonable interpretation of the statute and thus a permissible

means of preserving its constitutionality against a vagueness challenge. The concurrence disagreed, denouncing the limitation as "not interpretation but invention." 561 U.S. at 422 (Scalia, Thomas, and Kennedy, JJ., concurring in the judgment). Regardless of who was correct, the bribe-and-kickback limitation did not address the indeterminacy of the fiduciary duty requirement. Nor did *Percoco*, which told us a "little bit more about when a duty of honest services *does not* arise" but not "when it *does*." 598 U.S. at 336 (Gorsuch and Thomas, JJ., concurring in the judgment) (emphasis in original). Further elaboration of the fiduciary duty requirement, without any guidance from the statutory text or even legislative history, would cross the line from "interpretation" to "invention," if that line has not been crossed already. If § 1346 is to be made intelligible, Congress must do the job, not the federal courts.

Fair warning principles confirm this point. Consider a hypothetical ordinary person trying to discern the scope of § 1346. He reads the statute, but it provides little guidance. He decides to probe further and comes across *Skilling*. Now he knows that the phrase "honest services" is limited to bribes and kickbacks, but he learns that there is a fiduciary duty requirement as well. Nothing in the statutory language tells him anything about that duty. Nor does *Skilling* itself answer the question. Our ordinary person wonders, along with the *Skilling* concurrence, "Does it apply only to public officials? Or in addition to private individuals who contract with the public? Or to everyone, including the corporate

officer here?" 561 U.S. at 421 (Scalia, Thomas, and Kennedy, JJ., concurring in the judgment).

Undeterred, he continues his research and finds *Percoco*. That decision tells him one circumstance that does *not* give rise to a fiduciary duty, but it gives him "no idea [what] *does*." 598 U.S. at 336 (Gorsuch and Thomas, JJ., concurring in the judgment) (emphasis in original). On he goes to court of appeals opinions, but along with Judge Thapar he discovers that "there is no good answer" to "what 'fiduciary duty' suffices to make someone guilty of honest services fraud." *Householder*, 137 F.4th at 501 (Thapar, J., concurring).

Now let's assume our ordinary person is a television network executive assigned to compete for the rights to broadcast a hugely popular international sporting event. The non-government organization that sells those rights is in a foreign country. Let's further assume that the decisionmakers at that foreign organization expect to be compensated by networks competing for the broadcast rights. Our executive's foreign competitors are prepared to pay. Now our executive has a difficult decision to make. He intends to follow the law, but he does not want to lose a contract that will bring his company and its shareholders millions of dollars unless there is no lawful way to obtain it.

By this point, our hypothetical executive has done far more than anyone could reasonably expect to locate an "ascertainable standard of guilt" in § 1346. *L. Cohen Grocery Co.*, 255 U.S. at 89. He has tried diligently, albeit without success, to find that "certain

line" separating lawful conduct from an honest services violation. *Aguilar*, 515 U.S. at 600 (quotation omitted).

But still he persists. He researches court of appeals cases and finds none applying § 1346 to foreign commercial bribery. He discovers the Foreign Corrupt Practices Act and learns that it only prohibits bribes paid to foreign government officials, not private persons like those he contemplates paying. From this he concludes that Congress--which, he has come to learn, enacts all federal criminal law--made a policy decision to draw the line of criminality at bribery of foreign government actors. He even researches the law of the foreign country and finds no prohibition there on commercial bribery.

Satisfied that he can do so without violating the honest services statute, our executive decides to pay the compensation that his foreign counterparties request. His company obtains the television rights to the sporting event.

But then he gets indicted under § 1346. The prosecution advances the novel theory that the fiduciary duty the foreign payment recipients breached resides in a private code of conduct that the foreign non-government organization adopted. A jury convicts the executive under this theory, but on a motion for judgment of acquittal the district judge rejects it. Our executive draws comfort from this ruling; he had not found reason to believe that § 1346 applied to his conduct, and now a United States District Judge has come to the same conclusion. But the government appeals, and the court of appeals

holds that the theory is valid. It brushes aside the executive's contention that the statute did not provide fair warning that his conduct violated § 1346.

Now, of course, our executive understands that he violated the honest services statute, because the court of appeals has told him so. But he has learned this life-shattering lesson too late to conform his conduct to the law as he now understands it. Off to prison he goes.

It is in part to prevent this sort of injustice that the Court has barred common law crimes. *See, e.g., United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820). The point at which conduct becomes criminal "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." *Percoco*, 598 U.S. at 337-38 (Gorsuch and Thomas, JJ., concurring in the judgment). And it is the job of the legislature to provide that advance warning "as to what the State commands or forbids." *Lanzetta*, 306 U.S. at 453. Our hypothetical executive--and countless real, flesh and blood people now sitting in federal prison following honest services convictions--did not receive the warning that due process requires. They learned that their conduct violated § 1346 only after a jury found them guilty and a court upheld the conviction.

* * * *

For almost forty years, this Court and the lower federal courts have labored to give meaning to the honest services statute. Further such efforts would

cross the line from interpretation to legislation, if that line has not already been crossed, and would compound the due process violation that § 1346 has visited upon countless defendants. It is time for the Court to acknowledge that only Congress can make the statute intelligible.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the court of appeals reversed.

Respectfully submitted,

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