Nos. 25-390 & 25-396

In the Supreme Court of the United States

FULL PLAY GROUP, S.A.,
Petitioner,
v.
UNITED STATES OF AMERICA, ET AL.
Respondents.

HERNAN LOPEZ,
Petitioner,
v.
UNITED STATES OF AMERICA, ET AL.
Respondents.

On Petitions For Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

LUKE A. WAKE
Counsel of Record
WILSON C. FREEMAN
Pacific Legal Foundation
555 Capitol Mall,
Suite 1290
Sacramento, CA 95814
(916) 419-7111
lwake@pacificlegal.org
Counsel for Amicus Curiae Pacific Legal Foundation

QUESTIONS PRESENTED

1. Whether the honest-services statute criminalizes foreign commercial bribery.

2. Whether the honest-services statute is unconstitutionally vague.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Miscellaneous

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) is a nonprofit, nonpartisan public-interest law firm that has defended individual liberty and limited government since 1973—including many appearances before this Court. PLF's mission centers on the rule of law, which requires that Congress—not prosecutors or courts—make the law, and that criminal prohibitions provide clear, text-anchored notice so people can order their conduct. Vague statutes that shift core policy choices to enforcers threaten both due process and the separation of powers.

PLF has a particular interest in curbing overcriminalization that chills lawful enterprise and ordinary civic life.[2] Entrepreneurs, employees, nonprofit officers, and small businesses must be able to read the

---

[1] Pursuant to Rule 37.2, counsel for all parties received notice of intent to file this brief at least 10 days prior to the due date. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] Pacific Legal Foundation filed an amicus in support of neither party in *Skilling*, arguing, among other things, that "the language of the statute itself does not give fair warning to the lay public" and the various narrowing constructions adopted by Courts of Appeals at that time had "failed to lay out authoritative guidelines for applying the statute." Brief Amicus Curiae of Pacific Legal Foundation and Cato Institute in Support of Neither Party, *Skilling v. United States*, 2009 WL 4919360, at *13, 15 (Dec. 16, 2009). Rather, the brief argued, the honest services fraud statute "appears to be the prototypical vague statute proscribing 'bad conduct.'" *Id.* at *15.

U.S. Code and know what conduct is forbidden. When open-ended phrases like "the intangible right of honest services" are filled in by post hoc judicial pruning, ordinary Americans bear the compliance costs and the risk of arbitrary enforcement. This case presents an opportunity to reaffirm that, in our constitutional order, Congress must enact determinate criminal laws and that "a vague law is no law at all."

INTRODUCTION AND SUMMARY OF ARGUMENT

This case asks a first-principles question: Who makes criminal law? Article I vests *all* legislative power in Congress, and when Congress legislates it must decide the "important subjects," leaving only "details" to others. *Wayman v. Southard*, 23 U.S. (10 Wheat.) 1, 42-43 (1825). That allocation is what underwrites the vagueness doctrine's twin commands: Congress must adequately define criminal prohibitions such that enacted statutes give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited" and such that they will not encourage "arbitrary and discriminatory enforcement." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972).

In the honest services law, Congress enacted an indeterminate criminal prohibition, hoping courts could salvage it case-by-case. The statute is one sentence, simply sweeping into federal fraud crimes all schemes to deprive a person of "honest services." But honest services is not defined anywhere in the statute. And it had no agreed-upon preexisting meaning when the statute was passed. Almost 40 years has passed since it became law, and still "no one knows what 'honest-services fraud' encompasses." *Percoco v. United*

States, 598 U.S. 319, 333 (2023) (Gorsuch, J., concurring).

Despite this facial indeterminacy, in *Skilling v. United States*, 561 U.S. 358 (2010), the Court took the unusual step of reimagining the honest services statute to save it from invalidity. Although, at the time, Justice Scalia argued that the Court's "paring down" a statute to save it from vagueness concerns exceeded the judicial role, 561 U.S. at 422-24 (Scalia, J., concurring), the Court disagreed, asserting that case law required them to do so. *Id.* at 403. The "narrowing construction" adopted by the Court however, had no grounding in the statute's text. *Id.* at 423 (Scalia, J., concurring).

Skilling's approach undermined both individual liberty and separation of powers. First, no Court-driven fix of a statute can provide necessary "fair notice" to the public as to what the law requires. Individuals can conform their conduct to the law only if that law has a meaning which is discernable. Individuals can only be expected to discern a statute's meaning by reference to statutory text and context. Second, allowing prosecutors to continually push the boundaries of an undefined (and apparently evolving) term allows Congress to avoid the responsibility for defining the elements of a crime, effectively delegating authority to the executive to determine the scope of the statute.

Courts construe laws. But they cannot *make* law. A law, particularly a criminal law, must be capable of being understood by ordinary people, and Congress cannot defer on the important questions. These principles direct the outcome in this case. Accordingly, this petition presents an opportunity to do what the

Court should have done in *Skilling*: acknowledge that repairing a statute is beyond the scope of the judicial power and send the honest services law back to Congress.

A vague federal criminal statute poses a threat to everyone. Not only does it offend fundamental notions of fair play and justice to charge individuals with crimes they could not possibly have known they were committing, but vague statutes give arbitrary power to prosecutors and judges. In today's environment, where trust in federal criminal authorities is under constant attack, our system must be doubly vigilant against arbitrary criminal power.

The Court should grant this petition.

ARGUMENT

I. Background Of Honest Services Fraud

The history of the honest services statute and the background of this case were addressed in the petition, so only a short recap is necessary. In 1987, the Supreme Court concluded that courts and prosecutors, who had theorized an "intangible rights" branch of mail fraud, had pushed the statute beyond its text; the mail-fraud law "protects property rights," not an amorphous right to the honest services of officials. *McNally v. United States*, 483 U.S. 350, 356-60 (1987). Congress responded, in 1988, by adding 18 U.S.C. § 1346, which declares that a "scheme or artifice to defraud" includes deprivation of "the intangible right of honest services," but it did not define that phrase.[3]

[3] Indeed, the phrase "honest services" does not appear in the majority opinion in *McNally*.

In 2010, in *Skilling*, the Court confronted a vagueness challenge and salvaged § 1346 only by limiting it to "the bribe-and-kickback core" of pre-*McNally* cases. *Skilling*, 561 U.S. at 404-11; *see also Black v. United States*, 561 U.S. 465 (2010); *Weyhrauch v. United States*, 561 U.S. 476 (2010) (per curiam). And since then, the Court has repeatedly trimmed expansive applications, emphasizing the need for clear, text-anchored limits—most recently rejecting a standardless "clout" theory that would impose honest-services duties on private citizens. *Percoco*, 598 U.S. at 328-30. *See also McDonnell v. United States*, 579 U.S. 550, 567-75 (2016) (rejecting expansion of liability under honest service statute through expansive understanding of bribery statutes).

This case involves a further expansion of honest-services liability. The Second Circuit held that § 1346 can reach foreign, private-sector commercial bribery by treating South American soccer officials as employees who owed fiduciary duties to their federations—and by allowing those duties to be defined by nonpublic, privately drafted codes of conduct. The court below asserted that if conduct fell within the "core" of a bribery and kickback scheme, involving the violation of a genuine and established fiduciary duty, it did not matter that it represented an expansion of previously established liability. *United States v. Lopez*, 143 F.4th 99, 111 (2d Cir. 2025). On that premise, routine sponsorship and media-rights dealing becomes a federal felony if prosecutors can characterize benefits as "bribes" that induce a breach of a policy-based duty.

II. *Skilling*'s "Fix" For The Statute Was Illegitimate Judicial Lawmaking

The honest services statute has always been vague. By using a term ("the intangible right of honest services") with no discernable or accepted meaning and providing no way to understand or limit the term, Congress failed to make law. *See United States v. Davis*, 588 U.S. 445, 447-48 (2019) ("A vague law is no law at all."). The Court's decision to graft a "bribe or kickback" requirement into the statute was not authorized by the text.

In *Skilling*, six Justices acknowledged that the vagueness challenge to the statute had "force." 561 U.S. at 405. As the majority opinion stated, "honest-services decisions preceding *McNally* were not models of clarity or consistency." *Ibid.* Despite this, the Court attempted to preserve the statute by paring it back to only "bribes" and "kickbacks," citing its obligation that "*every reasonable construction* must be resorted to, in order to save a statute from unconstitutionality." *Id.* at 406 (citation omitted). There is no doubt that the Court was at least somewhat correct in concluding that Congress "intended" the statute to preserve something of the pre-*McNally* caselaw. *Id.* at 404. But the Court failed to consider whether Congress's unexpressed intent, even if discernable 22 years after the fact, can ever be a useful guidepost in interpreting a statute for purposes of a vagueness challenge.

As Justice Scalia recognized in his concurrence at the time, even if consistent with some of Congress's intent in 1988, "paring down" the statute to bribes and kickbacks simply is not a "reasonable" construction of the phrase "honest services." *Id.* at 422-23 (Scalia, J., concurring). Enacted words may carry an ordinary

meaning or a settled term-of-art meaning at the time of enactment; if they do, courts apply that meaning, and if they do not, courts do not invent one. *See, e.g.*, Antonin Scalia & Brian A. Garner, *Reading Law* 69 (2012) ("Words are to be understood in their ordinary, everyday meanings—unless the context indicates they bear a technical sense."); *id.* at 78 ("Words must be given the meaning they had when the text was adopted."); *see also Neder v. United States*, 527 U.S. 1, 22-25 (1999) (treating "fraud" as a term of art that includes materiality); *Morissette v. United States*, 342 U.S. 246, 263 (1952) (presuming mens rea for traditional crimes). And when Congress borrows language with a settled judicial construction, courts presume it adopts that construction; the prior-construction canon has no purchase where meaning was unsettled. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978). Here, however, there was not an ordinary, everyday meaning of "honest services"—or even an understanding of that term limiting it to bribes and kickbacks.

What *Skilling* actually did was to consult a contested pre-*McNally* mosaic to divine what Congress "intended." The Court stated expressly that it looked to the "genesis" of honest-services cases and announced that Congress "intended § 1346 to reach at least bribes and kickbacks," before holding that the statute "criminalizes only the bribe-and-kickback core." 561 U.S. at 404, 408-09. That move did not emerge from the words "intangible right of honest services"; it emerged from a policy- and history-based judgment about what Congress must have meant. After divining Congress's intent, the Court employed the "bribes and kickbacks" limitation because it is practical and somewhat concrete—not because of anything in the text of the law.

Textualism does not license that kind of rescue. A core principle of modern statutory interpretation is that "[t]he words of a governing text are of paramount concern, and what they convey, in their context, is what the text means." Scalia & Garner, *supra*, at 56; *Conroy v. Aniskoff*, 507 U.S. 511, 519 (1993) ("We are governed by laws, not by the intentions of legislators.") (Scalia, J., concurring). Or as the Court put it more recently, "Only the written word is the law, and all persons are entitled to its benefit." *Bostock v. Clayton Cnty.*, 590 U.S. 644, 653 (2020). That is why this Court has emphasized that without a contrary textual indication, statutes can only be given a fair reading. *Encino Motorcars, LLC v. Navarro*, 584 U.S. 79, 89 (2018). And since *Skilling*, the Court has clearly stated it is without power to "rewrite a law to conform it to constitutional requirements." *United States v. Stevens*, 559 U.S. 460, 481 (2010) (citation modified). These principles run completely contrary to *Skilling*'s approach with the honest services statute.

The inquiry, therefore, begins and ends with the words Congress passed through bicameralism and presentment—not with a judicial reconstruction of unexpressed aims.

III. *Skilling's* "Fix" Approach Actually Undermines Due Process Further

As the Court explained in *Skilling*, "a penal statute must define the criminal offense [1] with sufficient definiteness that ordinary people can understand what conduct is prohibited and [2] in a manner that does not encourage arbitrary and discriminatory enforcement." 561 U.S. at 402-03 (citation omitted). *See also Kolender v. Lawson*, 461 U.S. 352, 357 (1983). In fact, by prioritizing Congress's unexpressed intent

over the plain text of the statute, the Court inadvertently authorized a form of statutory interpretation in vagueness cases which deepens the very problems the vagueness doctrine is supposed to protect against.

First, *Skilling*'s rewrite approach undercuts fair notice: ordinary people read statutes, not case mosaics. Reconstructing a supposed "core" from decades of lower-court disagreement does not tell a "person of ordinary intelligence" what conduct is forbidden ex ante. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). Second, it aggravates arbitrary-enforcement risks. When the operative words—"intangible right of honest services"—carry no determinate meaning, prosecutors necessarily pick their theories first and courts prune later, the very "arbitrary and discriminatory enforcement" the doctrine forbids. *Ibid.* *See also Johnson v. United States*, 576 U.S. 591, 595-602 (2015); *Sessions v. Dimaya*, 584 U.S. 148, 162-63 (2018). As such, the Honest Fraud Services Act leaves it to the Executive Branch and the Judicial Branch to decide, in substance, what shall be deemed criminal conduct.

These concerns should give rise to a simple and clean rule: When courts evaluate a statute for concerns about vagueness, the reference point must be the text and ordinary canons of statutory construction. Only by limiting courts to these tools can the interests of due process be protected.

A. A fix focused on Congress's "intent" can never provide fair notice

The first purpose of the void-for-vagueness doctrine is thus to guarantee "that ordinary people have 'fair notice' of the conduct a statute proscribes." *Dimaya*, 584 U.S. at 155-56 (2018). As the Court has explained,

because people are free to "steer between lawful and unlawful conduct," laws must give "the person of ordinary intelligence a reasonable opportunity to know what is prohibited" so that he may act accordingly; otherwise, "[v]ague laws may trap the innocent by not providing fair warning." *Grayned*, 408 U.S. at 108-09.

This understanding reflects the founding-era principle that criminal rules must be prospective, public, and knowable. *See Dimaya*, 584 U.S. at 176-77 (2018) (Gorsuch, J., concurring in part & concurring in judgment) (tracing fair-notice requirements to Blackstone and other common law sources and an insistence on written, settled law). In the common law, as Justice Gorsuch explained, criminal indictments and criminal laws had to be clear enough so that "no one [could] be taken by surprise" by having to "answer in court for what [one] has not been warned to answer." *Id.* at 178 (Gorsuch, J., concurring in part & concurring in judgment) (citing *Goldington v. Bassingburn*, Y.B. Trin. 3 Edw. II, f. 27b, 196 (1310)).

In the modern era, the Court has held several vague statutes invalid where the judicial gloss on those statutes made them hopelessly indeterminate to ordinary people. *See, e.g.*, *Johnson*, 576 U.S. at 597-606 (striking the Armed Career Criminal Act's residual clause as void for vagueness because the "ordinary-case" method, coupled with the "serious potential risk" standard, produced indeterminacy, observing that "the residual clause leaves grave uncertainty about how to estimate the risk posed by a crime."); *Dimaya*, 584 U.S. at 154-69 (2018) (plurality opinion) (invalidating 18 U.S.C. § 16(b), as incorporated into the INA, for the same reasons identified in *Johnson*); *Davis*, 588 U.S. at 451-58 (holding 18 U.S.C. § 924(c)(3)(B)'s residual clause unconstitutionally

vague where the categorical "ordinary case" inquiry left courts (and defendants) to guess about both conduct and risk).

Following this standard, *Skilling*'s approach of looking to Congress's intent and the pre-*McNally* caselaw for the meaning of § 1346 cannot be supported. Ordinary people cannot be expected to reconstruct congressional purpose by canvassing court decisions or the Congressional record. Fair warning—and indeed, "ordinary notions of fair play"—demand an act drafted with at least such specificity that "men of common intelligence [need not] guess at its meaning and differ as to its application." *Connally v. Gen. Const. Co.*, 269 U.S. 385, 391 (1926); *see also McBoyle v. United States*, 283 U.S. 25, 27 (1931) ("Although it is not likely that a criminal will carefully consider the text of the law before he murders or steals, it is reasonable that a fair warning should be given to the world in language that the common world will understand."). A system that requires citizens (and line prosecutors) to divine liability by reconstructing legislative aims and contested historical practice, rather than by reading the statute's text, is precisely the one the fair-notice component of vagueness forbids.

The facts of this case illustrate how the Court's approach in *Skilling* undermined fair notice. How could the Defendants here have been on notice that their conduct would violate the honest services statute? The Second Circuit must have assumed that defendants of "ordinary intelligence" who read the honest services statute would be aware of the gloss put on that statute by both the Supreme Court and prosecutors, including that it can apply both extraterritorially and that the "honest services" being denied could in-

clude any breach of fiduciary duty, including employer-employee rules (in spite of the fact that neither of these issues had ever been addressed by the Supreme Court or even a pre-*McNally* case). The honest services statute applies to everyone, at all levels of sophistication. Its meaning must be at least be discernable from the text of the statute.

B. Judicial fixes of vague statutes invite arbitrary exercises of executive power

The second purpose of the vagueness doctrine is to prevent the prospect of arbitrary and discriminatory enforcement that comes with statutes that leave it to prosecutors or judges to define criminal conduct. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis," lacking "explicit standards" to govern enforcement. *Grayned*, 408 U.S. at 108-09. For that reason, statutes must contain "minimal guidelines to govern law enforcement." *Kolender*, 461 U.S. at 358, 362 (invalidating a statute that "encourages arbitrary enforcement" by failing to specify what identification suffices); *see also Papachristou v. City of Jacksonville*, 405 U.S. 156, 168 (1972) (vagrancy law vested "unfettered discretion" in police); *City of Chicago v. Morales*, 527 U.S. 41, 56-60 (1999) (plurality) (anti-gang loitering ordinance void where it lacked "minimal guidelines" and invited arbitrary arrests).

The phrase "intangible right of honest services" supplies no standards about who owes "honest services," what fiduciary duty triggers criminal exposure, or which exchanges constitute the kind of bribe or kickback that transforms workplace or political conduct into a felony. These are not minor issues, but

precisely the "important subjects" that Congress must address in all its lawmaking. *Wayman*, 23 U.S. at 1, 43. *See also FCC v. Consumers' Rsch.* 145 S. Ct. 2482, 2497, 2501 (2025) (Congress must establish "general policy" and impose "boundaries" on what the government can do with enacted law). Neither prosecutors nor the judiciary is equipped to weigh "competing [public] values" in deciding what shall or shall not be criminalized. *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987). However, absent that direction from Congress, prosecutors are quite happy to have the power to pick theories first and challenge courts to prune later—precisely the "ad hoc and subjective" pattern *Grayned* condemns. 408 U.S. at 109. While the Court's choice in *Skilling* to limit these problems to the context of "bribes and kickbacks" restricts the statute's scope, it otherwise removes the statute from what should be its anchor—the text. Now, as the Second Circuit's decision makes clear, even history is not a meaningful limitation. Instead, the statute has become an evolving ban on whatever conduct prosecutors think is "bad." *Cf. Kaweah Delta Health Care Dist. v. Becerra*, 123 F.4th 939, 952 (9th Cir. 2024) (invoking separation of powers in rejecting a statutory interpretation that would enable a federal officer to make decisions affecting the rights or obligations of others based on nothing more than his sense of "what[] he or she thinks is right").

Post-*Skilling* experience confirms the risk: the Court has had repeatedly to pare back expansive, standardless applications. *See McDonnell*, 579 U.S. at 567-75 (rejecting open-ended "official act" theory in corruption prosecutions); *Percoco*, 598 U.S. at 328-31 (rejecting "too vague" instructions that imposed hon-

est-services duties on a private citizen based on political "clout" untethered to law). This case may very well be the next chapter in this story. But this kind of serial correction of charging discretion is exactly what the Court has tried to prevent with its vagueness jurisprudence.

The constitutional cure must be legislated clarity. It is Congress's role to make law, not the courts'. And this case shows why. Without text-anchored standards, § 1346 will never provide prosecutors with clear rules to follow.

IV. Overturning *Skilling* Will Fix Both A Dangerous Example Of Untethered Federal Power And An Anomaly In The Court's Vagueness Jurisprudence

Section 1346 is a workhorse of federal white-collar enforcement; it reaches not only public corruption but also private employment relationships and commercial dealings. As this case shows, the decision below would permit prosecutors to premise federal felony liability on breaches of amorphous "fiduciary duties" defined by private codes of conduct—even foreign ones—so long as a benefit can be characterized as a "bribe." That regime burdens ordinary Americans—employees, managers, small-business owners, nonprofit officers—who cannot plausibly anticipate, from § 1346's text, which industry policies or internal manuals might be transformed into criminal law.

The practical costs are considerable. When criminal exposure turns on variable, nonpublic, and shifting private standards, lawful commerce and civic participation are chilled. Companies may over-engineer compliance to guard against unknowable federal the-

ories; counterparties might hesitate to extend ordinary hospitality or enter routine sponsorships; private and charitable boards will struggle to recruit. And the threat of untethered federal prosecution seems especially important in an era where people are becoming increasingly worried about government "lawfare," and the threat of arbitrary federal power is foremost in many minds.[4]

Equally important, left untouched, *Skilling*'s methodology continues to stand out as out of step. There, the Court moved metaphorical mountains to save the statute, combining history with the law's unexpressed goals to salvage a halfway concrete core from the mess Congress provided. But this is not reading text "in context"; it is effectuating unexpressed intent. Yet the Court's modern vagueness decisions teach a different lesson: when a penal statute's indeterminacy leaves courts to "guess" at its reach, the remedy is not atextual patchwork but invalidation. *Johnson*, 576 U.S. at 595-602 (residual clause void where "ordinary case" method produced hopeless indeterminacy); *Dimaya*, 584 U.S. at 154-69 (same for § 16(b)); *Davis*, 588 U.S. at 447 ("In our constitutional order, a vague law is no law at all.").

This case offers a clean opportunity to restore that through-line. The Court can say plainly that fair notice must come from Congress's enacted words—given their ordinary or settled legal meaning, alongside or-

---

[4] *See, e.g.*, Andrew C. McCarthy, *The Grave Dangers of Lawfare*, Nat'l Rev. Mag. (Sept. 2024), https://tinyurl.com/yepev7n7; Marc A. Thiessen, *When the Rule of Law Becomes Rule of Lawfare*, Wash. Post (Aug. 23, 2025), https://tinyurl.com/553ds7jp.

dinary canons of statutory construction—not from judicial reconstructions of purpose. Using these canons of construction, § 1346's operative phrase fails to provide enough content to make a viable criminal statute. Indeed, if Congress has failed to adequately define what it is prohibiting, it has failed to make law at all.

Striking down § 1346 would not hamstring anti-corruption efforts. Congress has enacted targeted bribery statutes, and it can write a clear honest-services law if it chooses. What it may not do is pass an indeterminate prohibition and rely on prosecutors and courts to supply the content later. The Constitution entrusts the making of criminal law to Congress. Where Congress has failed to speak with the clarity due process requires, the proper course is to "treat the law as a nullity and invite Congress to try again." *Davis*, 588 U.S. at 448.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

LUKE A. WAKE
Counsel of Record
WILSON C. FREEMAN
Pacific Legal Foundation
555 Capitol Mall,
Suite 1290
Sacramento, CA 95814
(916) 419-7111
lwake@pacificlegal.org

Counsel for Amicus Curiae
Pacific Legal Foundation

NOVEMBER 2025