No. 07-___

IN THE
Supreme Court of the United States

David Kay and Douglas Murphy,
Petitioners,

v.

United States of America,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD SUPREME COURT
LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Reid H. Weingarten
Bruce C. Bishop
David M. Fragale
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, DC 20036
Counsel for David Kay

Thomas C. Goldstein,
Counsel of Record
AKIN, GUMP, STRAUSS HAUER
& FELD LLP
1333 New Hampshire Ave.,
NW
Washington, DC 20036
(202) 887-4060

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Avenue
Bethesda, MD 20814

Counsel for Douglas Murphy

QUESTIONS PRESENTED

1. When an indictment omits an element of the offense, must it be dismissed, or may such an error instead be excused as harmless? (The Court granted certiorari to decide this question, but did not resolve it, last Term in *United States v. Resendiz-Ponce*, 127 S. Ct. 782, 785-86 (2007).)

2. When the text, structure, and legislative history of a criminal statute are all ambiguous, is the rule of lenity applicable, or instead is that principle limited merely to cases in which the court can only "guess" at Congress's intent?

TABLE OF CONTENTS

APPENDICES

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioners David Kay and Douglas Murphy respectfully petition for a writ of certiorari to the United States Court of Appeals for the Fifth Circuit in *United States v. Kay*, No. 05-20604, and *United States v. Murphy*, No. 05-20606.

OPINIONS BELOW

The order of the District Court for the Southern District of Texas (Pet. App. 109a-121a) granting petitioner's motion to dismiss is reported at 200 F. Supp. 2d 681. The opinion of the Court of Appeals for the Fifth Circuit (Pet. App. 53a-108a) reversing the district court's order is reported at 359 F.3d 738. The opinion of the Court of Appeals (Pet. App. 1a-52a) affirming petitioner's conviction is reported at 513 F.3d 432. The order of the Court of Appeals (Pet. App. 122a-130a) denying the petition for rehearing en banc is reported at 513 F.3d 461.

JURISDICTION

The judgment of the court of appeals was entered on October 24, 2007. The Fifth Circuit denied the petition for rehearing en banc on January 10, 2008. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Appendix to the petition reproduces the relevant provisions of the Constitution and the Foreign Corrupt Practices Act.

STATEMENT OF THE CASE

The Government charged petitioners with violating the Foreign Corrupt Practices Act, which makes it a crime to "willful[ly]" bribe a foreign official to "obtain[] or retain[] business." 15 U.S.C. §§ 78dd-1(a)(1), 78ff(a). The Fifth Circuit held that the indictment's omission of the element of "willful[ness]" was "harmless error" because petitioners were effectively on notice of the charges against them. The court of appeals further concluded—after reviewing the FCPA's statutory text, structure, and legislative history—that it was "ambiguous" whether Congress intended the FCPA to criminalize petitioners' conduct. The court nonetheless refused to apply the rule of lenity because it found some support for the Government's reading of the statute in the legislative history, so that the court was not required completely to "guess" at the FCPA's meaning.

1. The Foreign Corrupt Practices Act (FCPA) prohibits American businesses and their agents from using "the mails or any means or instrumentality of interstate commerce corruptly in furtherance of" a bribe to a foreign official to induce official action "to assist such [business] in obtaining or retaining business for or with . . . any person." 15 U.S.C. §§ 78dd-1(a)(1), -2(a)(1).[1] Individuals may be held criminally liable only for "willfully" violating the statute. *Id.* § 78ff(a).

[1] Petitioners were charged and convicted under both §§ 78dd-1 and 78dd-2. Because the operative language of those two sections is the same, the petition refers to only § 78dd-1 throughout.

2. The government indicted petitioners under the FCPA for having approved bribes to Haitian tax officials to reduce the customs duties and taxes paid by an affiliate of their employer, the Rice Corporation of Haiti (RCH). Pet. App. 102a-08a (superseding indictment). The allegations of the indictment related to "a time of political chaos and rampant corruption in" Haiti (*id.* 2a) during which "the standard practice of Haitian government officials was to routinely press companies like RCH to pay for local service, and almost all companies, including RCH's competitors, paid" (*id.*).

3. The district court dismissed the indictment, ruling that the FCPA does not criminalize payments to reduce customs duties and taxes, as opposed to payments intended to secure or retain contracts. App. C, *infra*. The court recognized initially that the phrase "obtain[] or retain[] business" "is ambiguous." *Id.* 113a. The court resolved the ambiguity by studying the statutory history, finding it persuasive that when Congress enacted the FCPA, it conspicuously did not adopt broader alternative bills that clearly would have encompassed the allegations against petitioners. *Id.* 114a-15a. Congress moreover twice "considered and rejected statutory language that would broaden the scope of the FCPA to cover the conduct in question here." *Id.* 120a; *see id.* 115a-16a (citations omitted). The district court accordingly found it unnecessary to consider application of the rule of lenity or principles of due process. *Id.* 121a.

4. On the Government's appeal, the Fifth Circuit reversed. Starting with the FCPA's text, the court of

appeals "agree[d] with the [district] court's finding of ambiguity for several reasons." *Id.* 62a. The statute itself gives no indication of the "proximity of the required nexus between" the bribe and the business to be obtained. *Id.* The terms "business" and "assist" do not help to resolve that uncertainty. *Id.* 63a-64a. The structure of the FCPA "provides little insight into the precise scope of the statute." *Id.* 64a. And the statute's "generic title fails to make one interpretation of the statutory language more persuasive." *Id.* 66a.

Having found the statutory text "ambiguous as a matter of law," the Fifth Circuit sought to divine Congress's intent from the legislative history. *Id.* 67a. The Conference Report on the FCPA was of no assistance because it "merely parrots the statutory language." *Id.* 70a (citing H.R. REP. NO. 95-831, at 12 (1977) (Conf. Rep.), *as reprinted in* 1977 U.S.C.C.A.N. 4121, 4124-25).

The court of appeals then observed that Congress had declined to enact broadly drafted House legislation that would have clearly criminalized petitioners' conduct by making it unlawful to bribe a foreign official "to use his or her influence to affect *any* act or decision." *Id.* 68a (quoting H.R. REP. NO. 95-640, at 7 (1977)) (emphasis added in Pet. App.). Congress instead substituted substantially narrower language drawn from the Senate bill, limiting the prohibition to payments made "to assist [the company] in obtaining, retaining or directing business to any person." Pet. App. 69a (quoting H.R. CONF. REP. 95-831, at 12). The relevant Senate Report provided no guidance regard-

ing the text's meaning. *See id.* 68a (citing S. REP. NO. 95-114, at 17 (1977)).

Citing no particular evidence in the legislative history, the court of appeals nonetheless thought it could identify support for the Government's interpretation in a generalized congressional desire "to prohibit bribery aimed at getting assistance in retaining business or maintaining business opportunities," which the court regarded as "sufficiently broad to include bribes meant to affect the administration of revenue laws." *Id.* 73a.

The Fifth Circuit further reasoned that its gestalt sense that the FCPA as originally enacted reached bribes intended to lower customs and tax obligations was reinforced by "subsequent . . . legislative history." *Id.* 76a. The court of appeals recognized that in 1988 Congress had considered but not enacted an amendment to the FCPA that would have encompassed petitioners' conduct by specifying that "obtaining or retaining business" "includes payments made for the 'procurement of legislative, judicial, regulatory, or other action in seeking more favorable treatment by a foreign government.'" *Id.* 79a (quoting H.R. REP. NO. 100-576, at 918 (1988) (Conf. Rep.)). But the court deemed that fact to have "no bearing" on the statute's meaning because the Conference Report issued after Congress rejected that amendment asserted "that the 'retaining business' language" of the FCPA as originally enacted already encompassed "a payment to a foreign official for the purpose of obtaining more favorable tax treatment." *Id.* 79a (quoting H.R. CONF. REP. NO. 100-576, at 918). The Fifth Circuit considered that statement in the Report to provide significant

support for the Government's position in light of this Court's determination in *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969), that "[s]ubsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." Pet. App. 80a-81a.

The Fifth Circuit finally reasoned that the Government's construction was supported by Congress's determination in 1998 to implement an Organization for Economic Cooperation and Development Convention. *Id.* 84a-87a (citing Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, Dec. 18, 1997, 37 I.L.M. 1 [hereinafter OECD Conv.]). The Fifth Circuit acknowledged that the Convention "prohibits payments to a foreign public official to induce him to 'act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business *or other improper advantage* in the conduct of international business'" (*id.* 84a-85a (quoting OECD Conv., art. 1.1) (emphasis in Pet. App.)), whereas Congress in implementing the Convention conspicuously did not amend the FCPA's "obtain or retain business" provision to track that language. Instead, Congress "chose to add the 'improper advantage' provision to the original list of abuses of discretion in consideration for bribes that the statute proscribes." *Id.* 85a. But in light of its conclusion that the FCPA as originally enacted already broadly encompassed bribery, the court "agree[d] with the Government that there really was no need for Congress" to amend the statute to track the Convention. *Id.* 86a. And according to the court of appeals, the Convention was intended to broadly pro-

hibit bribery, a purpose that "bolster[ed]" the conclusion "that the kind of conduct allegedly engaged in by [petitioners] can be violative of the statute." *Id.* 87a.

The Fifth Circuit declined to consider the application of the rule of lenity to the proper construction of the FCPA. *Id.* 100a n.96. Rather, "[g]iven the foregoing analysis of the statute's legislative history," the Fifth Circuit reinstated petitioners' indictment based on its conclusion that it could not "hold as a matter of law that Congress meant to limit the FCPA's applicability to cover only bribes that lead directly to the award or renewal of contracts." *Id.* 88a.

5. On remand, the Government secured a second superseding indictment that added allegations that petitioners conspired to violate the FCPA, and that Murphy acted to obstruct its administration. Second Superseding Indictment 7-14. Although the FCPA criminalizes only "willful" violations of the statute, 15 U.S.C. § 78ff(a), the Second Superseding Indictment (like the First) did not allege that the defendants acted willfully. *See* Pet. App. 30a. With regard to the initial FCPA charges, the superseding indictment added allegations that petitioners believed that unless they reduced the company's tax liabilities, they would be unable to "realiz[e] an operating profit" in Haiti. Second Superseding Indictment 3. At trial, the prosecution adduced testimony that "'smugglers' were not paying the taxes on imported rice—or not paying a substantial part of the taxes . . . So, they proved to be very tough competitors against Rice Corporation, who was paying a substantial part of the taxes on the imported rice." Pet. App. 8a n.14. Petitioners were convicted on

all counts. Kay was sentenced to thirty-seven months' imprisonment and two years' supervised release. Murphy was sentenced to sixty-three months' imprisonment and three years' supervised release. Both petitioners were also assessed monetary penalties.

6. a. On petitioners' appeal, the Fifth Circuit returned to the FCPA's prohibition on bribery intended to assist a U.S. company in "obtaining or retaining business." App. A, *infra*. This time, the court of appeals addressed the rule of lenity. The Fifth Circuit recognized that, even *after* considering the legislative history, "the business nexus standard is ambiguous," but it held that it could "avoid the rule of lenity" because the task of statutory construction was not reduced to mere "guesswork." *Id*. 6a, 16a. With respect to the relevance of legislative history, the Fifth Circuit recognized that this Court in decisions such as *Hughey v. United States*, 495 U.S. 411, 422 (1990), "attempted to bar legislative history as a means of clarifying ambiguity and avoiding application of the rule of lenity." Pet. App. 17a. But the court of appeals believed that this Court had subsequently "affirmed that legislative history is an appropriate means of clarification under the rule." *Id.* With respect to the degree of ambiguity required to trigger application of the rule of lenity, the court of appeals deemed that principle "a last resort of interpretation" (*id*. 15a), a conclusion it reached from a literal reading of this Court's statement in *Reno v. Koray*, 515 U.S. 50, 65 (1995), that lenity is relevant only when, "after seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended" (Pet. App. 16a). The Fifth Circuit accordingly held the principle of len-

ity to be irrelevant to its construction of the FCPA in light of the prior panel's determination that it need not "guess" at the statute's meaning because the legislative history provided some support for the Government's view. *Id.* 17a-18a.

b. The Fifth Circuit next rejected petitioners' contention that the jury instructions at trial had omitted the statutory requirement of willfulness. *Id.* 18a-20a; 15 U.S.C. § 78ff(a). The court reasoned that the term "willful" can have any of three meanings in a criminal statute: an intentional act, a knowingly unlawful act, or an act known to violate a particular statute. Pet. App. 21a-22a. The panel concluded that the FCPA did not encompass the final form of willfulness (which is reserved for detailed regulatory schemes)—and it declined to choose between the two less rigorous interpretations—because the jury instructions when read as a whole sufficiently conveyed both. *Id.* 22a.

c. The Fifth Circuit finally addressed the indictment's omission of any allegation that petitioners had acted willfully. *See* 15 U.S.C. § 78ff(a). The court of appeals deemed that error to be "harmless." Pet. App. 30a. According to the court, other language in the indictment sufficiently conveyed the least-rigorous form of willfulness—*i.e.*, "Defendants' *knowing commission* of acts that are unlawful generally and unlawful under the FCPA." *Id.* 31a; *see also id.* 30a (reaffirming prior precedent holding that an "indictment alleging that defendant 'corruptly did endeavor' sufficiently 'charges an intentional act,' which is 'interchangeable with the term willful'" (quoting *United States v. Haas*, 583 F.2d 216, 220 (5th Cir. 1978))). The panel did not assert

that the indictment's terms included allegations sufficient to satisfy a more rigorous interpretation of willfulness—*i.e.*, that petitioners knew that they were violating the law. Rather, the panel concluded with respect to that construction of "willful" that "[t]he indictment's language sufficiently placed Defendants on notice of each element of the crime charged and allowed them to prepare an effective defense." *Id.* 31a.

7. Petitioners sought rehearing, arguing that they could be convicted of "willful[ly]" violating the FCPA only if they knew that they were acting unlawfully (as opposed to merely acting purposefully). In response, the panel issued a further opinion (App. D, *infra*) in which it accepted that a "willful" violation requires proof that petitioners "knew that their conduct was illegal." Pet. App. 130a. *See also id.* 124a n.1. The court then reaffirmed its earlier conclusion that the petit jury instructions, read as a whole, were sufficient to require proof that petitioners knew that their conduct was unlawful. *Id.* 130a ("[T]his case was tried on the basis that the Government had to prove that the Defendants knew that their actions violated the law, although they did not need to prove that they were aware of the specific provisions of the FCPA."). On that basis, the court denied rehearing. *Id.*

REASONS FOR GRANTING THE WRIT

This case presents two critically important and recurring questions in criminal law, both of which have bedeviled the lower courts and require significant further guidance from this Court. The first question presented is whether the omission of an element of an of-

fense from an indictment is subject to automatic reversal as structural error or is instead subject to harmless error review. The need for this Court's review of that question is underscored by the Court's order granting certiorari on the same harmless error question last Term. The second question presented is whether the rule of lenity applies when a criminal statute is ambiguous, or instead only when the court can merely "guess" at the statute's meaning because the Government's position has no support at all. The Fifth Circuit in this case concluded that conduct was criminal based not on the text of the statute itself, but on the general policy underlying the statute and indirect evidence from subsequent legislative history. The court of appeals acknowledged that the statutory text remained ambiguous even after consulting those sources, but held that the rule of lenity was inapplicable because those sources provided *some* evidence of Congress's intent. Although that holding is supported by isolated dicta in a few of this Court's decisions, it cannot be reconciled with this Court's repeated holdings. This Court's review is necessary to resolve that inconsistency, and the significant conflict in the circuits that it has created.

I. Certiorari Should Be Granted To Determine Whether The Omission Of An Element Of An Offense From An Indictment Can Be Harmless Error.

Last Term, this Court granted certiorari to decide whether an indictment's omission of an element of an offense is structural error, or instead may be excused as harmless error. See *United States v. Resendiz-*

Ponce, 127 S. Ct. 782, 785-86 (2007). The Court, however, was unable to answer that important question in *Resendiz-Ponce* because further review determined that the indictment in that case contained no such omission. This case presents an ideal vehicle to finally resolve the recurring circuit conflict.

1. This Court's review is required to resolve a widespread and entrenched conflict in the circuits concerning whether the omission of an element of the offense from a grand jury indictment can be harmless error. The FCPA criminalizes only "willful[]" violations of its provisions. 15 U.S.C. § 78ff(a). The element of "willfulness" thus is critical to stating a criminal offense under that statute; in the absence of "willfulness," there is no crime. However, the indictment in this case entirely omitted the "willfulness" element, as the court of appeals acknowledged. Pet. App. 30a. The court nevertheless held that the omission of that critical element was "harmless." *Id.* That ruling was consistent with prior circuit precedent holding that the failure to include an element of an offense in an indictment "is susceptible to harmless error review." *United States v. Robinson*, 367 F.3d 278, 285-86 (5th Cir.), *cert. denied*, 543 U.S. 1005 (2004). Six other courts of appeals—including two courts sitting en banc—have adopted that same harmless-error rule.[2]

---

[2] *See United States v. Allen*, 406 F.3d 940, 943-45 (8th Cir. 2005) (en banc), *cert. denied*, 127 S. Ct. 826 (2006); *United States v. Higgs*, 353 F.3d 281, 304-07 (4th Cir. 2003); *United States v. Trennell*, 290 F.3d 881, 889-90 (7th Cir. 2002); *United States v. Cor-Bon Custom Bullet Co.*, 287 F.3d 576, 580-81 (6th Cir. 2002); *United States v. Prentiss*, 256 F.3d 971, 981-85 (10th Cir. 2001) (en banc), *overruling on other grounds recognized by United*

The Third and Ninth Circuits, however, have held the opposite. They have ruled that the omission of an essential element of the offense from an indictment is structural error requiring automatic reversal. *See United States v. Spinner*, 180 F.3d 514, 515-16 (3d Cir. 1999); *United States v. Du Bo*, 186 F.3d 1177, 1179-81 (9th Cir. 1999).

Thus, the conflict in the circuits is entrenched, and the issue is an important and recurring one. This case squarely presents the issue and offers this Court an ideal vehicle to resolve the circuit conflict. There is no dispute either that "willfulness" is a critical element of a crime under the FCPA, 15 U.S.C. § 78ff(a), or that the indictment omitted that element.

The court of appeals in this case held that the omission of the element of "willfulness" was harmless, because "[t]he indictment's language sufficiently placed Defendants on notice of each element of the crime charged and allowed them to prepare an effective defense." Pet. App. 31a. The court's reasoning thus depends critically on the dual premises that (i) an indictment need only give a defendant general notice of the offense charged, and (ii) no structural error arises from the failure to afford the grand jury the opportunity to determine independently and in the first instance whether the Government has sufficient evidence of each element of the offense to permit the Gov-

---

States v. Sinks, 473 F.3d 1315 (10th Cir. 2007); *United States v. Corporan-Cuevas*, 244 F.3d 199, 202 (1st Cir. 2001).

ernment to bring its prosecutorial force to bear against an individual.[3]

By contrast, had this case arisen in the Third or Ninth Circuit, the court of appeals would have reversed petitioners' convictions. In those circuits, the failure to allow the grand jury itself to determine whether there was probable cause to believe that petitioners acted willfully—*i.e.*, whether they acted with the intent to violate the law—would have been fatal to the indictment. *See United States v. Omer*, 395 F.3d 1087, 1088 (9th Cir. 2005); *Du Bo*, 186 F.3d at 1180 ("Specifically, the 'failure to include the element of willfulness . . . renders [an] indictment constitutionally defective.'" (quoting *United States v. Kurka*, 818 F.2d 1427, 1431 (9th Cir. 1987))).

---

[3] When the Fifth Circuit initially considered this case after petitioners' conviction, it stated that the error was harmless on the additional ground that, when read as a whole, the indictment sufficiently conveyed an allegation that petitioners acted purposefully. Pet. App. 24a; *see supra* at 8. But the court's opinion denying rehearing abandoned that interpretation of the "willfulness" element and acknowledged that the FCPA requires proof that the defendant intended to violate the law. Pet. App. 123a-24a & n.1 ("[W]e look to the jury instructions as a whole and the context of trial to ensure that the instructions adequately conveyed a requirement that the Government must prove that Defendants knew that their conduct was not legal – 'unlawfulness.'"); *see supra* at 8-9. The only remaining basis for the court of appeals' determination that the omission of the element of willfulness was harmless was thus its generalized sense that the indictment put petitioners on notice of the charges against them. But in any event, it is uncontested that the indictment omitted the required element of willfulness, whatever that term's meaning.

2. This Court's review is also needed because the court of appeals' decision disregards a fundamental constitutional protection for criminal defendants, contrary to precedent from this Court and other circuits. The Fifth Amendment grand jury right is a foundational constitutional guarantee that strikes a critical balance between the rights of the individual and the Government, by interposing the citizenry as a buffer between the individual and the Government's prosecutorial weight. The grand jury guarantee ensures that individuals are not required to face criminal charges, with all of a prosecution's enormous costs and consequences, without the prior intervention and concurrence of a neutral grand jury drawn from the citizenry itself. The roots of this protection run deep: "At common law, 'the most valuable function of the grand jury was . . . to stand between the prosecutor and the accused, and to determine whether the charge was founded upon credible testimony . . ..'" *Du Bo*, 186 F.3d at 1179 (quoting *Hale v. Henkel*, 201 U.S. 43, 59 (1906)). Recognizing the central importance of the grand jury right to the federal prosecutorial power, this Court has explained that a defendant has a "substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Stirone v. United States*, 361 U.S. 212, 217 (1960).

The Fifth Circuit's application of harmless-error analysis cannot be reconciled with this Court's recognition of the central role of the grand jury in our constitutional system. The Fifth Circuit permits a defen-

dant to be tried and convicted of an offense despite the fact that a grand jury did not find probable cause for each essential element of that crime. Moreover, because the prosecution depends upon a novel interpretation of the statute, there is substantial doubt whether the grand jury would have found the omitted willfulness element had it been required to do so. By excusing the Government's failure to put before the grand jury the basic question of whether petitioners intended to violate the criminal law, the Fifth Circuit's harmless error rule "deprive[d] the defendant[s] of a basic protection which the guaranty of the intervention of a grand jury was designed to secure." *Russell v. United States*, 369 U.S. 749, 770 (1962).

Accordingly, an indictment that omits an essential element of the offense is not susceptible to harmless error review. An error is harmless only if it can be found "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman v. California*, 386 U.S. 18, 24 (1967). That cannot be said when, as here, the indictment fails to allege an element—indeed, the element that draws the line between criminal and non-criminal conduct—and therefore fails to "properly allege an offense against the United States" at all. *Du Bo*, 186 F.3d at 1180 (quoting *United States v. Morrison*, 536 F.2d 286, 289 (9th Cir. 1976)). In that circumstance, harmless error review is nothing more than a judicial "guess as to what was in the minds of the grand jury at the time they returned the indictment." *Du Bo*, 186 F.3d at 1179 (internal citations omitted). That the Fifth Amendment does not permit.

Finally, a defective indictment raises the issue of whether a trial should have occurred at all. The error is therefore structural because it affects the entire framework of the criminal prosecution. Harmless error analysis does not work when the error eliminates the very basis for the prosecution to proceed.[4]

II. Certiorari Should Be Granted To Decide Whether The Rule Of Lenity Applies To Ambiguous Statutes Only When All Indications Of Congressional Intent Leave A Court In Equipoise.

1. "The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 93 (1820). It is accordingly well-settled that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity," *United States v. Bass*, 404 U.S. 336, 347-48 (1971), although the lenity principle does not apply in the absence of statutory ambiguity, *e.g.*, *United States v. Shabani*, 513 U.S. 10, 17 (1994). But the question of how much statutory

[4] This case perfectly illustrates the perils of substituting post hoc judicial review for grand jury scrutiny prior to a prosecution. Scouring an indictment for some – any – ground on which to characterize displacement of the grand jury as "harmless" can blind the court to the factual context and framework of the indictment. In this case, for example, the panel made a critical error in the reading of the indictment. The court asserted that the indictment alleged that petitioners acted "in violation of their lawful duty." Pet. App. 57a & n.82. But the cited allegation refers only to the conduct of Haitian officials, not petitioners. *Id.* 107a (petitioners' conduct "induc[ed] such foreign officials to do and omit to do acts in violation of their lawful duty").

ambiguity is required is just as plainly unsettled. The language of this Court's opinions and the holdings of multiple courts of appeals evidence the existence of significant confusion and the adoption of widely conflicting rules concerning how weak indirect, nontextual evidence of congressional purpose must be before the rule of lenity will be invoked to resolve a question that than an ambiguous statutory text does not answer.

The Fifth Circuit seemingly recognized that its ruling cannot be reconciled with two of this Court's decisions, *Hughey v. United States*, 495 U.S. 411 (1990), and *Crandon v. United States*, 494 U.S. 152 (1990). Pet. App. 12a, 17a. Those cases not only hold that lenity applies in cases of statutory ambiguity, but they also specifically express deep skepticism of the use of "legislative history as a means of clarifying ambiguity and avoiding application of the rule of lenity." *Id.* 17a (citing *Hughey*).

In *Crandon v. United States*, 494 U.S. 152 (1990), this Court considered whether an anti-bribery statute that prohibited private supplementation of government employees' salaries reached pre-departure payments made by a private sector employer to employees who were leaving the company to begin government service. *Id.* at 154-55. The Fourth Circuit had construed the statute against the defendants, based on inferences drawn from the statutory and legislative history, and from the public policy against conflicts of interest, which in the court of appeals' view "'support[ed] a broad interpretation of its coverage.'" *Id.* at 160. Reversing, this Court noted that "[b]ecause con-

struction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text." *Id.* at 160.

Subsequently, in *Hughey v. United States*, 495 U.S. 411 (1990), this Court considered whether, under the then-governing restitution statute, a criminal defendant convicted of only one offense must make restitution for related offenses that were charged but dismissed. *Id.* at 412-13. To buttress its interpretation of the statute, the Government invoked "the expansive declaration of purpose accompanying" the statute, "portions of the legislative history that reflect[ed] Congress' goal" of ensuring broad recovery by crime victims, and parallel public policy considerations. *Id.* at 420-21. This Court rejected such use of policy and legislative history, stating that even if the statutory language were ambiguous, "longstanding principles of lenity, which demand resolution of ambiguities in criminal statutes in favor of the defendant, preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history." *Id.* at 422 (citing and quoting *Crandon*, *quoted supra*). *See also Ratzlaf v. United States*, 510 U.S. 135, 147-48 (1994).

Some lower courts, including the Fifth Circuit in this case, have nonetheless concluded that decisions such as *Crandon* and *Hughey* have been superseded by dicta in cases like *Reno v. Koray*, 515 U.S. 50, 65 (1995). In *Koray* the Court stated that the rule of lenity "applies only if, 'after seizing everything from

which aid can be derived,' we can make 'no more than a guess as to what Congress intended.'" *Id.* at 65 (quoting *Smith v. United States*, 508 U.S. 223, 239 (1993), and *Ladner v. United States*, 358 U.S. 169, 178 (1958) (internal punctuation omitted in original)).

This language from *Koray* and similar cases has introduced significant confusion regarding the proper application of the rule of lenity. Certiorari should be granted to establish that the "no more than a guess" formulation was not intended to preclude application of the lenity principle when the statutory text is ambiguous.

This Court first employed the "no more than a guess" formulation in *Ladner v. United States*, 358 U.S. 169, 178 (1958). *Ladner*, however, signaled no departure from the historic standards for employing lenity. To the contrary, *Ladner* represented a standard application of the rule: "'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *Id.* (citation omitted). The Court explained, "This policy of lenity means that the Court will not interpret a federal criminal statute [more harshly] when such an interpretation can be based on no more than a guess as to what Congress intended." *Id.*

This use of the phrase "no more than a guess"—to *support* application of the rule of lenity—continued through *Bifulco v. United States*, 447 U.S. 381 (1980), and *United States v. Granderson*, 511 U.S. 39 (1994).

In each case, this Court invoked the principle that it "will not interpret a federal criminal statute so as to increase the penalty . . . when such an interpretation can be based on no more than a guess as to what Congress intended." *Granderson*, 511 U.S. at 42-43 (quoting *Bifulco*, 447 U.S. at 387, which in turn quoted *Ladner*). But that formulation plainly was not intended to be taken literally, as the Court reaffirmed that "where text, structure, and history fail to establish that the Government's position is *unambiguously correct*[,] we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor" (*id.* at 54 (emphasis added)) and that so long as "*doubts remain*, they must be resolved in accord with the rule of lenity" (*Bifulco*, 447 U.S. at 400 (emphasis added)).

2. Certiorari is also warranted in order to resolve the conflict in the circuits that has been engendered by the inconsistent rhetoric of this Court's precedents.

a. The Fifth Circuit in this case relied on the Court's dictum in *Koray*, *supra*, to establish a nearly insurmountable threshold for the application of the rule of lenity. Based on its conclusion that in light "of the statute's legislative history, we cannot hold as a matter of law that Congress meant to limit the FCPA's applicability" to exclude tax-related bribery (Pet. App. 88a), the court held that the statute was insufficiently ambiguous to permit resort to the rule of lenity. The court held lenity to be "a last resort of interpretation" that "applies only in situations of ambiguity more extreme than here, where, 'after seizing everything from which aid can be derived, [a court] can make no more than a guess as to what Congress intended.'" *Id.* 15a-

16a. *Accord United States v. Guidry*, 456 F.3d 493, 502 (5th Cir. 2006) (rejecting application of lenity because, "[e]ven if we were unable to discern congressional intent from the plain language, the legislative history *suggests* Congress intended to allow admission of other uncharged sexual offenses" (emphasis added)), *cert. denied*, 127 S. Ct. 996 (2007).

The Fifth Circuit is not alone in the exceedingly narrow scope that it affords the rule of lenity. The Tenth Circuit, for example, reads the *Koray* "no more than a guess" formulation to render the rule of lenity applicable "only as a tie-breaker when ordinary means of discerning statutory meaning leave the Court in 'equipoise'" after consulting "'all other techniques for statutory construction.'" *United States v. DeGasso*, 369 F.3d 1139, 1149 (10th Cir. 2004) (quoting *United States v. Ruiz-Gea*, 340 F.3d 1181, 1188 (10th Cir. 2003)).

b. The Fifth and Tenth Circuits stand in direct conflict with decisions of other courts of appeals—including particularly the Ninth and D.C. Circuits—which hold that the rule of lenity applies to ambiguous criminal statutes and moreover that legislative history must be exceptionally clear to resolve textual ambiguities that would otherwise trigger lenity. In *United States v. Cabaccang*, 332 F.3d 622 (9th Cir. 2003), the en banc Ninth Circuit overruled its prior precedent to hold that the transportation of drugs on a domestic flight that travels through international airspace does not constitute "import[ing]" drugs. On the assumption that the governing statute was ambiguous, the court held that "to the extent that any doubt remains, the

scope of the statute is sufficiently ambiguous to invoke the rule of lenity," which requires favoring the defendant unless "'text, structure, and history fail to establish that the Government's position is *unambiguously* correct.'" 332 F.3d at 635 (quoting *Granderson*, 511 U.S. at 54 (emphasis in *Cabaccang*)).

Similarly, in *United States v. Moore*, 84 F.3d 1567 (9th. Cir. 1996), the Ninth Circuit recognized that some legislative history favored the Government's interpretation of a federal firearms law, but concluded that lenity applied because "neither the text of the statute nor its legislative history *clearly* discloses" Congress's intent. 84 F.3d at 1572 (emphasis added). "Statutory construction expanding criminal liability beyond the express terms of a statute is disfavored, absent *strong* indications of legislative purpose." *Id.* (emphasis added and omitted).

Subsequently, in *United States v. Barajas-Montiel*, 185 F.3d 947, 951 (9th Cir. 1999), the Ninth Circuit inferred that a violation of 8 U.S.C. § 1324(a)(2)(B) requires a specific intent to violate the law, notwithstanding that the statute does not expressly "contain[] [that] requirement." The court relied on the reasoning of its prior ruling in *United States v. Nguyen*, 73 F.3d 887 (9th Cir. 1995), which inferred such a requirement in a related immigration provision on the basis of lenity: "If after examining the statutory language and the legislative history we perceive *any ambiguity* regarding Congress's intent to require a showing of criminal intent, we will resolve the ambiguity by implying a *mens rea* element." *Barajas-Montiel*, 185 F.3d at 952 (quoting *Nguyen*, 73 F.3d at 890-91) (emphasis added).

In *United States v. Villanueva-Sotelo*, 515 F.3d 1234 (D.C. Cir. 2008), the D.C. Circuit held that a defendant "knowingly transfers, possesses, or uses, without lawful authority" another person's identification only if he knows the identification belongs to someone else, as opposed to merely being forged. The court deemed the statutory text "ambiguous," concluding that both the defendant and government offered "plausible" interpretations. *Id.* at 1237-38. The court was willing to assume that the legislative history did not clearly resolve the question, and, although it cited to the "no more than a guess" formulation of *Koray*, the D.C. Circuit held that "were we unable to find 'an *unambiguous* intent on the part of Congress[,]' we would 'turn to the rule of lenity to resolve the dispute.'" *Id.* at 1246 (quoting *United States v. West*, 393 F.3d 1302, 1311 (D.C. Cir. 2005)) (emphasis added). The court reiterated that "lenity comes into play when, after resort to the traditional tools of statutory interpretation, reasonable doubt remains as to the statute's meaning." *Villaneueva-Sotelo*, 515 F.3d at 1236; *see also* Br. for U.S. at 22-23, *United States v. Villanueva-Sotelo* (accepting that under principle of lenity, "if the plain language of a statute or its legislative history do not clearly express the intent of Congress, any ambiguity in the statute should be resolved in the defendant's favor"); *West*, 393 F.3d at 1315 (quoting the "no more than a guess" formulation, but adopting the *Granderson* holding that lenity applies "where text, structure, and history fail to establish that the Government's position is unambiguously correct"); *United States v. Ray*, 21 F.3d 1134, 1140 (D.C. Cir. 1994) (explaining that "ambiguity must be resolved in favor of lenity and

against the prosecution," and that prior precedent holding that lenity "applied only to statutes grievously ambiguous" was inconsistent with more recent Supreme Court jurisprudence).

3. Certiorari is also warranted because the Fifth Circuit's interpretation of the rule of lenity is wrong. Under a proper understanding of this Court's precedents, the ambiguity regarding the FCPA's applications called for construing the statute to favor petitioners.

a. The Fifth Circuit set too high a bar to the invocation of the rule of lenity when it held that lenity applies only when all the available tools of statutory construction leave the court entirely at sea regarding the statute's meaning. Pet. App. 15a-16a. This Court's decisions have used a very different standard, applying lenity when standard methods of interpretation do not produce a conclusion that *clearly* supports the Government. *See supra* at 15-18; *see also*, *e.g.*, *Scheidler v. NOW, Inc.*, 537 U.S. 393, 409 (2003) ("When there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." (quoting *McNally v. United States*, 483 U.S. 350, 359-60 (1987)).[5]

[5] Although the Government often invokes the formulation that lenity applies only in case of "grievous ambiguity" (*e.g.*, Br. of United States at 44-46, *Burgess v. United States*, No. 06-11429 (2008)), it overreads that phrase, which in fact means only that lenity is properly invoked if, "after a court has seized everything from which aid can be derived, it is still left with an *ambiguous*

Furthermore, the court of appeals' holding that thin support in attenuated pieces of subsequent legislative history allowed it to "avoid the rule of lenity" (Pet. App. 16a) is irreconcilable with this Court's determination that such indirect indications of congressional intent should rarely be used to resolve ambiguities in criminal statutes against defendants. In decisions such as *Crandon*, *Hughey*, and *Ratzlaf*, where the Court either found or assumed that the statute's language was ambiguous, the Court held that lenity applies notwithstanding that the legislative history or statutory purpose provided some support for the Government's interpretation. In each of those cases, the Court held that because the legislative history did not establish that the Government's interpretation was *clearly correct*, lenity compelled reading the statute to favor the defendant. This Court's refusal to hold defendants liable based on remote indications of legislative purpose follows from the cardinal due process principle that criminal law must put the defendant on notice that his conduct is criminal. *See Hughey*, 495 U.S. at 422. There is no support for the proposition that a citizen should be deemed aware of the generic and isolated evidence of congressional intent that formed the basis of the Fifth Circuit's ruling in this case.

Indeed, the Fifth Circuit relied principally on the "general declarations of policy" (*Hughey*, 495 U.S. at 422) that this Court's decisions hold are not sufficient

---

statute" (*Chapman v. United States*, 500 U.S. 453, 463 (1991) (emphasis added)).

to negate application of the rule of lenity. Citing to nothing in the statutory text or legislative history *at all*, the Fifth Circuit concluded that it need not "guess" at Congress's intent because the FCPA was intended "to prohibit bribery aimed at getting assistance in retaining business or maintaining business opportunities," which it regarded as "sufficiently broad to include bribes meant to affect the administration of revenue laws." Pet. App. 73a. Under this Court's precedents, the fact that Congress's purpose in enacting a statute is encompassing enough to capture petitioners' conduct is not a sufficient basis to construe an ambiguous term in the Government's favor, when the defendant would not otherwise have been on notice of that construction.

Finally, principles of due process strongly reinforce the conclusion that the FCPA cannot properly be construed in this case to criminalize petitioners' conduct. "[D]ue process bars courts from applying a novel construction of a criminal statute to conduct that neither the statute nor any prior judicial decision has fairly disclosed to be within its scope." *United States v. Lanier*, 520 U.S. 259, 266 (1997). Because the Fifth Circuit's construction was "'unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue,' it must not be given retroactive effect." *Bouie v. City of Columbia*, 378 U.S. 347, 354 (1964) (citations omitted).

b. A proper application of the rule of lenity would construe the FCPA to favor petitioners, not the Government. The lower courts correctly concluded that the best indications of Congress's intent are ambigu-

ous as to whether petitioners' conduct was prohibited. The statute makes it a crime for an individual to "willfully" bribe a foreign official "in order to assist [a U.S. company] in obtaining or retaining business for or with . . . any person." 15 U.S.C. §§ 78ff, 78dd-1. Here, the Government charged petitioners with bribing Haitian officials in order to secure lower customs duties and taxes.

Both of the lower courts correctly recognized that the statutory text, structure, and title are fundamentally "ambiguous" on whether the FCPA criminalizes that conduct. Pet. App. 63a (court of appeals finding that "the ordinary and natural meaning of the statutory language *is* genuinely debatable and thus ambiguous"); *id.* 67a (holding statute "ambiguous as a matter of law"); *id.* 113a (district court concluding the FCPA's "obtain or retain business" language is "ambiguous under these circumstances").

Even resorting to the fiction that citizens look beyond a criminal statute and its known applications, petitioners would have had no reason to believe that their conduct was criminal. The most reliable evidence would have pointed in the opposite direction, under the principle that "Congress' rejection of the very language that would have achieved the result the Government urges here weighs heavily against the Government's interpretation." *Hamdan v. Rumsfeld*, 126 S. Ct. 2749, 2766 (2006) (citing *Doe v. Chao*, 540 U.S. 614, 621-23 (2004)). In 1977, when Congress first enacted the FCPA, it considered but did not adopt the House version of the statute, which broadly would have made it unlawful to bribe a foreign official "to use

his or her influence to affect any act or decision." H.R. REP. NO. 95-640, at 7 (1977). Subsequently, in revising the statute in 1988, Congress considered but did not adopt an amendment that would have expanded the FCPA to provide that obtaining or retaining business "includes payments made for the 'procurement of legislative, judicial, regulatory, or other action in seeking more favorable treatment by a foreign government.'" H.R. REP. NO. 100-576, at 918 (1988) (Conf. Rep.). It also considered the SEC's proposal to criminalize bribes paid to seek advantageous tax treatment, Pet. App. 71a, but declined to adopt that proposal, instead prohibiting only payments made to "obtain or retain business for or with . . . any person." *See id.* 61a (quoting 15 U.S.C. § 78dd-1(a)(1)). Finally, in 1997, in amending the FCPA to implement the OECD Convention, Congress conspicuously elected not to track the Convention's language by prohibiting a bribe "in order to obtain or retain business or other improper advantage in the conduct of international business." OECD Conv., art. 1.1.

On the still more extreme and implausible premise that citizens look beyond the statutory text, its structure, its title, *and* its history to determine the lawfulness of their conduct, petitioners *still* would have found no clear indication that they were breaking the law. As the court of appeals acknowledged, the most relevant sources—the Conference Report on the FCPA and the Senate Report on the bill that became the statute—are both uninformative. Pet. App. 70a, 72a.

The court of appeals nevertheless thought that its construction was supported by the Conference Report

discussing the 1998 amendments to the FPCA, which indicates that the statute applies to bribes intended to secure "more favorable tax treatment" (*id.* 79a-80a (quoting H.R. CONF. REP. NO. 100-576, at 918-19), an assertion that the court of appeals deemed equivalent to "[s]ubsequent legislation" and thus "entitled to great weight" under *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-81 (1969). That reasoning is deeply flawed. This Court has expressly and repeatedly "rejected the argument that the *Red Lion* rule should be applicable to the Committee Reports that accompany subsequent legislation." *South Carolina v. Regan*, 465 U.S. 367, 378 n.17 (1984) (citing *CPSC v. GTE Sylvania, Inc.*, 447 U.S. 102, 117, 118 n.13 (1980)). As the district court explained, "the 1988 House Conference Report consists of a belated interpretation of preexisting statutory language by the House, whose attempt to amend pertinent provisions of the statute had failed." Pet. App. 118a. The single statement cited by the Fifth Circuit is accordingly governed by the settled principle that "the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one." *CPSC*, 447 U.S. at 117.

4. This case presents the ideal vehicle to directly address the proper application of the rule of lenity to a case in which the text is ambiguous regarding Congress's intent and the Government's position receives merely weak support from the legislative history. Both the district court and court of appeals agreed that the statute's text, structure, and title are ambiguous as a matter of law. Pet. App. 67a; *id.* 113a. The central sources of legislative history—the directly relevant reports, floor materials, and unenacted versions

of the bills—are either silent with respect to the statute's application beyond bribes directly intended to secure commercial contracts, or favor petitioners. *See supra* at 3-6. Indeed, the Fifth Circuit frankly acknowledged that even *after* considering the FCPA's legislative history, the statute's "business nexus standard is ambiguous." Pet. App. 6a.

The court of appeals nonetheless held that lenity was wholly inapplicable because the meager support it previously had identified made it unnecessary to "guess" at Congress's intent. Pet. App. 15a-18a. The case is thus framed as a perfect opportunity to consider whether lenity is, in fact, no more than a "tie-breaker" when a court would otherwise throw up its hands, or whether that principle more fundamentally protects a defendant's right to fair notice, and applies when the statute's text, structure, and legislative history do not permit an individual to know clearly the scope of the criminal prohibition.

Indeed, the Court should use this case to decide whether legislative history is *ever* a sufficient basis to construe an otherwise ambiguous criminal statute expansively against a defendant. A plurality of the Court in *United States v. R.L.C.*, 503 U.S. 291, 305-06 (1992), reiterated that lenity applies if "any ambiguity survive[d]" a review of the statute and its legislative history. The plurality also applied the formulation of *Moskal v. United States*, 498 U.S. 103, 108 (1990), that lenity applies when "a reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history, and motivating policies' of the statute." *R.L.C.*, 503 U.S. at 305-06.

And the Court reinforced that legislative history will "rare[ly]" avoid application of lenity and that "'general declarations of policy,' whether in the text or the legislative history, will not support construction of an ambiguous criminal statute against the defendant." *Id.* at 306 n.6 (quoting *Hughey v. United States*, 495 U.S. at 422). But responding to three Justices who, recognizing the "tension in our precedents," would have held that "it is not consistent with the rule of lenity to construe a textually ambiguous penal statute against a criminal defendant on the basis of legislative history" (503 U.S. at 311, 308 (Scalia, J., joined by Kennedy and Thomas, JJ.)), the plurality left open the possible adoption of the concurrence's view that legislative history should be irrelevant to the application of the rule of lenity, noting that the issue was "not raised and need not be reached in the case." *Id.* at 306 n.6. This case squarely presents the issue for the Court's decision.[6]

---

[6] Leading appellate judges have voiced their strong dissent from the view that legislative history can provide citizens with sufficient notice. *E.g.*, *United States v. Laton*, 352 F.3d 286, 314 (6th Cir. 2003) (Sutton, J., dissenting) ("Because 'the rule of lenity ensures that criminal statutes will provide fair warning concerning conduct rendered illegal,' and because no one can plausibly conclude that a committee report or the floor statements of selected legislators provides such warning, the use of such material seems utterly incompatible with the purposes of the rule or the civilized interests it protects.") (citations omitted); *United States v. Barnes*, 295 F.3d 1354, 1370 (D.C. Cir. 2002) (Sentelle, J., dissenting) ("That a snippet of legislative history is more consistent with the less lenient application of a criminal statute hardly erodes the laudable principles of the rule of lenity. . . . [I]t seems to me most inconsistent with fundamental fairness and certainly with the rule of lenity to suppose that for a defendant to understand that his conduct is illegal, he must read not only the words

5. Whether the FCPA reaches petitioners' conduct is a question of substantial recurring importance. Because investigating and prosecuting FCPA violations is a high priority for the DOJ, the SEC, and the FBI,[7] it is critical that the scope of the FCPA be properly defined by the courts. In the thirty-six months following the Fifth Circuit's ruling in petitioners' case, the SEC brought more FCPA enforcement actions than during any prior three-year period,[8] and in 2007, targeted companies paid the largest civil fine and the largest criminal fine in the history of the FCPA.[9] The height-

---

of the statute, but find and construe the abstruse comments of a single senator on a single day."); *United States v. Weitzenhoff*, 35 F.3d 1275, 1295 (9th Cir. 1993) (opinion of Kleinfeld, J., for five judges dissenting from the denial of rehearing en banc) ("Instead of applying the rule of lenity, as it was required to do, the panel, after identifying the ambiguity, said '[w]e turn, then, to the legislative history of the provision at issue to ascertain what Congress intended.' That is not an appropriate way to resolve an ambiguity in a criminal law."); *United States v. McRee*, 7 F.3d 976, 985 (11th Cir. 1993) (Birch, J., dissenting) (rule of lenity violated by resort to "a declaration of policy that seeks to close statutory gaps").

[7] Claudius O. Sokenu, *FCPA Enforcement after* United States v. Kay*: SEC and DOJ Team Up to Increase Consequences of FCPA Violation*, *reprinted in* THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH HEIGHTENED ENFORCEMENT RISKS 189, 207-08 (Lucinda A. Low et al. eds., 2007) [hereinafter HEIGHTENED ENFORCEMENT RISKS]. The SEC's Enforcement Director announced in 2004 that the SEC intended to "aggressively" pursue FCPA violations, and an FBI official stated in 2006 that FCPA and corruption investigations were a high priority, surpassed only by counter-terrorism and counter-cyber-intelligence. *Id.* at 207-08 & n.8.

[8] *Id.* at 208.

[9] Danforth Newcomb, *Recent Trends and Patterns in FCPA Enforcement*, *in* HEIGHTENED ENFORCEMENT RISKS, *supra* note 7, at 385, 388.

ened level of enforcement raises the stakes for corporations and their directors, officers, and employees, who may be subject to both federal enforcement and private civil suits based on alleged FCPA violations. *See*, *e.g.*, *United States v. Titan Corp.*, No. 05-CR-314 (S.D. Cal. 2005); *Cheung v. Titan Corp.*, No. 04-CV-701 (S.D. Cal. 2004). Most federal cases against corporations are settled,[10] likely because businesses seek desperately to avoid the publicity associated with enforcement actions. It will be rare that charges are litigated as far as a court of appeals, let alone all the way to this Court. There would thus be little benefit to waiting for further percolation of the question presented, which will occur slowly if at all, while the delay will expose corporations and individuals to uncertainty and the risk of prosecution and other legal action. Consequently, petitioners' case offers an indispensable opportunity for this Court to definitively resolve the scope of the FCPA's "obtaining or retaining business" element.

---

[10] Lucinda A. Low et al., *The Foreign Corrupt Practices Act: Coping with Heightened Enforcement Risk*, *in* HEIGHTENED ENFORCEMENT RISKS, *supra* note 7, at 95, 109-10.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Pamela S. Karlan
Jeffrey L. Fisher
STANFORD SUPREME COURT LITIGATION CLINIC
559 Nathan Abbott Way
Stanford, CA 94305

Reid H. Weingarten
Bruce C. Bishop
David M. Fragale
STEPTOE & JOHNSON LLP
1330 Connecticut Ave., N.W.
Washington, DC 20036
Counsel for David Kay

Thomas C. Goldstein,
Counsel of Record
AKIN, GUMP, STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4060

Amy Howe
Kevin K. Russell
HOWE & RUSSELL, P.C.
7272 Wisconsin Avenue
Bethesda, MD 20814

Counsel for Douglas Murphy

April 9, 2008