# 23-7183(L)

# 23-7186(CON)

IN THE

# United States Court of Appeals

**FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA,

*Appellant,*

—against—

HERNAN LOPEZ, FULL PLAY GROUP, S.A.,

*Defendants-Appellees,*

JEFFREY WEBB, EDUARDO LI, JULIO ROCHA, COSTAS TAKKAS, JACK WARNER, EUGENIO FIGUEREDO, RAFAEL ESQUIVEL, JOSE MARIA MARIN, NICOLAS LEOZ, ALEJANDRO BURZACO, AARON DAVIDSON, HUGO JINKIS, MARIANO JINKIS, JOSE MARGULIES, JOSE LAZARO, ALFREDO HAWIT, ARIEL ALVARADO, RAFAEL CALLEJAS, BRAYAN JIMENEZ, RAFAEL SAGUERO, HECTOR TRUJILLO, REYNALDO VASQUEZ, JUAN ANGEL NAPOUT, MANUEL BURGA, CARLOS CHAVEZ, LUIS CHIRIBOGA, MARCO POLO DEL NERO, EDUARDO DELUCA, JOSE LUIS MEISZNER, ROMER OSUNA, RICARDO TEIXEIRA, CARLOS MARTINEZ, GERARD ROMY,

*Defendants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

## BRIEF FOR *AMICUS CURIAE* NEW YORK COUNCIL OF DEFENSE LAWYERS IN SUPPORT OF DEFENDANTS-APPELLEES

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## STATEMENT OF INTEREST OF AMICUS CURIAE[1]

The New York Council of Defense Lawyers ("NYCDL") is a not-for profit professional association of over 300 lawyers, including many former federal prosecutors and federal public defenders, whose principal area of practice is the defense of criminal cases in the federal courts of 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.

NYCDL files this *amicus* brief in support of Defendants-Appellees Hernan Lopez and Full Play Group, urging affirmance of the District Court's decision below, which correctly held that 18 U.S.C. § 1346 does not reach foreign commercial bribery.[2] NYCDL has a particular interest in this case because NYCDL's core

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[1]Pursuant to Rule 29.1 of this Court's Local Rules, NYCDL certifies that (1) this brief was authored entirely by counsel for NYCDL, and not by counsel for any party, in whole or part; (2) no party and no counsel for any party contributed money intended to fund preparing or submitting the brief; and (3) apart from NYCDL and its counsel, no other person contributed money intended to fund preparing or submitting the brief.

[2]The Government and Appellees Lopez and Full Play Group have consented to the filing of this *amicus* brief. Accordingly, this brief may be filed without leave of court, pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure.

concerns include combatting the unwarranted extension of federal criminal statutes, promoting clear standards for the imposition of criminal liability, and ensuring that all criminal defendants get a fair trial in the federal system. The unprecedented expansion of the "honest services" wire fraud statute urged by the Government in this case raises precisely these concerns.

NYCDL has participated as *amicus curiae* in numerous Supreme Court and Second Circuit proceedings. In recent years, NYCDL has filed *amicus* briefs addressing the interpretation of the wire and mail fraud statutes in *Ciminelli v. United States*, 598 U.S. 306 (2023) (invalidating right-to-control theory of wire and mail fraud, following government confession of error after certioriari was granted); *Percoco v. United States*, 598 U.S. 319 (2023) (jury instructions impermissibly allowed conviction on basis that a private person could owe a duty of honest services to the public); and *United States v. Connolly*, 24 F.4th 821 (2d Cir. 2022) (reversing convictions based on insufficiency of government's proof of the making of a false statement in bank and wire fraud prosecution).

## PRELIMINARY STATEMENT

Time and again, the Supreme Court has cautioned federal prosecutors that 18 U.S.C. § 1343—the federal wire fraud statute—is to be construed narrowly and *not* employed as a general policing mechanism to "enforce [a prosecutor's] view of integrity." *United States v. Kelly*, 140 S. Ct. 1565, 1574 (2020); *see Percoco*, 598

U.S. at 328 (confirming that Section 1346's reach "must be defined with the clarity typical of criminal statutes and should not be held to reach an ill-defined category of circumstances"). The Supreme Court's message has been unmistakable: "[a]bsent [a] clear statement by Congress," prosecutors should *not* use the federal fraud statutes to advance novel theories of criminality that have the effect of "plac[ing] under federal superintendence a vast array of conduct" that has been "traditionally policed" by non-federal actors. *Ciminelli*, 598 U.S. at 315-316. Relatedly, as relevant here, the Supreme Court has cautioned that "United States law governs domestically but does not rule the world." *RJR Nabisco, Inc. v. European Cmty.*, 579 U.S. 325, 335 (2016) (regarding wire fraud statute).

Despite the Supreme Court's reversals and explicit warnings, federal prosecutors are once again urging this Court to adopt a novel theory of federal fraud liability, in which any commercial bribe or kickback—made anywhere in the world—can fall under the jurisdiction of the Justice Department, so long as some written policy—even a private company's code of ethics or employee handbook—disapproves of the purported misconduct.

If the Government's interpretation of fraud liability is accepted by this Court, the primary remaining limit on the prosecution of commercial bribery committed in other countries is the requirement that a prosecutor demonstrate that a U.S. wire was involved and "essential" to the misconduct. *See United States v. Napout*, 963 F.3d

163, 180 (2d. Cir. 2020). But prosecutors have argued that this evidentiary burden is an easy "lift," and courts have routinely endorsed that view. In today's international economy, dollar-denominated transactions are the global norm, and it is also common for those transactions to involve a U.S. wire, even if neither party to the transaction is physically located in the United States, regardless of whether those parties have any connection to the United States or intended for any U.S. wire to be used. Emails and texts sent and received by parties outside the United States similarly can ping on U.S. servers without the parties' knowledge. Given these realities, the statutory interpretation that the Government urges here, in which foreign commercial bribery can be prosecuted as honest services wire fraud, in practical effect, empowers the Justice Department to serve as global policeman of commercial bribes and kickbacks—the precise "ballooning of federal power" that the Supreme Court has unequivocally rejected. *Kelly*, 140 S. Ct. at 1574.

Based on the substantial experience of NYCDL members, this phenomenon has a severe and consequential impact on the rights of individual accused persons. When prosecutors are permitted to try foreign conduct as a domestic offense, the unfairness to the defendants charged is outsized. Justice Story recognized the bare minimum of these consequential hardships more than 150 years ago, when he observed that "trial in a distant State or Territory" can lead to "the inability of [the defendant to] procur[e] the proper witnesses to establish his innocence." Joseph

Story, *A Familiar Exposition of the Constitution of the United States* § 386, at 229 (1859).

That inability is just one of the practical problems inherent in the Justice Department playing global policeman. The hurdles faced by defendants prosecuted in U.S. courtrooms for conduct that occurred abroad, other than the involvement of a U.S. wire, are myriad and significant. Defense fact investigation on foreign soil is difficult and burdensome, language barriers must be overcome, and jurors more easily distrust, discredit, or simply dislike a defendant who is not American, who does not speak English, or who hails from a foreign nation or who has an ethnicity or religious affiliation that is commonly stereotyped. Bail for foreign citizens or residents is instantly more difficult to obtain—even if the risk of danger posed by the defendant is no greater than when domestic white-collar crimes are charged—and the ordering of pretrial detention impairs the defendant's ability to prepare a rigorous defense. As in this case, defendants can face criminal prosecution for conduct that is not criminal in the jurisdiction where it occurred, or where the penalties are significantly less harsh than those imposed in the United States.

The production of evidence most important to the defendant—exculpatory evidence, whether that be documentary records or evidentiary testimony—cannot be compelled when located abroad and thus, often never gets presented at trial. But the leverage the Government has in prosecuting foreign conduct also means that trials

are less likely. The motivation of a foreign citizen or resident to fight U.S. charges via a jury trial is often significantly tempered by all the hardships just referenced—hardships which, in addition, must be endured far away from home and supportive friends and family.

NYCDL fully supports the argument of appellee Lopez that the District Court properly interpreted the reach of Section 1346. Adopting the Government's contrary interpretation would endorse a form of global jurisdiction that targets a population—foreign citizens and residents—least able to mount the defense that is supposed to be guaranteed in the U.S. justice system.

## ARGUMENT

### I. The District Court Properly Interpreted Section 1346 To Impose A Limiting Principle That Prevents The Justice Department From Seeking To Exercise Worldwide Jurisdiction Over Commercial Bribery and Kickback Offenses

As described above, the Supreme Court has consistently, and ever more emphatically, "caution[ed]" about expansion of the reach of the federal fraud statutes, holding that these laws should not be used to prosecute matters which have been traditionally handled by other, non-federal, authorities. *E.g. Ciminelli*, 598 U.S. at 315 (rejecting wire fraud theory that "vastly expands federal jurisdiction[,] without statutory authorization" into realms "traditionally left to state contract and tort law"). The Supreme Court's pronouncements, which have repeatedly emphasized the *constraints* of the federal fraud statutes, are particularly important

when considering whether *overseas* conduct falls within the contours of these laws. That is because under existing jurisprudence, the ordinary bar against foreign conduct being prosecuted under U.S. law—the "presumption against extraterritoriality"—currently provides few limitations to the Justice Department's ability to prosecute foreign fraud as a domestic offense. *Cf. Microsoft Corp. v. AT&T Corp*., 550 U.S. 437, 455 (2007) (explaining that "foreign conduct is [generally] the domain of foreign law") (brackets in original).

In this Circuit, a prosecutor who wishes to charge a foreign fraud in the courts of the United States must meet the requirement of demonstrating the use of a "U.S. wire" that was "essential" to the scheme to defraud. *Napout*, 963 F.3d at 180. Prosecutors have argued, however, for interpretations of this requirement that leave virtually unbounded the Justice Department's ability to prosecute overseas conduct as federal fraud. And courts have routinely endorsed this argument. For example, courts have held that the defendant need not himself or herself have sent or received the wire, or intended its sending or receipt. *United States v. Bortnovsky*, 879 F.2d 30, 39 (2d. Cir. 1989). While an "essential" wire sounds like one that must have been "vital" or "central" to the scheme, courts have deemed it sufficient for the U.S. wire to be an "event" not "merely incidental" to the scheme. *Bascuñán v. Elsaca*, 927 F.3d 108, 122 (2d Cir 2019) (citations omitted). In practice, then, alleging or proving a U.S. wire is often no real challenge, even in cases where the defendants

never stepped foot in the United States and their conduct, other than a single wire, occurred entirely abroad.

Indeed, the reality of global banking means that the prosecutor will likely not have far to look for a U.S. wire, even when the alleged fraudulent scheme occurred entirely offshore. Foreigners all over the world conduct business in U.S. dollars—even when individuals have no business in the United States and conduct no business there—because of the dollar's stability and reputation. Carol Bertaut et al., "The International Role of the U.S. Dollar" Post-COVID Edition, U.S. Federal Reserve (June 23, 2023) (describing the dollar as the "dominant global currency"). As estimated by the U.S. Federal Reserve, as of the end of 2022, roughly *half* of the total number of U.S. dollar banknotes that are currently outstanding are held by foreigners. *Id.*

As a result, electronic transfers of U.S. dollars—even between entirely foreign entities or individuals—routinely utilize correspondent banks in the United States in order to effectuate the transfer, with or without the knowledge of the sender or recipient. *See United States v. Turner*, 624 F. Supp. 2d 206, 229 (E.D.N.Y. 2009) (describing the "millions" of banking wires that "contact" the United States "only" because of the "happenstance of a domestic correspondent bank being involved" in a foreign transaction utilizing U.S. dollars). These wires, so long as they are used in the carrying out of the fraud scheme, can arguably satisfy *Napout*'s requirement for

a domestic application of the wire fraud statute. *See* Decision and Order at 8, *United States v. Boustani*, No. 18-cr-681 (WFK), (E.D.N.Y. Oct. 3, 2019), ECF No. 231(finding that correspondent bank wires, involved in transactions between two *foreign* bank accounts, were sufficient to defeat an extraterritorial challenge to conspiracy to commit wire fraud charge, even though none of the alleged conspirators had never stepped foot on U.S. soil).

Alternatively, a prosecutor seeking to find a U.S. wire can rely on an email or text message exchanged abroad but which happened, by chance, to be routed through servers in the United States. Again, this poses little challenge. In modern computing, emails and texts *sent and received* entirely *outside* the United States can, and do, ping on U.S servers, meaning that such a communication, used in the course of a fraud scheme, can serve as the basis for prosecution in the United States, despite the defendant's lack of *any* purposeful contact with this country. *See, e.g.*, *SEC v. Straub*, 921 F. Supp. 2d 244, 262 (S.D.N.Y. 2013) (noting, in FCPA case, that even though the emails that were the alleged means of concealing the bribes to foreign officials, were both *received* and *sent* from *outside* the United States, the emails were, unbeknownst to the defendants, "routed through and/or stored on network servers located within the United States," thus providing the SEC with jurisdiction).

Given that *Napout* is the law of this Circuit, the interpretation of Section 1346 that adheres to the recent admonitions of the Supreme Court is the one adopted by

the District Court. To ensure that Section 1346 does not overtake provinces traditionally left to U.S. states or foreign sovereigns, and also avoid the result that U.S. law "rule[s] the world," *RJR Nabisco*, 579 U.S. at 335, the District Court properly imposed the limitation that only conduct that had a corollary in the pre-*McNally* universe of cases could qualify as honest services wire fraud. *See* SGA48 (District Court's Memorandum and Order).

## II. Expansion Of The Wire Fraud Statutes To Encompass Foreign Commercial Bribery Will Deprive Defendants Prosecuted Under Such A Theory Of Fundamental Fairness

While the District Court's ruling is a proper application of honest services wire fraud jurisprudence, it also advances the goal of fairness in criminal proceedings in federal court. NYCDL members have a deep understanding of how an expansion of Section 1346 to encompass commercial foreign bribery would result in substantial unfairness to the foreign nationals and residents who can be targeted under an expanded theory. When the Justice Department pursues novel theories of criminal liability, there are always meaningful concerns about due process. But when, as is the case here, the Justice Department seeks to utilize a *novel* theory to prosecute conduct that took place entirely in a *foreign country*, foreign individuals newly eligible to be prosecuted in the U.S. courts are substantially and prejudicially impacted. The impairment of rights is amplified and deserving of particularly careful judicial consideration.

The challenges and burdens of preparing an effective defense in a case where the defendant is not a U.S. citizen or resident, and acted entirely from overseas in participating in the alleged scheme, are dramatically heightened, when compared to defending a case involving a domestic fraud scheme perpetrated in the U.S. by U.S. actors. As described above, *see supra* at 4-6, nearly every aspect of preparing the defense becomes more complicated and more burdensome when a defendant, whose allegedly fraudulent conduct took place entirely abroad, is tried in the U.S. federal courts. The government's leverage to obtain a guilty plea is boosted and the obstacles to the defendant in obtaining evidence and proceeding to trial are multiplied.

The remainder of this brief discusses in greater depth several of the forms of unfairness and impairment of fundamental rights.

### A. The Prosecution Of Foreign Conduct That Has Never Before Been Criminalized Deprives Foreign Citizens And Residents Of "Fair Notice"

The unfairness begins with the lack of "fair notice" of even the prospect of U.S. prosecution. To begin with, most foreign nationals would have no idea that a transaction conducted entirely outside of the United States, with other foreign nationals, could be subject to U.S. jurisdiction due to something like a wire transaction that was unknowingly run through a bank in the United States. It is

doubly unfair when the prosecution arises out of a legal theory that is unprecedented even in the United States. *See* Lopez Br. at 27-32.

The Due Process Clause of the Fifth Amendment "bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266–67 (1997). The underlying purpose behind this proscription is the long-standing principle that defendants should receive "fair warning" that their conduct could expose them to criminal liability. *Id*. But here, as the District Court found, there is simply "no precedential authority" to support "the application of this federal criminal statute, § 1346, to foreign commercial bribery." (SGA48-50 ("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.")). Because of the absence of precedent, persons engaged in commercial bribery on foreign soil have no reason to suspect that their conduct constitutes a violation of U.S. law, much less imagine that their conduct will result in being hauled into U.S. courts, perhaps thousands of miles from where the alleged offense took place.

In the case of foreign commercial bribery, even the argument that the conduct was self-evidently "wrong" falters. Numerous countries do not criminalize commercial bribery—including Paraguay, where the conduct at issue in this case

occurred. *See* Lopez Br. at 1. As one commentator has observed, "[w]hile virtually all jurisdictions criminalize some form of public bribery, many ignore formally addressing bribery in the private sector… Numerous countries with relatively powerful national economies, such as India, Japan, Thailand, Philippines, Saudi Arabia, and Indonesia, do not criminalize private bribery, whether in domestic or international business transactions. Among countries that do criminalize private bribery, the number of prosecutions is generally miniscule." Jeffrey R. Boles, *The Two Faces of Bribery: International Corruption Pathways Meet Conflicting Legislative Regimes*, 35 Mich. J. Int'l L. 673, 684-685 (2014).

The troubling lack of notice in U.S. law is exacerbated by the fact that although the United States *does* have a number of explicit anti-bribery statutes, including the Foreign Corrupt Practices Act ("FCPA"), *none* proscribe foreign commercial bribery. *See* Lopez Br. at 27 (explaining structure of the federal anti-bribery statutes and describing that they reinforce the conclusion that Section 1346 does not extend to foreign commercial bribery). In enacting the FCPA, Congress made explicitly clear that it was *not* interested in criminalizing such behavior. *See id.*; *see also United States v. Hoskins*, 902 F.3d 69, 83, 94 (2d Cir. 2018) (explaining that the limits of the FCPA—including the omission of foreign commercial bribery from the acts proscribed by the statute—resulted in part out of Congress's desire to protect "foreign nationals who may not be learned in American law"). Given the

FCPA and other federal criminal statutes that declined to criminalize foreign commercial bribery, it would surely shock persons abroad to learn that the Justice Department has actually possessed, since 1988, via the vague and much-derided honest-services wire fraud statute, the power to prosecute exactly that conduct.

That shock, of course, is precisely what the "fair warning" principles of the Due Process Clause are aimed at preventing. *McBoyle v. United States*, 283 U.S. 25, 27 (1931) ("It is reasonable that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear."). The absence of fair warning militates strongly against the Government's push for an expanded interpretation of Section 1346.

### B. Foreign Defendants Are Disadvantaged In Obtaining Bail, Even When They Pose No Risk of Danger, And Detention Impairs Their Ability To Prepare For Trial

Perhaps no moment is as important to the course of preparing a criminal defense than the determination of whether the defendant will be bail or detained. When the defendant is from abroad, and the conduct occurred abroad, that juncture is even more critical, and detention has a greater prejudicial impact than when the defendant is a U.S. citizen or resident who committed crimes in the United States. Defendants from outside of the United States are frequently in a remarkable and

unfair position: they have sufficient ties to be prosecuted in the United States, but insufficient ties to remain at liberty in the United States.

A defendant from abroad, who acted from abroad, inherently has less ties to the United States, more means of traveling abroad, and more incentive to do so. Unless the defendant has unusual circumstances that tie him or her to the United States, the Government thus routinely seeks pre-trial detention for foreign nationals charged with conducting criminal conduct from abroad, based on "risk of flight." This is so even when the defendant's alleged offense is a white-collar crime, there is no basis for finding the defendant to be a potential danger to the community, and the defendant is able to arrange residence in the United States. *See, e.g.,* Order at 5-6, *United States v. Ho Wan Kwok*, 23-cr-00118 (AT) (S.D.N.Y Apr. 20, 2023), ECF No. 51 (Chinese businessman charged with white-collar offenses denied bail because of his "limited connections to the United States" and his "substantial connections and resources abroad"); *United States v. Boustani*, 356 F. Supp. 3d 246, 254 (E.D.N.Y. 2019) (Lebanese businessman accused of fraud offenses, with no criminal history, denied bail after Government argued that defendant's "lack of ties to the United States" and "strong ties to the UAE and Lebanon" rendered him a "risk of flight); *United States v. Zarrab*, No. 15 Cr 867 (RMB), 2016 U.S. Dist. LEXIS 87463, *3, *18 (S.D.N.Y. June 16, 2016) (denying bail to businessman accused of non-violent sanctions offense who was a "dual national of Turkey and Iran" and

"ha[d] no ties to New York or to the United States" on the basis that he posed a flight risk).

While the bail statute permits the pre-trial detention of defendants based solely on risk of flight, 18 U.S.C. § 3142(e)(1) ("no condition or combination of conditions will reasonably assure the appearance of the person as required"), due process is more squarely implicated when the government urges an interpretation of Section 1346 that would bring within the ambit of U.S. prosecution *an entire class of individuals*—foreign nationals and residents who commit foreign commercial bribery—who by virtue of that same foreignness and foreign conduct are far *less* likely to obtain bail than a U.S. citizen or resident who committed the same fraud crime in the United States. The Government seeks this Court's pre-authorization to prosecute a swathe of individuals who, from the moment of prosecution, are highly likely to be knee-capped in their ability to retain their liberty, even on conditions of bail, as compared to the U.S. national who committed the same non-violent crime.

Beyond the deprivation of liberty, detention is concerning because of the detrimental impact on a defendant's ability to prepare for trial. Even domestic white-collar fraud cases routinely involve thousands, if not millions, of pages of records and emails—the import of which is often incomprehensible to defense counsel without client guidance. But absent court-ordered arrangements, inmates in pretrial detention lack access to electronic document review databases, are interrupted

throughout the day by lockdowns, head counts, and other prison procedures, have only restricted access to email and phone services, and are deprived of personal space and privacy. *United States v. Bodmer*, No. 03 Cr 947 (SAS), 2004 U.S. Dist. LEXIS 959, at *8-9 (S.D.N.Y. Jan. 28, 2024) (granting bail to foreign national in white-collar case, over Government objection, partly because pretrial detention would "hinder [the defendant's] ability to gather evidence, contact witnesses, or otherwise prepare for his defense" and noting that it would "be far easier for [defendant] to assist his counsel in reviewing and responding to discovery if counsel has regular, uninterrupted access to him."). Thus, it is well-documented that the ultimate impact of pre-trial detention on the outcome of a defendant's case can be extraordinary. *See* Jacqueline Lee, *To Detain or Not to Detain? Using Propensity Scores to Examine the Relationship Between Pretrial Detention and Conviction*, 30 Criminal Justice Pol. Rev., 1-25 (2019) (study finding that individuals who are detained before trial are more likely to be convicted, be sentenced to prison as opposed to jail or probation, and receive longer sentences if convicted); *see also* Arpit Gupta, et al. *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 Journal of Legal Studies, 471 (2016) (finding that pretrial detention significantly increases the probability of conviction, primarily through an increase in guilty pleas).

The consequences of pretrial detention are even more prejudicial when the defendant is from abroad and the charged conduct was abroad. The defendant's help may be particularly critical when evidence abroad must be located and brought to the United States, key documents in a foreign language must be located and translated, and foreign witnesses must be identified and approached. It may be paramount for defense counsel to understand the differences in legal systems or business practices between the United States and the foreign county or countries at issue. The detained defendant is highly impaired in lending this help.

In short, because pretrial detention serves as meaningful handicap to a defendant's ability to wage a vigorous defense, and because the Government so often seeks (and often wins) pretrial detention of foreign nationals solely on the basis of their alien status, this Court should consider whether an expanded interpretation of Section 1346 will lead to the more routine subjecting of foreign nationals to U.S. criminal proceedings that fail to live up to this nation's most cherished principle of providing a fair trial. *Stack v. Boyle,* 342 U.S. 1, 3 (1951) ("[The] traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction . . . Unless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.") (internal citations omitted).

### C. Obtaining Exculpatory Evidence From Abroad Is Particularly Difficult

When the Government prosecutes conduct committed abroad, because the evidence is overseas, defendants face heightened difficulties in obtaining the evidence they need to mount a defense, particularly exculpatory evidence. Of course, in any criminal case, the defendant is at a disadvantage because of his or her inability to utilize the grand jury's subpoena power to engage in factual investigation. *United States v. Rajaratnam*, 753 F. Supp. 2d 317, 321 n.1 (S.D.N.Y. 2011) ("[I]t remains ironic that a defendant in a breach of contract case can call on the power of the courts to compel third-parties to produce any documents 'reasonably calculated to lead to the discovery of admissible evidence,' while a defendant on trial for his life or liberty does not even have the right to obtain documents 'material to his defense' from those same third parties.") (internal citations omitted). But a defendant can, at the least, obtain admissible evidence located within the United States via a subpoena issued pursuant to Rule 17(c) of the Federal Rules of Criminal Procedure. *United States v. Nixon*, 418 U.S. 683, 699-700 (1974). A defendant can also subpoena a witness with admissible testimony in the United States to testify at trial. *See* Fed. R. Crim. P. 17(a).

When evidence is located abroad, however, a defendant's ability to obtain and make use of such evidence is highly constrained, since a subpoena's power to compel does not extend beyond the U.S. border. While the Government can employ

a Mutual Legal Assistance Treaty ("MLAT") request to secure foreign evidence, and can rely other information-gathering methods not overseen by a court, like cross-border agency-to-agency cooperation—a defendant has no such opportunity. Instead, the defendant is forced to rely on the provisions of Rule 15 and the "letter rogatory" process, which is (i) burdensome; (ii) subject to several layers of judicial review, in at least two different countries; and (iii) frequently so slow to produce results that it is not worth the effort.

Rule 15 provides that where a defense witness is unavailable and cannot be compelled to appear at trial, the witness's testimony can be preserved for the jury through a pre-trial deposition conducted abroad. Fed. R. Crim. P. 15(a). However, before a court will order a Rule 15 deposition, the defendant must demonstrate that the prospective witness's testimony is not only "material," but also "necessary to prevent a failure of justice." *United States v. Cohen*, 260 F.3d 68, 78 (2d Cir. 2001). "Materiality" can be a difficult standard to meet when counsel has been unable to conduct factual investigation as freely as in the United States to find even "relevant" information. Some courts have held that a defendant cannot satisfy the "materiality" requirement unless he or she can show that the "proposed testimony exculpates . . . the defendant." *United States v. Abu Ghayth*, 17 F. Supp. 3d 289, 299 (S.D.N.Y. 2014); *see also United States v. Birrell*, 276 F. Supp. 798, 822 (S.D.N.Y. 1967) ("Rule 15(a) does not constitute a mandatory automatic provision

requiring the Court to order the deposition of any foreign witness."). But again, to demonstrate that testimony will be exonerating, without having had prior investigative capabilities "on the ground"—like access to the witness—is particularly difficult.

It can also be challenging for a district court to make determinations regarding the ultimate import of evidence proffered by the defense at the pre-trial stage, when the court often lacks context and must anticipate the trial proof. For this reason, even evidence that one court has found unworthy of a Rule 15 deposition was deemed by another to be material and exculpatory. *Compare* Memorandum Order, *United States v. Allen*, 14-cr-272 (JSR), (S.D.N.Y Aug. 18, 2015), ECF No. 100 (in bank and wire fraud prosecution, denying motion for Rule 15 deposition of foreign witness after concluding that testimony was not material) *with* Decision and Order at 8, *United States v. Connelly*, 16-cr-00370 (S.D.N.Y. May 15, 2018), ECF No. 261 and Order at 1, *United States v. Connelly*, 16-cr-00370 (S.D.N.Y. July 10, 2018) ECF No. 279 (disagreeing with conclusion in *Allen* and ordering Rule 15 deposition of same witness after finding that "if defendants are not permitted to elicit [witness's] evidence, it will work a failure of justice").

Even if a defendant is able to persuade a court that a Rule 15 deposition of a witness located abroad is appropriate, that is no guarantee that the deposition will necessarily take place. Because a U.S. court lacks the power to compel the

attendance of persons located overseas, a district court must utilize 28 U.S.C. § 1781 and transmit a "letter rogatory" directly to a foreign tribunal, requesting that the foreign body make the witness available for questioning. *See* 28 U.S.C. § 1781(b)(2); *United States v. Al Fawwaz*, No. S7 98 CRIM 1023 LAK, 2014 WL 627083, at *2 (S.D.N.Y. Feb. 18, 2014) (letters rogatory are "the medium, in effect, whereby one country, speaking through one of its courts, requests another country, acting through its own courts and by methods of court procedure peculiar thereto and entirely within the latter's control, to assist in the administration of justice in the former country"). The foreign tribunal, however, is under no obligation to adhere to the request and, in fact, is encouraged to evaluate for itself whether such a deposition is appropriate. *See* Thomas L. Fowler, *Letters Rogatory: Current Problems Facing International Judicial Assistance*, 4 N.C. J. Int'l L. 297, 299 (1978) (explaining that "foreign tribunal is under no obligation or compulsion to execute the letters rogatory" and "the decision ultimately rest[s] upon the tribunal's own discretion whether to enforce them or not").

Defendants seeking documents that are located abroad face a similar series of hurdles. While the defendant does not need to satisfy the standards of Rule 15, he does need to move the court to issue a letter rogatory seeking documentary evidence. Courts retain the discretion to deny such requests. Moreover, even when a letter rogatory is transmitted, it can take months for any responsive materials to be

returned, meaning that the defendant may not receive the requested materials in time to make use of them at trial. *See* U.S. Department of State, Preparation of Letters Rogatory, https://travel.state.gov/content/travel/en/legal/travel-legal-considerations/internl-judicial-asst/obtaining-evidence/Preparation-Letters-Rogatory.html (explaining that "[e]xecution of letters rogatory may take a year or more"). Finally, because materials obtained via letter rogatory hail from abroad, they may, even if exculpatory, be deemed inadmissible at trial if the defendant is unable to establish a proper foundation for their admissibility.

A letter rogatory process that is "complicated, dilatory, and expensive," *United States v. Rosen*, 240 F.R.D. 204, 215 (E.D.V.A. 2007), is the defendant's only means of obtaining exculpatory evidence from third parties when the Government seeks to prosecute conduct occurring overseas. Should the honest-services wire fraud statute be expanded to encompass commercial bribery committed in foreign countries, as the Government urges here, the burdens of the letter rogatory process—among other limits on a defendant's ability to investigate—will impair the ability of many more defendants to find and present exonerating evidence.

In sum, when prosecutors try a defendant for foreign conduct as if he or she had committed a similar offense domestically, the rules and procedures that would normally safeguard notice, the defendant's ability to obtain bail, and the power to obtain exonerating evidence, among other rights, are less effective. The likelihood

of prosecuting the innocent is increased, which in turn casts doubt on the legitimacy of the court system in the United States and its promise to afford all defendants a fair trial. This Court should be deeply skeptical of any theory of prosecution that makes it more difficult for defendants prosecuted under that theory to exercise their fundamental right to defend themselves.

## CONCLUSION

The decision of the District Court below should be affirmed.

Dated: New York, New York
April 9, 2024

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) because it contains 5,654 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), according to the Word Count feature of Microsoft Word.

2. 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 this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font of Times New Roman.

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