Nos. 97-1792 and 97-8964

In the Supreme Court of the United States

OCTOBER TERM, 1997

LYLE DAVID PIERCE, III, AND
REGINA PIERCE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the wire fraud statute, 18 U.S.C. 1343, prohibits schemes to use the interstate wires in the United States to defraud a foreign government of tax revenue.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 130 F.3d 547.[1] The opinion of the district court (Pet. App. 13a-20a) is unreported.

[1] All "Pet. App." citations refer to the appendix to the petition in No. 97-1792.

JURISDICTION

The judgment of the court of appeals was entered on December 5, 1997. A petition for rehearing was denied on February 5, 1998 (Pet. App. 21a). The petition for a writ of certiorari in No. 97-8964 was filed on May 4, 1998. The petition for a writ of certiorari in No. 97-1792 was filed on May 5, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Over the past decade, as the Canadian government has significantly increased the taxes and duties on liquor and tobacco products, a lucrative "black market" has arisen for liquor and tobacco products smuggled into Canada from the United States. The St. Regis Mohawk Indian Reservation (or Akwesasne), which straddles the boundary between the United States and Canada, has become a center for such smuggling activity. Pet. App. 3a-4a; Gov't C.A. Br. 2-3.

2. On February 29, 1996, a federal grand jury in the Northern District of New York returned a single-count indictment charging petitioners and others with conspiring to commit money laundering, in violation of 18 U.S.C. 1956(a)(1)-(2) and (h). The conspiracy charge arose out of the defendants' alleged participation in an enterprise to smuggle liquor through the Reservation into Canada. Pet. App. 3a-5a, 22a-28a.

According to the indictment, petitioners and their co-conspirators, using interstate telephone calls, facsimiles, and wire transmissions, ordered large shipments of liquor from suppliers in the United States. They allegedly stored the liquor on the Reservation, smuggled the liquor into Canada, avoiding Canadian

customs agents, and delivered the liquor to black marketeers in such cities as Montreal and Toronto. The conspirators allegedly transported the Canadian currency generated by the liquor sales back to the United States, where the funds were deposited or exchanged to obtain bank drafts or wire transfers, which, in turn, were used to purchase additional liquor to be smuggled into Canada. Pet. App. 4a-5a, 22a-28a.

The indictment charges that petitioners and their co-defendants conspired to violate two substantive provisions of the money-laundering statute: the prohibition on conducting a financial transaction involving "the proceeds of specified unlawful activity" with "the intent to promote the carrying on of specified unlawful activity," 18 U.S.C. 1956(a)(1)(A)(i), and the prohibition on transporting currency between the United States and another country with "the intent to promote the carrying on of specified unlawful activity," 18 U.S.C. 1956(a)(2)(A). The indictment identifies the "specified unlawful activity" as wire fraud "to defraud the Canadian government of revenue," in violation of 18 U.S.C. 1343. Pet. App. 23a.[2]

3. Petitioners and their co-defendants moved to dismiss the indictment on the ground that the United States lacks authority to prosecute wire fraud aimed at defrauding a foreign government of tax revenue. Relying on the First Circuit's decision in *United*

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[2] The money-laundering statute defines "specified unlawful activity" to include, with exceptions not relevant here, "any act or activity constituting an offense listed in section 1961(1) of this title." 18 U.S.C. 1956(c)(7)(A). Section 1961(1)(B), in turn, identifies as an offense "any act which is indictable under * * * section 1343 (relating to wire fraud)." 18 U.S.C. 1961(1)(B) (Supp. II 1996).

States v. *Boots*, 80 F.3d 580, cert. denied, 117 S. Ct. 263 (1996), the district court granted the motion. Pet. App. 13a-20a. The court reasoned that it could not determine whether the defendants had the requisite intent to defraud without passing on the validity of Canadian revenue laws, because "[i]f the law they intended to violate was not valid, the defendant could not have had a criminal intent." *Id.* at 20a. The court then concluded that inquiry into the validity of Canadian revenue laws is precluded by the common-law "revenue rule," which bars United States courts from entertaining suits to enforce foreign tax judgments. *Id.* at 17a, 20a.

4. The court of appeals reversed. Pet. App. 1a-12a. The court recognized that the text of the wire fraud statute "unambiguously prohibits the use of interstate or foreign communication systems by anyone 'who intend[s] to devise *any* scheme or artifice to defraud.'" *Id.* at 9a (quoting 18 U.S.C. 1343). The wire fraud statute thus "neither expressly, nor impliedly, precludes the prosecution of a scheme to defraud a foreign government of tax revenue." *Ibid.*

The court of appeals went on to hold that the common-law revenue rule is "inapplicable to the instant case" and, therefore, "provides no justification for departing from the plain meaning of the statute." Pet. App. 9a. It reasoned that United States courts need not pass on "the validity of a foreign sovereign's revenue laws"—the inquiry forbidden by the revenue rule—in order to determine whether a defendant used the wires with the intent to defraud the foreign sovereign of tax revenue. *Id.* at 11a. The wire fraud statute, explained the court, "punishes the *scheme*, not its success." *Ibid.* (quoting *United States* v. *Helmsley*, 941 F.2d 71, 94 (2d Cir. 1991), cert. denied, 502 U.S.

1091 (1992)). Accordingly, a defendant may violate the wire fraud statute by using the wires to carry out a scheme designed to defraud a foreign government of tax revenue, even if the scheme could not succeed because, for example, no tax was actually due. Pet. App. 10a-11a.

ARGUMENT

The court of appeals correctly rejected petitioners' contention that the wire fraud statute cannot, as a matter of law, apply to schemes to use the wires to defraud a foreign government of tax revenue. Although the Second Circuit's decision in this case conflicts with the First Circuit's decision in *United States* v. *Boots*, 80 F.3d 580, cert. denied, 117 S. Ct. 263 (1996), we do not believe that the question presented by the petitions, which has thus far been addressed in only two circuits, requires the Court's review at this time.

1. The language of the wire fraud statute is broad. It applies to "*any* scheme or artifice to defraud * * * by means of wire, radio or television communication in interstate or foreign commerce." 18 U.S.C. 1343 (emphasis added). It contains no exception based on the identity of the victim of the fraud or the nature of the property at which the scheme was directed.

The wire fraud statute, and the analogous mail fraud statute, have thus been recognized to apply to fraudulent schemes involving the sort of victim (*i.e.*, a foreign government) and the sort of property (*i.e.*, tax revenue) involved in this case. The courts have upheld convictions of defendants who were found to have engaged in schemes to defraud foreign governments, foreign corporations, and foreign individuals. See, *e.g.*, *United States* v. *Sensi*, 879 F.2d 888 (D.C. Cir.

1989) (foreign corporation owned by foreign government); *United States* v. *Van Cauwenberghe*, 827 F.2d 424 (9th Cir. 1987) (foreign individual and foreign corporation), cert. denied, 484 U.S. 1042 (1988); *United States* v. *Gilboe*, 684 F.2d 235, 237-238 (2d Cir. 1982) (foreign government), cert. denied, 459 U.S. 1201 (1983).[3] The courts have also upheld mail and wire fraud convictions of defendants who were found to have engaged in schemes to defraud the federal government or a State of tax revenue. See, *e.g.*, *United States* v. *Goulding*, 26 F.3d 656, 663 (7th Cir.) (federal taxes), cert. denied, 513 U.S. 1061 (1994); *United States* v. *Dale*, 991 F.2d 819, 849 (D.C. Cir.) (per curiam) (federal taxes), cert. denied, 510 U.S. 906 (1993); *United States* v. *Helmsley*, 941 F.2d 71, 94 (2d Cir. 1991) (state taxes), cert. denied, 502 U.S. 1091 (1992); *United States* v. *Melvin*, 544 F.2d 767 (5th Cir.) (state taxes), cert. denied, 430 U.S. 910 (1977); *United States* v. *Brewer*, 528 F.2d 492 (4th Cir. 1975) (state taxes).

Petitioners nonetheless assert that the mail and wire fraud statutes should not be used "to protect foreign countries against fraudulent schemes," especially schemes to defraud foreign countries of tax revenue, because "[t]here is nothing in [those] statutes or their legislative histories that indicates" that

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[3] Cf. *Republic of the Philippines* v. *Marcos*, 862 F.2d 1355, 1358-1361 (9th Cir. 1988) (en banc) (federal district court could adjudicate foreign government's civil claim under Racketeer Influenced and Corrupt Organizations Act based, in part, on predicate acts of mail and wire fraud), cert. denied, 490 U.S. 1035 (1989); *Republic of Panama* v. *BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 948-951 (11th Cir. 1997) (assuming that federal district court could adjudicate such claim by foreign government if elements were properly pleaded).

Congress intended the statutes to apply to such schemes (L. Pierce Pet. 9-10; see R. Pierce Pet. 3). Petitioners view such congressional silence as creating "ambigu[ity]" (L. Pierce Pet. 10, 11) about the reach of the mail and wire fraud statutes. As this Court recently reiterated, however, "the fact that a statute can be applied in situations not expressly anticipated by Congress does not demonstrate ambiguity," but instead "demonstrates breadth." *Pennsylvania Dep't of Corrections* v. *Yeskey*, No. 97-634 (June 15, 1998), slip op. 5 (internal quotation marks omitted).[4]

2. In urging the inapplicability of the wire fraud statute, petitioners principally rely (L. Pierce Pet. 12-16; R. Pierce Pet. 2-4) on a judge-made doctrine—the "revenue rule"—that generally "prevent[s] a foreign country from enforcing its tax judgment in the courts of the United States." *Her Majesty the Queen*

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[4] Contrary to petitioner Lyle Pierce's suggestion (L. Pierce Pet. 11), this case does not implicate the international law principle that a country should not prosecute conduct occurring beyond its borders unless the conduct has "a substantial, direct, and foreseeable effect" within that country. Restatement (Third) of Foreign Relations Law § 421(2)(j) (1987). This case does not involve conduct that occurred solely, or even primarily, outside the United States. To the contrary, the indictment alleges numerous overt acts that petitioners and their co-conspirators committed or caused to be committed in the United States as part of the scheme to defraud Canada of tax revenue. See Pet. App. 24a-26a; see also Restatement (Third) of Foreign Relations Law § 421(2)(i) (1987) (a state may assert jurisdiction with respect to "activity in the state"). Nor can it be assumed that the alleged scheme, which included multiple transactions with at least one financial institution and two other businesses in the United States (see Pet. App. 24a-26a), had no "substantial, direct, and foreseeable effect" in this country.

in Right of the Province of British Columbia v. *Gilbertson*, 597 F.2d 1161, 1165 (9th Cir. 1979) (refusing to entertain suit by Canadian government to enforce provincial tax judgment); see *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 413-414 (1964) (noting "the principle enunciated in federal and state cases that a court need not give effect to the penal or revenue laws of foreign countries"). The accepted rationale for the revenue rule is that a domestic court could not enforce a foreign tax judgment without inquiring into whether the foreign tax is "consonant with its own notions of what is proper"—an inquiry that could "seriously embarrass" the foreign state and that "involves the relations between the states themselves, with which courts are incompetent to deal." *Moore* v. *Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) (L. Hand, J., concurring), aff'd on other grounds, 281 U.S. 18 (1930).[5]

This case does not implicate either the revenue rule itself or the rationale on which it is based. It is not an action brought by the government of Canada to enforce a Canadian tax judgment. It is, instead, an action brought by the United States government to enforce its own criminal laws against money laundering and wire fraud committed in this country.

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[5] The *Moore* case was brought in district court in New York against the executors of the estate of a decedent who had allegedly owed state and local taxes in Indiana. Although the court of appeals in *Moore* assumed that the same "settled principles of private international law" applied whether the party seeking to collect the tax was a foreign country or a State (30 F.2d at 602), this Court has since made clear that a State is required by the Full Faith and Credit Clause to honor another State's tax judgment. *Milwaukee County* v. *M.E. White Co.*, 296 U.S. 268 (1935).

Nor does such an action require a United States court to construe a foreign tax law, much less to pass on whether such a law is valid or "proper." It is well-settled that the mail and wire fraud statutes "punish[] the *scheme*, not its success." *Helmsley*, 941 F.2d at 94; accord *United States* v. *Bucey*, 876 F.2d 1297, 1311 (7th Cir.), cert. denied, 493 U.S. 1004 (1989).[6] In *Helmsley*, for example, the Second Circuit held that the defendant could be convicted of mail fraud in connection with a scheme to defraud New York State of tax revenue, even if she did not, in fact, owe any tax to the State. It was enough that she had used the mails to carry on a scheme designed to commit tax fraud. See *Helmsley*, 941 F.2d at 94 ("an actual tax debt is not an element of the mail fraud offense"). And, in *Bucey*, the Seventh Circuit affirmed the mail fraud conviction of a defendant who had participated in a scheme to defraud the United States of tax revenues, even though "the government was not *in fact* deprived of tax revenues" since his "tax-evading 'clients' in this case were undercover government

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[6] See also, *e.g.*, *United States* v. *Carrington*, 96 F.3d 1, 7 (1st Cir. 1996) ("The crime of wire fraud does not require that the defendant's object be attained. It only requires that the defendant devise a scheme to defraud and then transmit a wire communication for the purposes of executing the scheme."), cert. denied, 117 S. Ct. 1328 (1997); *United States* v. *Frey*, 42 F.3d 795, 800 (3d Cir. 1994) ("the success of the scheme is not relevant in a mail or wire fraud conviction"); *United States* v. *Pollack*, 534 F.2d 964, 971 (D.C. Cir.) ("success of the scheme and loss by a defrauded person are not essential elements of the crime under 18 U.S.C. §§ 1341, 1343"), cert. denied, 429 U.S. 924 (1976); *United States* v. *Jackson*, 451 F.2d 281, 283 (5th Cir. 1971) ("The Wire Fraud Statute does not require that the scheme be successful, or even that the victim be deceived."), cert. denied, 405 U.S. 928 (1972).

agents." 876 F.2d at 1311. "[T]he fact that the government was not actually deprived of tax revenues does not warrant reversal of [the defendant's] conviction," the court explained, because "the ultimate success of the fraud and the actual defrauding of a victim are not necessary prerequisites to a successful mail fraud prosecution." *Ibid.*

Similarly, here, the government must prove that petitioners and their co-conspirators intended to defraud Canada of taxes and duties.[7] But the government need not also prove that they actually did defraud Canada (or would have done so had the scheme not been discovered). The fraudulent scheme could be established without proof that they were required by Canadian law to pay taxes and duties on liquor brought into the country for commercial sale. Accordingly, contrary to petitioner Lyle Pierce's assertions (L. Pierce Pet. 5, 14), our courts need not decide whether the Canadian revenue laws apply to "aboriginal people," such as petitioners, in order for petitioners to be convicted of the charged conspiracy to engage in financial transactions in furtherance of a

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[7] The government will seek to establish the requisite criminal intent at trial by offering evidence that, among other things, petitioners and their co-conspirators conducted their activities in code, destroyed records of their transactions, and operated under cover of darkness. Gov't C.A. Br. 14. Petitioners may, of course, attempt to persuade the jury that they did not possess such intent, for example, by arguing that they reasonably believed that the Canadian revenue laws did not apply to them and their co-conspirators. But such a defense does not, as petitioners suggest (L. Pierce Pet. 14-15; R. Pierce Pet. 2), require any determination of what Canadian law actually provides. It merely requires a finding as to what petitioners reasonably believed the law to be.

scheme to defraud the Canadian government of revenue.[8] Nor need our courts otherwise pass on the validity or the construction of the Canadian revenue laws. It is thus evident that domestic criminal prosecutions such as this one do not present the concerns that, as explained by Judge Hand in *Moore* v. *Mitchell*, motivated the adoption of the revenue rule in the different context of civil suits by foreign governments to enforce their own tax judgments. Cf. *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp.*, 493 U.S. 400, 405 (1990) (explaining that "the factual predicate for application of the act of state doctrine d[id] not exist" where "[n]othing in the present suit requires the Court to declare invalid * * * the official act of a foreign sovereign").

3. We recognize, as did the Second Circuit, that the decision below conflicts with the First Circuit's decision in *United States* v. *Boots*, *supra*, on the question whether the wire fraud statute encompasses schemes to defraud a foreign government of tax revenue. See Pet. App. 3a (noting "disagree[ment] with the reasoning in *Boots*").[9] But no appellate or district court in any other circuit has yet had an occasion to address that question. We thus cannot say that the question arises with sufficient frequency to require

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[8] Petitioner Lyle Pierce implicitly concedes (L. Pierce Pet. 11) that no Canadian court has held that an aboriginal person is exempt from having to pay taxes and duties on liquor brought into Canada for commercial sale.

[9] The two cases differ to the extent that *Boots* involved a prosecution directly under the wire fraud statute, while this case involves a prosecution under the money-laundering statute, with wire fraud as the "specified unlawful activity." The court of appeals did not perceive that difference as affecting the analysis of the question presented.

this Court's consideration at this time. If the Court is nonetheless inclined to resolve the conflict before it deepens, we are not aware of any reason why this would be an unsuitable case in which to do so.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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