No. 07-1281

# 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

## BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONERS


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## INTEREST OF *AMICUS CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation, representing an underlying membership of more than three million companies and professional organizations of all sizes and in all industries.[1] The Chamber advocates the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus* briefs in cases that raise issues of vital concern to the nation's business community.

This case addresses the "business nexus" element of the Foreign Corrupt Practices Act ("FCPA"). The FCPA is an extraordinary piece of extraterritorial legislation, representing a laudable moral commitment by the United States to police and prosecute certain bribes paid to foreign government officials. But the FCPA was never meant to transform every public corruption issue, worldwide, into a crime under U.S. law. It applies only to payments made for the purpose of "obtaining or retaining business." The Fifth Circuit's two decisions in this case essentially nullify that requirement, vastly expanding the substantive scope of the FCPA to payments that have absolutely no direct connection to "obtaining or retaining business." This case merits review by this Court, for at least two reasons.

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[1] Pursuant to this Court's Rule 37, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* made a monetary contribution to the preparation or submission of the brief. Counsel of record for all parties were timely notified 10 days prior to filing and have consented to the filing of this brief. Letters of consent have been filed with the Clerk.

*First*, the Fifth Circuit's decision, and the expansive enforcement efforts it has spawned, threaten American executives with prison for conduct not criminalized by the plain language of the statute. The Fifth Circuit's refusal to apply the rule of lenity in this case—despite concluding that the Act was ambiguous even *after* considering legislative history—essentially nullifies that vital and historic canon of construction. The rule of lenity is essential to the fair and orderly administration of justice. The Fifth Circuit's dismissive treatment of the rule is grounded in a misinterpretation of this Court's recent cases that only this Court can correct. As the petition explains, there is an active circuit split on this issue that merits review.

*Second*, the proper interpretation of the FCPA's business nexus requirement concerns the fundamental scope of one of the most important American laws governing the conduct of business overseas, and presents an issue of national and international importance. As the pace of globalization increases, many of the Chamber's members compete vigorously for business overseas and in emerging markets, and are governed by the FCPA. The Chamber and its members certainly do not condone the paying of bribes, anywhere or for any purpose, and work hard to comply with local anti-corruption laws everywhere that they do business. But the FCPA can often transform what would be a relatively minor violation under local law into potentially enterprise-threatening U.S. criminal liability. Setting aside the risk of criminal liability itself, FCPA investigations and compliance efforts are extraordinarily expensive and disruptive, frequently involving the need for large teams of U.S. lawyers and

forensic investigators to interview witnesses, review documentary evidence, and analyze financial transactions on the far side of the world, and in unfamiliar languages. The Fifth Circuit's decision in this case broadens the FCPA's substantive coverage from interactions with foreign officials for the purpose of obtaining or retaining business, to essentially any interaction with a foreign official on any subject, however trivial—and hence greatly increases the investigative and compliance burden on U.S. businesses without any clear direction from Congress. The Chamber therefore urges this Court to grant certiorari to provide members of the business community with clear guidance on their potential exposure to FCPA liability and to clarify the proper boundaries of the FCPA.

## ARGUMENT

### I. THE FIFTH CIRCUIT'S APPROACH TO THE RULE OF LENITY IS DEEPLY FLAWED AND MERITS REVIEW

#### A. The Rule Of Lenity Requires That The Fifth Circuit's Interpretation Of The FCPA In This Case Must Be Rejected

The Fifth Circuit repeatedly acknowledged that the FCPA's "obtaining or retaining business" language is "'amenable to more than one reasonable interpretation' and therefore 'ambiguous as a matter of law' absent its legislative history." Pet. App. 12a (footnote and citation omitted); *see also id.* at 63a ("genuinely debatable and thus ambiguous"). It acknowledged that the direct legislative history—the Conference Report—"merely parrots the statutory language" and sheds no additional light. *Id.* at 70a. The Fifth Circuit also recognized that Congress rejected more broadly

drafted language from the House bill that would have eliminated any business nexus requirement (making it unlawful to bribe a foreign official "to use his or her influence to affect any act or decision") in favor of the narrower Senate version ultimately enacted. *id.* at 68a.

The court nonetheless resolved the acknowledged ambiguity in this criminal statute in *the government's* favor, for several unpersuasive reasons. Despite finding no support in the text, and acknowledging that Congress rejected the text that would have specifically covered the conduct in this case, the Fifth Circuit concluded (without citation) that the Senate was nevertheless "*mindful* of bribes that influence legislative or regulatory actions." *Id.* at 72a (emphasis added). It reasoned that "the concern of Congress with the immorality, inefficiency, and unethical character of bribery presumably does not vanish simply because the tainted payments are intended to secure a favorable decision less significant than winning a contract bid." *Id.* at 74a. And it relied on a Conference Report from the 1988 amendments to the FCPA declaring that "a payment to a foreign official for the purpose of obtaining more favorable tax treatment" was already covered by the Act. *Id.* at 79-80a. The court defended this obviously improper reliance on subsequent *legislative history* by invoking this Court's statement 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 (emphasis added).

The Fifth Circuit also declined to apply the rule of lenity, which it characterized as a "last resort of interpretation" that applies only 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.* at 15a-16a (quoting *Reno v. Koray*, 515 U.S. 50, 65 (1995)). The Fifth Circuit's approach to the construction of a concededly ambiguous criminal statute, for which not even the legislative history supplies any clear guidance, is plainly improper. The rule of lenity requires that "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." *McNally v. United States*, 483 U.S. 350, 359-60 (1987). As Chief Justice Marshall explained in *United States v. Wiltberger*, 18 U.S. (5 Wheat.) 76, 95 (1820), when addressing another question of ambiguity in the extraterritorial application of U.S. law,

> The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself. It is founded on the tenderness of the law for the rights of individuals; and on the plain principle that the power of punishment is vested in the legislative, not in the judicial department. It is the legislature, not the Court, which is to define a crime, and ordain its punishment.

The principle is that "before a man can be punished, his case must be plainly and unmistakably within the statute." *United States v. Lacher*, 134 U.S. 624, 628 (1890); *see also United States v. Laton*, 352 F.3d 286, 314 (6th Cir. 2003) (Sutton, J., dissenting) ("I am aware of no decision from our Court or from the United States Supreme Court that *broadens* the reach of a criminal statute on the basis of legislative history …."), *cert. denied*, 542 U.S. 937 (2004).

The Fifth Circuit's articulation of the rule of lenity as a "last resort of interpretation" fundamentally misunderstands the purposes and role of the rule. Properly understood, lenity is a primary canon of construction in its own right. The Fifth Circuit's approach strips one of the most venerable and significant presumptions in the law of any significance whatsoever.

The Fifth Circuit's fundamental error was in failing to appreciate that lenity applies whenever a statute remains ambiguous—*i.e.*, reasonably susceptible to more than one interpretation—after resort to the conventional core tools of statutory construction. The Fifth Circuit invoked stray language from this Court's opinion in *Koray* to suggest that lenity instead only comes into play when a court "'can make no more than a guess as to what Congress intended.'" Pet. App. 15a-16a (citations omitted). As the petition explains, however, the "no more than a guess" phrase entered the law in decisions of this Court *applying* the lenity principle, not rejecting it. *See, e.g.*, *Ladner v. United States*, 358 U.S. 169, 178 (1958). It was never intended to permit a court to resolve statutory ambiguity against a criminal defendant whenever it could do so without resorting to sheer speculation. The test has always been 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." *United States v. Granderson*, 511 U.S. 39, 54 (1994).

The Fifth Circuit forthrightly conceded that the FCPA's business nexus requirement remains ambiguous even after mining all possible inferences from the text and structure of the statute. The court of

appeals resolved that ambiguity in the government's favor by relying on a vague witches' brew of considerations, dominated by the court's intuition (not grounded in any particular language) about Congress's overall preferences, and several sources that might loosely be described as legislative history. It focused on a prior SEC report that the court believed provided some of the impetus for the FCPA's passage, and a Conference Report from a subsequent Congress purporting to interpret what the earlier Congress meant when it enacted the FCPA.

This Court's opinions have reflected different views about whether a statutory ambiguity in a criminal statute may ever be resolved in the government's favor through resort to legislative history. *Compare*, *e.g.*, *Moskal v. United States*, 498 U.S. 103, 108 (1990) (applying lenity only to "situations in which 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") (citation omitted), *with Hughey v. United States*, 495 U.S. 411, 422 (1990) ("[L]ongstanding principles of lenity … preclude our resolution of the ambiguity against petitioner on the basis of general declarations of policy in the statute and legislative history."). There is much to be said for a rule that, although all citizens are presumed to know the text of the law and relevant interpretive judicial decisions, they are not presumed or required to study congressional reports, floor statements by individual congressmen, or similar forms of legislative history. *E.g.*, *Laton*, 352 F.3d at 314 (Sutton, J., dissenting) (stating that a contrary rule "stretches the necessary legal fiction that every person knows the law to the

breaking point") (citation omitted). Such statements are at best tangential to the legislative and interpretive process, and can frequently be found to express contradictory sentiments such that "[j]udicial investigation of legislative history has a tendency to become, to borrow Judge Leventhal's memorable phrase, an exercise in 'looking over a crowd and picking out your friends.'" *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 567 (2005) (citing Patricia M. Wald, *Some Observations on the Use of Legislative History in the 1981 Supreme Court Term*, 68 Iowa L. Rev. 195, 214 (1983)). This case presents an especially egregious example of the use of legislative history.

Moreover, the materials the Fifth Circuit relied upon do not even genuinely merit the label of "legislative history." The Fifth Circuit conceded that the actual legislative history of the FCPA's business nexus provision is entirely uninformative. If anything, Congress's rejection of the broader House version of the language counsels strongly *against* the government's interpretation. *See, e.g., Chickasaw Nation v. United States*, 534 U.S. 84, 93 (2001) ("We ordinarily will not assume that Congress intended 'to enact statutory language that it has earlier discarded in favor of other language.'") (citation omitted). The Fifth Circuit relied on an SEC report expressing that agency's views *prior* to passage of the FCPA, but that document is not legislative history in any conventional sense. It may have been part of the background informing Congress about the need for some legislative action in this area, but it obviously sheds no light on why, for example, Congress ultimately chose the narrower Senate language rather than the broader House bill (which would have been more clearly

consonant with the views previously expressed by the SEC). And the Fifth Circuit's reliance on *subsequent legislative history* from a later Congress is obviously illegitimate. As the petition explains, the Fifth Circuit completely misunderstood the *Red Lion* principle—which gives great weight to subsequent interpretive *legislation*, not to subsequent legislative history. *Red Lion*, 395 U.S. at 380-81. This Court continues to engage in a spirited debate about the general relevance of legislative history to statutory interpretation, but agrees unanimously that subsequent legislative history of the sort relied upon by the Fifth Circuit is essentially useless and should be wholly disregarded.

Although it may be possible to develop various opinions about the proper scope of the business nexus provision without resorting to sheer guesswork, there is no serious dispute that the conventional tools of statutory interpretation—including legislative history, correctly conceived—leave this statute ambiguous. This case therefore should have been resolved by the historic principle that ambiguities in criminal statutes are always resolved against the government.

### B. The Rule Of Lenity Is Crucially Important To The Fair And Orderly Administration Of Justice

The administration of justice would benefit greatly from an opinion by this Court refocusing the lower courts on the importance of the rule of lenity.

*First*, the rule of lenity is an important corollary of the due process principle that "'fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear.'" *United States v.*

*Bass*, 404 U.S. 336, 348 (1971) (citation omitted). Neither the punitive nor the deterrent purposes of the criminal law are sensibly served by punishing persons who reasonably believed that they were conforming their conduct to the requirements of the law. *E.g.*, *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. This proposition seems to me quite offensive to our historic sense of fairness in criminal law, indeed, perhaps to the Due Process Clause.").

*Second*, the rule of lenity minimizes hard questions of fair notice by construing criminal statutes narrowly and resolving ambiguities against the government. In that sense, lenity operates like a special-purpose application of the general doctrine of constitutional doubt by avoiding the need for courts to resolve difficult due process questions. *See, e.g.*, *Clark v. Martinez*, 543 U.S. 371, 380-81 (2005) (discussing lenity and constitutional doubt together); *Almendarez-Torres v. United States*, 523 U.S. 224, 270 (1998) (Scalia, J., dissenting) (noting that "the doctrine of constitutional doubt comes into play when the statute is 'susceptible of' the problem-avoiding interpretation, … when that interpretation is *reasonable*, though not necessarily the best").

*Third*, this Court has long recognized that the rule of lenity plays an important role in protecting legislative prerogatives in the definition of crimes and the evolution of the criminal law. There has never been any federal common law of crimes, *see United States v. Hudson & Goodwin*, 11 U.S. (7 Cranch) 32 (1812), and

the rule of lenity serves to ensure that in the criminal context judges do not engage even in interstitial "interpretive" lawmaking. The substantive scope of the criminal law is so important that it should be vested, exclusively, in the elected and accountable branches of government. "[B]ecause criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity." *Bass*, 404 U.S. at 348.

*Finally*, rigorous application of the rule of lenity will minimize circuit splits over the substantive scope of criminal statutes. As Justice Scalia has observed:

> In our era of multiplying new federal crimes, there is more reason than ever to give this ancient canon of construction [the rule of lenity] consistent application: by fostering unanimity in the interpretation of criminal statutes, it will reduce the occasions on which this Court will have to produce judicial havoc by resolving in defendants' favor a Circuit conflict regarding the substantive elements of a federal crime.

*Bryan v. United States*, 524 U.S. 184, 205 (1998) (Scalia, J., dissenting).

In *Bousley v. United States*, 523 U.S. 614 (1998), for example, this Court had to sort through a jurisprudential quagmire produced by its earlier decision in *Bailey v. United States*, 516 U.S. 137 (1995). *Bailey* had resolved a circuit split over the interpretation of a federal crime in a manner more favorable to defendants. Numerous habeas petitions were soon filed in the previously pro-government circuits by defendants arguing that they would have been factually innocent under the interpretation of the statute that this Court adopted in *Bailey*. This Court

ultimately held that persons convicted under the incorrect pro-government interpretations of the statute were entitled to *habeas* relief if they could show "actual innocence" under the interpretation adopted in *Bailey*. *See Bousley*, 523 U.S. at 623-24. But because, as a practical matter, claims of "actual innocence" were easy to make and hard to disprove without a hearing, the final practical result of the *Bailey* circuit split was that many of the defendants convicted in the circuits initially adopting the harsher (pro-government) interpretation of the statute ultimately gained a right to re-litigate their convictions in an evidentiary hearing on federal *habeas corpus* review.

The collateral fallout from this Court's decisions in *Bailey* and *Bousley* was a great burden for the federal district courts and the general administration of justice. Similar juridical chaos can be expected going forward whenever this Court resolves a circuit split about the substantive interpretation of a criminal statute. And it is all largely unnecessary, because if the rule of lenity is properly and consistently applied, circuit splits over the substantive interpretation of criminal statutes should be exceedingly rare. By granting review in this case and forcefully restating the importance of the rule of lenity, this Court can help forestall future unnecessary circuit splits and ensure that the vexing retroactivity and *habeas* problems encountered in *Bousley* do not again choke the federal docket.

## II. THE PROPER INTERPRETATION OF THE FCPA'S BUSINESS NEXUS REQUIREMENT PRESENTS AN ISSUE OF NATIONAL IMPORTANCE

The Chamber and its members are not advocating for any right to pay bribes overseas when those bribes do not relate to obtaining or retaining business. Even without an unjustifiable extension of the FCPA, U.S. businesses seek to comply with local anti-corruption laws in all of their activities. Indeed, U.S. businesses increasingly are adopting global anti-corruption policies that require compliance with the FCPA *and* local anti-corruption laws. Nonetheless, the Fifth Circuit's expansive interpretation of the FCPA merits review for several reasons.

### A. The Fifth Circuit's Decision Has Substantially Increased FCPA Compliance Costs

In order to avoid the risk of enterprise-threatening criminal liability, a U.S. company must be extremely vigilant about any interaction potentially subject to the FCPA. It may, for example, need to require multiple internal reviews and approvals, scrupulously document and retain the evidence of legitimate payments to "facilitat[e] or expedit[e] … routine governmental action," and devote substantial resources to vetting and monitoring third-party representatives (or refrain from delegating FCPA-covered interactions at all). And when it learns that conduct has occurred that may have violated the FCPA, a prudent U.S. company must pursue an internal investigation.

Those investigations are often extraordinarily expensive, because of their complexity and the need for U.S. lawyers and financial investigators to operate in

unfamiliar countries and languages. Comprehensive internal investigations often range from $1 million to $20 million. *See* Steven Pearlstein, *Cashing In on Corruption*, The Washington Post, Apr. 25, 2008, at D1. As of November 2007, in the midst of a long running investigation, electronics company Siemens disclosed that it has already spent $500 million on its internal investigation overseen by Debevoise & Plimpton. *See* Jack Ewing, *Siemens Braces for a Slap from Uncle Sam*, BusinessWeek, Nov. 26, 2007, at 78. ABB settled a case with the government for $16.4 million in fines and penalties, but the investigation and continued monitoring will cost more. ABB, a Swiss-Swedish engineering group, reported paying for 43,000 hours of lawyers' time and, as part of the settlement with the SEC, must hire a compliance monitor to oversee its operations. Tom Leander, *In China, You Better Watch Out*, CFO Asia (Mar. 20, 2006). Such costly "[c]ompliance monitors with three-year mandates have become a common feature of recent enforcement actions." Lucinda A. Low et al., *Enforcement of the FCPA in the United States: Trends and the Effects of International Standards*, *reprinted in* The Foreign Corrupt Practices Act: Coping with Heightened Enforcement Risks 93 (Lucinda A. Low et al. eds., 2007) ("Heightened Enforcement Risks"). In fact, nearly "every settled case since the Fifth Circuit's decision in *Kay* has included an agreement by the settling company to retain an independent consultant acceptable to the SEC and DOJ to evaluate the settling company's compliance with the FCPA." Claudius O. Sokenu, *FCPA Enforcement After* United States v. Kay: *SEC and DOJ Team Up To Increase Consequences of FCPA Violation*, *reprinted in* Heightened Enforcement Risks at 132. And those

direct costs do not account for the disruptive costs to the business's operations or other compliance priorities.

Safeguards and expenses like these are within what Congress contemplated when a U.S. company is attempting to obtain or retain business from or directed by a foreign government. In such contexts, the core purposes of the FCPA are implicated and companies are on clear notice of the need for heightened vigilance. Before this prosecution, the vast majority of federal criminal enforcement of the FCPA had been in the context of payments to obtain or renew contracts, consistent with the statutory prohibition on illicit payments "to assist such [business] in obtaining or retaining business for or with … any person." 15 U.S.C. § 78dd-2(a)(1). *See, e.g.*, *United States v. Liebo*, 923 F.2d 1308, 1311-12 (8th Cir. 1991); *United States v. Castle*, 925 F.2d 831, 832-33 (5th Cir. 1991) (per curiam); *United States v. Young & Rubicam, Inc.*, 741 F. Supp. 334, 344 (D. Conn. 1990).

The Fifth Circuit's reasoning in this case vastly increases the compliance burdens and costs on U.S. companies by greatly expanding the scope of the interactions potentially subject to criminal liability under U.S. law. The court held that "[a]voiding or lowering taxes reduces operating costs and thus increases profit margins, thereby freeing up funds that the business is otherwise legally obligated to expend. And this, in turn, enables it to take any number of actions to the disadvantage of competitors." Pet. App. 74a. The same can be said about virtually any contact with a foreign official that somehow—and no matter how indirectly—enables the company to take some action that reduces costs or otherwise benefits it.

Thus, for example, even small illicit payments by a third-party customs agent somewhere become a potential criminal violation of U.S. law, with a host of potential consequences for the U.S. company that retained the local agent that far exceed the significance of the offense in the jurisdiction where the conduct occurred.

### B. The Fifth Circuit's Decision Has Directly Resulted In Expansive Enforcement By The Government

The Fifth Circuit's substantive expansion of the FCPA has had a dramatic impact on U.S. enforcement activities. "Since the Fifth Circuit's decision in February 2004, the SEC and DOJ have intensified their respective FCPA enforcement programs." Sokenu, *supra*, at 142; *see also* Low, *supra* at 67. Although *Kay* at least required the government to prove at trial some connection between the illicit conduct and obtaining or retaining business, this standard in practice leads to investigations of *any* potential payment to government officials no matter how attenuated the business nexus. Indeed, many of the post-*Kay* investigations and prosecutions have relied on the *Kay* reasoning to target allegedly illicit payments that have little if anything to do with obtaining or retaining business. As one commentator put it:

> U.S. companies … face an ever-expanding interpretation of the FCPA by the enforcement agencies—the Justice Department on the criminal side and the Securities Exchange Commission at the civil end.
>
> The agencies operate largely unconstrained by judicial precedent: Staying in business is more

> important than setting precedent to most companies, so they typically plead guilty or settle with the government rather than risk the potentially ruinous consequences of going to trial.
>
> The dearth of case law and widening intolerance of bribery can turn compliance into an international game of pin the tail on the donkey.

John Gibeaut, *Battling Bribery Abroad*, ABA Journal 50 (Mar. 2007).

One area on which the government has focused intensely since *Kay* involves payments to reduce or avoid regulatory burdens. American businesses face substantial regulatory and operational burdens abroad.

> The ability of a company to operate in a host country … and the success of those operations, often turns on discretionary government decisions, including foreign investment or trade approvals; the obtaining of concessions (as in the natural resources sector), franchises, permits, or licenses (as in the telecommunications sector in many countries or in other 'sensitive' sectors), tax or customs rulings, and other regulatory actions or benefits. As a condition to trade or investment transactions, the government may require the foreign investor to partner with a local firm, subcontract certain work to local firms, meet specified local employment standards, build infrastructure, or satisfy other performance conditions.

Low, *supra* at 72.

While the FCPA contains an express safe harbor for so-called "facilitating payments" or "grease payments" necessary to induce a foreign official simply

to do his or her job, the line between a legitimate facilitating payment and a forbidden bribe is often murky at best. For example, the payments to local officials or law enforcement that the DOJ and SEC can potentially target in the wake of *Kay* are often necessary to protect a company's property or construction equipment from theft, to permit a company's ships to enter port without harassment, or to obtain necessary permits, licenses, or zoning rules to even begin operations in a country. A U.S. company may ultimately be seeking nothing more than protection of private property and the rule of law, but there is always a risk that U.S. prosecutors will attempt to recharacterize such payments as an illicit effort to influence local regulatory or enforcement discretion in a manner that confers, under the Fifth Circuit's broad understanding, some business advantage.

In the wake of *Kay*, there have been numerous FCPA actions predicated in part or in whole on payments made to reduce or avoid regulatory burdens, and many additional cases remain under investigation. Among others, the DOJ and SEC have entered into resolutions with companies alleged to have paid bribes to obtain (1) government inspection reports and laboratory certifications;[2] (2) reductions in annual employment tax obligations;[3] (3) reductions in general

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[2] *See SEC v. Delta & Pine Land Co.*, No. 07-cv-01352 (D.D.C. filed July 25, 2007); *In the Matter of Delta & Pine Land Co.*, SEC Admin. Proceeding File No. 3-12712, Cease & Desist Order at 3 (July 26, 2007), *available at* http://www.sec.gov/litigation/admin/2007/34-56138.pdf

[3] *In the Matter of Bristow Group Inc.*, SEC Admin. Proceeding File No. 3-12833, Cease & Desist Order at 3 (Sept. 26, 2007),

tax obligations;[4] (4) refunds on previous tax payments;[5] (5) customs clearance for goods or equipment that were improperly or illegally imported;[6] (6) customs clearance for goods delayed due to the failure to post bonds with sufficient funds to cover duties and tariffs;[7] (7) encourage the repeal or amendment of national regulations limiting foreign investments;[8] (8) repeal of a government decree requiring an environmental

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*available at* http://www.sec.gov/litigation/admin/2007/34-5633.pdf; Press Release, *SEC Institutes Settled Enforcement Action Against Bristow Group for Improper Payment to Nigerian Gov't Officials and Other Violations* (Sept. 26, 2007), *available at* http://www.sec.gov/news/press/2007/2007-201.htm.

[4] *In the Matter of Baker Hughes Inc.*, SEC Admin. Proceeding File No. 3-10572, Cease & Desist Order (Sept. 12, 2001), *available at* http://www.sec.gov/litigation/admin/34-44784.htm; *SEC v. KPMG Siddharta Siddharta & Harsono*, No. H-01-3105 (S.D. Tex. filed Sept. 11, 2001); *SEC v. Mattson*, No. H-01-3106 (S.D. Tex. filed Sept. 11, 2001).

[5] *SEC v. Triton Energy Corp.*, No. 97-cv-00401-RMU (D.D.C. filed Feb. 27, 1997).

[6] *In the Matter of BJ Servs. Co.*, SEC Admin. Proceeding File No. 3-11427, Cease & Desist Order (Mar. 10, 2004), *available at* http://www.gov/litigation/admin/34-49390.htm.

[7] *United States v. Vetco Gray Controls Inc.*, No. 07-cr-004 (S.D. Tex. filed Jan. 5, 2007).

[8] *SEC v. BellSouth Corp.*, No. 02-cv-00113-ODE (N.D. Ga. filed Jan. 15, 2002). It is worth noting that the Senate originally proposed language that would have prohibited payments made for the purpose of "obtaining or retaining business … or directing business to, any person or *influencing legislation or regulations* of [the foreign] government." S. 305, 95th Cong. § 103 (1977) (emphasis added). This language was ultimately rejected in favor of the current statute.

impact study to be conducted;[9] (9) expedited government registration certifications required by law to produce, warehouse, or market products in the country;[10] and (10) beneficial changes to laws and regulations relating to land development.[11] Additional ongoing investigations implicate payments to bribe tax, customs and administrative officials to obtain (1) reduced tax obligations; (2) importation of construction equipment in violation of customs regulations; (3) customs clearance for goods and equipment; (4) immigration and tax benefits; and (5) a beneficial tax audit.

The Fifth Circuit's decisions thus have greatly exacerbated compliance and investigative costs by extending the FCPA's coverage to essentially any contact between a company, or its agents and representatives, and any foreign government official. Instead of devoting compliance resources to prevent bribes to government officials to obtain or retain business, companies are being forced to expend vast amounts of time and money policing nearly every interaction—no matter how insignificant—with foreign officials, employees of state run enterprises, and virtually anyone who might in some way have influence with a foreign government. U.S. businesses are also

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[9] *See* News Release, *Monsanto Announces Settlements With DOJ and SEC Related to Indonesia* (Jan. 6, 2005), *available at* http://Monsanto.mediaroom.com/index.php?s=43&item=278.

[10] *See SEC v. Dow Chem. Co.*, No. 07-cv-336 (D.D.C. filed Feb. 12, 2007).

[11] *United States v. Halford*, No. 01-cr-00221-SOW-1 (W.D. Mo. filed Aug. 3, 2001); *United States v. Reitz*, No. 01-cr-00222-SOW-1 (W.D. Mo. filed Aug. 3, 2001); *United States v. King*, No. 01-cr-0190-DW (W.D. Mo. filed June 27, 2001).

significantly hampered in their ability to rely on local agents, such as customs agents, whose services may as a practical matter be essential (or even required by local law) to navigating unfamiliar regulatory environments, but whose behavior cannot be completely controlled. And these third party representatives are a huge source of potential liability because the FCPA explicitly makes businesses liable both for conduct they authorize and conduct as to which they are willfully blind or deliberately ignorant. 15 U.S.C. § 78dd-1(f)(2). To avoid allegations of willful blindness, companies subject to the FCPA must devote considerable resources to vetting and monitoring third parties and documenting that they have done so. Again, while such compliance activity is appropriate in the sales agent context, *Kay* vastly expands the universe of third parties that must get this enhanced scrutiny, far beyond the statutory purpose of preventing companies from buying business.

### C. The Business Community Needs This Court's Guidance

At a minimum, U.S. businesses need guidance about the substantive scope of the FCPA. Although enforcement actions continue to increase, there is little official guidance on how to comply with the FCPA. There are no implementing regulations or guidelines issued by the DOJ or SEC with respect to the FCPA's "business nexus" provision.

> In-house and outside counsel for U.S. corporations doing business abroad therefore must navigate through the extraterritorial application of a U.S. criminal bribery statute with unclear standards, in the context of complex and sensitive foreign business

> relationships, and in an environment where illicit payments are a common business practice of foreign competitors.

Donald Zarin, *Introduction* to *The FCPA in 2008: Not the Statute You May Have Thought It Was*, *reprinted in* The Foreign Corrupt Practices Act 2008: Coping with Heightened Enforcement Risks 20 (Lucinda A. Low et al. eds., 2008).

This uncertainty can place American businesses at a significant competitive disadvantage, by chilling vigorous competition that may in fact be consistent with a proper interpretation of U.S. law. As early as 1981, the Senate Committee on Banking, Housing and Urban Affairs proposed amendments to the FCPA because "the lack of clarity in the [FCPA's] provisions, and the incorporation into the statute of standards which are not realistic in the practical world in which international commerce operates" had led to "excessive" "lost opportunities of U.S. businesses." S. Rep. No. 97-209, at 3 (1981).[12] Better clarity about the substantive requirements of the FCPA is particularly

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[12] *See, e.g.*, Business Accounting and Foreign Trade Simplification Act: Joint Hearings on S. 708 Before the Subcomm. on Sec. and the Subcomm. on Int'l Fin. & Monetary Policy of the Comm. on Banking, Housing and Urban Affairs, 97th Cong. 1 (1981) ("The Foreign Corrupt Practices Act has been the source of a great deal of confusion and uncertainty in the business community.") (statement of Chairman D'Amato); Business Accounting and Foreign Trade Simplification Act: Joint Hearing on S. 430 Before the Subcomm. on Int'l Fin. & Monetary Policy and the Subcomm. on Sec. of the Comm. on Banking, Housing, and Urban Affairs, 99th Cong. 1 (1986) ("Complaints from the American business community about the vague and confusing definitions and enforcement provisions in the FCPA have continued unabated since the FCPA became law in 1977.") (statement of Chairman Heinz).

essential for smaller enterprises that lack the resources of a Fortune 500 company and cannot realistically implement the comprehensive and costly compliance plans that the government has become so fond of. In addition, it is not just U.S. businesses that are covered. Because the FCPA's anti-bribery provisions extend to U.S. "issuers," companies whose securities trade publicly in the United States, any company in the world that chooses to list securities in our markets is subject to the full scope of the FCPA, as defined in *Kay*. At a time when U.S. capital markets are facing increasing global competition, an unbounded criminal statute that is being aggressively prosecuted is hardly helpful.

The absence of conflicting circuit precedent on the specific language of the FCPA is no reason to defer review. This has been the landmark case for the substantive interpretation of the FCPA's "business nexus" requirement, and has effectively become the law nationwide. And it is not realistic to expect that the Fifth Circuit's interpretation will be the subject of substantial litigation in the near future. Because of the enterprise-threatening risks associated with any criminal indictment of a business enterprise, the government is able to force "increasingly onerous settlements that companies are compelled to accept." Sokenu, *supra* at 132. Litigating with the government in a criminal context simply is not a viable option for business enterprises in most circumstances. *See* Low, *supra* at 77. And, as the petition explains, this case presents several collateral legal issues that have divided the lower courts.

## CONCLUSION

The petition for certiorari should be granted, and the judgment should be reversed.

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