No. 21-20658

United States Court of Appeals
for the
Fifth Circuit

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

v.

DAISY TERESA RAFOI BLEULER,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
NO.: 4:14-CR-514-7

BRIEF FOR *AMICUS CURIAE* INTERNATIONAL ACADEMY OF FINANCIAL CRIME LITIGATORS IN SUPPORT OF DEFENDANT-APPELLEE

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, counsel for *Amicus Curiae* states that The International Academy of Financial Crime Litigators has no parent corporation, and no company holds 10 percent or more of its stock.

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THE INTEREST OF THE *AMICUS CURIAE*

The International Academy of Financial Crime Litigators ("the Academy")[1] is a not-for-profit public interest organization established under the laws of France with its seat in Basel, Switzerland. It is "a collaboration between public- and private-sector litigation professionals and the renowned Basel Institute on Governance" whose "aim [is] to promote worldwide access to solutions in cases of economic crime." Its stated mission is "to be an independent non-partisan global center of excellence in all aspects of financial crimes by promoting international cooperation, access to justice and due process in the interests of victims and accused." It is not oriented toward criminal defense, but rather is based on "[r]espect for members of the bar and professionals on 'all sides' of economic crime cases." These and other elements of its mission statement, a summary of its activities, and biographies of its Fellows can be found on the Academy's website, https://www.financialcrimelitigators.org/.[2]

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[1] Pursuant to Rule 29(a) of the Federal Rules of Appellate Procedure the Academy certifies that (1) this brief was authored entirely by counsel for the Academy, and not by counsel for any party, in whole or part; (2) no party and no counsel for any party contributed money to fund preparing or submitting this brief; and (3) apart from the Academy and its counsel, no other person contributed money to fund the preparation or submission of this brief. A Fellow of the Academy acts as counsel for the Appellee, but did not participate in the drafting of this brief or the decision to submit it.
Both parties consented to the filing of this brief.

[2] The positions taken in this brief do not necessarily represent the opinions of individual Fellows of the Academy or of any institutions with which the Fellows are employed or associated.

The Academy has an interest in this appeal because its outcome will have an impact on world-wide efforts to combat bribery of foreign officials. Successful pursuit of companies and individuals engaged in multinational bribery depends on careful consultation and cooperation among the countries committed to prosecuting these offenses. The positions taken by the Government would weaken multinational efforts aimed at promoting cross-border cooperation through international standards to which the United States is a party.

SUMMARY OF ARGUMENT

In this appeal, the Government seeks two rulings that would inhibit coordination of multi-jurisdictional criminal investigations, particularly involving foreign bribery, around the world. *First*, it asks this Court to reject the well-reasoned analysis of the United States Court of Appeals for the Second Circuit in *United States v. Hoskins*, 902 F.3d 69 (2d Cir. 2018) ("*Hoskins*"), which gave full rein to the Government to investigate and prosecute violators of the Foreign Corrupt Practices Act ("FCPA") pursuant to its terms, but refused to extend the reach of the FCPA to individuals who do not fit within the defined "categories" of potential violators set forth in the FCPA. *Second*, it asks this Court to apply a vague definition to one of those categories – an "agent of a domestic concern" – with such a broad reach that it could apply to a wide range of conduct not prohibited by the FCPA, including the operations of foreign banks and other institutions that provide financial services. The Government further claims that an accused to whom a criminal statute does not even apply cannot contest that issue prior to trial.

These positions would create troubling precedent in the administration of transnational justice. The FCPA led to, and functions as a coherent part of, an international fabric of cooperative efforts to combat the worldwide scourge of official corruption. This fabric is reflected in, among other places, the Convention

on Combatting Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention"), adopted in 1997 by the Organization for Economic Co-operation and Development ("OECD") under the leadership of the United States and subsequently signed by it and its principal trading partners.[3] The FCPA today is the result of amendments made in response to this commitment to harmonized standards for the investigation and prosecution of transnational bribery, and owes its current effectiveness to the fact that the United States does not act alone in the fight against worldwide corruption. As this Court noted, in 1998 the FCPA was amended with the specific "intention to implement the [OECD] Convention." *United States v. Kay*, 359 F.3d 738, 756 (5th Cir. 2004). It follows that the FCPA must not only be interpreted and applied in a manner strictly consistent with its explicit terms, but with a wary eye to the risk that application overseas in a manner not authorized by the statute itself or required by the OECD Convention would infringe on the interests of our international partners, and inhibit cross-border cooperation with them.

[3] At present 44 nations have ratified the Convention, see https://www.oecd.org/daf/anti-bribery/WGBRatificationStatus.pdf. *See generally* The OECD Convention on Bribery: A Commentary (Mark Pieth et al. eds., 2d ed. 2014).

ARGUMENT

Unlike most federal criminal statutes, the FCPA limits the "categories" of individuals to whom it applies; if a defendant does not fit within a specified category, the case against that defendant cannot proceed. The Government claims that it can prosecute Rafoi under two separate theories. *First*, it relies on several frequently used FCPA categories to which Rafoi does *not* belong, and argues that the Government can prosecute her under theories of secondary liability. *Second*, it argues that Rafoi fits into a separate category as an "agent of a domestic concern;" it then argues that once it has invoked this phrase, the trial court was powerless to inquire into its precise meaning, or whether Rafoi fits within it.

These arguments are wrong. The Government's secondary liability theory, which has already been rejected by the Second Circuit in *Hoskins*, flies in the face of precedent, and if accepted would largely free the Government from territorial constraints. Its use of the phrase "agent of a domestic concern" to identify a non-citizen living and operating an independent business abroad depends on a strained interpretation of the statutory language that is not what Congress intended. The trial court was justified in determining the meaning of this category; both it and the parties should be encouraged to explore whether Rafoi in fact fits within it.

I. THE FCPA DOES NOT PERMIT THE GOVERNMENT TO RESORT TO SECONDARY LIABILITY PRINCIPLES TO PROSECUTE CATEGORIES OF INDIVIDUALS THAT CONGRESS CLEARLY EXCLUDED FROM THE FCPA'S REACH.

As the Second Circuit has noted, "the FCPA defined precisely the categories of persons who may be charged for violating its provisions." *Hoskins*, 902 F.3d at 71. The most frequently used categories are an "issuer" of securities in the United States or an officer of such an issuer,[4] a "domestic concern" or an "United States person,"[5] and a person who committed any relevant act "while in the territory of the United States."[6] The Government admits that Rafoi fits into none of these categories. Rather, it seeks to proceed against her as an aider-and-abettor (under 18 U.S.C. §2) or conspirator (under 18 U.S.C. §371 and *Pinkerton*) of someone who *does* fit within an FCPA category. The Government argues that "[a] person … may be liable for conspiracy even though he was incapable of committing the substantive offense." Gov't Br. at 15 (quoting *Salinas v. United States,* 522 U.S. 52, 64 (1997)). That argument fails because the structure and terms of the FCPA as well as its legislative history show that Congress was clearly aware of the "category" of individuals in which Rafoi actually belongs – non-Americans who

[4] 15 U.S.C. §78dd-1.
[5] 15 U.S.C. §78dd-2.
[6] 15 U.S.C. §78dd-3.

are not connected with a U.S. "concern" and commit no relevant act here – and excluded it from FCPA coverage.

To prevail, the Government must succeed on two arguments, each rejected by the Second Circuit. It must first convince this Court that the rule of *Gebardi v. United States*, 287 U.S. 112 (1932), that the purposeful exclusion of an identifiable potential category of violators evinces an intent to preclude their prosecution under secondary liability principles, should not be applied here; separately, it must overcome the presumption against extraterritorial application of U.S. statutes emphasized by the Supreme Court in *Morrison v. Nat'l Australia Bank Ltd.,* 561 U.S. 247 (2010). While its arguments on these points are misguided for separate reasons, they share a common flaw: The Government reads the FCPA to cast the widest possible net to pursue alleged wrongdoers wherever they can be found in the world. But this prosecutorial zeal does not address the text of the FCPA when it was first adopted and later amended, which is the relevant question. As Judge Lynch concluded in his *Hoskins* concurrence: "But we do not sit to decide how Congress might have written the law if it had specifically considered this case. We can only apply the law that Congress did write, which limits the extraterritorial application of the FCPA to specific cases that do not include Hoskins's situation." *Hoskins*, 902 F.3d at 102. He based this conclusion on the panel's review of the text, structure, and legislative history of the FCPA, which confirmed that

Congress's focus was not on pursuing allegedly complicit non-American individuals wherever they could be found all over the world. Rather, Congress was "largely concerned with ensuring the SEC's ability to supervise and police companies," and also "desired that the statute not overreach in its prohibitions against foreign persons." *Id.* at 94. The Government's focus on its present-day aspirations rather than the limited powers Congress chose to give it undermines both parts of its analysis.

A. The *Gebardi* principle

The fundamental question posed by *Gebardi* is whether Congress, when formulating a criminal statute, intended to exclude a class of persons from liability. Specifically, "[t]he question is…whether Congress intended the general conspiracy statute, passed many years before the FCPA," to reach non-agent, non-citizens acting outside of the United States. *United States v. Castle*, 925 F.2d 831, 835 (5th Cir. 1991). The Government contends that congressional intention not to subject a class of persons to federal criminal prosecution can only be inferred if they "frequently, if not normally" participate in the underlying conduct. Gov't Br. at 18. But this is just one approach to deducing the meaning of the text; other traditional methods – which lead to the opposite result in this case – are more appropriate and persuasive.

In *Castle,* this Court rejected the Government's claim that even though the FCPA by its terms applies only to bribe-givers, it could nonetheless prosecute bribe-takers by arguing that they aided-and-abetted or conspired with bribe-givers, observing that "[t]he principle enunciated by the Supreme Court in *Gebardi* squarely applies to the case before this Court." 925 F.2d at 833. Contrary to the Government's gloss that *Castle* "invoked *Gebardi* based on the traditional and limited necessary-party analysis," Gov't Br. at 22, this Court came to its conclusion "[b]ased upon the language of the statute and the legislative history," *id.* at 836, which the Court reviewed in detail. In *Hoskins*, the Second Circuit relied in part on the analysis in *Castle* to conclude that the Government could not rely on secondary liability principles to prosecute individuals falling outside the "categories" designated by Congress – the issue presented here. *Hoskins*, 902 F.3d at 83-84. These precedents, as well as a fresh review of the FCPA, compel a similar outcome.

Under *Castle* and *Hoskins*, the first question is whether the FCPA differentiates between the "categories" specified in it and the "category" in which Rafoi actually belongs – that is, a non-citizen, non-resident operating entirely and independently outside the United States. The text of the FCPA demonstrates that Congress had this categorical distinction in mind. As the Supreme Court emphasizes, "the best evidence of Congress's intent is the statutory

text." *Nat'l Fed'n of Indep. Bus. v. Sebelius,* 567 U.S. 519, 544 (2012). This Court and others have reiterated that "[w]hen the plain language of a statute is unambiguous and does not lead to an absurd result, our inquiry begins and ends with the plain meaning of that language." *United States v. Clayton*, 613 F.3d 592, 596 (5th Cir. 2010) (quotation marks omitted). The plain text of the FCPA enumerates the only categories of persons to whom it applies. Nothing in the FCPA suggests that these categories are non-exhaustive.

The structure of the FCPA shows that this distinction was not unintended, but rather reflects Congress's intent to avoid the "inherent jurisdictional, enforcement, and diplomatic difficulties" of prosecuting foreign citizens for extraterritorial conduct. *Castle*, 925 F.2d at 835. Congress usually drafts criminal statutes in broad terms and rarely specifies that a statute only applies to certain categories of persons; the FCPA is unusual in its delineation of specific categories. These categories are unified by a single underlying requirement: a particular, concrete and substantial connection to the United States.[7] In contrast, none of the statutes in the litany of cases the Government cites possesses this unique structure. Gov't Br. at 18-20 (citing cases concerning the Occupational Safety and Health Act, wire fraud, money laundering, the "federal 'kingpin' statute," and receiving a

[7] In 1998, Congress amended the FCPA to apply internationally "irrespective of whether [the defendant] makes use of the mails or any means or instrumentality of interstate commerce," but limited this extraterritorial application to a "United States person." 15 U.S.C. §78dd-2(i)(1).

firearm as a convicted felon). As this Court pointed out in *Castle*, Congress considered to whom the FCPA would – and would not – apply; the limited list of potential defendants that Congress chose to subject to potential FCPA criminality "includes virtually every person or entity involved, including foreign nationals who participated in the payment of the bribe when the U.S. courts had jurisdiction over them," from which it follows that Congress intended *not* to expose further categories or groups. 925 F.2d at 835.

The legislative history supports this conclusion. As this Court held in *Castle*, Congress drafted carefully and restrictively because it was "well aware of the 'inherent jurisdictional, enforcement, and diplomatic difficulties' raised by the application of the bill to non-citizens of the United States." 925 F.2d at 835.[8] Similarly, in *Hoskins* the Second Circuit conducted a methodical analysis of the ample FCPA legislative history, concluding that it demonstrated an affirmative policy "to leave foreign nationals outside the FCPA when they do not act as agents, employees, directors, officers, or shareholders of an American issuer or domestic concern, and when they operate outside United States territory." 902 F.3d at 93-94.

[8] Quoting from H.R. Conf. Rep. No. 831, 95th Cong., 1st Sess. 14, *reprinted in* 1977 U.S. Code Cong. & Admin. News 4121, 4126.

B. The *Morrison* presumption against extraterritoriality

In *Morrison v. Nat'l Australia Bank Ltd.,* 561 U.S. 247 (2010) ("*Morrison*") the Supreme Court stated a simple rule for interpreting federal statutes: "When a statute gives no clear indication of an extraterritorial application, it has none." 561 U.S. at 255. The Court has sharpened this interpretive rule in a variety of areas,[9] noting that U.S. law "does not rule the world." *RJR Nabisco*, 579 U.S. at 335 (quoting from *Microsoft Corp. v. AT&T Corp*., 550 U.S. 437, 454 (2007)).

The Government has tried to downplay the impact of this Supreme Court precedent in order to maximize its prosecutorial flexibility free of judicial constraints. In *United States v. Vilar*, 729 F.3d 62 (2d Cir. 2013), the Government went so far as to argue that *Morrison* should systematically not apply to criminal cases at all, claiming that when the Executive Branch elects to prosecute individuals or entities based upon their non-domestic conduct, that is binding on the courts. That position was squarely rejected.[10] In this appeal, the Government tries to argue that Rafoi fails both parts of the "two-step framework for deciding questions of extraterritoriality." Gov't Br. at 32-33 (quoting *WesternGeco LLC v. ION Geophysical Corp.,* 138 S.Ct. 2129, 2136 (2018)). Its arguments would

[9] *See, e.g., Kiobel v. Royal Dutch Petoleum*, 569 U.S. 108 (2013); *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325 (2016).

[10] "[T]he government is incorrect when it asserts that 'the presumption against extraterritoriality for civil statutes … simply does not apply in the criminal context.'" *Vilar*, 729 F.3d at 72.

virtually free it from any *Morrison*-based territoriality restraints of criminal prosecutions and should likewise be rejected.

The Government claims, without support or even discussion, that the FCPA satisfies the first step of the *Morrison* analysis because "[t]he FCPA gives a clear indication of Congress's intent for it to apply extra-territorially to a wide variety of actors, including non-U.S. persons acting abroad in various roles." Gov't Br. at 36. This is not the case: As noted, the text, structure and legislative history of the FCPA emphasize that while Congress was aware of the "wide variety of actors" worldwide who might be involved in transnational bribery, for stated reasons it chose to treat non-US "actors" very carefully, and to permit prosecution of them only if they fell within narrowly defined "categories."

Most of the Government's *Morrison* analysis focuses on the second step, which asks whether "the case involves a domestic application of the statute." *RJR Nabisco*, 579 U.S. at 337. Its principal argument is that since it chose to prosecute Rafoi for conspiracy under 18 U.S.C. §371, the "focus" for *Morrison* purposes becomes "the conspiratorial agreement or the overt acts in furtherance of the conspiracy." Gov't Br. at 34. This argument not only depends on the Government's survival of a *Gebardi* analysis whether Congress intended to extend the FCPA by means of the conspiracy statute, but would allow the Government to eliminate meaningful *Morrison* analysis in cases in which a conspiracy allegation

can be added, simply by saying that a conspiracy allegation against anyone in the world irrespective of that person's connection with the United States is a "domestic application" of the statute.

The *Hoskins* Court was thorough on this point, observing that Congress drafted the key provisions of the statute so as *not* to include non-Americans not connected with a U.S. company *unless* they committed a relevant act on U.S. soil, and that the legislative history reflected congressional insistence on placing careful limits on prosecuting foreigners.[11] It concluded, "the government cites no case in which a statute drew specific lines as to its extraterritorial application, and those lines were exceeded using the conspiracy or complicity theories." 902 F.3d at 97. Relying principally on pre-*Morrison* opinions[12] and on inapposite venue decisions,[13] the Government repeats its reliance on general law enforcement principles, but nowhere demonstrates that in adopting *this* statute Congress intended to allow the Government to prosecute individuals outside the "precise categories" delineated in the law, all of which have a domestic but not an extraterritorial nexus. Absent a showing of a congressional mandate for extraterritorial effect in the circumstances present here, *Morrison* and its progeny

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[11] The Government's grudging acknowledgment that "the FCPA's legislative history contains some indicators of the *Hoskins* Court's view," Gov't Br. 31, simply understates the extent, consistency, and significance of that history, which is amply reviewed in the *Hoskins*, 902 F.3d at 83-95.

[12] *United States v. Perez-Herrera,* 610 F.2d 289 (5th Cir. 1980)

[13] *Whitfield v. United States*, 543 U.S. 209 (2005)

command that it has none. The Government can point to no provision of the OECD Convention or other international agreement that obligates the United States to prosecute non-citizens who committed no relevant act on U.S. territory. Further, while the Government can argue that *Gebardi* created an "exception" where a defendant might bear a burden of persuasion, the opposite is true with respect to cases analyzed under *Morrison*, where Government must show that Congress intended the particular statute to apply extraterritorially to the factual circumstances in the case – absent which it does not.[14]

II. THE DISTRICT COURT WAS EMPOWERED TO DETERMINE THE MEANING OF AN "AGENT OF A DOMESTIC CONCERN," AND SHOULD HAVE SIGNIFICANT DISCRETION TO DETERMINE PRE-TRIAL WHETHER THE DEFENDANT COULD BE FOUND TO FALL IN THAT CATEGORY.

The Government's other basis for charging Rafoi under the FCPA is to argue that she falls within the category of an "agent of a domestic concern."[15] After unsuccessfully pressing the Government to define what this phrase actually

[14] The district court in *United States v. Firtash*, a case that the Government heavily relies upon, acknowledged this. 392 F. Supp. 3d 872, 892 (N.D. Ill. 2019) ("the presumption against extraterritoriality arguably undermines assumptions on which *Pino-Perez* [the principal Seventh Circuit case the district court relied on] was based."). The district court ultimately did not opine on the extraterritoriality issue, but conceded that "*RJR Nabisco*…appears to acknowledge that legislative history can constrain a statute's extraterritorial application."

[15] 15 U.S.C. § 78dd-2 applies to "any domestic concern" as well as to "any officer, director, employee, or agent of such domestic concern, or any stockholder thereof acting on behalf of such domestic concern." The term "domestic concern" is defined in 15 U.S.C. §78dd-2(h)(1). The Indictment alleges that individuals other than Rafoi are "domestic concerns." *See, e.g.,* Superseding Indictment, ¶13

means, the district court concluded that the Government's approach violated the Due Process Clause because it failed to give adequate notice of a criminal violation, and further that it did not appear from the indictment's factual allegations that Rafoi was an "agent of a domestic concern." Opinion at 21-22. On appeal, the Government focuses on whether the district court appropriately characterized the issue as one of "jurisdiction" under Rule 12(b)(2) of the Federal Rules of Criminal Procedure, Gov't Br. at 37 *et seq.*; it responds only briefly to the question of Due Process vagueness, *id.* at 49, and offers no useful definition of the critical phrase.

The Academy's position is that especially when faced with a threshold question of whether a criminal statute applies to an indicted defendant, the trial courts should be encouraged to exercise significant discretion. Contrary to the Government's position, (A) the phrase "agent of a domestic concern" has a clear and definite meaning; (B) it was appropriate for the trial court to rule on that meaning before trial; and (C) the court had discretion to explore, before the commencement of trial, whether the relevant statute even applied to the defendant.

A. The phrase "agent of a domestic concern" has a definite meaning.

As noted, in drafting the FCPA, Congress "defined precisely the categories of persons who may be charged for violating its provisions,"[16] and one such category is an "agent of a domestic concern." As an element of a criminal statute, this phrase must have a clear meaning, absent which the statute is unenforceable under the Due Process Clause. *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"). The Supreme Court has regularly rejected the Government's attempts to broaden the applicability of criminal statutes beyond the "paradigmatic cases" that they were intended to address.[17] This is important in interpreting the FCPA, where the drafters were aware that it might be applied to "foreign nationals who may not be learned in American law." *Hoskins*, 902 F.3d at 94.

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[16] *United States v. Hoskins*, 902 F.3d 69, 71 (2d Cir. 2018); *see also id.* at 83-84 (noting that Congress "carefully tailored" these categories with "surgical precision").

[17] *Skilling v. United States,* 561 U.S. 358, 411 (2010) (declining to expand "honest-services wire fraud" beyond "paradigmatic cases" of bribery or kickbacks); *see also Marinello v. United States*, 138 S. Ct. 1101, 1108–09 (2018) (rejecting the Government's "broad interpretation" of a criminal tax statute that would "risk the lack of fair warning and related kinds of unfairness"); *McDonnell v. United States*, 579 U.S. 550, 574 (2016) (noting that "the Government's expansive interpretation" of the phrase "official act" in criminal statutes "would raise significant constitutional concerns").

Contrary to the Government's position, courts cannot infer that Congress intended to incorporate some general and broad "common law" meaning of a phrase into a criminal statute, unless that meaning has already been established with specificity. In interpreting a criminal statute, "[t]he canon on imputing common-law meaning applies only when Congress makes use of a statutory *term* with established meaning at common law," *Carter v. United States,* 530 U.S. 255, 264 (2000) (emphasis in original); otherwise, Congress cannot be presumed to have incorporated the "cluster of ideas" associated with a word or phrase. *Id.,* quoting *Morissette v. United States*, 342 U.S. 246, 263 (1952).[18]

In using the word "agent" Congress did not intend to criminalize acts committed by anyone falling within the "wide and diverse range of relationships and circumstances" that may be encompassed by "agency" principles in general. Restatement (Third) Of Agency §1.01, cmt. c. The words "officer, director, employee, or agent" designate specific and distinctive categories; it would make no sense for Congress to use the terms "officer, director [and] employee" only to give

[18] *N.L.R.B. v. Amax Coal Co*., 453 U.S. 322 (1981), a pre-*Carter* decision not involving a criminal statute, is not to the contrary. In that case, the Court was asked to interpret the powers and responsibilities of a "trustee" within the meaning of Labor Management Relations Act, 1947, 29 U.S.C. §141 et seq. In reaching the conclusion that the word "trustee" meant a person with fiduciary responsibilities, the Court noted that "[w]here Congress uses terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Id.* at 329. The Court then proceeded to scrutinize the legislative history to confirm that in crafting the statute, Congress had the well-defined and precise concept of a "trustee" specifically in mind. *See id.* at 331, quoting from one of the bill's sponsors.

the fourth term ("agent") such a broad meaning as to make the first three unnecessary.[19] When used in the context of the FCPA, the word "agent" has a particular meaning that was not only well-known to and repeatedly referenced by Congress, but was necessary for the legislation to have its intended effect. When making illicit payments overseas, international companies often refrain from using their own "officers, directors or employees" who may find it unseemly to make payoffs themselves, but routinely use "agents" or "intermediaries" to funnel illicit funds to a corrupt "official." The use of the phrase in this sense was repeatedly referenced in the congressional debates over the FCPA;[20] in contrast, there is no reference to broader or common law "agency principles" as the source of its meaning.

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[19] In responding to a similar argument in another case, the Government argued that "this argument collapses on itself. For example, an officer is *always* an employee, so the law could have just said 'employee.'" Reply Brief for the United States at 42, *United States v. Hoskins*, No. 20-842(L) (2d Cir. January 12, 2021), ECF No. 110 (emphasis in original). This is incorrect: in many corporate structures – such as a wholly-owned business or a partnership – an "officer" may speak for the entity without having an "employee" status.

[20] A Senate Committee report emphasized:

> And payments to agents, while knowing or having reason to know, that all or a portion of the payment will be offered or given to a foreign government official, foreign political party or candidate for foreign political office for the proscribed purposes are also forbidden.

Senate Report 95-114 of the Committee on Banking, House and Urban Affairs (May 2, 1977); *see also id.* ("The prohibitions against corrupt payments apply in this regard to payments by agents where the corporation paying them knew or had reason to know they would be passed on in whole or in part to a foreign government official for a proscribed purpose."); *see also* the parallel House Report, House Rep. 95-640, House Committee on Interstate and Foreign Commerce (September 28, 1977), which specifically referred to an "agent" as "distinguished from an officer, director or other person policymaking position…."

While the OECD did not use the word "agent" in the Convention, it was mindful of the critical role played by agent/fixer/intermediaries. Shortly after the OECD Convention went into effect, the Working Group on Bribery in International Business Transactions (which all parties to the Convention are required to join) compiled a report exploring the challenges posed by intermediaries.[21] It notes that "for the purposes of this report an intermediary is defined or described as a person who is put in contact with or in between two or more trading parties," and first among the examples of such an intermediary it offers the word "agent."[22] Throughout the document, the OECD used the words "agent" and "intermediary" in identical ways; there is not a single suggestion that it understood the term to have a broader, or less well defined, meaning.

In choosing the phrase "agent of a domestic concern," Congress clearly had in mind individuals such as intermediaries or "fixers" who were designated by a principal, itself subject to U.S. jurisdiction, to perform specific acts in furtherance of a bribery scheme; equally clearly, Congress did not intend, and cannot be assumed to have intended, a broad "common law" definition with potential

[21] Typologies on the Role of Intermediaries in International Business Transactions: Final Report, Working Group on Bribery in International Business Transactions (Oct. 9, 2009), http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/43879503.pdf.
[22] *Id.* at 5.

application to a virtually limitless range of individuals whose businesses or operations interact with those of the principal.

B. The proper interpretation of the phrase "agent of a domestic concern" can and should be decided prior to trial.

Especially since Rafoi's status as an "agent of a domestic concern" is a "gateway" question that determines whether the FCPA even applies to her, there was ample reason for the district court to explore the meaning of the statute and the parameters of its applicability in pre-trial proceedings. The meaning of the statutory language would ultimately need to be nailed down either as part of a Rule 29 motion for an acquittal on the ground that the evidence was "insufficient to sustain a conviction" *under the terms of the relevant statute*, Fed. R. Crim. P. 29(a), or when the district court formulates its jury instructions. In order to perform these functions the Court would hear the parties on their respective views of how the critical words "agent of a domestic concern" should be construed and applied, and make its ruling. It makes profound sense in the supervision of criminal justice for a trial court to explore this question, and if possible decide it, prior to trial.

Rule 12(b)(1) provides that "[a] party may raise by pretrial motion any defense, objection or request that the court can determine without a trial on the merits," which encompasses a ruling on the meaning of this phrase. Rule 12(d) emphasizes that "[t]he court must decide every pretrial motion before trial unless it

finds good cause to defer a ruling." It adds that "[t]he court must not defer a ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal." This command is pertinent since if the court were to interpret the phrase adversely to the Government for the first time during trial, the Court might issue an acquittal under Rule 29 *from which the Government could not appeal* if it found that the evidence was insufficient under the proper standard;[23] if the case went to a jury, the jury might acquit under a standard that the Government would maintain was improper – but the Government could never appeal the acquittal. In *Hoskins* the Government was able to appeal the trial court's *pre-trial* determination of how the FCPA should be interpreted in light of *Gebardi* and *Morrison*.[24] All the parties – and the administration of justice – benefit from a pre-trial definition of this important threshold element of the alleged offense, and the trial court should be encouraged to do so here.

Resolving this issue pre-trial is important in order to encourage a rational and fruitful cooperation among potential prosecuting authorities. Facilitating such

[23] Rule 29(b) permits a trial court to "reserve decision" until after a jury has issued its verdict, and if a jury returns a verdict of guilty and the court issues a Rule 29(a) acquittal, the Government can appeal that ruling seeking a reinstatement of the guilty verdict. However, such a deferral is entirely discretionary with the court and the Government cannot compel it.

[24] In *Hoskins* the defendant elected not to seek pre-trial guidance on the parameters of the "agent of a domestic concern" provision, so that issue was not decided in *Hoskins* but is presently before the Court in the Government appeal of the trial judge's post-trial Rule 29 acquittal in which she found insufficient the evidence that Hoskins had acted as an agent of a domestic concern.

cooperation is in fact a treaty obligation that the United States accepted by agreeing with its major trading partners to join in a cooperative effort to combat overseas bribery as set forth in the OECD Convention. Article 4.3 of the Convention recognizes that frequently "more than one Party [that is, signatory nation] has jurisdiction over an alleged offence described in this Convention," and commands that in that case "the Parties involved *shall*, at the request of one of them, consult with a view to determining the most appropriate jurisdiction for prosecution." OECD Convention (emphasis added). In any "consultation" in compliance with this mandatory treaty obligation, an obvious variable bearing on "appropriateness" is whether one country's criminal statute even applies to a potential accused; if not, that country should desist, defer to another country, or ask it to prosecute. A refusal to be forthcoming on "jurisdictional" elements until trial, at which point the issue would be tested by a procedure that could lead to an acquittal rather than to prosecution in a more "appropriate" forum, not only violates the spirit of Article 4.3 but would undermine the core cooperative framework of the Convention.[25]

[25] The OECD recently emphasized the importance of "direct coordination" among signatory nations to the OECD Convention, noting that "consistent with Article 4.3" prosecutors should "consider, where appropriate, consultations during the investigation, prosecution, and conclusion of the case, in conformity with their legal systems." OECD, Recommendation of the Council for Further Combatting Bribery of Foreign Public Officials in International Business Transactions, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0378 (November 25, 2021), at XIX(B).

C. The district court should explore pre-trial whether the defendant is an "agent of a domestic concern."

The Government's position is that if it accurately recites the statutory language in the indictment, the trial court is powerless to inquire into the factual basis for this allegation and must await the presentation of evidence at trial. While "summary judgment does not exist in federal criminal procedure," *United States v. Sampson*, 898 F.3d 270, 282 (2d Cir. 2018), it does not follow that district courts are as powerless as the Government contends. Rather, as the Tenth Circuit has noted that under some circumstances "it is permissible and may be desirable where the facts are essentially undisputed, for the district court to examine the factual predicate for an indictment to determine whether the elements of the criminal charge can be shown sufficiently for a submissible case."[26]

There are several reasons why the trial judge should be encouraged to narrow these issues before trial, and why the parties should be urged to cooperate. To begin, the critical issue is not whether the defendant committed an act that would in itself constitute a crime, but rather whether her acts placed her in one of

[26] *United States v. Brown*, 925 F.2d 1301, 1304 (10th Cir. 1991). This Court, and most other circuits, have recognized that it is appropriate for a district court to conduct a proffer or other fact-finding function when considering a pretrial motion to dismiss. *See United States v. Flores*, 404 F.3d 320, 324 (5th Cir. 2005); *United States v. Brissette*, 919 F.3d 670, 676 (1st Cir. 2019); *United States v. Alfonso*, 143 F.3d 772, 776-77 (2d Cir. 1998); *United States v. DeLaurentis,* 230 F.3d 659, 660-61 (3d Cir. 2000); *United States v. Weaver*, 659 F.3d 353, 355 (4th Cir. 2011); *United States v. Levin*, 973 F.2d 463, 467 (6th Cir. 1992); *United States v. Risk*, 843 F.2d 1059 (7th Cir. 1988); *United States v. Brown*, 925 F.2d 1301, 1304 (10th Cir. 1991); *United States v. Yakou*, 428 F.3d 241, 246-47 (D.C. Cir. 2005).

the "precisely defined" categories to which the FCPA even applies – a classic threshold or "gateway" issue. The allegation that Rafoi acted as an "agent of a domestic concern" by "assist[ing] [other defendants] in opening bank accounts, including bank accounts in Switzerland," Superseding Indictment (Doc. 129, April 24, 2019) at ¶ 52, could easily be made against a wide variety of banks and financial managers if their customers included bribe-givers; allowing the Government unreviewable authority to haul such non-US actors into a U.S. court from all around the world would risk exactly the kinds of foreign relations complications that the drafters of the FCPA wished to avoid and implicates the sovereign interests of their home countries.[27]

To address this, the trial court should be encouraged, in the exercise of its discretion, to consider several useful options that have successfully been employed in similar cases.

To begin, this indictment does include a number of concrete and specific factual allegations against Rafoi,[28] which could be analyzed to determine whether the indictment constitutes "a plain, concise, and definite written statement of the

[27] See *United States v. Bescond*, 24 F.4th 759, 775 (2d Cir. 2021), holding that a non-citizen not present in the United States and who committed no act here must be allowed to present arguments to the trial court on whether the criminal statute applied to her, noting that a refusal "assigns no weight to the sovereignty of other nations."
[28] Superseding Indictment at ¶¶ 12-48.

essential *facts* constituting the offense charged," as required by Rule 7(c)(1) of the Federal Rules of Criminal Procedure.

The Government should also be given the opportunity to make a factual "proffer" of the facts upon which it relies to show that Rafoi acted in a capacity as an "agent of a domestic concern." As noted, a number of courts have emphasized that once the Government has made a "full proffer" of facts on a particular issue, it is proper for a trial court to make a dispositive ruling on the basis of it. *See* cases cited *supra* note 26. Such a proffer need not disclose the full array of evidence available to the Government but would be limited to whether Rafoi fits into one of the FCPA's specific categories. These approaches, of course, require not only the supervision of the trial judge but the good-faith cooperation of the Government as officers of the court.

CONCLUSION

The Academy urges the Court to reject the Government's (i) theory of secondary liability and (ii) proposed application of "agent of a domestic concern."

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the appellate CM/ECF system. I further 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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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 International Academy of Financial Crime Litigators 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 6450 words absent those portions excluded by Rule 32(f) of the Federal Rules of Appellate Procedure.

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: June 7, 2022

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