20-842(L)

20-1061(CON), 20-1084(CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant-Cross Appellee,

v.

FREDERIC PIERUCCI, WILLIAM POMPONI,
Defendants,

LAWRENCE HOSKINS,

Defendant-Appellee-Cross Appellant.

On Appeal from the United States District Court for the District of Connecticut,
No. 12-cr-238 (Hon. Janet Bond Arterton)

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for *Amicus Curiae* states as follows:

- The National Association of Criminal Defense Lawyers has no parent corporation, and no company holds 10 percent or more of its stock.

INTEREST OF THE *AMICUS CURIAE*[1]

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit voluntary professional bar association that works on behalf of criminal defense attorneys to ensure justice and due process for those accused of crime or misconduct. Founded in 1958, NACDL has a nationwide membership of many thousands of direct members, and more than 40,000 members through affiliated organizations. NACDL's members include private criminal defense lawyers, public defenders, military defense counsel, law professors, and judges. NACDL is the only nationwide professional bar association for public defenders and criminal defense lawyers. NACDL is dedicated to advancing the proper, efficient, and just administration of justice. Each year, it files numerous amicus briefs in the U.S. Supreme Court, and federal and state appellate courts across the country, providing amicus assistance in cases that present issues of broad importance to criminal defendants, criminal defense lawyers, and the criminal justice system as a whole.

In this case, the Government has advanced an untenably broad interpretation of the Foreign Corrupt Practices Act—specifically, the Act's use of the term "agent." The Government's proposed interpretation will not only subvert congressional intent

[1] All parties have consented to the filing of this brief. No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

to keep the statute narrowly focused to only certain types of actors, but it also threatens to extend criminal liability in the United States, without fair notice, to a broad swath of foreign nationals with little connection to the United States. NACDL has a strong interest in ensuring that all criminal statutes, including this one, are limited by the boundaries Congress imposed and by fundamental due-process principles such that they do not contribute to the dangerous trend of overcriminalization that exists in our criminal justice system.

INTRODUCTION

In the Foreign Corrupt Practices Act ("FCPA"), Congress "defined precisely the categories of persons who may be charged for violating its provisions." *United States v. Hoskins*, 902 F.3d 69, 71 (2d Cir. 2018) (*"Hoskins I"*). In so doing, Congress sought to protect from liability "foreign nationals who may not be learned in American law," and "desired that the statute not overreach in its prohibitions against foreign persons." *Id.* at 94.

This Court already has rejected one attempt by the Government in this case to expand the scope of the FCPA beyond Congress's intent. In *Hoskins I*, based on the "carefully tailored text of the statute" and the "legislative history reflecting that Congress drew lines in the FCPA out of specific concern about the scope of extraterritorial application of the statute," this Court concluded that "Congress

did not intend for persons outside of the statute's carefully delimited categories to be subject to conspiracy or complicity liability." *Id*. at 83-84.

Now, the Government again urges the Court to expand the reach of the FCPA to reach Hoskins, this time arguing that he acted as an "agent" of a domestic concern. To that end, the Government relies on a flexible and capacious definition of "agent," ostensibly premised on common-law principles of agency. The amorphous interpretation urged by the Government would expand the scope of agent liability well beyond Congress's intent, subject a wide range of unwitting foreign persons to ambiguous potential liability, and create precisely the uncertainty and overreach that Congress sought to avoid by carefully prescribing the classes of persons subject to criminal liability.

As set forth below, the text, structure, and legislative history of the FCPA demonstrate that Congress intended the term "agent" to have a narrower meaning than the common-law definition: specifically, Congress intended that "agent" liability be restricted to foreign bribe-paying intermediaries. This specific definition of "agent" comports with its well-established international meaning, and with the meaning of "agent" in the international convention "with which Congress intended to make American law comply." *Id*. at 91.

Even if the precise scope of "agent" liability intended by Congress were ambiguous, the Government's sprawling, indefinite interpretation—which stretches

even the more expansive common-law understanding of "agency" to its breaking point—must be rejected because it violates the presumption against extraterritoriality, the rule of lenity, and underlying fundamental constitutional principles of separation of powers and due process. These concerns only further confirm that the FCPA's use of the word "agent" should be construed narrowly.

ARGUMENT

I. THE TEXT, STRUCTURE, PURPOSE, AND LEGISLATIVE HISTORY OF THE FCPA MAKE CLEAR THAT CONGRESS INTENDED FOR "AGENT" LIABILITY TO APPLY NARROWLY TO BRIBE-PAYING INTERMEDIARIES.

The FCPA's text, structure, purpose, and history belie the broad, common-law definition of "agent" that the Government urges the Court to adopt.[2] As this Court has recognized, Congress "carefully tailored" the liability for foreign individuals under the FCPA with "surgical precision," with the intention of "limit[ing] its jurisdictional reach." *Hoskins I*, 902 F.3d at 83-84. It did so because "[p]rotection of foreign nationals who may not be learned in American law is consistent with the central motivations for passing the legislation, particularly foreign policy and the public perception of the United States." *Id.* at 94.

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[2] In this case, both parties agreed that the common-law definition of agent applied. However, Defendant-Appellee Hoskins's brief acknowledges there is "strong reason" to believe that Congress intended "agent" to have a narrower meaning: specifically, third-party, bribe-paying intermediaries. Hoskins Br. 15 n.7. Moreover, as explained in Hoskins's brief, the Government seeks to expand even the broad common-law agency definition.

Specifically, a foreign person acting outside the United States can be criminally liable only if the person is "an officer, director, employee, or agent" of a domestic concern or issuer or a "stockholder thereof acting on behalf of" such issuer or domestic concern. 15 U.S.C. §§ 78dd–1(a), (g), 78dd–2(a), (g).

While the FCPA does not define the term "agent," the text and structure of the statute, combined with its legislative history, confirm that Congress *did not* intend "agent" to mean "common-law agent," but something narrower. Specifically, Congress selected the word "agent" to refer to intermediaries used by domestic concerns to pay bribes.[3]

A. The Text of the FCPA Compels a Narrower Reading of "Agent" Than the Common-Law Definition.

"[T]he starting point in every case involving construction of a statute is the language itself." *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978) (punctuation omitted). Courts "'look to the statutory scheme as a whole and place the particular provision within the context of that statute.'" *Hoskins I*, 902

[3] The Government's assertion that the common-law definition of agent applies automatically, simply because the FCPA does not define the term (Govt. Br. 28), is contrary to established law. In fact, in the case cited by the Government for this proposition, *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322 (1981), the Supreme Court explained that a court may infer that Congress means to incorporate the established meaning of a term "unless the statute otherwise dictates." *Id.* at 329. In that case, the Court examined the legislative history of the statute at issue and found that it confirmed Congress's intent to incorporate the common law. *Id.* at 329-34. By contrast, as explained in this brief, the FCPA's text and history dictate a meaning narrower than the common-law definition of "agent."

F.3d at 81 n.5 (quoting *Raila v. United States*, 355 F.3d 118, 120 (2d Cir. 2004)). "[B]eyond context and structure," courts often look to "history and purpose to divine the meaning of language." *Gundy v. United States*, 139 S. Ct. 2116, 2126 (2019) (punctuation and citation omitted).

Here, the statute identifies the category of foreign persons subject to liability as "any officer, director, employee, *or agent*" of a domestic concern. 15 U.S.C. § 78dd-2(a) (emphasis added). Congress's use of the words "*or* agent" indicates that "agent" must mean something *different* from the preceding categories of persons – that is, directors, officers, and employees.

Using the common-law definition of "agent" makes little sense in light of the plain text. A common-law agency relationship is established by: "(1) the manifestation by the principal that the agent shall act for him; (2) the agent's acceptance of the undertaking; and (3) the understanding of the parties that the principal is to be in control of the undertaking." *Cleveland v. Caplaw Enters.*, 448 F.3d 518, 522 (2d Cir. 2006) (punctuation and citation omitted); *see also* Govt. Br. 28. This definition of agency "encompasses a wide and diverse range of relationships and circumstances," including "the relationships between employer and employee, [and] corporation and officer." Restatement (Third) Of Agency § 1.01, cmt. c. Accordingly, under the common-law definition of "agent," that term

would subsume, and render superfluous, other words the statute uses to define who may be liable—namely, an "officer" or "employee." 15 U.S.C. § 78dd-2.

If Congress had intended "agent" to be such a broad, catch-all category, it easily could have said so, by drafting the statute to apply to any officer, director, employee, or *other* agent. That it chose not to do so indicates it had no such intent.

As this Court has recognized, Congress "carefully tailored" the "text of the statute," in light of the risks attendant to extraterritorial application. *Hoskins I*, 902 F.3d at 83. Its use of the words "*or* agent," and its decision not to use the phrase "or other agent," were not accidental choices. Congress's carefully selected wording indicates that "agent" has a specific meaning narrower than the common-law definition.

B. Applicable Rules of Construction Confirm That the Meaning of "Agent" in the FCPA Is Narrower Than the Common-Law Meaning.

Applicable canons of construction—applied in light of Congress's purpose in crafting the statute—reinforce the conclusion that Congress intended the word "agent" in the FCPA to have a definition narrower than the common-law definition.

First, it is a "cardinal principle of statutory construction that courts must give effect, if possible, to every clause and word of a statute." *Williams v. Taylor*, 529 U.S. 362, 404 (2000). In fact, the Government acknowledges that this well-settled rule against superfluities applies to the FCPA. Govt. Br. 57 (quoting *State Street*

Bank and Trust Co. v. Salovaara, 326 F.3d 130, 139 (2d Cir. 2003) ("It is well-settled that courts should avoid statutory interpretations that render provisions superfluous.")).[4]

Here, as explained above, the broad common-law definition of "agent" would subsume and render superfluous the terms "employee" and "officer" because employees and officers both fall within the common-law definition of "agent." *See* Restatement (Third) of Agency § 1.01 cmt. c. Accordingly, the rule against superfluity compels a narrower definition of "agent."

Second, the doctrine of *noscitur a sociis*—"a word is known by the company it keeps"— compels the same conclusion. *Yates v. United States*, 574 U.S. 528, 543 (2015). Courts rely on *noscitur a sociis* "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words, thus giving unintended breadth to the Acts of Congress." *Id.* (punctuation and citation omitted); *see also* *United States v. Williams*, 553 U.S. 285, 294 (2008) (recognizing that the meanings of statutory words may be "narrowed by the commonsense canon

[4] The Government invokes the rule against superfluities in an effort to lessen its burden of proving agency under common-law principles. Specifically, the Government argues that the right to fire is not necessary to establish the control element of an agency relationship because to impose such a requirement "would equate a principal-agent relationship to one of employer-employee." Govt. Br. 57. But the Government fails to acknowledge the flipside of the rule: that the Government's own definition of "agent" would violate the rule by rendering the term "employee" superfluous.

of *noscitur a sociis*—which counsels that a word is given more precise content by the neighboring words with which it is associated"); *McDonnell v. United States*, 136 S. Ct. 2355, 2369 (2016) (applying the rule against superfluity and *noscitur a sociis* to conclude that "question" or "matter," in definition of "official action" in federal bribery statute, must have narrow meanings similar to the accompanying words "cause, suit, proceeding or controversy").

The doctrine of *noscitur a sociis* requires that "agent" must be given a meaning consistent with its accompanying words. Each of those words—director, officer, employee, and shareholder—identifies a precise, easily discernable category of persons with a clear relationship to the domestic concern. Those categories comport with Congress's purpose of giving clear notice to potential defendants by "defin[ing] precisely the categories of persons who may be charged for violating its provisions." *Hoskins I*, 902 F.3d at 71. A foreign defendant would rarely be surprised to learn that he or she was a director, officer, employee, or shareholder of a domestic concern, and therefore subject to the FCPA.

By contrast, the common-law definition of "agent" is far broader than the other categories and swallows two of those categories (officer and employee). Moreover, the common-law definition, particularly as interpreted by the Government, introduces ambiguity that is conspicuously—and intentionally—absent from the other categories. In fact, the Government repeatedly emphasizes its

position that the existence of an agency relationship is "highly factual," Govt Br. at 3, 53, 57, can be "indirect," *id*. at 59, "express or implied," *id*. at 29, and "can turn on a number of factors, including: the situation of the parties, their relations to one another, and the business in which they are engaged; the general usages of the business in question and the purported principal's business methods; the nature of the subject matters and the circumstances under which the business is done." *Id*. at 28 (quoting *Cleveland*, 448 F.3d at 522). Such a malleable definition of "agent"—which is dependent on close examination and balancing of an unbounded variety of possible factors—would leave foreign actors in the dark about whether a prosecutor or jury might later deem them to be "agents" subject to potential criminal liability.

The Government's variable, indefinite definition of "agent" thus would destroy the "carefully drawn limitations" that Congress delineated for the purpose of avoiding overreach and providing clear notice of who could be charged under the FCPA. *Hoskins I*, 902 F.3d at 71. Consistent with Congress's plain intent, such an amorphous definition must be rejected, and "agent" must be given a narrower, more certain meaning. As explained below, the legislative history demonstrates that in providing for "agent" liability, Congress intended to reach third-party intermediaries used to pay bribes.

C. The Legislative History Confirms Congress's Intent to Limit the Definition of "Agent" to Only Foreign Intermediaries Paying Bribes on Behalf of Domestic Concerns.

To evaluate "the scope of a federal criminal statute," this Court must look not only to the statute's "language" and "purpose," but also its "legislative history." *United States v. Rooney*, 37 F.3d 847, 851 (2d Cir. 1993). "Because interpretations of criminal statutes which would 'criminalize a broad range of apparently innocent conduct' are disfavored . . . it is [this Court's] task to ascertain whether Congress intended the statute to be so all-encompassing" by "turn[ing] to the statute's legislative history." *United States v. Yip*, 930 F.2d 142, 149 (2d Cir. 1991) (citation omitted).

Congress enacted the FCPA in 1977 in response to reports that U.S. business interests were offering bribes to foreign officials. *See* H.R. Rep. No. 95–640, at 5–6 (1977); S. Rep. No. 95–114 (1977). The original Act imposed liability on agents of domestic concerns who were U.S. citizens, nationals, or residents, or who were otherwise subject to U.S. jurisdiction, and only if the domestic concern was found liable. *See* Foreign Corrupt Practices Act, Pub. L. No. 95–213, 91 Stat. 1494, 1497 (1977). Since then, Congress has tweaked the scope of coverage twice over—once in 1988, to remove the requirement that an agent's liability be predicated on the liability of a domestic concern, and once in 1998, to conform the FCPA to the Organization for Economic Cooperation and Development's ("OECD") Convention

on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention"). *See* H.R. Rep. No. 100–576, at 923–24 (1988); *see also* Foreign Corrupt Practices Act Amendments of 1988, Pub. L. No. 100–418, § 5003, 102 Stat. 1107 (1988); International Anti-Bribery and Fair Competition Act of 1998, Pub. L. No. 105–366, § 3(b)(2), 112 Stat. 3302 (1998); Presidential Statement on Signing the International Anti-Bribery and Fair Competition Act of 1998, 34 Weekly Comp. Pres. Doc. 2290 (Nov. 10, 1998). In each iteration of the FCPA, congressional records make clear that Congress clearly intended the term "agent" to mean a third-party intermediary involved in the payment of bribes on behalf of a U.S.-based company.[5]

1. The FCPA's Legislative History Shows Congress Did Not Have Common-Law Agency Principles in Mind When Enacting the FCPA.

As explained above, *see* Parts I.A and I.B, *supra*, it would make little sense as a textual matter to read "agent" as a common-law agent. If "agent" meant common-law agent, then the statute would not need to separately identify "employees" and other traditional "agents" in the text of the statute. Reading the

[5] Congress also intended to limit liability to the activities of domestic concerns, not the activities of their foreign corporate affiliates. *See* H.R. Rep. No. 95–831, at 14 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4120, 4126 ("[T]he conferees recognized the inherent jurisdictional, enforcement, and diplomatic difficulties raised by the inclusion of foreign subsidiaries of U.S. companies in the direct prohibitions of the bill.").

FCPA's "agent" as a common-law "agent," then, would render much of the statute surplusage.

The legislative history confirms that when Congress considered anti-bribery legislation during the 94th Congress (1976-1977), members of Congress did not intend for "agent" to mean "employee" or any other form of common-law agent. Rather, Congress intended the term "agent" to capture those who would approach foreign officials for the purpose of buying their influence. In May 1976, the Senate Banking Committee received from the SEC an extensive "Report on Questionable and Illegal Corporate Payments and Practices," which summarized the SEC's enforcement activities and findings as of that date. In the report, the SEC expressed concern that "*commercial agents and consultants*" would be used as conduits for bribes to government officials. *Report of the Securities & Exchange Comm'n on Questionable and Illegal Corporate Payments and Practices*, 94th Cong., 2d Sess., 27–28 (May 14, 1976) (submitted to the Sen. Comm. on Banking, Hous., and Urban Affairs) ("*SEC Report*") ("Commission or consultant payments substantially in excess of the going rate for [] services may give rise to a disclosable event, depending upon the significance of the business involved. In many instances, this may suggest that a portion of the commission was, in fact, intended to be passed through government officials or their designees to influence government action."); *see also* Mike Koehler, *The Story of the Foreign Corrupt Practices Act*, 73 Ohio St.

L.J. 929, 981–82 (2012) ("Congress also targeted foreign agent fees given the prominent use of agents in many of the foreign corrupt payments uncovered . . . ."). The SEC Report further described that in many cases of "unusual sales commissions . . . a portion of the payment to a *foreign agent* or *consultant* ultimately was passed to foreign government officials in order to obtain favorable treatment of some kind for the company." *SEC Report*, pp. 28, 39, *supra* (emphasis added). In other words, the SEC report considered by Congress made clear that an "agent" was synonymous with "consultant," and not an employee.

Congress followed the SEC's lead and defined "agent" narrowly to mean consultants selling influence with foreign government officials. The Senate Banking Committee, for example, identified "foreign sales agents" as "essentially [] *influence peddlers*." S. Rep. No. 94-1031, at 9 (1976) (emphasis added); *see also The Activities of American Multinational Corporations Abroad: Hearings Before the Subcomm. on Int'l Econ. Policy of the H. Comm. on Int'l Relations*, 94th Cong. 101 (1975) (statement of Rep. Robert N. C. Nix, Chairman, Subcomm. on Int'l Econ. Policy, H. Comm. on Int'l Relations) ("One local agent [] admitted … that he has three members of the National Assembly (Parliament) of the country on retainer fees for the purpose of obtaining inner circle intelligence and to promote the sales potential of his principal's products."). Senator John Tower, for example, described the problem of bribery as "improper payments to foreign government officials or

their intermediaries." 122 Cong. Rec. 30281, 30332 (1976) (statement of Sen. John Tower, Member, S. Comm. on Banking, Hous., and Urban Affairs) (emphasis added). Senate Banking Committee Chairman William Proxmire expressed his hopes that "the law [would] require regular disclosure of all *consultants fees and sales commissions* paid to *foreign agents*." *Foreign and Corporate Bribes: Hearings on S. 3133 Before the Senate Banking Comm.*, 94th Cong. 2 (1976) (emphasis added). Similarly, Senator Bob Eckhardt urged that "all payments made to *foreign agents or other intermediaries*" should be reported. *Unlawful Corporate Payments Act of 1977 Before the House Comm. On Interstate and Foreign Commerce Subcomm. On Consumer Protection and Finance*, 95th Cong. 264 (1977) (written statement by Sen. Eckhardt, Chairman, Subcomm. on Consumer Prot. and Fin., S. Comm. on Interstate and Foreign Commerce) (emphasis added). These statements evince a contemporaneous understanding that "agent" under the FCPA did not mean anyone who perceived the domestic concern as a principal (as the common law would), but an individual that played a very particular type of role in a very particular setting abroad.

2. Congress Continued to Express its Understanding of "Agent" as a "Consultant" or "Intermediary" When Amending the FCPA in 1988.

In 1988, Congress amended the FCPA to impose a greater scienter requirement for imposing liability on a domestic concern—instead of reaching domestic concerns that had a "reason to know" about a bribe, the amended FCPA

would hold liable only "knowing" domestic concerns. Pub. L. No. 100–418, § 5003 (1988). Before making the change, Congress expressed its understanding of the scope of the FCPA in its original form: a tool to crack down on "*third parties*" being used "as *conduits* for illegal payments." H.R. Rep. No. 100–40, pt. 2, at 75 (1987) (emphasis added). During discussion of the amendments, Senator Proxmire again treated "agents" and "consultants" synonymously, describing an "agent" as "go fors" responsible for forwarding money to foreign officials. *See* S. Rep. No. 99–486, at 28–29 (1986) (statement of Sen. Proxmire, Member, S. Comm. on Banking, Hous., and Urban Affairs); *see also id.* ("The majority of the FCPA cases which have been investigated involved payments made *to 'agents' or 'consultants'* who then forwarded all or a portion of the money they received to foreign officials." (emphasis added)).

Consider, too, the reports that are part of the 1988 amendments' legislative history—they validate Congress's understanding of the term "agent" as a consultant or intermediary. Reports regarding the Senate Banking Committee's proposed amendments contained a section titled "Intermediaries," and suggested the proposed changes regarding payments through intermediaries were "intended to be the exclusive means of enforcement of the Act with respect to payments made by an agent of a 'domestic concern.'" S. Rep. No. 97–209, at 20 (1981); S. Rep. No. 98–207, at 21 (1983); S. Rep. No. 99–486, at 15. Similarly, the Conference Report on

the final 1988 amendments contained a section titled "Anti-bribery provision—Standard of Liability for Acts of Third Parties (Agents)," where "*third party* bribery" was defined as "the furnishing of money or any other 'thing of value' by an agent for the purpose of bribing foreign officials." H.R. Rep. No. 100–576, at 919 (1988) (emphasis added).

3. Congress Intended the 1998 Amendments to Harmonize with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

In December 1997, the United States and thirty-two other nations signed the OECD Convention, which Congress implemented by enacting amendments in 1998. The OECD Convention called on all parties to make it a criminal offense "for any person intentionally to 'offer promise or give any undue pecuniary or other advantage, whether directly or through *intermediaries*, to a foreign public official, of that official.'" OECD Convention, signed by Convention on Dec. 17, 1997, ratified by U.S. on Dec. 8, 1998, Art. 1.1 (emphasis added). Congress implemented this requirement by amending the FCPA "to conform it to the requirements of and to implement the OECD Convention" by applying criminal liability to "agents" of domestic concerns who were non-resident foreign nationals. S. Rep. No. 105–277, at 2 (1988). In making these changes, Congress confirmed its intention to use a definition of "agent" that is narrower than the common-law understanding of "agent," and continued to maintain a distinction between those "employed by" a U.S. company and those "acting as agents of U.S. companies." *Hoskins I*, 902 F.3d at 91.

The OECD's subsequent Working Group on Bribery understood "agent" to mean an intermediary who is "put in contact with or in between two or more trading parties," serving as a "conduit for goods or services offered by a supplier or consumer" OECD Working Group on Bribery in International Business Transactions, *Typologies on the Role of Intermediaries in International Business Transactions*, at 5 (2009) ("[A] principal may intentionally want to commit foreign bribery, and decide to do so through an *intermediary* . . . *the same agent* may be used for both legitimate and illegitimate reasons." (emphasis added)). To illustrate this understanding, the OECD provided various case studies involving intermediaries. In one of these case studies, the OECD described the "agent" or "intermediary" as someone who "bribe[s] foreign official[s] to obtain confidential information … [and] approache[s] potential bidders in the procurement and [sells] this information to his/her preferred bidder." *Id.* at 29.

While an international organization's understanding of a statutory concept is usually not probative in construing a federal statute, the OECD guidance is relevant here because it reflects an international consensus on what an agent is for purposes of bribery. More importantly, the consensus reflected in the guidance is embodied in the OECD Convention to which the United States is a signatory, and the FCPA, which was specifically amended to implement the OECD Convention's requirements, fulfills the United States' treaty obligations. Construing "agent"

broadly to encompass common-law agents would put the FCPA at odds with the Convention and the norms that it embodies—a set of norms on which the Government itself relied in *Hoskins I*. *See* 902 F.3d at 90–91 (explaining that "the 1998 statute aimed to 'amend[] the FCPA to conform it to the requirements of and to implement the OECD Convention," and considering the Government's arguments relying on the text of the OECD Convention). Under the *Charming Betsy* canon,[6] this Court is obligated to avoid such a conflictive reading. *See Amerada Hess Shipping Corp. v. Argentine Republic*, 830 F.2d 421, 426 (2d Cir. 1987) ("[W]here fairly possible, a United States statute is to be construed so as not to bring it into conflict with international law." (citation and internal quotation marks omitted)), *rev'd on other grounds sub nom Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989). But there should be no need to resort to *Charming Betsy*, because the OECD understanding of "agent" is also in line with Congress's prior expressions on what it means for a person to be an "agent" under the FCPA. In Congress's eyes, agents are "consultants," "influence peddlers," "intermediaries," "third parties," and "conduits," but they are not any and all persons who would meet the common-law definition of "agent."

[6] Chief Justice Marshall's reasoning in *Murray v. Schooner Charming Betsy* established what has become known as the *Charming Betsy* canon, *i.e.*, the principle that "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." 6 U.S. (2 Cranch) 64, 118 (1804).

II. THE GOVERNMENT'S EXPANSIVE INTERPRETATION OF AGENT LIABILITY VIOLATES THE PRESUMPTION AGAINST EXTRATERRITORIALITY.

As explained above, it is clear from the text and history of the FCPA that Congress intended for "agent" liability to be limited to bribe-paying intermediaries. Even if this were not the case, however, the presumption against extraterritoriality would compel rejection of the Government's capacious, indeterminate definition of "agent" because Congress has not clearly expressed an intent to permit such expansive application to foreign defendants.

Both this Court and the Supreme Court have repeatedly held that "when a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *Morrison v. Nat'l Australia Bank Ltd.*, 561 U.S. 247, 265 (2010); *see also Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 442, 454–56 (2007) (rejecting "expansive interpretation" of extraterritorial application of patent law and recognizing that "[a]ny doubt" about whether conduct fell within the statute would be resolved by the presumption against extraterritoriality); *Hoskins I*, 902 F.3d at 95–97.

Here, nothing in the text or history of the FCPA suggests that Congress intended to reach the wide array of fact-specific relationships arguably within the common-law definition of agency. To the contrary, Congress was especially concerned that the FCPA could be weaponized against a broad swath of foreign

nationals when it did not so intend, so it cabined extraterritorial application to specifically identified classes and provided clear notice of who is subject to liability. The legislative history reflects a recognition that a "delicate touch" was required with respect to foreign nationals, in light of concerns about foreign relations implications and due process. *Hoskins I*, 902 F.3d at 85–86.

In light of Congress's intent to limit the FCPA's foreign application, this Court should reject the Government's expansive interpretation of "agent." *See Microsoft Corp.*, 550 U.S. at 442, 455–56. In *Hoskins I*, this Court pointed to "the carefully tailored text of the statute, read against the backdrop of a well-established principle that U.S. law does not apply extraterritorially without express congressional authorization and a legislative history reflecting that Congress drew lines in the FCPA out of specific concern about the scope of extraterritorial application of the statute" in concluding "that Congress did not intend for persons outside of the statute's carefully delimited categories to be subject to conspiracy or complicity liability." 902 F.3d at 83–84; *see also id.* at 95–97.

That same analysis compels rejection of the Government's capacious definition of "agent." Absent a clear congressional intent to grant the Government such unbounded prosecutorial authority, agency liability should be limited to the paradigmatic cases that Congress plainly meant to capture.

III. THE RULE OF LENITY AND RELATED CONSTITUTIONAL PRINCIPLES PRECLUDE THE GOVERNMENT'S EXPANSIVE INTERPRETATION OF AGENT LIABILITY.

In recent years, both the Supreme Court and this Court have repeatedly repelled Government efforts to stretch the scope of federal laws—including corruption and bribery statutes—beyond the scope clearly authorized by Congress. *See, e.g., Hoskins I*, 902 F.3d 69 (rejecting Government's attempt to expand FCPA liability through conspiracy and complicity statutes); *Kelly v. United States*, 140 S. Ct. 1565, 1571–74 (2020) (rejecting Government's attempt to expand scope of wire fraud and federal programs fraud statutes to political payback scheme); *Marinello v. United States*, 138 S. Ct. 1101, 1108–09 (2018) (rejecting Government's "broad interpretation" of criminal tax statute that would "risk the lack of fair warning and related kinds of unfairness"); *McDonnell*, 136 S. Ct. 2355 (vacating conviction under federal bribery statute and noting that Government's expansive interpretation of "official action" raised significant due process concerns); *Skilling v. United States*, 561 U.S. 358, 368, 408–11 (2010) (limiting application of honest-services wire fraud statute to the clearly proscribed "paradigmatic cases" of bribes and kickbacks).

In so doing, the Supreme Court has recognized that a criminal statute cannot be broadly construed "on the assumption that the Government will use it responsibly." *McDonnell*, 136 S. Ct. at 2372–73 (punctuation and citation omitted). "[T]o rely upon prosecutorial discretion to narrow the otherwise wide-ranging scope

of a criminal statute's highly abstract general statutory language places great power in the hands of the prosecutor," "risks allowing policemen, prosecutors, and juries to pursue their personal predilections," and "risks undermining necessary confidence in the criminal justice system." *Marinello*, 138 S. Ct. at 1108–09 (punctuation and internal citation omitted). Consequently, as the Supreme Court has recognized in the context of domestic federal bribery law, "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 2372–73 (punctuation and citation omitted).

This case presents a quintessential attempt by the Government to wield a federal statute as a meat axe. As explained above, the legislative history evinces congressional intent that "agent" liability be restricted to bribe-paying intermediaries. But even if the above analysis leaves any doubt about the precise meaning of "agent," the rule of lenity—and the fundamental constitutional principles that underlie it—prohibit the Government's approach.

The rule of lenity requires that any ambiguity about the breadth of a criminal statute be resolved in favor of lenity. *See, e.g., Yates*, 574 U.S. at 547–48. The rule is "founded on the tenderness of the law for the rights of individuals to fair notice of the law, and on the plain principle that the power of punishment is vested in the

legislative, not in the judicial department." *United States v. Davis*, 139 S. Ct. 2319, 2333 (2019) (punctuation and citation omitted).

Both concerns are particularly compelling here, given Congress's sensitivity to the risks involved in imposing criminal liability on foreign nationals, and its desire to avoid ensnaring "foreign nationals who may not be learned in American law." *Hoskins I*, 902 F.3d at 94; *see, e.g., Johnson v. United States*, 576 U.S. 591, 595 (2015) (recognizing that due process prohibits conviction "under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement").

As explained in Hoskins's brief, the Government's construction of "agent" stretches even the broad common-law definition to its breaking point. The Government argues that Hoskins is subject to agent liability, in essence, because a domestic concern engaged in a bribery scheme, and Hoskins assisted in the scheme.[7] The Government's theory would effectively undo this Court's *Hoskins I* decision, permitting a wide range of foreign conspirators to be prosecuted as agents.

The expansive, amorphous definition of "agent" promoted by the Government creates serious concerns of separation of powers, by stretching FCPA criminal

[7] *See* Govt. Br. 3 (summarizing Government's argument that the domestic concern had the requisite control over Hoskins "based on extensive evidence of Hoskins seeking approval from API for his actions, Hoskins acceding to API's instructions, API's control over the Tarahan Project and the hiring of consultants, and Hoskins's support role within Alstom").

liability beyond Congress's intent. Further, it presents exactly the overreach and fair-notice concerns that troubled Congress, and that animated it to define "with great precision, who would be liable." *Hoskins I*, 902 F.2d at 88. A foreign national of ordinary intelligence, "who may not be learned in American law," *id*. at 94, cannot be expected to anticipate when the Government might weigh the indefinite universe of facts and circumstances possibly relevant under the Government's definition, and conclude, in hindsight, that an agency relationship existed. *See Marinello*, 138 S. Ct. at 1108 (recognizing that "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" (punctuation and internal citation omitted)).

Under these circumstances, it is particularly appropriate to "require that Congress should have spoken in language that is clear and definite," *Yates*, 574 U.S. at 548, before permitting the Government to gut the precise limits articulated by Congress and criminally prosecute any foreign defendant it deems within the "wide and diverse range of relationships and circumstances" encompassed by common-law agency principles. Restatement (Third) Of Agency § 1.01 cmt. c.

CONCLUSION

The District Court's order of acquittal should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rules of Appellate Procedure 29(a)(4) and 32(g)(1), I hereby certify that the foregoing Brief of the National Association of Criminal Defense Lawyers as *Amicus Curiae* Supporting Appellee complies with the type-volume limitations of Federal Rules of Appellate Procedure 29(a)(5). According to the word count feature of Microsoft Word, the word-processing system used to prepare the brief, the brief contains 5,998 words.

I further certify that the foregoing brief complies with the typeface and type style requirements of Federal Rule of Appellate Procedure 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman font, a proportionally spaced typeface.

Dated: October 20, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on October 20, 2020, I electronically filed the foregoing document with the United States Court of Appeals for the Second Circuit by using the CM/ECF system.

I certify that all participants in the case are registered CM/ECF users, and that service will be accomplished by the appellate CM/ECF system.

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