No. 03-725

In the Supreme Court of the United States

DAVID B. PASQUANTINO, CARL J. PASQUANTINO, AND ARTHUR HILTS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

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

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-37a) is reported at 336 F.3d 321. The opinion of the panel (Pet. App. 38a-53a) is reported at 305 F.3d 291.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2003. On September 29, 2003, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including November 15, 2003, and the petition was filed on November 14, 2003. The petition for a writ of certiorari was granted on April 5, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioners David and Carl Pasquantino were convicted of six counts of wire fraud, in violation of 18 U.S.C. 1343. Petitioner Arthur Hilts was convicted of one count of wire fraud, in violation of 18 U.S.C. 1343. David and Carl Pasquantino were sentenced to 57 months of imprisonment, to be followed by three years of supervised release; Hilts was sentenced to 21 months of imprisonment, to be followed by two years of supervised release. A panel of the court of appeals reversed petitioners' convictions. Pet. App. 39a-53a. The en banc court of appeals vacated the panel decision and affirmed petitioners' convictions. *Id.* at 1a-37a.

1. Between 1996 and 2000, petitioners smuggled large quantities of liquor into Canada. Pet. App. 2a. Petitioners' scheme deprived the government of Canada and the Province of Ontario of more than $3 million in excise duties and tax revenue. J.A. 104-105. To execute the scheme, petitioners David and Carl Pasquantino, while in New York, would telephone discount liquors stores in Maryland and place orders for low-end liquor; petitioner Hilts and others would pick up the liquor in rental trucks and drive it to New York for storage; and, finally, one of petitioners' drivers would then smuggle a quantity of the liquor across the Canadian border. Pet. App. 2a-3a.

Petitioners used fraudulent means to accomplish their scheme. Petitioners' smugglers concealed the liquor in the trunk of the vehicles that carried the liquor into Canada. Pet. App. 3a. In response to questions by a Canadian border official asking petitioners' smugglers what goods they were bringing into the country, the

smugglers failed to state that they were bringing in liquor. *Id.* at 18a. When Canadian officials directed petitioners' smugglers to a secondary inspection area for an examination of their cars, the drivers would instead drive off into the interior of Canada. *Id.* at 3a; J.A. 68-69.

Imported alcohol is heavily taxed by Canada. Canada imposes a federal excise tax, a federal sales tax, a Liquor Control Board tax, and a provincial sales tax. Pet. App. 4a; J.A. 65. In total, the Canadian taxes on a case of alcohol purchased in the United States amount to nearly twice its purchase price. Pet. App. 4a; J.A. 65-66. For example, if alcohol is purchased for $56 per case in the United States, the Canadian taxes would be approximately $100 per case. *Ibid.*

2. A federal grand jury returned an indictment charging petitioners with "devis[ing] and intend[ing] to devise a scheme and artifice to defraud the governments of Canada and the Province of Ontario of excise duties and tax revenues relating to the importation and sale of liquor." Pet. App. 58a. Each of the wire fraud counts was based on a telephone call between New York and Maryland. *Id.* at 60a-64a.

In a pretrial motion to dismiss the indictment, petitioners argued that, in light of the common law revenue rule, a scheme to defraud a foreign government of tax revenue is not cognizable under the wire fraud statute. The district court denied the motion. J.A. 47-62. After a trial, the jury found petitioners Carl and David Pasquantino guilty on all six counts of the indictment. Pet. App. 4a-5a. The district court dismissed all but one of the counts against petitioner Hilts before it submitted the case to the jury, and the jury found Hilts guilty on the remaining count. *Id.* at 5a.

3. A divided panel of the court of appeals reversed petitioners' convictions. Pet. App. 38a-53a. The panel held that a scheme to defraud a foreign government of tax revenue is not cognizable under the wire fraud statute. *Id.* at 39a. The panel reasoned that, while Canada's right to tax revenue is a property right under the wire fraud statute, the common law revenue rule bars a court from recognizing that property right. *Id.* at 43a-44a.

The court of appeals granted the government's request for rehearing en banc and affirmed petitioners' convictions. Pet. App. 1a-37a. The court first held that, because the wire fraud statute, on its face, reaches schemes to defraud a foreign government of tax revenue, such conduct could fall outside that statute only if there were, at the time of the statute's enactment, a well-established common law rule prohibiting the courts of one sovereign from recognizing the existence of the revenue laws of a foreign sovereign. *Id.* at 6a (citing *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991)). The court held that the proper formulation of the common law revenue rule did not have that broad a reach. The court relied on the Restatement (Third) of Foreign Relations Law of the United States (1987), which states that "[c]ourts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states." *Id.* at 6a (quoting Restatement (Third), § 483). The court emphasized that the common law rule is "permissive" rather than "mandatory," and it "pertains to the nonenforcement of foreign tax judgments as opposed to the nonrecognition of foreign revenue laws." *Id.* at 11a.

The court of appeals also rejected petitioners' argument that affirming their convictions would be the

"functional equivalent" of enforcing the revenue laws of Canada and the Province of Ontario. Pet. App. 13a. The court concluded that a prosecution under the federal wire fraud statute does not enforce any tax judgment or claim of a foreign sovereign. *Ibid.* Instead, "such prosecution seeks only to enforce the federal wire fraud statute for the singular goal of vindicating our government's substantial interest in preventing our nation's interstate wire communication systems from being used in furtherance of criminal fraudulent enterprises." *Id.* at 13a-14a. The court also concluded that petitioners' convictions do not raise separation-of-powers concerns because "Congress enacted the wire fraud statute and the United States Attorney, acting on behalf of the United States as directed by the Executive Branch, made the decision to seek the [petitioners'] indictment thereunder." *Id.* at 14a.

The en banc court, like the panel, also held that, contrary to petitioners' contention, a foreign government's right to tax revenue constitutes a property right under the wire fraud statute, as required under *Cleveland* v. *United States*, 531 U.S. 12 (2000).[1] The court reasoned that "because a government has a property right in tax revenues when they accrue, * * * the tax revenues owed Canada and the Province of Ontario by reason of the [petitioners'] conduct in the present case constitute property for purposes of the wire fraud statute." Pet. App. 16a (citing *United States* v. *Brewer*, 528 F.2d 492,

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[1] *Cleveland* interpreted the mail fraud statute, 18 U.S.C. 1341, but because "[t]he mail and wire fraud statute share the same language in relevant part," this Court "appl[ies] the same analysis to both * * * offenses." *Carpenter* v. *United States*, 484 U.S. 19, 25 n.6 (1987).

495 (4th Cir. 1975)). The court noted that this Court, in holding that unissued video poker licences were not "property" in the hands of the State, had "conspicuously pointed out that the government in that case had 'nowhere allege[d] that Cleveland defrauded the State of any money to which the State was entitled by law.'" Pet. App. 16a (quoting *Cleveland*, 531 U.S. at 22). In this case, the court observed, the government had made such an allegation. Pet. App. 16a.

Judge Gregory, joined by Judge Michaels, dissented. Pet. App. 27a-37a. The dissent concluded that the revenue rule not only bars enforcement of a foreign government's revenue laws, but also any recognition of such laws. *Id.* at 31a. Because the indictment in this case alleged the existence of Canada's tax laws, and because petitioners' sentences depended on the amount of Canada's tax loss, the dissenters concluded that the revenue rule barred the government's prosecution. *Id.* at 35a-36a.

SUMMARY OF ARGUMENT

A. The wire fraud statute prohibits "any" scheme to defraud that is executed through interstate wires. There is no exception to that categorical prohibition based on the identity of the victim or the nature of the money or property that is the object of the fraud. The language of the wire fraud statute therefore prohibits the use of interstate wires to execute a scheme to defraud a foreign government of tax revenue.

B. The common law revenue rule has no application to criminal prosecutions under the wire fraud statute. That common law principle prevents a foreign government or someone acting on its behalf from using the courts in this country to collect money due under the foreign government's tax laws. A prosecution under

the wire fraud statute is not brought on behalf of the foreign government, and it does not seek to enforce a claim to tax revenue. The prosecution neither satisfies nor eliminates any tax obligation the defendant may owe to a foreign government. Instead, such a prosecution is brought on behalf of the United States and its objective is to vindicate this country's interest in preventing interstate wires from being used to execute a scheme to defraud. Such a prosecution therefore does not implicate the common law revenue rule.

C. In order to prove a scheme to defraud a foreign government of tax revenue, the government must establish the existence of foreign tax laws that require the payment of taxes. Such a recognition of foreign tax laws does not violate the common law revenue rule. The common law revenue rule bars direct or indirect *enforcement* of a foreign government's tax claim; it does not bar *recognition* of foreign revenue laws as an incident of the Executive Branch's exercise of its sovereign power to enforce a federal criminal prohibition.

D. The purposes of the revenue rule are to prevent a foreign government from asserting its sovereignty in this country and to relieve courts of the need to make sensitive policy judgments on which foreign tax claims should be enforced and which should not. A wire fraud prosecution for a scheme to defraud a foreign government of tax revenue does not violate either of those policies. Such a prosecution is not the product of a foreign sovereign's assertion of authority; it is the product of an assertion of United States sovereignty over criminal conduct occurring here. Moreover, courts that preside over wire fraud prosecutions are not required to make sensitive judgments about which prosecutions promote United States policy and which

do not. Those judgments are entrusted to the Executive Branch.

E. A scheme to defraud a foreign government of tax revenue satisfies the wire fraud statute's "money or property" requirement. Common law fraud includes the deprivation of money or property that is legally due to the victim. Depriving a foreign government of money legally due under its tax laws falls squarely within that established common law understanding. Indeed, early federal customs statutes used the term "defraud" to refer to schemes to deprive the government of tax revenue.

Cleveland v. *United States*, 531 U.S. 12 (2000), is consistent with that established common law understanding. In that case, the Court held that a scheme to obtain a state video poker licence did not involve a deprivation of money or property because the State had a regulatory rather than a property interest in the license. Crucial to the Court's analysis was that the government had not alleged that the defendant deprived the State of money to which it was legally entitled. *Id.* at 18. Prosecutions of schemes to deprive a government of tax revenue involve precisely such an allegation. They therefore satisfy the wire fraud statute's money or property requirement.

F. Neither the smuggling statute nor the United States-Canada Revised Protocol bars a wire fraud prosecution for defrauding a foreign government of tax revenue. The government may not prosecute conduct under the smuggling statute unless the smuggling offense occurs in a country with a reciprocal prohibition. The wire fraud statute, however, does not contain such a limitation, and nothing in the smuggling statute purports to introduce that element into the later enacted wire fraud statute. The United States-Canada

Revised Protocol specifies the circumstances under which the United States will give assistance to Canada in collecting tax revenue. Because a prosecution under the wire fraud statute is not intended as a surrogate means of assisting Canada in collecting its tax revenue, the Revised Protocol has no application here.

ARGUMENT

THE WIRE FRAUD STATUTE PROHIBITS THE USE OF INTERSTATE WIRES TO EXECUTE A SCHEME TO DEFRAUD A FOREIGN GOVERNMENT OF TAX REVENUE

While residing in this country, petitioners devised a scheme to smuggle liquor into Canada and defraud Canada and the Province of Ontario of the taxes owed on the liquor. Petitioners executed that scheme by using interstate wires in this country for the purpose of ordering the liquor necessary for the scheme. That conduct plainly constituted a scheme to defraud in violation of the wire fraud statute. Neither the common law revenue rule, nor petitioners' efforts to take their conduct outside of the scope of a money-or-property fraud, nor other federal law addressing other circumstances, justifies reading an exception into the wire fraud statute that would immunize petitioners' conduct from a federal wire fraud prosecution.

A. The Text Of The Wire Fraud Statute Covers Schemes To Defraud A Foreign Government Of Tax Revenue

The wire fraud statute prohibits "*any* scheme or artifice to defraud" where interstate wires are used "for the purpose of executing such scheme or artifice." 18 U.S.C. 1343 (emphasis added). The term "any" is all-inclusive. *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997). It means that the wire fraud statute applies to

all schemes to defraud that are executed through interstate wires, regardless of the identity of the victim or the nature of the money or property that is the object of the fraud. The text of the wire fraud statute does not exempt schemes to defraud foreign or governmental entities, and it contains no exception for schemes to deprive such entities of tax revenue. Indeed, the statute expressly prohibits schemes to defraud through the use of wires in "foreign commerce," 18 U.S.C. 1343, and thus contemplates that foreign entities may be victims of wire fraud. As long as the defendant has devised a "scheme to defraud" and has used interstate wires to execute that scheme, a violation of the wire fraud statute has occurred.

Consistent with the statute's text, courts have recognized that the wire fraud statute and the similarly-worded mail fraud statute (18 U.S.C. 1341) apply to schemes to defraud foreign governments, foreign corporations, and foreign individuals. *United States* v. *Sensi*, 879 F.2d 888, 892 (D.C. Cir. 1989) (scheme to defraud government-owned foreign corporation); *United States* v. *Van Cauwenberghe*, 827 F.2d 424, 426 (9th Cir. 1987) (scheme to defraud 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) (scheme to defraud foreign government), cert. denied, 459 U.S. 1201 (1983). The courts of appeals that have addressed the question have also uniformly held that the wire and mail fraud statutes apply when the object of a fraudulent scheme is to deprive a domestic governmental entity of tax revenue. *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. 1030 (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, 773 (5th Cir.) (state taxes), cert. denied, 430 U.S. 910 (1977); *United States* v. *Brewer*, 528 F.2d 492 (4th Cir. 1975), (state taxes); *United States* v. *Mirabile*, 503 F.2d 1065, 1066-1067 (8th Cir. 1974) (state taxes), cert. denied, 420 U.S. 973 (1975).

The same textual analysis applies equally when the two elements are combined: the text of the wire fraud statute covers schemes to defraud that involve a foreign government as the victim, and tax revenue as the object of the fraud. The court below and the Second Circuit have correctly so held. See Pet. App. 12a; *United States* v. *Trapilo*, 130 F.3d 547, 551 (1997).[2]

B. The Revenue Rule Is Not Implicated By A Criminal Wire Fraud Prosecution Because Such A Prosecution Seeks to Vindicate The United States' Sovereign Interest In Punishing Criminal Conduct In This Country, Not The Foreign Government's Interest In Revenue Collection

Petitioners argue that, in light of the common law revenue rule, schemes to defraud a foreign government of tax revenue are not cognizable under the wire fraud statute. Pet. Br. 9-27. In particular, they argue that the revenue rule immunizes their conduct because (1) the wire fraud statute was enacted against the backdrop of the common law revenue rule, (2) the common law revenue rule bars criminal prosecutions of schemes

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[2] While the First Circuit in *United States* v. *Boots*, 80 F.3d 580, cert. denied, 519 U.S. 905 (1996), held that the revenue rule bars a prosecution based on a scheme to defraud a foreign government of tax revenue, that court did not dispute that such a scheme falls within the literal language of the wire fraud statute.

to defraud a foreign government of tax revenue, and (3) the wire fraud statute does not expressly abrogate that common law principle and therefore incorporates it. See *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) ("where a common-law principle is well established, * * * the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'"). Petitioners' reliance on the revenue rule is misplaced. At the time the wire fraud statute was enacted, there was no well established common law principle —under the revenue rule or otherwise—that barred a domestic criminal prosecution of a scheme to defraud a foreign government of tax revenue. The wire fraud's prohibition against "any" scheme to defraud therefore authorizes such a prosecution, and "the common law revenue rule, inapplicable to the instant case, provides no justification for departing from the plain meaning of the statute." *Trapilo*, 130 F.3d at 551.

1. The Revenue Rule's Core Principle Bars A Foreign Sovereign From Pursuing Its Tax Claims In This Country's Courts

At its core, the revenue rule prevents a foreign sovereign from filing suit in this country to recover money due under its tax laws. See *Attorney Gen. of Canada* v. *R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 109 (2d Cir. 2001) ("courts of one sovereign will not enforce the tax judgments or unadjudicated tax claims of other sovereigns"), cert. denied, 537 U.S. 1000 (2002); *Republic of Honduras* v. *Philip Morris Companies, Inc.*, 341 F.3d 1253, 1256 (11th Cir. 2003) (revenue rule "prevents the courts of one sovereign from enforcing or adjudicating tax claims from another

sovereign"), cert. denied, 124 S. Ct. 1075 (2004); *Her Majesty the Queen in Right of the Province of British Columbia* v. *Gilbertson*, 597 F.2d 1161, 1163 n.1 (9th Cir. 1979) (revenue rule "prevents a foreign jurisdiction from either instituting a suit to recover taxes" or "to enforce its own court's judgment for taxes"); *United States* v. *Harden*, [1963] S.C.R. 366, 370 (Sup. Ct. Can.) (under revenue rule "courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign States"); *Peter Buchanan Ltd.* v. *McVey*, [1955] A.C. 516, 526 (Ir. H. Ct. 1950) ("courts of [one] country will not enforce the revenue claims of a foreign country in a suit brought for [that] purpose by a foreign public authority or the representative of such an authority"), aff'd, [1955] A.C. 530 (Ir. S. C. 1951).[3] That core principle has no application to a criminal prosecution under the wire fraud statute. Such prosecutions are brought by the United States to enforce a prohibition against criminal conduct occurring in this country. They are not brought by foreign governments, and they do not seek to recover taxes due under foreign tax law. Indeed, the prosecution in no way affects the extent

[3] Not all sources accept that strong form of the rule. The Restatement (Third) of the Foreign Relations Law of the United States § 483 states that "[c]ourts in the United States are not required to recognize or to enforce judgments for the collection of taxes * * * * rendered by the courts of other states." Restatement (Third) 611. The comment to that section states that "[n]o rule of United States law or of international law would be violated if a court in the United States enforced a judgment of a foreign court for payment of taxes * * * that was otherwise consistent with" the general standards for enforcing judgments. *Ibid* (Cmnt. a). The Restatement (Second) of Conflict of Laws, § 89(b) (1971) expresses no opinion on "whether, in situations not covered by treaty, an action by a foreign nation on a claim for taxes will be entertained in the United States."

to which petitioners may owe taxes to the Canadian government. Thus, the revenue rule's core common law formulation does not assist petitioners in resisting their prosecution for wire fraud.

2. The Ancillary Principles Drawn From The Revenue Rule Also Do Not Bar Criminal Prosecutions By The United States

The revenue rule not only bars a foreign government from *directly* asserting claims to unpaid taxes based directly on foreign tax law. It also reaches *indirect* efforts by a foreign government to use our courts to collect its tax revenues. There are two kinds of suits that have been recognized to fall into that category.

First, the revenue rule applies to cases where a foreign government asserts a claim based on a contract or tort theory, rather than directly under its tax law, but the objective of the suit remains to collect taxes due under foreign law. For example, in *Harden*, the United States brought suit in Canada based on a contract theory, but the underlying contract reflected an agreement to pay the taxes due under United States law. In reliance on the revenue rule, the Supreme Court of Canada refused to entertain the suit. 1963 S.C.R. at 371. Similarly, in *Attorney Gen. of Canada*, Canada brought suit under the provisions for private enforcement of the RICO statute, but the object of Canada's action was to collect its lost tax revenue. The Second Circuit held that Canada's civil RICO suit was barred by the revenue rule. 268 F.3d at 130-134.

Second, the revenue rule has been held applicable where a *private* party asserts a claim that does not rest on foreign tax law, but the entire object of the suit is to recover taxes for the foreign government. *Peter Buchanan, Ltd.* is an example. There, a private liquida-

tor brought suit to recover assets of an estate, but the liquidator was acting at the behest of a foreign sovereign, and the entire purpose of the suit was to recover taxes for that government. The court held that the revenue rule barred the liquidator's suit. 1955 A.C. at 527, 530. A critical fact was that the right in question was "being enforced at the instigation of a foreign authority." *Id.* at 527.

Both lines of cases involve two crucial elements: a foreign government or someone acting on its behalf brings the suit; and the object of the suit is to vindicate the foreign sovereign's interest in collecting tax revenue. Suits with those features are substantively indistinguishable from suits by foreign governments that seek to collect taxes based on foreign tax law. Such "indirect enforcement" is prohibited because "a foreign State cannot be allowed to do indirectly what it cannot do directly." 1 *Dicey & Morris*, *The Conflict of Laws* 90 (2000) (*Dicey & Morris*).[4]

The situation is fundamentally different in a prosecution under the wire fraud statute that charges a scheme to defraud a foreign government of tax revenue. In

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[4] For that reason, the United States, in its amicus brief filed at the Court's invitation at the petition stage in *Attorney General of Canada*, took the position that the revenue rule barred Canada's claim under the civil RICO provisions. 01-1317 U.S. Br. at 11-13. The government accepted that the civil RICO provisions were drafted against the backdrop of the common law revenue rule and that Congress expected that it would therefore apply, *id.* at 11 (citing *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991)), but the government explicitly distinguished criminal prosecutions like this one from Canada's civil suit because "criminal prosecutions vindicate the interests of the United States" and are brought by the Executive Branch on its own behalf, not on behalf of a foreign government and not to further that government's interest in collecting its taxes. *Id.* at 15-16.

such a prosecution, neither of the elements that trigger application of the revenue rule is present. First, the United States brings a wire prosecution on its own behalf, not on behalf of a foreign government. Second, it seeks to vindicate the United States' sovereign interest in preventing the wires from being used to further a scheme to defraud, not a foreign sovereign's interest in collecting tax revenue. As the court of appeals in this case explained, a prosecution under the wire fraud statute "does nothing civilly or criminally to enforce any tax judgments or claims that the foreign sovereign has or may later obtain against the defendant." Pet. App. 13a. Instead, such a prosecution "seeks only to enforce the federal wire fraud statute for the singular goal of vindicating our government's substantial interest in preventing our nation's interstate wire communication systems from being used in furtherance of criminal fraudulent enterprises." *Id.* at 13a-14a.

Thus, in bringing a criminal wire fraud prosecution, the United States pursues its own sovereign interest as an independent government, and does not act as the agent of a foreign nation seeking to pursue its revenue claims. Accordingly, a wire fraud prosecution does not provide a foreign government with an indirect route to achieve indirectly what it is forbidden from achieving directly by the revenue rule. Petitioners have not pointed to any cases predating enactment of the wire fraud statute that provide a basis for reaching a different conclusion.[5]

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[5] Petitioners rely primarily on the two lines of cases discussed above. Pet. Br. 19-20. They also cite (*id.* at 18) a set of cases holding that a contract to supply goods to be smuggled into another country is enforceable. *E.g.*, *Holman* v. *Johnson*, 98 Eng.

C. A Wire Fraud Prosecution Alleging A Scheme To Defraud A Foreign Government Of Tax Revenue Requires A Court To Recognize Foreign Tax Law, But Such Recognition Does Not Implicate The Revenue Rule

1. In a prosecution that alleges a scheme to defraud a foreign government of tax revenue, the government must prove the existence of foreign tax laws. A wire fraud prosecution requires proof of a scheme to deprive the victim of money or property, *McNally* v. *United States*, 483 U.S. 350, 356 (1987), and the existence of foreign tax laws requiring the payment of tax revenue must be proved in order to show that the scheme is aimed at depriving the government of money or property. See *United States* v. *Pierce*, 224 F.3d 158, 165-166 (2d Cir. 2000); see also pp. 28 to 33, *infra*. Such recognition of foreign tax laws as an incident of enforcing the wire fraud statute does not implicate the revenue rule.

Some early English cases characterized the revenue rule in dicta as forbidding any recognition of foreign

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Rep. 1120 (K.B. 1775); *Boucher* v. *Lawson*, 95 Eng. Rep. 53 (K.B. 1734). Those rulings reflect a policy judgment that such contracts promote commerce. *Id.* at 55-56. Other courts have refused to apply the revenue rule in similar circumstances. See William Dodge, *Breaking the Public Law Taboo*, 43 Harv. Int'l L.J. 161, 178 (2002) (discussing *Foster* v. *Driscol*, [1929] 1 K.B. 470 and *Regazzoni* v. *K.C. Sethia*, [1956] 2 Q.B. 490)); *id.* at n.116 (citing *Bhagwandas* v. *Brooks Exim Pte Ltd.*, [1994] 2 Sing. L. Rep. 431 (H.Ct.) (Sing.) and *Ralston Purina Co.* v. *McKendrick*, 850 S.W.2d 629, 639 (Tex. App. 1993)). Accordingly, there is no firmly established common law rule governing such cases. In any event, cases that address the enforceability of private contracts and that are based on a perceived interest in promoting commerce are not instructive on the question whether the revenue rule applies when the United States seeks to vindicate its sovereign interest in preventing interstate wires from being used to promote fraudulent schemes.

revenue laws. See *e.g.*, *Holman* v. *Johnson*, 98 Eng. Rep. 1120, 1121 (K.B. 1775) ("no country ever takes notice of the revenue laws of another"). But those cases overstated the scope of the rule. The revenue rule "relates only to *enforcement*, but it does not prevent *recognition* of a foreign [revenue] law." *Dicey & Morris*, 90; *Peter Buchanan, Ltd.*, 1955 A.C. at 523; *Regazzoni*, 2 Q.B. at 515-516; *Attorney Gen. of Canada*, 268 F.3d at 133-134. For example, a court will grant a foreign government's application to gather evidence for use in a foreign tax proceeding. *Attorney Gen. of Canada*, 268 F.3d at 133. A court will not restrain a trustee from complying with foreign fiscal obligations. *Dicey & Morris*, at 91. And a court will indemnify a trustee for money the trustee was legally compelled to pay in satisfaction of a tax liability even though the tax claim could not itself be enforced. *Ibid.* The common element is that such suits require recognition of foreign law, but they do not require enforcement of a foreign government's claim to tax revenue.

The situation is the same here. In a wire fraud prosecution, a court recognizes the existence of foreign revenue laws for the purpose of enforcing the wire fraud statute's categorical prohibition against "any" scheme to defraud executed through interstate wires, not for the purpose of enforcing, directly or indirectly, a foreign government's claim to tax revenue.

2. The district court's reliance on Canadian tax law (Pet. Br. 26) to determine the amount of loss for sentencing purposes also involves recognition rather than enforcement of a foreign revenue law. The Sentencing Guidelines incrementally increase the offense level for fraudulent conduct based on the amount of loss suffered by the victim. See Sentencing Guidelines § 2B1.1(b)(1) (replacing Guidelines § 2F1.1(b)(1)). That

amount-of-loss Guideline reflects a policy unrelated to enforcement of any revenue law—that a defendant's sentence should depend on the extent of the harm he has caused to the victim of his crime. The district court's reliance on Canadian tax law to determine the amount of the loss therefore does not enforce that law; instead, it recognizes it for the purpose of enforcing the Guidelines policy that a defendant's sentence should reflect the extent of the harm that he has caused. See *United States* v. *Chimielewski*, 218 F.3d 840, 843 (8th Cir. 2000) ("we consider a foreign loss not to uphold a foreign law, but to uphold our own law, U.S.S.G § 2F1.1, which directs us to consider the loss caused by fraud as a measure of a just punishment").[6]

3. Petitioners argue (Pet. Br. 26) that the federal criminal code's provision for mandatory restitution to a victim of an offense demonstrates that this prosecution enforced Canada's revenue laws. That issue is not directly presented in this case, and, in any event, petitioner's claim is unfounded.

The restitution provision instructs a court to order restitution to the victim of, *inter alia*, "an offense against property, * * * including any offense committed by fraud or deceit." 18 U.S.C. 3663A(a)(1), (c)(1)(A)(ii). The government did not urge the district court to order restitution in this case on the theory that it was not "appropriate * * * since the victim is a foreign government and the loss derives from tax laws

[6] Petitioner did not raise in either the district court or in the court of appeals a claim that the district court's determination of the amount of loss in this case violated the Sixth Amendment. Nor is that issue within the question presented. Accordingly, petitioners' current assertion (Pet. Br. 26 n.29) that their sentences must be vacated in light of *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), is not properly presented here.

of the foreign government." J.A. 106. Consistent with that recommendation, the district court did not order restitution. J.A. 129-130. Thus, petitioners are in no position to claim that any provision for restitution converted this case into an indirect suit for Canadian taxes that would implicate the revenue rule. The applicability of the restitution provision is simply not at issue in this case.

Petitioners claim that the United States had no authority to "pick and choose" which provisions of the criminal code would apply to petitioners' conduct, and, had the prosecutor proceeded as required by law and sought restitution, it would have been clear that prosecution under the wire fraud statute was an effort to collect on a foreign sovereign's tax claim. Pet. Br. 26. But even if restitution had been sought and ordered, that would not support the conclusion that prosecution for wire fraud would be barred.

It is far from clear that restitution to a foreign government should be regarded as an indirect substitute for a suit by the foreign government itself seeking to recoup tax loss. While victims have certain limited rights in the restitution process,[7] restitution

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[7] The victim has the right to appear although not necessarily the right to present evidence, and cannot seek a judgment (in the criminal case) on his own behalf. 18 U.S.C. 3664(d)(2) requires the probation officer to obtain information from the victims for the presentence report and gives the victims certain other rights. Under subsection (5), the victim can petition the court for an amended restitution order if it discovers additional losses. The government has to consult with the victims before sentencing, to the extent practicable, so that it can provide the probation officer with a listing of amounts subject to restitution. 18 U.S.C. 3664(d)(1). Enforcement of restitution is primarily by the United States, which can enforce victim restitution orders in the same manner that it recovers fines and in accordance with the practices

remains a criminal punishment that is imposed as part of the sentence for an offense. As this Court has explained, restitution imposed as part of a criminal sentence is a "penal" sanction despite its additional function to reimburse a victim for loss. *Kelly* v. *Robinson* 479 U.S. 36, 52 (1986). Seen in that light, restitution is a punishment that fulfills the domestic criminal law's aims, once the United States, as sovereign, has made an independent decision to prosecute. A foreign government, such as Canada, cannot directly or indirectly initiate that process.

But even if criminal restitution were thought to fall within the scope of the revenue rule, the proper solution would be to interpret the restitution provision itself against the backdrop of the revenue rule and hold that Title 18 of the United States Code lacks the direct statement necessary to authorize an award of restitution that would otherwise be barred by the common law principle. Cf. *Astoria Fed. Sav. & Loan Ass'n*, *supra*; *United States* v. *Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." (citation omitted)). There is no justification for going further and precluding prosecution altogether, thereby providing a safe haven for defendants like petitioners who violate the wire fraud statute

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and procedures for the enforcement of a civil judgment under Federal or state law. 18 U.S.C. 3613. See 18 U.S.C. 3613A, 3614 (authorizing sanctions for defaulting on payment of restitution). There is one provision that gives the victim a mechanism for enforcing the restitution order. 18 U.S.C. 3664(m)(1)(B) (authorizing issuance and registration of an abstract of judgment, which can be made a lien on the defendant's property). See generally *United States* v. *Phillips*, 303 F.3d 548 (5th Cir. 2002), cert. denied, 537 U.S. 1187 (2003).

by engaging in schemes on United States soil aimed at defrauding foreign governments of tax revenue.

D. The Policies That Underlie The Revenue Rule Do Not Justify Its Application To A Criminal Prosecution For Wire Fraud

Courts have articulated both separation-of-powers and judicial competence rationales for the revenue rule. Neither provides a basis for extending the rule to bar a criminal prosecution commenced by the Executive Branch.

1. Separation-of-Powers Concerns Do Not Justify Application Of The Revenue Rule To A Wire Fraud Prosecution

Courts have offered two separation-of-powers justifications for the revenue rule. First, courts have stated that the revenue rule prevents sovereigns from asserting their sovereignty within the borders of other countries, helping nations to maintain peaceful relations. *Attorney Gen. of Canada*, 268 F.3d at 111; *Gilbertson*, 597 F.2d at 1165; *Government of India* v. *Taylor*, [1955] A.C. 491, 511. Second, courts have stated that the revenue rule relieves courts of the need to perform the sensitive task of deciding which foreign revenue laws should be enforced and which should not. *Attorney Gen. of Canada*, 268 F.3d at 112; *Gilbertson*, 597 F.2d at 1164-1165; *Peter Buchanan*, 1955 A.C. at 528-529.

Criminal prosecutions under the wire fraud statute do not transgress either of those polices. As discussed above, see p. 16, such a prosecution is not the product of a foreign sovereign's assertion of authority within this country; it is the product of an assertion of United States sovereignty over criminal conduct occurring here. The Executive, acting through federal prosecu-

tors, makes the decision to prosecute when it concludes that fraudulent behavior directed at foreign tax authorities warrants punishment, in order to prevent this country from being the home base for criminals.

Such domestic criminal conduct may have a host of adverse ramifications. The profits from such conduct may fund other criminal schemes at home or abroad. The transnational collaboration of criminals to accomplish such schemes may lead to the development of international criminal organizations that elude any single nation's ability to detect and prosecute. The conduct of such criminal schemes may provide a training ground for similar operations that are later launched against domestic victims. And the existence of criminals operating at large here may irritate foreign relations if the United States allows victimization of other nations to go unpunished. While a categorical bar on Executive Branch prosecutions based on foreign taxes would tie the hands of the Executive in dealing with crimes against other nations, a sound exercise of prosecutorial discretion can reflect consideration of the nature of foreign tax systems, issues of reciprocity, and broader diplomatic interests. All of those considerations explain why the United States has a prosecutorial interest in bringing such cases, independent of protecting a foreign nation's revenues.

Nor does a wire fraud prosecution put the court in the position of making sensitive policy decisions about the merits of various foreign taxing systems. In a wire fraud prosecution, the court evaluates whether the indictment alleges the essential elements of a wire fraud offense, instructs the jury on the elements of the offense, and determines whether the evidence is sufficient to permit a jury to find that the elements have been proved. But the court is not required to decide

which prosecutions promote United States foreign policy interests and which do not, or which prosecutions accord with United States public policy and which do not. The Executive Branch—the Branch with the preeminent responsibility for the conduct of foreign affairs—makes those determinations in deciding whether to initiate a prosecution.

The Constitution gives the Executive Branch the responsibility to "take Care that the Laws are faithfully executed," U.S. Const. Art. II, § 3, and that responsibility carries with it the power to decide when a criminal prosecution furthers the policy interests of the United States, including foreign policy interests. See *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996). Once the Executive Branch brings such a prosecution, a court has no authority to reject it on public policy grounds. Rather, the court may dismiss the prosecution only if it is legally insufficient under the wire fraud statute or the prosecution transgresses constitutional limitations. See *ibid.*

For that reason, petitioners' rhetorical questions concerning prosecutions based on odious foreign tax systems (Pet. Br. 13 (quoting *Attorney Gen. of Canada*, 268 F.3d at 113)) are properly addressed by the exercise of Executive Branch discretion, unless a particular prosecution is found to be unconstitutional. That process, in which prosecutors can consult with the Department of State and other interested agencies to determine the foreign relations and foreign policy interests of the United States, is the proper mechanism for resolution of these issues—rather than rote application of the common law revenue rule. As the Second Circuit has explained: "When the United States prosecutes a criminal action, the United States Attorney acts in the interest of the United States, and

his or her conduct is subject to the oversight of the executive branch. Thus, the foreign relations interests of the United States may be accommodated throughout the litigation." *Id.* at 123.

In sum, because a court in a wire fraud prosecution is not required to make any sensitive public policy judgments on when a prosecution for defrauding a foreign government of tax revenue is appropriate, and because the Executive Branch is fully competent to make those judgments, the separation-of-powers rationale for the revenue rule has no application here. Indeed, a misapplication of the revenue rule to forbid the United States to initiate a prosecution that served important domestic and foreign relations interests would affirmatively interfere with the proper allocation of power among the branches.

2. Difficulties In Determining Foreign Tax Law Do Not Justify Application Of The Revenue Rule To A Wire Fraud Prosecution

The only other justification offered for the revenue rule is the difficulty of determining foreign law. *Taylor*, 1955 A.C. at 514 (Lord Somervell of Harrow). That difficulty, however, is not a persuasive justification for the revenue rule as a general matter, and it is particularly unpersuasive as a ground for barring a wire fraud prosecution.

Federal courts are fully competent to resolve questions of foreign law. Federal Rules of Criminal Procedure 26.1 provides a specific procedure for determining foreign law, permitting the court to consider "any relevant material or source—including testimony —without regard to the Federal Rules of Evidence." This process is part of a variety of circumstances in which federal courts are required to make determina-

tions of foreign law. As noted (p. 10, *supra*), it is well established that a wire or mail fraud prosecution may be based on a scheme to defraud involving foreign property, which in turn may implicate issues of foreign law. More broadly, federal courts have general criminal jurisdiction in the Canal Zone, Guam, and the Virgin Islands; the law of the demanding state is relevant in an extradition proceeding; foreign law may justify non-compliance with a subpoena; foreign law may be a defense to prosecution; and foreign law may be relevant in prosecutions for kidnapping (18 U.S.C. 1201), transportation of stolen vehicles (18 U.S.C. 2312), and sale or receipt of stolen livestock (18 U.S.C. 2317). See Fed. R. Crim. P. 26.1 (advisory committee notes). See also *United States* v. *McNab*, 331 F.3d 1228, 1239-1248 (11th Cir. 2003) (interpreting and determining the validity of Honduran law in a prosecution under the Lacey Act, 16 U.S.C. 3372(a)(2)(A), which prohibits the importation of "fish or wildlife taken, possessed, transported, or sold in violation of * * * any foreign law"), cert. denied, 124 S. Ct. 1406 (2004).

The government's obligation to prove beyond a reasonable doubt that the defendant has acted with the intent to defraud also means that prosecutions will be brought only when the government has concluded that it is clear that foreign laws required the payment of taxes and the defendants sought to defraud the foreign government of that revenue. In the present case, for example, the government presented uncontradicted evidence that Canada and the Province of Ontario impose taxes on the importation and sale of liquor. Pet. App. 4a. Whatever the difficulty in determining foreign law, however, Rule 26.1 expressly entrusts federal courts with that responsibility. Such difficulties are not

a sound basis for refusing to entertain a wire fraud prosecution.

3. The Common Law Revenue Rule Is Not Subject To Expansion Based On Policy Considerations

Reliance on the traditional policy rationales for the revenue rule to justify its application to a wire fraud prosecution fails for an additional reason. Policy rationales alone cannot justify expanding the revenue rule beyond its established common law scope, particularly in light of the clarity with which the wire fraud statute covers petitioners' conduct. As the court of appeals in this case explained, "a significant separation of powers problem would arise were we to play diplomat from the bench by relying on a novel expansion of the common law revenue rule, no doubt a policy laden rule, to set aside [petitioners'] * * * convictions." Pet. App. 14a.

This Court reached an analogous conclusion in *Kirkpatrick & Co.* v. *Environmental Tectonics Corp. Int'l*, 493 U.S. 400 (1990), with respect to the act of state doctrine. In that case, the Court held that the act of state doctrine applies only when a claim or defense requires a court to declare invalid the official act of a foreign state performed within its own territory. *Id.* at 405-406. The Court rejected the argument that the policies underlying the act of state doctrine—international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations—justify an extension of that doctrine to cases where a claim requires a court to make factual findings that suggest that an act of state is invalid. *Id.* at 408-409. The Court explained that the act of state's "underlying policies" are not "a doctrine unto themselves justifying expansion of the act of state

doctrine" into "new and unchartered fields." *Id.* at 409. While in this case neither the common law revenue rule nor its underlying policies stands in the way of a prosecution under the wire fraud act, any suggestion that the revenue rule should be extended to preclude this prosecution must fail.

E. A Scheme To Deprive A Foreign Government Of Tax Revenue Satisfies The Wire Fraud Statute's "Money Or Property" Requirement And Involves Common Law Fraud

In *McNally* v. *United States*, 483 U.S. 350, 358 (1987), the Court held that the term "to defraud" commonly refers to "wronging one in his property rights by dishonest methods or schemes," and usually signifies "the deprivation of something of value by trick, deceit, chicane or overreaching." Based on that understanding, the Court held that the mail fraud statute reaches only deprivations of "money or property." *Id.* at 359; see *id.* at 360. In *Carpenter* v. *United States*, 484 U.S. 19 (1987), the Court interpreted the wire fraud statute to impose the same requirement. Noting that the wire fraud statute has the same relevant language as the earlier enacted mail fraud statute, *id.* at 25 n.6, the Court held that both statutes are limited to schemes "to deprive another of money or property." *Id.* at 27. See *Cleveland* v. *United States*, 531 U.S. 12, 26 (2000) (reaffirming *McNally*).[8]

Schemes to defraud a foreign government of tax revenue satisfy the wire fraud statute's "money or property" requirement. Such a scheme seeks "to de-

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[8] Between *Carpenter* and *Cleveland*, Congress amended the mail and wire fraud statutes to cover "the intangible right of honest services." 18 U.S.C. 1346. In all other circumstances, the money or property requirement remains intact.

prive" the foreign government "of money" due under that government's tax laws.

1. The Common Law Defined Fraud To Include Schemes To Deprive A Victim of Money Legally Due

Petitioners contend that a scheme to defraud a foreign government of tax revenue does not satisfy the money or property requirement because the defendant in such a scheme does not seek to obtain from the government money or property already in the government's possession. Pet. Br. 30, 35. But, in accordance with its common law antecedents, the wire fraud statute covers any scheme to deprive a victim of money or property that is legally due to the victim. A scheme to deprive a government of revenue due under its tax laws is an example of such a fraudulent scheme. That understanding of the term "defraud" was well established by the time the mail fraud statute was first enacted in 1872.

One legal dictionary of that era stated that "to defraud is to withhold from another that which is justly due to him." 1 *Bouvier's Law Dictionary* 530 (1897); accord William Anderson, *A Dictionary of Law* 474 (1893) (defining "defraud" as "to withhold from another what is justly due him"). Thus, if an insolvent debtor entered into an agreement with his creditors that they would accept a proportion of payment on his debts in satisfaction of the whole, but he then reached a secret agreement with a particular creditor that would give him an advantage over the others, it was regarded as common law fraud. 1 Stewart Rpalje & Robert Lawrence, *A Dictionary of American and English Law* 546 (1883). Similarly, at that time, it constituted common law fraud if a woman, after entering into a contract to marry, secretly conveyed her property in order to

defeat her prospective husband's marital right to the property. *Ibid.* As those examples demonstrate, common law fraud includes schemes to deprive the victim of money or property to which the victim was, or would become, legally entitled. Schemes to defraud a government of tax revenue fit within that common law tradition.

Indeed, by the time of the enactment of the mail fraud statute, the term "defraud" had long been understood to encompass schemes to deprive a government of tax revenue. A statute enacted by the First Congress subjected to forfeiture goods entered into the country not invoiced according to their actual value "with design to defraud the revenue." Act of July 31, 1789, ch. 5, § 22, 1 Stat. 42. Similarly, the First Congress subjected to forfeiture packages of goods that were misidentified "with intention to defraud the revenue." § 23, 1 Stat. 43. In 1874, Congress authorized criminal prosecution of persons who enter goods "with intent to defraud the revenue" and "deprive[]" the United States of "lawful duties." Act of June 22, 1874, ch. 391, § 12, 18 Stat 186. And an early decision under that statute held that "the United States is deprived of duties the moment it becomes entitled to them and they are withheld by the importer." *United States* v. *Boyd*, 24 F. 692, 694 (C.C.S.D.N.Y. 1885). Against that background, the courts of appeals that have addressed the question have all held that a scheme to deprive the United States or a State of tax revenue satisfies *McNally*'s money or property requirement. *Fountain* v. *United States*, 357 F.3d 250, 257 (2d Cir. 2004); *United States* v. *Bucey*, 876 F.2d 1297 (7th Cir.), cert. denied, 493 U.S. 1004 (1989); *United States* v. *Herron*, 825 F.2d 50, 56 (5th Cir. 1987); *Brewer*, 528 F.2d at 495.

This Court's decision in *Manning* v. *Seeley Tube & Box Co.*, 338 U.S. 561 (1950), further supports that conclusion. In that case, the Court held that a taxpayer was required to pay interest on an assessed tax deficiency. The Court explained that because the taxpayer had "a duty to pay [the] tax" from the date the return was due to be filed until the date of the assessment, the government "possess[ed] the right of use of the money owed" during that period. *Id.* at 565-566. Under *Manning*, the government has a property interest in uncollected taxes that are legally due, and a scheme to deprive the government of such taxes therefore satisfies *McNally*'s money or property requirement.

2. The Inapplicability Of The Wire Fraud Statute To State Issued Licenses Does Not Assist Petitioners

In support of their argument that schemes to deprive a government of tax revenue do not satisfy the money or property requirement, petitioners mistakenly rely on this Court's decision in *Cleveland*. In that case, the Court held that a State of Louisiana video poker license was not government property within the meaning of the mail fraud statute. The Court reasoned that the government's interest in the license was regulatory and that regulatory interests do not satisfy the wire fraud statute's money or property requirement. 531 U.S. at 20-24. Petitioners contend that, because the government also has a regulatory interest in imposing taxes, a government's interest in tax revenue does not satisfy the money or property requirement. Pet. Br. 41-44.

The indictment in this case, however, did not charge that petitioners schemed to defraud a foreign government of its regulatory interest in imposing taxes. Rather, the indictment charged that petitioners

schemed to deprive Canada and Ontario of money due under their tax laws. Pet. App. 58a. The jury instructions similarly asked the jury to decide whether petitioners had devised "a plan *to deprive another of money* by trick, deceit, deception or swindle." J.A. 86 (emphasis added). Nothing in *Cleveland* suggests that such a scheme fails to satisfy the money or property requirement. To the contrary, the Court in *Cleveland* emphasized that "[t]ellingly, as to the character of Louisiana's stake in its video poker licenses, the Government nowhere alleges that Cleveland defrauded the State of any money to which the State was entitled by law. Indeed, there is no dispute that TSG paid the State of Louisiana its proper share of revenue, which totaled more than $1.2 million, between 1993 and 1995." 531 U.S. at 22. As that passage indicates, a scheme to defraud a government of tax revenue satisfies the wire fraud statute's money or property requirement because it involves defrauding the government of "money to which the [government] was entitled by law." *Ibid.*

Cleveland states that the object of the fraud must be property "in the victim's hands," and not merely property in the defendant's hands. 531 U.S. at 26. In light of the common law understanding of fraud, this Court's decision in *Manning*, and the passage in *Cleveland* cited above, that formulation necessarily encompasses schemes to deprive a government of money that is legally due under its tax laws. "[T]axes owed to the government—even if not yet collected—are property in the hands of the government." *Fountain*, 357 F.3d at 257.

Petitioners assert (Pet. Br. 38-40), that the analysis in *Cleveland* would mandate, in order to determine whether an indictment charging a scheme to defraud a foreign government of tax revenue satisfies the money

or property requirement, "a highly intrusive endeavor requiring a detailed inquiry into complex substantive and procedural issues under foreign tax systems." In a reprise of their revenue-rule arguments, petitioners suggest that such an inquiry would require the courts to make determinations that "necessarily affect[] the foreign relations of the United States." *Id.* at 40. That contention is unfounded. To determine whether an indictment alleges an offense, a court need only determine whether the foreign government has required the payment of taxes and whether the defendant schemed to fraudulently deprive the foreign government of those taxes. In making that inquiry, it is not necessary to decide whether or when a foreign tax claim is transferrable, whether the government has a regulatory as well as a monetary interest in its tax laws, or whether the foreign tax is consistent with United States public policy. *Id.* at 38-40. As long as foreign law requires the payment of taxes and the defendant has schemed to deprive the foreign government of that tax revenue, *McNally*'s money or property requirement is satisfied. The analysis is particularly straightforward in a scheme like petitioners' where, unlike the scheme in *Cleveland*, the whole point of the enterprise is to deprive the foreign government of taxes due.

3. The Revenue Rule Does Not Defeat A Showing By The United States That A Foreign Nation Has A Money Or Property Interest In Taxes Due

Petitioners argue that depriving a foreign government of tax revenue cannot be common law fraud because the revenue rule prevents a foreign government from asserting a common law fraud claim to recover lost tax revenue. Pet. Br. 33-34; see *id.* at 29. That argument reflects a misunderstanding of the re-

venue rule. When a court invokes the revenue rule to bar a suit that seeks to collect tax revenue under a common law fraud theory, it is not for failure to allege the elements of common law fraud. Instead, the suit is dismissed because the revenue rule requires a foreign government to resort to its own courts, rather than ours, to enforce its common law fraud claim. See *Dicey & Morris* 89 (expressing the revenue rule as a rule of jurisdiction). Because the wire fraud statute requires the government to show that there was a scheme to defraud and not that the victim of the fraud could recover on a fraud claim in our courts, the revenue rule has no bearing on the government's ability to prove the elements of a wire fraud violation.[9]

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[9] Petitioners argue that the government failed to prove the "materiality" and the "money or property" elements of the offense. Pet. Br. 34-35, 41. Those fact-bound contentions are not within the question presented. In any event, the government introduced evidence that Canada and Ontario impose taxes on the importation and sale of liquor, and that petitioners sought to deprive Canada and Ontario of that tax revenue through a scheme that involved concealment of the liquor in the trunks of cars, failure to answer truthfully when Canadian officials asked what goods were being brought into the country, and failure to present vehicles for inspection when directed to do so. Pet. App. 3a-4a, 18a. That evidence was more than sufficient to prove both elements.

F. Neither The Smuggling Statute Nor The United States-Canada Revised Protocol Bars A Wire Fraud Prosecution Of A Scheme To Defraud A Foreign Government Of Tax Revenue

1. The Smuggling Statute Does Not Limit The Scope Of The Wire Fraud Statute

Petitioners err in contending (Pet. Br. 21-22) that the existence of the smuggling statute, 18 U.S.C. 546, precludes a wire fraud prosecution charging a scheme to defraud a foreign government of tax revenue. The smuggling statute prohibits any person owning a United States vessel from allowing the vessel to be used for smuggling goods into another country in violation of the laws of that country, provided that the other country has a reciprocal prohibition. 18 U.S.C. 546. The wire fraud statute, however, does not require a reciprocal prohibition as an element of the offense, and nothing in the terms of the smuggling statute purports to introduce that element into the subsequently enacted wire fraud statute.

Indeed, while some conduct can be covered by both statutes, the smuggling statute and the wire fraud statute involve distinct offenses with different elements. To prove a violation of the smuggling statute, it is not necessary to prove that the smuggling has been executed through interstate wires, or that there has been a scheme to deprive the foreign government of money or property. On the other hand, to prove a violation of the wire fraud statute, it is not necessary to prove that a vessel has been used for the purpose of smuggling goods into another country or that the country that is the object of the fraud has a reciprocal statute.

Petitioners argue that because the smuggling offense is more specific than the wire fraud offense with respect to the conduct of smuggling, only the smuggling statute may be applied. Pet. Br. 45- 46. But where conduct violates two criminal statutes, the decision about which charge to bring "generally rests entirely in [the prosecutor's] discretion." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978). That principle applies regardless of whether one of the statutes is more specific with respect to the conduct at issue.

For example, in *Edwards* v. *United States*, 312 U.S. 473, 484 (1941), the Court held that the government could prosecute a scheme to engage in securities fraud through the mail under the mail fraud statute, even though the same conduct was covered by the more specific securities fraud statute. The Court explained that "[t]he two can exist and be useful, side by side." *Ibid.*

The courts of appeals have also repeatedly held that the government is entitled to prosecute conduct under the mail fraud statute even though that conduct is covered by a more specific statute and the more specific statute, like the smuggling statute, carries less severe penalties. See, *e.g.*, *United States* v. *Oldfield*, 859 F.2d 392, 397-399 (6th Cir. 1988) (permissible for government to charge mail fraud rather than odometer tampering); *Dale*, 991 F.2d at 849 (permissible for government to charge mail fraud rather than tax fraud); *Melvin*, 544 F.2d at 773 (permissible to charge mail fraud rather than violation of Jenkins Act); *United States* v. *Brien*, 617 F.2d 299, 310 (1st Cir.) (permissible to charge mail fraud rather than violation of Commodities Futures Trading Act), cert. denied, 446 U.S. 919 (1980). As those cases demonstrate, more specific statutes do not control or limit the government's authority to proceed

under the mail and wire fraud statutes provided the terms of the mail and wire fraud statutes have been violated. That principle is controlling here.[10]

2. The United States-Canada Treaty Does Not Limit The Scope Of The Wire Fraud Statute

Prosecution of a scheme to defraud a foreign government of tax revenue also does not conflict with the United States-Canada Revised Protocol. See A Revised Protocol Amending the 1980 Tax Convention With Canada, Mar. 17, 1995, U.S.-Canada, art. 15, S. Treaty Doc. No. 104-4 (1995). The Revised Protocol provides for mutual assistance in collecting tax revenue with respect to "all categories of taxes" (*id.* at 16 (adding Art. XXVI A, para. 9)), and has three provisions that petitioners rely on here. First, it authorizes tax collection assistance only for a revenue claim that has been "finally determined." *Id.* at 14 (adding Art. XXVI A, para. 2). Second, it bars assistance for the collection of any revenue claim arising during the time a person was a citizen of the government from whom assistance is requested. *Id.* at 8 (adding Art. XXVI, para. 8). Finally, it requires Canada and the United States to provide "comparable levels of assistance." *Id.* at 16 (adding Art. XXVI A, para. 11).

Petitioners contend that those limitations counsel against interpreting the wire fraud statute to permit

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[10] The United States Attorney's Manual advises prosecutors not to prosecute schemes to defraud the United States of tax revenue under the mail and wire fraud statutes absent exceptional circumstances. U.S. Attorney's Manual § 6-4.210 (2004). That reflects a judgment about the appropriate exercise of prosecutorial discretion. It does not reflect a judgment that the mail and wire statutes do not apply to such conduct. See 18 Tax Div. Dir. No. 99, at 2-3 (Mar. 30, 1993).

prosecution in this case because petitioners are citizens of the United States and Canada has not finally determined the taxes due. If such a prosecution were permitted, petitioners argue, it would give Canada greater assistance in collecting tax revenue than that extended by the Protocol. Pet. Br. 49. The flaw in petitioners' argument is that the present prosecution is not designed to serve as a means for Canada to collect taxes on its own behalf. Rather, the prosecution seeks to prevent criminals based in the United States from using this country as a means of victimizing foreign governments. The prosecution itself does not affect the extent to which petitioners owe taxes to the Canadian government. The domestic criminal prosecution in this case is therefore authorized by the provisions of the wire fraud statute, and nothing in the Revised Protocol detracts from that conclusion.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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