No. 14-189

IN THE
Supreme Court of the United States

JOEL ESQUENAZI and CARLOS RODRIGUEZ,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AND THE INDEPENDENCE INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

The Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 *et seq*. (FCPA), makes it unlawful for certain persons or entities—including all U.S. businesses—to make payments to a "foreign official" for the purpose of obtaining or retaining business. The FCPA defines "foreign official" as including "any officer or employee of a foreign government or any department, agency, or instrumentality thereof." 15 U.S.C. § 78dd-2(h)(2)(A). Petitioners were convicted of violating the FCPA, and given draconian prison sentences, based on evidence that they made payments to officials of Haiti Teleco, a stock corporation that provides telephone service within Haiti, based on the lower courts' conclusion that Haiti Teleco was an "instrumentality" of the government of Haiti.

Amici curiae address only the first question presented by the Petition:

Is a corporation an "instrumentality" of a foreign government within the meaning of the FCPA if it meets the definition of "instrumentality" established by the Eleventh Circuit—"an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own"—even though: (1) the foreign government has never designated the corporation as being a part of the government; (2) the corporation issues common stock, and the foreign government was not among the initial stockholders; and (3) the corporation performs a function (here, providing telephone service) that is not a traditional government function?

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INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation (WLF) is a non-profit public interest law firm and policy center with supporters in all 50 states.[1] WLF devotes a substantial portion of its resources to promoting business civil liberties and the rule of law.

In particular, WLF regularly appears in this and other federal courts, both as counsel of record for criminal defendants and as an *amicus curiae*, in opposition to overly expansive use of the criminal laws against legitimate businesses and their employees. *See, e.g., Yates v. United States*, No. 13-7451, *cert. granted*, 134 S. Ct. 1935 (2014); *King v. United States, cert. denied*, 132 S. Ct. 2740 (2012). WLF regularly publishes articles addressing the need to adopt reasonable limits on the scope of prosecutions under the Foreign Corrupt Practices Act of 1977, 15 U.S.C. §§ 78dd-1 *et seq*. (FCPA). *See*, *e.g.*, Michael E. Clark, *What Is a "Foreign Official"?: Vague Term Complicates Corrupt Practices Act Compliance*, WLF LEGAL BACKGROUNDER (Nov. 18, 2011) (available at www.wlf.org/upload/legalstudies/

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. More than 10 days prior to the due date, counsel for *amici* provided counsel for Respondent with notice of their intent to file. All parties have consented to the filing; letters of consent have been lodged with the Court.

legalbackgrounder/11-18-11Clark_LegalBackgrounder.pdf) (hereinafter, "WLF Backgrounder").

The Independence Institute is a public policy research organization created in 1984, and founded on the eternal truths of the Declaration of Independence. The Independence Institute has participated as an *amicus* or party in many constitutional cases in federal and state courts. Its *amicus* briefs in *District of Columbia v. Heller* and *McDonald v. Chicago* (under the name of lead *amicus* ILEETA, the International Law Enforcement Educators & Trainers Association) were cited in the opinions of Justices Alito, Breyer, and Stevens. The Independence Institute's briefs in *NFIB v. Sebelius* explicated the original constitutional structure of federalism.

Under the broad interpretation of the FCPA adopted by the Eleventh Circuit, businesses and their employees are potentially subject to criminal prosecution for payments made to a vast number of foreign individuals, including many individuals who are not considered government "officials" as that term is commonly understood. *Amici* are concerned that the appeals court's counter-intuitive statutory interpretation—the first appellate decision to address the meaning of the relevant provisions—will interfere with the ability of American firms to engage in routine overseas business transactions. Moreover, because no company is willing to assume the criminal prosecution risk that challenging the Justice Department's broad FCPA interpretations would entail, *amici* are concerned that the erroneous decision below will effectively create a nationwide standard for the foreseeable future unless this Court agrees to review the decision.

STATEMENT OF THE CASE

The facts of this case are set out in detail in the Petition. *Amici* wish to highlight several facts of particular relevance to the issue on which this brief focuses.

During the years at issue here, Petitioners Joel Esquenazi and Carlos Rodriguez were senior officers of Terra Communications Corp., a Florida company that purchased phone time from foreign vendors and resold the minutes to customers in the United States. Among the foreign vendors with whom Terra regularly conducted business was Telecommunications D'Haiti S.A. ("Haiti Teleco"), which controlled virtually all telecommunications services within Haiti.

As the United States readily conceded in its follow-on prosecution of a Haiti Teleco official, Terra fell victim to a "shakedown" by senior executives at Haiti Teleco. Although the government stated that "everyone knew" that Terra was contractually entitled to purchase phone time at low rates, the executives: (1) jacked up the rates charged to Terra; (2) "disconnected" Terra when it could not afford to pay the higher rates; and (3) told Terra that it would not be reconnected unless it paid large fees directly to the executives. *See* ROA, Transcripts, Book 7, 3/12/2012 Tr. (Doc. #774), at 90-91. Prosecutors described these events as "the art of the shakedown. [Haiti Teleco executive Jean Rene Duperval] reminded Terra [who] was in charge, he reminded them who had the power to disconnect or reconnect, and who had the power to lower rates." *Id.* at 91. Prosecutors added:

> That's what a shakedown can be. "I know you're entitled to 7 cents, but what can I get to make it happen?"
>
> "I'll give you $10,000 a month."
>
> "Sold." That is the violation here.

Id. at 99.

Prosecutors contended that Petitioners violated the FCPA when they acquiesced to the shakedown efforts and authorized payments to the Haiti Teleco executives between 2001 and 2004 in order to return rates charged for phone time to the lower rates stipulated in Terra's contract.

A principal issue contested at trial was whether Haiti Teleco was an "instrumentality" of the government of Haiti during the years in question; if not, then Petitioners did not violate the FCPA. *See* 15 U.S.C. § 78dd-2(a)(1) (prohibiting payments to a "foreign official" for the purpose of obtaining or retaining business); 15 U.S.C. § 78dd-2(h)(2)(A) (defining a "foreign official" as including "any officer or employee of a foreign government or any department, agency, or instrumentality thereof"). Petitioners contended that Haiti Teleco was *not* an instrumentality because that term does not encompass corporations that a foreign government did not create and that did not perform a "traditional government function," even if (as here) a foreign government temporarily owned a controlling share of the corporation's common stock.

The trial court rejected Petitioners' proposed

"traditional government function" instruction and instructed the jury that its "instrumentality" determination should consider, *inter alia*, whether Haiti Teleco "provides services to the citizens and inhabitants of Haiti" and whether the Haitian government owned a majority of Haiti Teleco's shares. Pet. App. 24. The jury convicted Petitioners on all counts, including one count of conspiracy to violate the FCPA and seven counts alleging specific payments made in violation of the FCPA. Petitioner Esquenazi was sentenced to 15 years' imprisonment; Petitioner Rodriguez was sentenced to seven years.

The Eleventh Circuit affirmed. Pet. App. 1-50. The court recognized that "[t]he FCPA does not define the term 'instrumentality'" and that neither it nor any other appellate court had previously addressed the meaning of the term. *Id.* at App. 10. It further recognized that "instrumentality" is "a word susceptible of more than one meaning." *Id.* at App. 11. After examining the language of § 78dd-2(h)(2)(A) and "the broader statutory context in which the word is used," *id.* at App. 13, the court concluded that, for FCPA purposes, an "instrumentality" is "an entity controlled by the government of a foreign country that performs a function the controlling government treats as its own." *Id.* at App. 20.

The court then included a noncomprehensive list of "some factors that may be relevant" in determining whether the court's "control" and "treats as its own" standards have been met, including whether the government owns a majority of the corporate stock and whether the corporation "provides services to the public at large in the foreign country." *Id.* at App. 20 - App.

23. Conspicuously absent from the list is any consideration of the specific services offered by the corporation, to determine whether those services are of the sort that are generally understood to be traditional government functions.

Applying its definition of "instrumentality" and examining the evidence in the light most favorable to the prosecution, the appeals court stated, "[W]e have little difficulty concluding sufficient evidence supported the jury's necessary finding that Teleco was a Haitian instrumentality." *Id.* at App. 27. In particular, the court pointed to evidence that Haiti owned most of the shares of Haiti Teleco and that the company maintained a monopoly over telecommunications services in the country. *Ibid.*

SUMMARY OF ARGUMENT

This case presents an issue of exceptional importance to the business community. Although the FCPA was adopted nearly 40 years ago, the statute has been the subject of remarkably few court decisions. The result is that there is very little definitive guidance regarding the statute's meaning that can assist businesses in avoiding criminal violations, yet they are urgently in need of such guidance in light of the significant increase in FCPA enforcement activity during the past decade.

The issue raised by this case—who are the "foreign officials" to whom the FCPA restricts payments?—is the single greatest source of confusion regarding the scope of the FCPA. Until the Eleventh Circuit ruled in this case, *no* federal appeals court had

addressed that issue. Moreover, *amici* are unaware of any other cases in the appellate pipeline that raise the issue. The reason for the dearth of cases is readily apparent. Although federal prosecutors have initiated numerous FCPA proceedings in recent years, *every* large business entity against which a proceeding was initiated has entered into a settlement agreement. In light of the huge negative consequences that would befall any company that contested and lost an FCPA case, businesses are categorically unwilling to challenge in court government assertions that payments it made violated the FCPA. Given the absence of any case law, review is urgently needed to provide the business community with concrete guidance regarding the FCPA's definition of a "foreign official" (and the subsidiary term "instrumentality"). In the absence of such guidance from this Court, businesses will have to navigate these unsettled waters with only the negligible guidance provided by the decision below—with very little likelihood that other appeals courts will weigh in any time soon. The Eleventh Circuit's guidance is thin indeed; by stating explicitly that its list of relevant factors is non-exclusive, the appeals court leaves American businesses to guess at when a corporation whose controlling shareholder is a foreign government will be deemed an "instrumentality" of that government for FCPA purposes.

Review is also warranted because the court below has adopted a definition of "instrumentality" that is far broader than anything set forth in the FCPA. The Eleventh Circuit's definition is inconsistent with the language of § 78dd-2(h)(2)(A) as well as the overall structure of the FCPA. In particular, because the word "instrumentality" appears in conjunction with the

words "department" and "agency," the maxim *noscitur a sociis* (a word is known by the company it keeps) calls into doubt the Eleventh Circuit's decision to include entities within the definition of "instrumentality" that bear little resemblance to the common understanding of a government "department" or "agency."

The appeals court's definition is also inconsistent with Congress's and this Court's use of the term "instrumentality" in other contexts. In particular, the Court has never used that term in conjunction with a corporation that was not created by the government itself and where the government merely acted in a manner consistent with its (temporary) role as a majority shareholder.

The appeals court's decision is particularly problematic because it arises in a criminal law context in which an individual's good-faith disagreement with a prosecutor's interpretation of a statutory term can (and did here) result in imposition of a lengthy prison term. The Eleventh Circuit conceded that the word "instrumentality" is capable of multiple meanings. It adopted an extremely broad definition of the term, and at the same time it heightened potential uncertainty by insisting that whether a particular entity is an "instrumentality" of a foreign government is a question of fact to be determined by the jury. Indeed, the universal response among defense lawyers was that the decision left the issue even more muddled than it had been previously. The U.S. Department of Justice has declined to exercise the full extent of its authority to provide safe-harbor guidance that would reduce the level of uncertainty. As a result, the competitiveness of American businesses in overseas markets suffers when

companies refrain from engaging in legal activities out of a fear that they might expose themselves to FCPA liability. Review is warranted to resolve that constitutionally intolerable level of uncertainty.

The United States has waived its right to respond to the Petition, perhaps in an effort to signal to the Court that the issues raised are unimportant and thus that review should be denied. The United States cannot in good faith assert that the issues raised herein are not of paramount importance. The principal question raised by the Petition (who qualifies as a "foreign official" for purposes of FCPA payment restrictions?) is at issue in a significant number of the numerous recent FCPA investigations, yet this is the first occasion the question has reached the appellate level, and there is little likelihood that the question will again reach this Court in the foreseeable future. At the very least, the United States ought to be directed to file a response and explain why it believes that the case is unworthy of the Court's attention.

REASONS FOR GRANTING THE PETITION

I. Review Is Warranted Because the Business Community Is Badly in Need of Guidance Regarding a Term That Has Gone Undefined for Far Too Long: Who Is a "Foreign Official" Under the FCPA?

The FCPA makes it unlawful for certain persons or entities—including all U.S. businesses—to make payments to a "foreign official" for the purpose of obtaining or retaining business. 15 U.S.C. § 78dd-2(a)(1). The statute defines the term "foreign official"

as including, *inter alia*, "any officer or employee of a foreign government or any department, agency, or instrumentality thereof." 15 U.S.C. § 78dd-2(h)(2)(A). The United States contends that the payments by Petitioners at issue in this case were improper because Haiti Teleco is an "instrumentality" of a foreign government (Haiti) and thus that Haiti Teleco officials to whom Petitioners made payments were "foreign officials" for purposes of the FCPA.

The FCPA does not define the term "instrumentality." Nor has the Department of Justice issued regulations for the purpose of clarifying the meaning of that term. Indeed, as the appeals court conceded, Pet. App. 10, the decision below marked the first occasion on which a federal appeals court addressed the meaning of that term, which has been part of federal law for nearly 40 years. Review of that decision is warranted to provide the business community with badly needed guidance regarding this frequently recurring issue.

As the appeals court recognized, "instrumentality" is "a word susceptible of more than one meaning." Pet. App. 11. Companies conducting business overseas have struggled throughout the FCPA's 40-year history to understand which of the foreign companies with which they deal meet the statute's definition of an "instrumentality" of a foreign government and thus are subject to the FCPA's payment prohibitions. In particular, the statute does not explain whether sovereign ownership or control of a *commercial* enterprise (*i.e.*, a profit-seeking enterprise that markets goods or services routinely made available

by the private sector) can ever qualify as an "instrumentality" of a foreign government that holds a controlling interest in the enterprise. There is considerable reason to doubt that the FCPA addresses payments made to employees of a commercial enterprise, regardless whether at the time of payment the controlling shareholder happened to be a foreign government. After all, as one commentator has noted, "Congress passed the FCPA in 1977 with a clear intent to address foreign bribery of government officials. The FCPA was not intended to prohibit private, or commercial bribery." WLF Backgrounder, *supra*, at 3. The special concern that Congress expressed regarding the corrosive, anti-democratic effect of bribes paid to government officials is viewed by many as inapplicable to payments made to individuals employed by an enterprise engaged in profit-seeking, commercial ventures.

One leading commentator has opined that "no FCPA element is more urgently in need of judicial scrutiny than the FCPA's 'foreign official' element." Michael Koehler, *The Facade of FCPA Enforcement*, 41 GEO. J. INT'L L. 907, 966 (2010) (concluding that in 2/3 of all recently settled FCPA proceedings, prosecutors pointed to a *commercial* enterprise as the "instrumentality" of a foreign government to which payments were made).

Professor Koehler's article explains at length why there have been *no* previous appellate decisions construing what constitutes a "foreign official" and an "instrumentality" of a foreign government within the meaning of the FCPA, despite the frequency with which

the issue arises. Virtually all FCPA investigations end with the company under investigation declining to contest prosecutors' FCPA claims, paying substantial fines, and entering into a pre-litigation settlement—either through a plea agreement, a non-prosecution agreement, or a deferred prosecution agreement. *Id.* at 909. Even when they disagree with the legal theories underlying prosecutors' FCPA claims, American companies have been unwilling to challenge those claims because they realize that a courtroom loss could result in death for the corporation and lengthy prison sentences for senior executives. *Id.* at 923-25. "Simply put, challenging the DOJ is too risky. In fact, no company has challenged the DOJ in an FCPA enforcement action in the last 20 years." *Id.* at 927; *see also id.* at 963-64 ("As a practical matter, to challenge a DOJ legal interpretation in an FCPA enforcement action, a company would first need to be criminally indicted, something no member of a board of directors is going to let happen regardless of the ultimate criminal fine or penalty the DOJ is seeking.").

Although these issues have not been litigated, they have arisen with growing frequency as American companies increase their level of activity in countries where host governments play a much more direct role in commercial enterprises than governments in North America and Western Europe typically do. For example, many of the overseas commercial affairs of citizens of the United Arab Emirates (UAE) are coordinated through Dubai World, an investment vehicle wholly owned and operated by the Emirate of Dubai. Dubai World's massive commercial activities span more than 100 countries around the world and are virtually never

conducted in the name of the Dubai government, yet one could plausibly argue under the Eleventh Circuit's test that each of the subsidiaries of Dubai World is an "instrumentality" of the UAE, and that payments made to employees of Dubai World are thus subject to FCPA restrictions. Similar issues arise with respect to commercial entities based in China, where the line between "private" commercial enterprises and those in which the national government exercises control is often quite murky.

The decision below provides little, if any, guidance for companies seeking answers to their "instrumentality" questions, and likely introduces additional confusion. In particular, by specifying that its list of relevant factors is non-exclusive, Pet. App. 20a, the Eleventh Circuit's decision leaves open the possibility that other, unspecified factors might control future "instrumentality" cases. And given the absence of other cases in the litigation pipeline raising similar issues, denial of the Petition in this case will deprive companies of badly needed guidance for the foreseeable future.

Moreover, this Petition presents the Court with a particularly attractive vehicle for addressing the "instrumentality" issue. There are no procedural issues lurking in the case that might prevent the Court from reaching the merits of Petitioners' claim that commercial entities that do not perform traditional governmental functions are not "instrumentalities" of a foreign government for purposes of the FCPA. Petitioners raised that claim at all stages of appellate review. The judgment is final—Petitioners are already

serving prison sentences—and the issue is outcome-determinative, *i.e.*, if Petitioners are correct that Haiti Teleco is not an "instrumentality" of the Haitian government, their convictions cannot stand.

II. Review Is Warranted Because the Eleventh Circuit Construed "Instrumentality" Far Too Broadly

Review is also warranted because the appeals court misconstrued the term "instrumentality." The court adopted a definition of that term that gives the FCPA a far broader scope than the statute admits. An examination of the language of 15 U.S.C. § 78dd-2(h)(2)(A), as well as the FCPA as a whole, indicate that its payment restrictions apply to employees of entities that perform traditional governmental functions, not more broadly (as the Eleventh Circuit held) to employees of virtually any entity over which a foreign government exercises control.

Petitioners' convictions rest on the United States's contention that Robert Antoine and Jean Rene Duperval—the two Haiti Teleco officials accused by prosecutors of "shak[ing] down" Terra—were "foreign officials" within the meaning of the FCPA. The statute defines a "foreign official" in relevant part as "any officer or employee of a foreign government or any department, agency, or instrumentality thereof." 15 U.S.C. § 78dd-2(h)(2)(A). While prosecutors do not contend that Haiti Teleco was either a "department" or "agency" of the Haitian government, they do contend that it was an "instrumentality" of the government—a term not defined in the statute or any implementing

regulation. That contention is inconsistent with normal rules of statutory construction.

Statutory construction begins with statutory text. Courts properly presume that the "legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain,* 503 U.S. 249, 253-54 (1992). "[V]ague notions of a statute's 'basic purpose' are . . . inadequate to overcome the words of its text regarding the specific issue under consideration." *Mertens v. Hewitt Assocs.*, 508 U.S. 248, 261 (1993). The word "instrumentality" refers to a thing that one uses to accomplish one's intended purposes. *See, e.g., Black's Law Dictionary* (9th ed. 2009) (an "instrumentality" is "A means or agency through which a function of another entity is accomplished, such as a branch or governing body."). When applied to a government, the use of the word "instrumentality" thus connotes an entity designed to carry out the functions/purposes of government. All agree that Congress adopted the FCPA to address payments made to government officials, not private commercial bribery. Accordingly, Congress's use of the word "instrumentality" suggests that Congress had in mind entities that carry out "government functions" as that term has traditionally been understood by Congress. The operation of a for-profit commercial enterprise (particularly where, as here, the private sector would be willing and able to step forward to fill any void created by the absence of a government-run commercial enterprise) is, while not unheard of, not a traditional function of governments.

The Eleventh Circuit's far broader construction

of the term "instrumentality" is not consistent with the foregoing analysis. The appeals court defined an "instrumentality" as any entity "that performs a function the controlling government treats as its own," without regard to the type of function at issue. Pet. App. 20. While the court included a noncomprehensive list of "some factors that may be relevant" in determining whether the court's "control" and "treats as its own" standards have been met, *id.* at App. 20 - App. 23, it is difficult to imagine that there could ever be a commercial enterprise of which a foreign government was the majority owner that did not fall within the Eleventh Circuit's definition of an "instrumentality" of the government.[2] Review is warranted to address the inconsistency between the statutory language and the appeals court's overly broad definition of the term

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[2] The Eleventh Circuit appears to have derived several of its "relevant" factors out of thin air, and they likely were adopted merely as a means of confirming its pre-determined conclusion that Haiti Teleco is an "instrumentality" of the government of Haiti. For example, one of the factors that the court said points in the direction of an "instrumentality" finding is if the entity "provides services to the public at large in the foreign country." Pet. App. 23. But virtually all commercial enterprises, Haiti Teleco included, seek to provide services to "the public at large" (on the theory that a larger customer base breeds increased profits), so this factor does nothing to distinguish government-controlled commercial enterprises that should be classified as government "instrumentalities" from those that should not be so classified. Another factor identified as relevant by the appeals court was "whether the entity has a monopoly over the function it exists to carry out." *Id.* at App. 22. But the fact that a foreign government has granted a monopoly to a favored commercial enterprise is more likely an indication that the government desires that the enterprise be extremely profitable, not that the enterprise is carrying out some uniquely governmental function.

"instrumentality."

The Eleventh Circuit's statutory interpretation is also inconsistent with the *noscitur a sociis* canon: a word should be given meaning by the words around it. The FCPA uses the word "instrumentality" in parallel with the words "department" and "agency," suggesting that entities meeting the definition of an "instrumentality" of a foreign government would be roughly similar to entities meeting the definition of a "department" or an "agency" of the government. The United States does not contest that a government-owned commercial enterprise would not ordinarily be classified as a "department" or "agency" of the government, a description more commonly applied to regulatory bodies (*e.g.*, EPA, FDA, or OSHA) or to entities that carry out uniquely governmental functions (*e.g.*, a police or fire department or the Federal Reserve). Congress's use of the word "instrumentality" in association with the words "department" and "agency" indicates that similar limitations should be applied to the word "instrumentality." As this Court has explained, "The maxim *noscitur a sociis*, that a word is known by the company it keeps, while not an inescapable rule, is often wisely applied where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961). *Accord, Nat'l Muffler Dealers Ass'n v. United States*, 440 U.S. 472, 485 n.20 (1972); *Gustavson v. Alloyd Co.*, 513 U.S. 561, 575 (1995).

Finally, even if a court were to conclude that § 78dd-2(h)(2)(A) is ambiguous with respect to whether

"instrumentalities" include commercial enterprises that do not carry out traditional governmental functions, the Eleventh Circuit's adoption of the broader interpretation is inconsistent with the rule of lenity. "The rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them." *DiPierre v. United States*, 131 S. Ct. 2225, 2237 (2011). The preceding analysis demonstrates, *at the very least*, that ascribing a more limited scope to "instrumentality" is at least as plausible as the appeals court's broader construction. Petitioners' convictions cannot stand if an "instrumentality" of a foreign government is construed as being limited to entities performing traditional government functions. There is no evidence that operating a for-profit telecommunications company is a traditional government function; telephone companies in the United States and many other countries have long been privately owned.[3]

In sum, review is warranted in light of the Eleventh Circuit's misconstruction of an important federal statute that has a significant impact on numerous American companies that conduct business

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[3] Indeed, Haiti Teleco was initially established as a privately owned corporation. The government of Haiti later purchased a great majority of the corporate stock, and the government took no steps to return the corporation to private ownership until after the events at issue in this lawsuit. But throughout the period during which Haiti was temporarily the majority shareholder and exercised control over the company, it neither altered the corporate structure nor directed the corporation to operate in a manner inconsistent with its roots as a profit-seeking commercial venture.

overseas.

III. Review Is Warranted to Address the Conflict Between the Eleventh Circuit's Decision and This Court's Decisions Regarding What Constitutes an "Instrumentality" of Government

Review is also warranted because the appeals court's definition of "instrumentality" is inconsistent with Congress's and this Court's understanding, in other contexts, regarding when an entity should be deemed an "instrumentality" of government. WLF recognizes that "instrumentality" has multiple meanings and that it is not wholly implausible that Congress intended to assign a different meaning to the word in the context of the FCPA than it has in other contexts. Nonetheless, the fact that the Court's understanding of an "instrumentality" of government in other contexts differs from the Eleventh Circuit's understanding of that term in the FCPA context provides at least some basis for suspecting that the appeals court has misunderstood Congress's meaning in this case.

This Court's traditional understanding of when an entity is an "instrumentality" of government is best illustrated by a series of cases that have addressed whether certain entities are subject to constraints imposed by the U.S. Constitution. The Court has explained that an entity is subject to constitutional constraints if and only if it is an "instrumentality" of the United States. Thus, the Court held in *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 394 (1995),

that Amtrak is subject to First Amendment constraints because, the Court concluded, Amtrak "is an agency or instrumentality of the United States." Amtrak argued that it was not an "instrumentality" because it was established in corporate form and because its directors, although appointed by the President, had some degree of independence (*e.g.*, the President could not remove them for cause). The Court disagreed, concluding that Amtrak was a government "instrumentality" because it had been created by Congress *to serve a specific governmental goal*: to ensure the continuation of passenger railroad service at a time when the private sector had concluded that it would no longer provide such services because they could not be operated profitably. *Id.* at 973-75. The Court contrasted the "instrumentality" status of Amtrak with that of corporations whose common stock or other securities are acquired by the federal government on a temporary basis:

> Amtrak is not merely in the temporary control of the Government (*as a private corporation whose stock comes into federal ownership might be*); it is established and organized under federal law for the very purpose of pursuing federal governmental objectives.

Id. at 973-74 (emphasis added). In other words, Amtrak was deemed an "instrumentality" of the federal government for First Amendment purposes not because its actions were controlled by the government (although they were) but because it was a corporation created to serve a uniquely governmental purpose (the provision of transportation services unavailable from private, profit-

seeking commercial enterprises).

The distinction the Court drew between Amtrak and Conrail (another railroad corporation controlled by the federal government)[4] is instructive. In a 1974 decision, the Court had determined that Conrail was *not* an "instrumentality" of the United States and thus was not subject to constraints imposed by the Fifth Amendment's Takings Clause. *Regional Rail*, 419 U.S. at 152 ("Conrail is not a federal instrumentality by reason of the federal representation on its board of directors."). Even though the federal government controlled both corporations through its control of their respective boards of directors, the key distinction between the two was that the responsibility of the Conrail directors was "to operate Conrail at a profit for the benefit of its shareholders," *id.*, while the responsibility of the Amtrak directors was to serve a governmental purpose (the provision of unprofitable passenger rail service that was otherwise unavailable). *Lebron*, 513 U.S. at 399. The Court explained, "Amtrak

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[4] In 1973, Congress arranged for the creation of the Consolidated Rail Corp. ("Conrail"), a corporation whose function was to assist in the reorganization and continued operation of eight railroads that had become bankrupt and were unable to reorganize successfully under existing bankruptcy law. Congress provided Conrail with substantial debt financing and then placed the federal government temporarily in control of Conrail's board of directors to protect the government's investment. *See Regional Rail Reorganization Act Cases*, 419 U.S. 102, 152 (1974) (Congress granted the federal government control of Conrail's board of directors "to protect the United States' important interest in assuring payment of the obligations guaranteed by the United States. Full voting control of Conrail will shift to the shareholders if federal obligations fall below 50% of Conrail's indebtedness.").

is worlds apart from Conrail: The Government exerts its control not as a creditor but as a policymaker, and no provision exists that will automatically terminate upon termination of a temporary financial interest." *Id.*

The interests of the Haitian government in Haiti Teleco resembled the interests of the United States in Conrail, not the interests of the United States in Amtrak. The Haitian government purchased its majority stock holdings in Haiti Teleco at some point after the corporation's formation. During the period that the government controlled Haiti Teleco, it operated the corporation just as it would have operated any other commercial venture. The telecommunications services Haiti Teleco provided undoubtedly would have been provided by the private sector on a profit-making basis had the government not adopted laws prohibiting competition, a prohibition that enhanced Haiti Teleco's profitability. The government controlled the appointment of senior corporate officials, but that was its right as the majority shareholder. Its control ended the moment the government sold its shares in connection with its privatization initiative. Accordingly, under this Court's traditional understanding of what constitutes an "instrumentality" of a government, Haiti Teleco was not an instrumentality of the Haitian government. Haiti Teleco was no more a government "instrumentality" than were General Motors and AIG when, for several years following the 2008 financial meltdown, the United States government controlled both corporations by virtue of being their majority shareholder.

IV. Review Is Warranted Because Companies Operating Overseas Are Facing a Constitutionally Intolerable Level of Uncertainty Regarding the Scope of the FCPA

Review is also warranted because continued uncertainty regarding the scope of the FCPA has created a constitutionally intolerable dilemma for companies operating overseas. As the Court has long recognized, the constitutional right of due process guarantees that no person should be forced "to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939). Due process also requires that penal requirements be drafted with sufficient clarity so as to discourage "arbitrary and discriminatory enforcement." *Skilling v. United States*, 561 U.S. 358, 403 (2010). In the absence of further clarification from this Court, the FCPA's restrictions on payments to "foreign officials" cannot meet those basic due process requirements.

The FCPA does not define the word "instrumentality." Although the statute grants the Department of Justice authority to issue guidance that would allow companies more easily to determine when a corporation with ties to a foreign government should be deemed an "instrumentality" of that government, *see* 15 U.S.C. § 78dd-2(e), it has steadfastly refused to provide the binding guidance that companies need if they are to compete vigorously in overseas markets while at the same time ensuring that they do not run afoul of U.S.

criminal laws.[5] The result is that business executives, when confronted with shakedown schemes of the sort to which Petitioners fell victim, are forced to guess at whether making the payments necessary to allow them to remain in business will also expose them to FCPA prosecution. As this case makes harshly clear, an incorrect guess regarding how federal prosecutors will choose to enforce the law can have disastrous consequences.

American businesses and their employees should not be required to continue to confront dilemmas of this sort. The Court should grant review in order to answer once and for all who are the "foreign officials" to whom the FCPA restricts payments.

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[5] The business community is in general agreement that the Justice Department regulations implementing § 78dd-2(e) are of little use for companies seeking guidance; they are overly cumbersome, provide little if any real guidance, and offer virtually no protection from subsequent prosecutions. *See* 28 C.F.R. §§ 80.1 *et seq*. The Justice Department's November 2012 informal FCPA guidance document is similarly unhelpful; it (1) includes no "hypotheticals" discussing application of the "foreign official" requirement; and (2) conflicts with SEC guidance by indicating that an entity might qualify as an FCPA "instrumentality" even when foreign government stock ownership is less than 50%. *See* Michael Koehler, *The Noticeably Missing Hypothetical and the Government's Two Instrumentality Positions* (Nov. 19, 2012) (available at http://www.fcpaprofessor.com/the-noticeably-missing-hypothetical-and-the-governments-two-instrumentality-positions).

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

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