No. 15-432

In the Supreme Court of the United States

GARY HEINZ, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
BRENT SNYDER
Deputy Assistant Attorney General
JAMES J. FREDRICKS
DANIEL E. HAAR
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the ten-year statute of limitations provided by 18 U.S.C. 3293(2) for an offense that "affects a financial institution" applies to petitioners' wire fraud offenses, which caused their financial-institution employer to pay millions of dollars in restitution and civil penalties.

TABLE OF CONTENTS

Page

Opinions below ... 1
Jurisdiction ... 1
Statement ... 2
Argument ... 7
Conclusion ... 14

TABLE OF AUTHORITIES

Cases:

American Soc'y of Mech. Eng'rs, Inc. v. *Hydrolevel Corp.*, 465 U.S. 556 (1982) ... 9
Burlington Indus., Inc. v. *Ellerth*, 524 U.S. 742 (1998) ... 9
New York Cent. & Hudson River R.R. v. *United States*, 212 U.S. 481 (1909) ... 9
United States v. *Agne*, 214 F.3d 47 (1st Cir. 2000) ... 12
United States v. *Bouyea*, 152 F.3d 192 (2d Cir. 1998), cert. denied, 528 U.S. 904 (1999) ... 8, 12
United States v. *Mullins*, 613 F.3d 1273 (10th Cir.), cert. denied, 562 U.S. 1035 (2010) ... 7, 12
United States v. *Pelullo*, 964 F.2d 193 (3d Cir. 1992) ... 12
United States v. *Serpico*, 320 F.3d 691 (7th Cir. 2003) ... 8, 11, 12
United States v. *Stargell*, 738 F.3d 1018 (9th Cir. 2013), cert. denied, 134 S.Ct. 2289 (2014) ... 8
United States v. *Ubakanma*, 215 F.3d 421 (4th Cir. 2000) ... 12, 13

Statutes and rule:

Financial Institutions, Reform, Recovery, and Enforcement Act of 1989, Pub. L. No. 101-73, 103 Stat. 183 ... 4

Statutes and rule—Continued: Page

§ 101(1), 103 Stat. 183 10
§ 101(10), 103 Stat. 183 10
18 U.S.C. 371 2
18 U.S.C. 1005 10
18 U.S.C. 1014 10
18 U.S.C. 1341 5
18 U.S.C. 1343 ..... 2, 5
18 U.S.C. 1349 ..... 2, 5
18 U.S.C. 3293 10
18 U.S.C. 3293(2) ..... *passim*
Fed. R. Evid. 403 11

Miscellaneous:

Black's Law Dictionary (10th ed. 2014) 7
H.R. Rep. No. 54, 101st Cong., 1st Sess. (1989) 10
Webster's Third New International Dictionary (1976) 7

In the Supreme Court of the United States

No. 15-432

GARY HEINZ, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-5) is reported at 790 F.3d 365. An accompanying summary order (Pet. App. 6-10) is not published in the Federal Reporter but is reprinted at 607 Fed. Appx. 53. The pretrial opinion of the district court (Pet. App. 65-109) is not published in the Federal Supplement but is available at 2012 WL 2878126. The post-trial opinion of the district court (Pet. App. 11-64) is reported at 23 F. Supp. 3d 148.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2015. On July 30, 2015, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including October 2, 2015, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

On September 15, 2011, a federal grand jury in the Southern District of New York returned a superseding indictment charging petitioners with conspiracy to commit wire fraud affecting a financial institution, in violation of 18 U.S.C. 371 and 1349 (Counts 1 and 2), and with wire fraud affecting a financial institution, in violation of 18 U.S.C. 1343 (Count 3). Gov't C.A. Br. 2, 5. Petitioners Heinz and Welty were charged with a separate count of conspiring to commit wire fraud affecting a financial institution, in violation of 18 U.S.C. 1349 (Count 4). *Id.* at 5. Heinz was also charged with an additional count of wire fraud affecting a financial institution (Count 5). *Ibid.* Petitioner Ghavami was found guilty on Counts 1-3, was sentenced to 18 months of imprisonment, and was fined $1 million. Heinz was found guilty on Counts 1-5, was sentenced to 27 months of imprisonment, to be followed by three years of supervised release, and was fined $400,000. Welty was found guilty on Counts 1, 2, and 4, was sentenced to 16 months of imprisonment, to be followed by three years of supervised release, and was fined $300,000. Pet. App. 16. The court of appeals affirmed. *Id.* at 1-10.

1. "Municipal bonds are issued by government and quasi-governmental entities to raise money for operations or projects." Pet. App. 12. Bond issuers often reinvest the bond-sale proceeds until the funds are needed. Reinvestment vehicles, called "investment products," are provided by financial institutions and are selected through a competitive bidding process run by a broker on behalf of the bond issuer. *Id.* at 12-13. The bidding must follow procedures set forth in regulations, issued by the United States Treasury

Department, that are designed to ensure that investment products are sold at their "fair market value." *Id.* at 13. Brokers and bidders typically must certify compliance with these regulations. *Id.* at 13-14.

Petitioners were employed by UBS, a financial institution, in its municipal-reinvestment business. C.A. App. A895-A896, A1040, A1560. UBS advised municipalities that issued bonds and underwrote municipal bond offerings. *Id.* at A902-A905. UBS also "functioned as both a broker and a provider for municipal bond investment products." Pet. App. 13.

On numerous occasions, petitioners manipulated the bidding process for municipal investment contracts. Acting in UBS's role as a provider of investment products, petitioners conspired with their counterparts at two other financial institutions—Bank of America and JP Morgan—to inflate profits at the expense of the municipalities. Pet. App. 14. Petitioners also conspired with a broker to steer investment contracts to UBS by giving UBS a "last look" at competitors' bids. *Id.* at 14-15. Acting in UBS's role as a broker, petitioners arranged for favored providers to win bids by manipulating the bidding process, including by supplying last looks. *Id.* at 15. Despite these activities, petitioners falsely certified that UBS had complied with Treasury regulations requiring competitive bidding. *Id.* at 16.

On May 4, 2011, UBS entered into a non-prosecution agreement with the United States Department of Justice in which UBS

> admit[ted], acknowledge[d] and accept[ed] responsibility for the conduct of * * * certain then-employees of UBS at its municipal reinvestment and derivatives desk * * * [who] entered into un-

> lawful agreements to manipulate the bidding process and rig bids on certain relevant municipal contracts, and [who] made payments and engaged in other activities in connection with those agreements, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and certain sections of Title 18 of the United States Code.

C.A. App. A249. UBS also entered into settlement agreements with the United States Securities and Exchange Commission, the Internal Revenue Service, and 25 state attorneys general requiring UBS to pay $160 million in civil fines and restitution. Gov't C.A. Br. 27. JP Morgan also entered into a similar non-prosecution agreement, and both JP Morgan and Bank of America agreed to civil settlements with various federal and state agencies. C.A. App. A267-A276, A286-A293. In total, the three financial institutions paid $525 million in civil fines and restitution pursuant to these "Bank Agreements." Pet. App. 31 n.6; see C.A. App. A231-A233, A248-A303.

2. On September 15, 2011, a grand jury charged petitioners with committing wire fraud, and with conspiring to do so, by rigging investment-product bids in order to defraud municipalities, inflate UBS's profits, and deprive the United States of associated funds. C.A. App. A111-A113, A121, A129, A131-A133, A141-A142. Each offense was alleged to have affected a financial institution by making it "susceptible to substantial risk of loss" and by causing the institution "actual loss." *Id.* at A146-A185. Under the Financial Institutions, Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, when mail fraud, wire fraud, or conspiracy to commit mail or wire fraud "affects a financial institution," the

statute of limitations increases from 5 to 10 years, see 18 U.S.C. 3293(2), and the maximum prison sentence increases from 20 to 30 years, see 18 U.S.C. 1341, 1343, 1349.

Petitioners moved pretrial to dismiss the indictment, arguing that it was untimely because it was returned more than five years after their offenses had occurred. Pet. App. 65, 74-76. The district court denied the motion, ruling that the ten-year statute of limitations provided by 18 U.S.C. 3293(2) would apply if the government proved, as alleged in the indictment, that the charged fraud offenses had affected any financial institution, including the institutions that signed the Bank Agreements. Pet. App. 90. The court further ruled that the government, to prove such an effect, would be permitted to introduce at trial the Bank Agreements, as well as testimony from representatives of the financial institutions that signed them. *Ibid.* In order "to hopefully remove from the case that body of evidence," C.A. App. A881.1, petitioners stipulated that "each offense charged in the above-captioned matter, if proven beyond a reasonable doubt to have occurred, affected a financial institution for purposes of 18 U.S.C. § 3293(2)." Pet. App. 4. The stipulation, executed by petitioners and the government, did not include a reservation of appellate rights because the government "c[ould]n't agree to that." C.A. App. A1122. Petitioners acknowledged that they were "not going to argue * * * , on appeal, that * * * the evidence was insufficient at trial because there wouldn't have been any." *Ibid.* After signing the stipulation, however, petitioners stated orally that the stipulation was made "subject of course

to our reservation of rights in the motions we made." *Id*. at A1205.

Following a four-week trial, the jury convicted Heinz on two counts of wire fraud and three counts of conspiracy to commit wire fraud; convicted Welty on three counts of conspiracy to commit wire fraud; and convicted Ghavami on one count of wire fraud and two counts of conspiracy to commit wire fraud. Pet. App. 16; Gov't C.A. Br. 4-5.

3. The court of appeals affirmed. Pet. App. 1-10. The court found that petitioners had preserved their legal argument on the statute of limitations. *Id.* at 4. The court nevertheless rejected that argument, finding that petitioners' wire fraud offenses had, "within the meaning of § 3293(2)," "'affected' the three banks" that had signed the Bank Agreements. *Id.* at 5. The court explained that "[t]he verb 'to affect' expresses a broad and open-ended range of influences." *Id.* at 4 (citation omitted). "The plain language of § 3293(2) makes clear," therefore, that its ten-year "statute of limitations [applies] to a broader class of crimes than those in which the financial institution is the object of fraud." *Ibid.* (internal quotation marks and citation omitted).

Based on the facts of the case, the court of appeals found that petitioners' conduct had "affected" financial institutions within the meaning of Section 3293(2). Pet. App. 5. It was, the court stated, "undisputed that the banks executed the Bank Agreements prompted in part by the fraudulent conduct of [petitioners] and their co-conspirators." *Ibid.* "As a result, the banks incurred significant payments and related fees, which were foreseeable to [petitioners] at the time of their fraudulent activity." *Ibid.* Finally, the court held that

"[t]he role of the banks as co-conspirators in the criminal conduct d[id] not break the necessary link between the underlying fraud and the financial loss suffered." *Ibid.*

ARGUMENT

Petitioners contend (Pet. 18-22) that the ten-year statute of limitations under 18 U.S.C. 3293(2) for an offense that "affects a financial institution" does not apply where employees of a bank commit fraud that is designed to benefit the bank, even if the fraud results in severe financial penalties. They also contend (Pet. 15-18) that the lower courts are divided on that issue. Neither contention is correct, and further review is not warranted.

1. Section 3293(2) extends the statute of limitations for wire fraud from five to ten years "if the offense affects a financial institution." As the court of appeals explained, "[t]he verb 'to affect' expresses a broad and open-ended range of influences." Pet. App. 4 (citation omitted). See Pet. 18 ("to produce an effect upon") (quoting *Webster's Third New International Dictionary* 35 (1976)); *Black's Law Dictionary* 68 (10th ed. 2014) (similar). When a bank employee exposes his employer to criminal liability and substantial monetary penalties, that employee has "affected" the bank's financial wellbeing. Courts of appeals have accordingly found that Section 3293(2) applies where a defendant's criminal conduct exposes a financial institution to "new or increased risk of loss." *United States* v. *Mullins*, 613 F.3d 1273, 1278 (10th Cir.), cert. denied, 562 U.S. 1035 (2010). See *id.* at 1278-1279 ("[A] 'new or increased risk of loss' is plainly a material, detrimental effect on a financial institution, and falls squarely within the proper scope of the stat-

ute."); *United States* v. *Serpico*, 320 F.3d 691, 694 (7th Cir. 2003) ("[T]he schemes affected the banks if they exposed the financial institutions to a new or increased risk of loss.") (internal quotation marks and brackets omitted); see also *United States* v. *Stargell*, 738 F.3d 1018, 1022 (9th Cir. 2013) (interpreting identical language in 18 U.S.C. 1343), cert. denied, 134 S. Ct. 2289 (2014).

In this case, petitioners' conduct did not merely expose UBS and other banks to a risk of loss. Rather, their conduct caused actual harm: UBS ultimately paid $160 million in civil fines and restitution, and the three banks paid a combined $525 million pursuant to the Bank Agreements. See p. 4, *supra*. The harmful effect of petitioners' fraud on these financial institutions was undeniably substantial.

Petitioners argue (Pet. 19) that Section 3293(2) is satisfied only where the harmful effect on a financial institution "follow[s] directly and proximately" from a defendant's conduct. The court of appeals did not disagree with that proposition. To the contrary, it stated that "the effect of the fraud [must be] 'sufficiently direct.'" Pet. App. 5 (quoting *United States* v. *Bouyea*, 152 F.3d 192, 195 (2d Cir. 1998), cert. denied, 528 U.S. 904 (1999)). The court, however, found that standard to be satisfied here because the "significant payments and related fees" imposed on the three banks were "foreseeable to [petitioners] at the time of their fraudulent activity." *Ibid.* ("It is undisputed that the banks executed the Bank Agreements prompted in part by the fraudulent conduct of [petitioners]."). Any disagreement by petitioners with that fact-bound determination (Pet. 19-20) does not merit this Court's review.

Petitioners also contend (Pet. 19) that "[w]here the bank is a culpable member of the conspiracy, * * * its fraudulent conduct is not a proximate cause of any settlement it may reach." That unsupported assertion, which is itself unsound, does not explain why *petitioners*' fraudulent conduct did not proximately cause the settlement. A corporation can clearly be held criminally liable based on the conduct of its employees while acting within the scope of their employment, see *New York Cent. & Hudson River R.R.* v. *United States*, 212 U.S. 481, 493-495 (1909), and an employee's criminal conduct thus may foreseeably produce liability for the corporation that prompts the need to settle. Employee misconduct may also produce civil liability for a corporation. See, *e.g.*, *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 756 (1998); *American Soc'y of Mech. Eng'rs, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 565-566 (1982). Accordingly, nothing is "linguistically strange" or "counterintuitive" (Pet. 20) in suggesting that, where a bank's employees commit fraud on the bank's behalf, causing the bank to pay $160 million in fines and restitution, those employees have "affected" the bank financially. That effect is no less direct because the bank is "culpable" for its employees' misconduct.

Petitioners further argue (Pet. 20, 23-24) that the structure and purpose of FIRREA indicate "that 'affect' does not apply where the bank is a perpetrator" of a financial crime. That is incorrect. FIRREA was adopted in order "[t]o promote, through regulatory reform, a safe and stable system of affordable housing finance" and "[t]o strengthen the civil sanctions and criminal penalties for defrauding or otherwise damaging depository institutions and their deposi-

tors." FIRREA § 101(1) and (10). Congress thus passed FIRREA to protect the banking *system*, a goal well served by punishing bank employees who involve their employers and other banks in criminal wrongdoing, causing serious, harmful financial consequences for those financial institutions. See H.R. Rep. No. 54, 101st Cong., 1st Sess. 291-292 (1989) (FIRREA intended to protect financial institutions against risks threatening their solvency). And, contrary to petitioners' suggestion (Pet. 20), Section 3293 does not extend the statute of limitations merely for "crimes *against* [financial] institutions or the FDIC." Rather, consistent with FIRREA's broad goal of protecting the financial system generally, Section 3293 applies to a wide array of financial crimes that may be committed by bank employees while working on their employer's behalf. See, *e.g.*, 18 U.S.C. 1005 (false bank entries intended to deceive federal regulators or "any agent or examiner appointed to examine the affairs of such bank"); 18 U.S.C. 1014 (false statement or report intended to influence federal agencies).

The government's reading of Section 3293(2) also does not produce "breathtaking" (Pet. 21) consequences. A bank will not face increased liability under FIRREA "whenever its employee commits a wire or mail fraud," nor would "virtually any misconduct involving a publicly-traded company" qualify merely because "some bank owns shares of the stock." Pet. 21-22. Section 3293(2) only applies where criminal misconduct has a "sufficiently direct" effect on a financial institution. Pet. App. 5 (internal quotation marks omitted). Petitioners point to no prosecution in more than 25 years since FIRREA was enacted to

substantiate their speculation (Pet. 22) that such "scenarios" are imminent.

Finally, it is not unfairly "prejudicial" (Pet. 24) to prove that a bank employee's actions affected his employer by introducing evidence that the bank paid money to the government in order to settle criminal charges stemming directly from the employee's conduct. See Pet. 24-25. Here, none of the Bank Agreements named petitioners as the agents responsible for the banks' crimes; and the district court stated its intention, if the Bank Agreements would be admitted at trial, to "provide an instruction that the evidence [could] be used" only to prove effect on a financial institution and "not as evidence of [petitioners'] guilt." Pet. App. 89-90. Nevertheless, to prevent the jury from seeing that evidence, petitioners stipulated that "each offense charged in the above-captioned matter, if proven beyond a reasonable doubt to have occurred, affected a financial institution for purposes of 18 U.S.C. § 3293(2)." Pet. App. 4. That stipulation eliminated any possibility of prejudice to petitioners, unfair or otherwise. Moreover, to the extent that introducing a bank settlement might cause "unfair prejudice" in a particular case, the defendant may seek to exclude such evidence under Rule 403 of the Federal Rules of Evidence.

2. Petitioners argue (Pet. 18) that this Court's review is necessary to bring "clarity" to "the circuits' varying definitions of 'affect.'" No conflict exists.

Only one other court of appeals has considered whether fraud "affects" a financial institution within the meaning of Section 3293(2) if the institution is a willing participant in the fraud, and it reached the same conclusion as the court below. In *Serpico*, *su-*

pra, employees of a labor organization deposited union funds with several banks in return for favorable personal loans, kickbacks, and other rewards. 320 F.3d at 693-694. The defendants insisted that the banks were "willing participants" in the scheme and thus were not "affect[ed]" within the meaning of the statute. *Id.* at 694-695. The Seventh Circuit disagreed. One bank had pleaded guilty for its role in the scheme and had gone out of business "as a result of punishments it received." *Id.* at 695. Under those circumstances, the court "f[ou]nd it hard to understand how a bank that was put out of business as a direct result of the scheme was not 'affected,' even if it played an active part in the scheme." *Ibid.*

Petitioners do not claim that any court of appeals has agreed with their view that Section 3293(2) cannot be satisfied by "misconduct by the bank or its employees." Pet. 18. Instead, petitioners assert (Pet. 17) that the courts of appeals "have adopted varying standards to assess the required nexus between the offense and the effect on the financial institution." But the cases cited by petitioners merely state that the effect on a financial institution cannot be too "attenuated," "remote," or "indirect." *Mullins*, 613 F.3d at 1278; see *United States* v. *Pelullo*, 964 F.2d 193 (3d Cir. 1992) ("unreasonably remote"); *United States* v. *Agne*, 214 F.3d 47 (1st Cir. 2000) ("too remote"). Those formulations are consistent with one another and also with the decision below, in which the Second Circuit held that the effect must be "sufficiently direct." Pet. App. 5 (quoting *Bouyea*, 152 F.3d at 195).

Petitioners state (Pet. 17-18) that the Fourth Circuit "applied the tightest nexus requirement" in *United States* v. *Ubakanma*, 215 F.3d 421 (2000), requiring

the government to show that "financial institutions themselves were harmed or victimized in any way, or that they were intended to be so harmed or victimized by the fraud scheme." Pet. 18 (quoting *Ubakanma*, 215 F.3d at 426). That test was satisfied here: "As a result" of petitioners' crimes, "the banks incurred significant payments and related fees, which were foreseeable to [petitioners] at the time of their fraudulent activity." Pet. App. 5. Petitioners cannot credibly argue that the banks were not "harmed * * * in any way" by petitioners' misconduct.

3. Petitioners' stipulation that their offenses "affected a financial institution for purposes of 18 U.S.C. § 3293(2)," Pet. App. 4, renders this case a poor vehicle for interpreting that provision. Even if petitioners preserved their legal argument despite the stipulation, but see Gov't C.A. Br. 33-39, the stipulation resulted in the government not offering evidence at trial showing how petitioners' offenses adversely affected UBS, JP Morgan, and Bank of America. The trial evidence accordingly contains nothing addressing that topic except a one-sentence stipulation. See C.A. App. A1122 (Petitioners are "not going to argue * * * , on appeal, that * * * the evidence was insufficient at trial because there wouldn't have been any."). Given that factual vacuum, this case is not an appropriate vehicle for determining what conduct qualifies as "affect[ing] a financial institution" within the meaning of Section 3293(2).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
BRENT SNYDER
Deputy Assistant Attorney General
JAMES J. FREDRICKS
DANIEL E. HAAR
Attorneys

DECEMBER 2015