16-1010

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

—against—

FREDERIC PIERUCCI, WILLIAM POMPONI,

Defendants,

LAWRENCE HOSKINS,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF FOR THE NEW YORK COUNCIL OF DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE AND AFFIRMANCE

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

The New York Council of Defense Lawyers ("NYCDL") is a not-for-profit professional association of approximately 250 lawyers, including many former federal prosecutors, whose principal area of practice is the defense of criminal cases in the federal courts in New York. NYCDL's mission includes protecting the individual rights guaranteed by the Constitution, enhancing the quality of defense representation, taking positions on important defense issues, and promoting the proper administration of criminal justice. NYCDL offers the Court the perspective of experienced practitioners who regularly handle some of the most complex and significant criminal cases in the federal courts.[1]

NYCDL files this *amicus* brief in support of Defendant-Appellee Lawrence Hoskins, and urges affirmance of the District Court's ruling that accomplice liability may not be imposed on non-resident foreign nationals who are not subject to criminal liability as principals under the Foreign Corrupt Practices Act

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[1] Pursuant to Rule 29(a)(4)(E) of the Federal Rules of Appellate Procedure ("FRAP"), the NYCDL certifies that (1) this brief was authored entirely by counsel for the NYCDL, and not by counsel for any party, in whole or part; (2) no party and no counsel for any party contributed money to fund preparing or submitting this brief; and (3) apart from the NYCDL and their counsel, no other person contributed money to fund preparing or submitting this brief.

("FCPA").[2] NYCDL has a particular interest in this case because NYCDL's core concerns include combatting the unwarranted extension of federal criminal statutes and promoting clear standards for the imposition of criminal liability. As shown below, the Government's unprecedented attempt to use the federal conspiracy and aiding and abetting statutes to expand the extraterritorial reach of the FCPA, and thereby ensnare foreign individuals who fall outside the carefully-delineated categories of principals covered by the FCPA, raises precisely those concerns.

INTRODUCTION AND SUMMARY OF ARGUMENT

There is no question that in the FCPA, Congress carefully delineated the categories of defendants who would be subject to its prohibitions. Congress understood that it was legislating with respect to international conduct, and that efforts to apply U.S. law to foreign conduct raised significant "jurisdictional, enforcement, and diplomatic difficulties." H.R. Rep. No. 95-831, at 14 (1977); Supp. App. 186.[3] Congress was thus extraordinarily careful to define exactly who would be covered by the Act. While U.S. companies, citizens, and residents are subject to the Act for any conduct worldwide, a foreign national is only subject to

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[2] All parties have consented to the filing of this brief. Accordingly, it may be filed without leave of court, pursuant to FRAP Rule 29(a)(2).

[3] "U.S. Br." refers to the brief filed by the Government on this appeal; "Hoskins Br." refers to the brief filed by Defendant Lawrence Hoskins; "A." refers to the Appendix filed by the Government with its brief; "Supp. App." refers to the Supplemental Appendix filed by Mr. Hoskins.

the Act if he was an "officer, director, employee, or agent" of a U.S. company, 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), or if he acted "while in the territory of the United States" to further a corrupt payment to a foreign government official. 15 U.S.C. § 78dd-3(a).

The issue on this appeal is whether the Government can circumvent these careful limitations on the scope of the Act through reliance on secondary theories of liability, for conspiracy or aiding-and-abetting. The brief filed by Mr. Hoskins convincingly demonstrates that the text, structure, and legislative history of the Act do not permit this end-run around the Act's limitations. Under the Supreme Court's decision in *Gebardi v. United States*, 287 U.S. 112 (1932), and its progeny, the Government cannot use secondary theories of liability to circumvent Congress' deliberate decision to exclude foreign nationals from the scope of the Act, except in the narrow circumstances where prosecution is expressly permitted.

But there are other fundamental policy reasons why the District Court's decision should be affirmed, which are not fully developed in Mr. Hoskins' brief.

First, the Government's position violates the presumption against extraterritorial application of U.S. statutes. It is well-settled that where, as here, a statute "provides for *some* extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *Morrison v. Nat'l Austl. Bank Ltd.*, 561 U.S. 247, 265 (2010) (emphasis added). The case law is

clear that the Government's effort to use theories of secondary liability to circumvent those limits also violates the presumption of extraterritoriality. As the D.C. Circuit has explained, "[g]enerally, the extraterritorial reach of an ancillary offense like aiding and abetting or conspiracy is coterminous with that of the underlying criminal statute." *United States v. Ali*, 718 F.3d 929, 939 (D.C. Cir. 2013). Thus, courts have repeatedly rejected Government efforts to use aiding-and-abetting or conspiracy theories to expand the extraterritorial scope of statutes, in cases arising under the FCPA, *see United States v. Castle*, 925 F.2d 831 (5th Cir. 1991); *United States v. Bodmer*, 342 F. Supp. 2d 176 (S.D.N.Y. 2004), and in cases raising similar issues under other statutes, *see United States v. Yakou*, 428 F.3d 241 (D.C. Cir. 2005); *United States v. Chalmers*, 474 F. Supp. 2d 555 (S.D.N.Y. 2007) (Chin J.). Remarkably, the Government's brief makes no mention of the presumption against extraterritoriality or the recent Supreme Court decisions discussing it; indeed, the Government's brief never even acknowledges that it is talking about a vast expansion of the extraterritorial scope of the FCPA. As discussed below, however, the presumption against extraterritoriality is fatal to the Government's theory on this appeal.

Second, the Supreme Court has repeatedly criticized the Government's effort to improperly expand the scope of federal criminal statutes beyond their proper scope. This has been especially true in cases involving corruption and

bribery, the very type of conduct proscribed by the FCPA. This case represents yet another example of the Government attempting to improperly broaden the scope of a federal criminal statute. In several recent decisions, the Supreme Court has used standard interpretive tools to cabin elastic federal crimes, including careful reading of the statutory text and adherence to the rule of lenity. As demonstrated below, application of these principles weighs strongly against the expansive application of the FCPA advocated by the Government here.

ARGUMENT

I. THE GOVERNMENT'S ATTEMPT TO USE CONSPIRACY AND AIDING-AND-ABETTING CHARGES TO EXPAND THE EXTRATERRITORIAL REACH OF THE FCPA VIOLATES THE PRESUMPTION AGAINST EXTRATERRITORIALITY.

A. The Supreme Court Has Strongly Reaffirmed The Presumption Against Extraterritorial Application Of Federal Statutes.

The Supreme Court in recent years has strongly reaffirmed the presumption against extraterritorial application of federal statutes. As the Court has explained, "[i]t is a basic premise of our legal system that, in general, 'United States law governs domestically but does not rule the world.'" *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)). Accordingly, the Court held in *Morrison* that "[i]t is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of

the United States." 561 U.S. at 255 (internal quotations and citation omitted); *accord RJR Nabisco*, 136 S. Ct. at 2100 ("Absent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application."). The presumption "serves to protect against unintended clashes between our laws and those of other nations which could result in international discord." *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (citation omitted); *see also RJR Nabisco*, 136 S. Ct. at 2100 (presumption "serves to avoid the international discord that can result when U.S. law is applied to conduct in foreign countries").

"The principles underlying the presumption against extraterritoriality thus constrain courts" when interpreting federal statutes. *Kiobel*, 133 S. Ct. at 1665. As the Court explained in *Morrison*, "[w]hen a statute gives no clear indication of an extraterritorial application, it has none." 561 U.S. at 255. But where, as here, the statute "provides for *some* extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *Id.* at 265 (emphasis added). In other words, as the Court held in *RJR Nabisco*, "[t]he scope of an extraterritorial statute thus turns on the limits that Congress has (or has not) imposed on the statute's foreign application." 136 S. Ct. at 2101.

B. Congress Has Deliberately Chosen To Limit The Extraterritorial Reach Of The FCPA.

These principles govern the disposition of this appeal. There can be no doubt that Congress carefully considered the extent to which the FCPA should apply to foreign nationals, and enacted well-defined limits on the scope of their liability. U.S. companies and U.S. citizens and residents may be prosecuted for any conduct they engage in, world-wide, with respect to making a corrupt payment to a foreign government official. But foreign nationals are only liable under the FCPA if they are an "officer, director, employee, or agent" of a U.S. company, or if they take action in the United States in furtherance of a scheme to make such a corrupt payment. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a), 78dd-3(a).[4]

These carefully-drawn limitations were hardly inadvertent. On the contrary, the legislative history shows that these limitations were based on legitimate concerns about the proper scope of U.S. law with respect to the conduct of foreign citizens acting overseas. There is no dispute that the principal focus of the FCPA when it was first enacted was on bribery by U.S. companies, not on foreign

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[4] The Government's claim that the FCPA "expansively applies" to foreign nationals on the bribe-paying side of the offense, U.S. Br. at 34, is a blatant misrepresentation of the statute. The statute does not apply broadly to "foreign nationals on the bribe-paying side" and "include[ ] them . . . as principals," as the Government claims. *Id*. Rather, the FCPA by its express terms applies to foreign nationals acting overseas only if they are an "officer, director, employee, or agent" of a U.S. company.

conduct, *see Castle*, 925 F.2d at 834; *Bodmer*, 342 F. Supp. 2d at 186, and that the conduct of foreign actors was brought within the scope of the statute only to the extent that they were "officers, directors, employees, or agents" acting on behalf of a U.S. company. The legislative history shows that these limitations were adopted in light of Congress' "recogni[tion] that principles of international law and comity generally operate to preclude a nation from establishing laws applicable to conduct which takes place outside that country's territorial boundaries." S. Rep. No. 94-1031, at 10 (1976); Supp. App. 39. The Carter Administration advised Congress that "great care must be taken with an approach which makes certain types of extraterritorial conduct subject to our country's criminal laws," *Foreign Corrupt Practices and Domestic and Foreign Investment Disclosure: Hearings on S. 305 Before the Senate Comm. on Banking, Housing and Urban Affairs*, 95th Cong., 1st Sess., at 70 (1977) (statement of W. Michael Blumenthal, Sec'y of the Treasury); Supp. App. 280, and that there was a "problem of extraterritoriality which needs to be carefully addressed," in order to "insur[e] fairness and due process . . . for . . . foreign citizens." *Id*. at 94; Supp. App. 287. Accordingly, the House Report that accompanied the final bill in 1977 explained that most foreign nationals were not covered by the statute because of "jurisdictional enforcement, and diplomatic difficulties [which] may not be present in the case of individuals who are U.S. citizens, nationals, or residents." H.R. Rep. No. 95-831, at 14 (1977); Supp. App.

186.

These concerns about the proper limits of U.S. criminal jurisdiction are the same concerns that underlie the presumption against extraterritoriality. The FCPA was amended in certain respects in 1988 and 1998, but these amendments did not in any way undermine Congress' sensitivity to the established limits on the extraterritorial scope of the statute. The 1998 amendments, in particular, were intended to bring the U.S. into compliance with the Organisation for Economic Co-operation and Development ("OECD") Convention on Combatting Bribery of Foreign Public Officials, and therefore expanded the statute to (1) reach conduct committed by foreign nationals while in the territory of the U.S., and (2) assert jurisdiction over the conduct of U.S. citizens for their conduct anywhere in the world. But nothing in these amendments expanded the scope of the statute with respect to the conduct of foreign nationals committed overseas. On the contrary, the purpose of the Convention was to commit signatories to prosecute bribery *within their own jurisdictions*; Congress understood that the principal responsibility for prosecuting bribery by foreign nationals under the Convention fell on their home jurisdictions. *See* H.R. Rep. No. 105-802, at 10 (1998); Supp. App. 253.

We are not contending that, in carefully limiting the scope of the FCPA as applied to foreign nationals, Congress was trying to immunize foreign nationals

who do not fall within the scope of the FCPA from criminal liability for their conduct. Rather, Congress, in adopting these limitations, was recognizing the proper limits of U.S. criminal jurisdiction, including the substantial problems of fairness and due process (including the limited availability of overseas witnesses and evidence) created by an effort to prosecute foreign citizens for foreign conduct. Rather than authorizing U.S. prosecution, Congress understood that it was principally the responsibility of foreign governments to bring such criminal enforcement actions when warranted.

C. The Government Cannot Expand The Extraterritorial Reach Of The FCPA By Use Of The Conspiracy And Aiding-And-Abetting Statutes.

The Government ultimately recognizes that the FCPA, by its terms, does not reach the conduct of a foreign national who is not an agent of a U.S. company. Instead, the Government contends that it can rely on the general federal conspiracy statute, 18 U.S.C. § 371, and the aiding-and-abetting statute, 18 U.S.C. § 2, to bring Hoskins' conduct within the scope of the FCPA. But this contention also runs afoul of the presumption against extraterritoriality.

First, nothing in the conspiracy or aiding-and-abetting statutes indicates that they are generally to be given extraterritorial effect. The mere fact that these statutes apply broadly to any "person" who conspires or "whoever" aids and abets a criminal offense does not mean that they apply extraterritorially. *See Kiobel*, 133

S. Ct. at 1665 ("it is well established that generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality") (collecting cases). To have an extraterritorial effect, there must be some "affirmative indication" of congressional intent for the statutes to apply to foreign conduct, *Morrison*, 561 U.S. at 265, and there is no such affirmative indication here. *See generally id*. at 262 ("On its face, § 10(b) contains nothing to suggest that it applies abroad.")

Instead, the rule is that "[g]enerally, the extraterritorial reach of an ancillary offense like aiding and abetting or conspiracy is coterminous with that of the underlying criminal statute." *Ali*, 718 F.3d at 939 (citing *Yakou*, 428 F.3d at 252); *accord United States v. Ballestas*, 795 F.3d 138, 144 (D.C. Cir. 2015); *see also United States v. Hill*, 279 F.3d 731, 739 (9th Cir. 2002) ("[A]iding and abetting, and conspiracy . . . confer extraterritorial jurisdiction to the same extent as the offenses that underlie them.").

Moreover, the relevant case law strongly supports the District Court's ruling that where Congress has so carefully limited the extent to which foreign nationals are subject to prosecution, the Government cannot rely on secondary theories of liability to expand the scope of the statute. The leading case under the FCPA is *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991), which held that the FCPA's careful limitations on who could be prosecuted did not permit the Government to prosecute a foreign official on the theory that he conspired with other defendants to

make (and accept) corrupt payments. The district court's opinion (adopted by the Fifth Circuit, 925 F.2d at 832) held that courts "may not allow the Executive to override the Congressional intent not to prosecute foreign officials for their participation in the prohibited acts." *Id*. at 833. The court relied in part on *Gebardi*, *id*. at 833, but also emphasized that Congress had deliberately refrained from prosecuting foreign officials because of the "'jurisdictional, enforcement, and diplomatic difficulties' raised by the application of the bill to non-citizens of the United States." *Id*. at 835. Indeed, the Court expressly rejected the very argument the Government makes here, *see* U.S. Br. at 38-40, holding that the House Report's reference to aiding-and-abetting liability did *not* permit the Government to expand the scope of the statute to foreign nationals not otherwise covered by the Act. 925 F.2d at 835.

Similarly, the district court in *United States v. Bodmer*, 342 F. Supp. 2d 176 (S.D.N.Y. 2004), held that the Government, under the rule of lenity, could not prosecute a foreign national who was an "agent" of a U.S. company under the pre-1998 version of the FCPA, before Congress clarified that "agents" of a U.S. company were covered. The court recognized that Congress had chosen to proceed carefully with respect to foreign nationals, because of concerns about the extraterritorial application of the statute to foreign citizens. *Id*. at 183-84.

The District Court's ruling is also strongly supported by decisions involving

other federal criminal statutes that limit their application to foreign nationals. For example, in *United States v. Yakou*, 428 F.3d 241 (D.C. Cir. 2005), the D.C. Circuit rejected the Government's attempt to circumvent the limitations of the Arms Export Control Act ("AECA") and its implementing regulations, by charging that the foreign defendant had aided-and-abetted his son in the U.S. to engage in unlawful arms brokering activity in violation of the statute. The statute and regulations provided that the Act applied to "[a]ny U.S. person, wherever located, and any foreign person located in the United States or otherwise subject to the jurisdiction of the United States." *Id.* at 243 (alteration in original) (citation omitted).

After determining that Yakou was not a "U.S. person," and therefore could not be liable as a principal, *id*. at 251, the court held that the Government also could not prosecute Yakou as an aider-and-abetter. *Id*. at 251-54. The D.C. Circuit held that "[t]he aiding and abetting statute . . . is not so broad as to expand the extraterritorial reach of the underlying statute." *Id*. at 252. Applying the presumption against extraterritoriality, the court held that there was no "affirmative evidence" that Congress had intended to permit the aiding and abetting statute to expand the scope of the AECA. *Id*. On the contrary, the court looked to the legislative history of the AECA and found that "Congress has expressed its intent to limit the extraterritorial reach" of the statute—in particular, to limit it to "United

States brokers of arms and foreign brokers of arms located in the United States, but not . . . foreign brokers located outside the United States." *Id.* In these circumstances, the court held that "apply[ing] the aiding and abetting statute to Yakou's conduct in Iraq would confer extraterritorial jurisdiction far beyond that which is available directly under the" statute. *Id*. at 253.

The D.C. Circuit in *Yakou* recognized that there was "some tension between the presumption against extraterritoriality and the principle that aiders and abetters need not be able to be convicted as principals," but held that "the presumption against extraterritoriality . . . should control." *Id.* As the court explained, "Congress and the State Department did not go to such lengths to exclude non-U.S. persons located outside the United States from direct extraterritorial liability . . . only to permit these same persons to be charged under an aiding-and-abetting statute for the identical conduct." *Id*. at 253-54.

Judge Chin reached a similar result in *United States v. Chalmers*, 474 F. Supp. 2d 555 (S.D.N.Y. 2007). In *Chalmers*, the defendant, a foreign corporation, was charged with violating 18 U.S.C. § 2332d(a), which prohibits a "United States person" from engaging in a financial transaction with a foreign government that supports international terrorism. *Id*. at 564-65. The Government first argued that the defendant should be considered a U.S. person—an argument the district court rejected—but then argued in the alternative that the foreign corporation, even if not

directly subject to the statute, could be prosecuted as an aider and abetter. *Id*. at 565. Judge Chin rejected that argument, too, relying on *Yakou*. Judge Chin agreed with *Yakou*'s holding that "[t]he aiding and abetting statute . . . is not so broad as to expand the extraterritorial reach of the underlying statute." *Id*. at 566 (alteration in original) (quoting *Yakou*, 428 F.3d at 252). Quoting *Yakou*, Judge Chin also noted that "the congressional choice to limit liability to 'U.S. persons' is highly significant and inconsistent with catching the non-U.S. person who happens to engage in [illegal] activities with a 'U.S. person'" on an aiding-and-abetting theory. *Id*. (alteration in original) (quoting *Yakou*, 428 F.3d at 252).[5]

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[5] The District Court did not address the argument advanced in this brief, and did not consider whether the presumption against extraterritorial application of U.S. law precluded the Government's attempt to use conspiracy or aiding-and-abetting charges to expand the scope of the foreign nationals who could be charged under the FCPA. In his initial motion to dismiss, Mr. Hoskins argued that he could not be prosecuted as an agent of a domestic company in the substantive FCPA counts, asserting that this was an extraterritorial application of the statute. Memorandum of Law in Support of Lawrence Hoskins' Motion to Dismiss the Second Superseding Indictment, filed July 31, 2014 (Dkt. No. 149), at 34-35. The District Court rejected that argument, holding that Hoskins could be properly charged as an agent of a domestic company because this was "domestic conduct" that did not invoke the presumption against extraterritoriality. A. 80. This reasoning has no application to the very different extraterritoriality argument advanced here, and does not support application of the statute to a foreign national who does not come within the FCPA by its terms and was not an agent of a U.S. firm.

D. The Government's Arguments For Extending The Extraterritorial Reach Of The FCPA Are Unpersuasive.

In light of this well-developed case law, the Government's argument that it can reach Mr. Hoskins' conduct outside the United States through application of the aiding-and-abetting and conspiracy statutes must be rejected. The Government's theory would impermissibly "confer extraterritorial jurisdiction far beyond that which is available directly" under the FCPA. *Yakou*, 428 F.3d at 253.

The various arguments that the Government advances to support its reliance on the aiding-and-abetting and conspiracy statutes are unpersuasive. Thus, the Government repeatedly argues that the statute and legislative history of the FCPA "do[ ] not clearly indicate an intent to exclude non-agent foreign nationals from conspirator and accomplice liability." U.S. Br. at 38; *see also id*. at 47-48 ("the 1998 FCPA does not expressly exclude non-agent foreign nationals"). Indeed, the Government goes so far as to claim that the District Court's reasoning—that the legislative history did not show any "unambiguous statement" that Congress intended the secondary liability statutes to apply to foreign nationals not otherwise covered by the FCPA—"turns the analysis on its head." U.S. Br. 47. But the District Court had it right, and it is the Government that has inverted the proper analysis. As discussed above, under the presumption of extraterritoriality, there must be a "clear, affirmative indication" from Congress that it intended either the

FCPA or the secondary liability statutes to apply to Mr. Hoskins' extraterritorial conduct, *see RJR Nabisco*, 136 S. Ct. at 2101; *Yakou*, 428 F.3d at 252, and there is no such affirmative indication here. The District Court did exactly what the Supreme Court has instructed courts to do: presume that a statute applies extraterritorially only to the extent the court finds clear and unambiguous Congressional intent to do so. *See Morrison*, 561 U.S. at 264 (the Government's "possible interpretations of statutory language do not override the presumption against extraterritoriality"); *see also In re Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corporation*, 829 F.3d 197, 211 (2d Cir. 2016) (rejecting argument that "stands the presumption against extraterritoriality on its head").

Similarly, the Government argues that the Court should apply "the usual rules of secondary liability that extend coverage to foreign nationals operating outside the United States based on ties to domestic conduct." U.S. Br. at 37; *see also id*. at 56 (arguing that the legislative history "did not signal an affirmative legislative policy to jettison well-entrenched principles of conspirator and accomplice liability"). The Government cites no authority to support its claim that this is the "usual rule," and there is none. On the contrary, as discussed above, the general rule is that the extraterritorial reach of the conspiracy and aiding and abetting statutes is co-extensive with the underlying statute. *See Ali*, 718 F.3d at

939, and other cases cited at p. 11, *supra*. As applied here, the conspiracy and aiding-and-abetting statutes cannot reach extraterritorial conduct beyond that which the FCPA itself reaches. *Cf. RJR Nabisco*, 136 S. Ct. at 2103 (RICO applies to foreign racketeering activity based on predicate offenses committed abroad, but only to extent that each of those offenses violates a predicate statute that itself has extraterritorial effect).

Another centerpiece of the Government's brief is its claim that the FCPA could not have intended to exclude from liability the overseas boss who directs subordinates in the United States to pay a bribe in violation of the Act. *See* U.S. Br. at 15, 57-59. Indeed, the Government goes so far as to claim that an overseas executive like Mr. Hoskins is precisely "the type of participant at whom the statute is aimed." *Id*. at 28. The problem with this argument—and it is a big one—is that it is undisputed, at least for purposes of this appeal, that FCPA by its terms does *not* apply to someone in Mr. Hoskins' position. The statute applies to foreign nationals acting overseas only if they are an "officer, director, employee, or agent" of a U.S. company. If Congress had intended to authorize U.S. prosecution of a foreign national who had caused a U.S. company to pay a bribe, it plainly could have done so (and could yet do so, by amending the statute). *See*, *e.g.*, *Neal v. United States*, 516 U.S. 284, 295 (1996) ("Congress is free to change this Court's interpretation of its legislation.") (citation omitted). But there is no basis for

contending that the FCPA intended to apply to foreign nationals beyond the terms of the statute. On the contrary, as discussed above, Congress anticipated when it reenacted the statute in 1998 to comply with the OECD Convention that it was principally the responsibility of foreign governments to prosecute their own citizens for commercial bribery overseas.

Finally, the Government relies heavily on the principle that a defendant can be held liable for conspiring to violate a statute even if he could not be charged as a principal. *See, e.g.*, U.S. Br. at 14, 19-21, 30. But this settled principle is simply irrelevant to this case. Neither the Supreme Court's recent decision in *Ocasio v. United States*, 136 S. Ct. 1423 (2016), nor any of the other cases cited by the Government on this point involves any question regarding the extraterritorial application of the conspiracy statute. There is no doubt that a foreign national could in theory be liable for conspiracy to violate the FCPA, if that were what Congress intended. But there is no evidence that Congress intended to subject foreign nationals to liability under the FCPA any more than the terms of the statute expressly provide. Applying the presumption against extraterritoriality, the absence of any affirmative indication that Congress intended this extraterritorial scope is dispositive, and compels the decision reached by the District Court here.

II. OTHER CONSTITUTIONAL PRINCIPLES, WHICH HAVE BEEN CONSISTENTLY APPLIED TO LIMIT DOMESTIC APPLICATION OF STATUTES PROHIBITING CORRUPTION AND BRIBERY, COUNSEL IN FAVOR OF A NARROW APPLICATION OVERSEAS.

In recent years, the Supreme Court has repeatedly imposed clear limits on federal crimes where prosecutors have sought to extend the ambit of a statute's reach beyond its plain terms. This has been especially so in cases involving corruption and bribery, the core of the conduct proscribed by the FCPA. *See McDonnell v. United States*, 136 S. Ct. 2355, 2371-73 (2016) (vacating conviction of public official accused of *quid pro quo* corruption where jury instruction represented an overly expansive interpretation of statutory language); *Skilling v. United States*, 561 U.S. 358, 368, 408-09 (2010) (limiting application of honest services wire fraud statute to specific categories of conduct proscribed by Congress).

In insisting upon narrow application of federal criminal statutes, the Supreme Court has used standard interpretive tools to cabin elastic federal crimes, including careful reading of the statutory text and adherence to the rule of lenity. These interpretive tools rest on two main constitutional foundations: the separation-of-powers principle that it is for Congress, and not the executive or judicial branch, to enact federal criminal laws; and the due process prohibition against vague criminal statutes. These principles counsel against expansive

application of the FCPA even without taking into consideration the presumption against extraterritoriality. Indeed, it would be odd to insist on stringent adherence to statutory text in policing domestic corruption, while permitting more expansive interpretations overseas, where the exercise of United States criminal authority is on far more delicate ground.

In *McDonnell*, the Supreme Court rejected an expansive reading of an anti-corruption statute, 18 U.S.C. § 201(a)(3), where the prosecution and the trial court had interpreted the term "official act" to include conduct beyond the scope intended by Congress, as discerned from the statutory text. 136 S. Ct. at 2371-73. In *Skilling*, the Supreme Court narrowly construed the honest services wire fraud statute, 18 U.S.C. § 1346, to reflect Congress's limited purpose in enacting that statute, as reflected in the precise wording of its text and in its legislative history. 561 U.S. at 407-09. In both cases, the Court insisted upon application of the rule of lenity and the fundamental constitutional principles that underlie it.

Under the rule of lenity, the Supreme Court "has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987) (collecting Supreme Court cases). "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *United States v. Santos*, 553 U.S. 507,

514 (2008). Where "any doubt" exists, the "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Yates v. United States*, 135 S. Ct. 1074, 1088 (2015) (citation omitted).

This rule serves two principal functions. It ensures that individuals receive "fair warning" before being punished for their conduct. *United States v. Bass*, 404 U.S. 336, 348 (1971). It is foundational that "no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed." *Santos*, 553 U.S. at 514; *see United States v. Gradwell*, 243 U.S. 476, 485 (1917) ("[B]efore a man can be punished as a criminal under the Federal law his case must be 'plainly and unmistakably' within the provisions of some statute.") (citation omitted). The rule also "vindicates the principle that only the *legislature* may define crimes and fix punishments." *Whitman v. United States*, 135 S. Ct. 352, 354 (2014) (Scalia, J., statement respecting denial of certiorari) (emphasis in original); *United States v. Wiltberger*, 18 U.S. 76, 95 (1820) (the rule of lenity "is founded on … the plain principle that the power of punishment is vested in the legislative, not in the judicial department"). The rule of lenity does this by precluding courts from expanding criminal prohibitions by resolving ambiguities in favor of liability.

The concept of fair notice as embodied in the rule of lenity is fundamentally an issue of due process. *McDonnell*, 136 S. Ct. at 2373 (subjecting individuals to

prosecution without "fair notice. . . . raises the serious concern that the [statutory] provision 'does not comport with the Constitution's guarantee of due process'") (quoting *Johnson v. United States*, 135 S. Ct. 2551, 2560 (2015)); *Skilling*, 561 U.S. at 415 (Scalia, J., concurring in part and concurring in the judgment) (vagueness of statutory text "violates the Due Process Clause of the Fifth Amendment"); *Yates*, 135 S. Ct. at 1088. The deference to legislative intent also embodied in the rule of lenity is based on the constitutional principle of separation of powers. *Welch v. United States*, 136 S. Ct. 1257, 1268 (2016) ("separation of powers prohibits a court from imposing criminal punishment beyond what Congress meant to enact"); *Yates*, 135 S. Ct. at 1088.

These fundamental constitutional principles apply here and counsel in favor of limiting the scope of criminal liability under the FCPA. The Government appears to be promoting and exploiting a potential ambiguity in the extraterritorial application of the statute and using it to justify a prosecution that is nowhere anticipated or provided for in the statute's carefully-delineated text. Indeed, the text of the statute runs plainly against such overbroad interpretation by defining precisely which actors fall within its scope. Foreign nationals operating overseas while serving neither as agents nor employees of a domestic concern are simply not within its purview. Congress has not seen fit to extend liability to these actors even in two separate rounds of amendments. *See* Hoskins Br. at 46-48. To suggest

that unidentified additional actors can be added to an already clearly identified list is to violate basic principles of fair notice protecting individuals against unfair prosecutions. To undermine Congress's work in delimiting the scope of the FCPA, by importing such broad concepts as conspiracy and aiding and abetting liability, is to violate separation of powers principles by which the legislature alone fixes the bounds of criminal liability. *See Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000) (holding that the statute applied only to the category of persons Congress identified, a "trustee," because "the sole function of the courts . . . is to enforce [the statute] according to its terms.") (citation omitted); *Yates*, 135 S. Ct. at 1086 ("Had Congress intended" for a statute to have an "all encompassing" meaning, "it is hard to see why it would have needed to include the examples at all.") (citation omitted). And to subject an individual to prosecution based on a questionable application of a statute, the textual basis for which is at best ambiguous, is to create a situation in which the rule of lenity must be applied.

Nothing justifies impressing federal criminal law into service that its text cannot bear, particularly on the international stage. Significant and concrete consequences flow from broad and unprecedented use of criminal statutes without clear textual support. Most obviously, capacious readings of criminal statutes vastly expand the power of prosecutors and law enforcement. Where a law is interpreted overly broadly, it may reach a vast swath of actors

that the legislature did not intend to bring within its grasp and that few would expect to fall within the scope of the law. This leaves many—in places near and far throughout the globe—to the mercy of prosecutorial discretion, a discretion not necessarily constrained by considerations of comity or foreign policy.

The effect of the Government's expansive interpretation of overseas criminal liability, in the face of a contrary statutory text, is to assert United States criminal enforcement jurisdiction globally and aggressively, leaving other nations with little independent space to police supposed bad actors on their own. As *McDonnell and Skilling* instruct, we are careful to limit the scope of corruption statutes when they apply domestically, insisting that any prosecution hew to the statutory text. We tread in dangerous waters when we ignore the same limits internationally and ignore fundamental constitutional interpretive principles in order to expand our global reach. "[A] statute in this field that can linguistically be interpreted to be either a meat axe or a scalpel should reasonably be taken to be the latter." *McDonnell*, 136 S. Ct. at 2373 (quoting *United States v. Sun-Diamond Growers of Cal.*, 526 U.S. 398, 412 (1999)).

CONCLUSION

For the foregoing reasons, the District Court's decision that "Congress did not intend to impose accomplice liability on non-resident foreign nationals who were not subject to direct liability" under the FCPA (A. 137) should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limit set by Local Rule 29.1(c) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), it contains 6,091 words. In addition, this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface using Microsoft Word in Times New Roman 14-point font.

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I hereby certify that on this 16th day of December 2016, the foregoing Brief was filed through the Court's ECF system, and accordingly was served electronically on all parties.

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