# 18-1589

IN THE

# United States Court of Appeals

**FOR THE SECOND CIRCUIT**

UNITED STATES OF AMERICA,

*Appellee,*

—against—

REZA ZARRAB, aka Riza Sarraf, CAMELIA JAMSHIDY, aka Kamelia Jamshidy, HOSSEIN NAJAFZADEH, MOHAMMAD ZARRAB, aka Can Sarraf, aka Kartalmsd, MEHMET ZAFER CAGLAYAN, aka Abi, SULEYMAN ASLAN, LEVENT BALKAN, ABDULLAH HAPPANI,

*Defendants,*

MEHMET HAKAN ATILLA,

*Defendant-Appellant.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

## REPLY BRIEF FOR DEFENDANT-APPELLANT MEHMET HAKAN ATILLA

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## INTRODUCTION

The government's brief is most remarkable for what it does *not* say. In 72 pages, the government never disputes the IEEPA-conspiracy jury instructions "conflict[] with IEEPA's limitation of presidential regulatory authority to persons or property 'subject to the jurisdiction of the United States.'" Opening Br. 36 (quoting 50 U.S.C. § 1702(a)(1)). The government's failure *even to mention* the instructions' silence on that fundamental limitation is effectively a confession of error—although the government lacks the candor to acknowledge it. The government likewise cites no precedent adopting its novel interpretation of the sanctions-evasion provisions *or* its proposed application of 18 U.S.C. § 371 to alleged deception to evade or avoid secondary sanctions.

Nor can the government identify any evidence Atilla knew that Zarrab's scheme, after withdrawing euros and Turkish liras from Halkbank, would later use U.S. banks to convert funds to dollars; it relies instead on irrelevant expert testimony regarding energy markets, *never addressing* Atilla's explanation why that testimony does not establish his knowledge, *compare* Gov't Br. 31, *with* Opening Br. 51-53, and on documents that, so far as the record reflects, *Atilla never saw*, *see* Gov't Br. 31-32. And the government ignores Atilla's detailed explanations of the irrelevance of the government's principal authority supporting exclusion of Zarrab's jailhouse conversation regarding his readiness to lie to obtain a reduced sentence, *United*

*States v. Coven*, 662 F.2d 162 (2d Cir. 1981), *compare* Gov't Br. 68-70, *with* Opening Br. 75 n.18, and of the prejudicial effect of the instructional and evidentiary errors below, *compare* Gov't Br. 48-50, 70-72, *with* Opening Br. 44-47, 77-80. The government's repeated failures to furnish precedent and record citations responsive to Atilla's arguments demonstrate the fatal shortcomings in this unprecedented prosecution—the first *ever* for evading or avoiding the imposition of secondary sanctions.

## ARGUMENT

### I. IEEPA and the Regulations and Executive Orders Do Not Criminalize Conspiracies to Prevent Imposition of Secondary Sanctions—Especially by Foreigners Abroad

The government does not contest it asserted two alternative theories on the IEEPA-conspiracy count (Count 2) that tracked the distinction between "primary sanctions" (those prohibiting transactions between U.S. persons and Iran, *e.g.*, 31 C.F.R. § 560.204), and "secondary sanctions" (those restricting access to the U.S. financial system by *foreigners* the Treasury Secretary determines have done business with Iran, *e.g.*, 31 C.F.R. §§ 561.203-.204). *See generally* A348-49. First, Atilla allegedly conspired to evade or avoid the imposition of secondary sanctions on Halkbank by concealing sanctionable conduct, and second, Atilla allegedly conspired to cause primary-sanctions violations by causing U.S. banks to provide prohibited financial services for Iran's benefit. *See* A721, A779-80 & n.2. Nor does

the government contest the secondary-sanctions jury instructions allowed conviction for conspiring to violate IEEPA if Atilla and other foreign nationals merely "agree[d] to engage in … transactions" outside of the United States "designed to avoid the imposition of" sanctions on a foreign financial institution, such as Halkbank. SPA27.

Atilla's opening brief demonstrated the government's newly invented secondary-sanctions theory is "legally untenable because it is not a crime under IEEPA … to evade or avoid the imposition of such sanctions." Br. 30. The government's response ignores arguments it cannot overcome and attempts to buttress its flimsy secondary-sanctions theory by framing it in the language of *primary*-sanctions violations. *E.g.*, Gov't Br. 41 ("purpose of the Regulations is to cut off indirect access by Iran *to the U.S. banking system*" (emphasis added)); *id.* at 44 (alleging Atilla conspired to execute "transactions on behalf of Iran through … unwitting U.S. banks"). The government's efforts to evade Atilla's arguments cannot obscure the secondary-sanctions theory's fatal flaws; the erroneous jury instructions demand a new trial.

### A. The Government Implicitly Concedes Error in Instructing Jurors They Could Convict Atilla for Conspiring to Avoid Imposition of Secondary Sanctions

1. The district court instructed that jurors could convict Atilla of conspiring to violate IEEPA if he and other foreign nationals "agree[d] to engage in …

transactions" outside the United States "designed to avoid the imposition of [secondary] sanctions" on a foreign financial institution, such as Halkbank. SPA27. Remarkably, the government *never contests* this instruction exceeded "IEEPA's limitation of presidential regulatory authority to persons or property 'subject to the jurisdiction of the United States.'" Opening Br. 36 (quoting 50 U.S.C. § 1702(a)(1)). This critical "limitation[]" on "the President's IEEPA authority" was a central focus of Atilla's argument that his foreign conduct did not violate IEEPA. *Id.* at 9-11, 36-38, 61 n.15. Yet the government never mentions it; indeed, the phrase "subject to the jurisdiction of the United States" *never appears* in the government's brief. *E.g.*, Gov't Br. 42-43 (selectively quoting § 1702(a)(1) to omit phrase). The government does not contend actions allegedly taken *outside the United States* by *foreign* nationals to avoid imposition of secondary sanctions on *foreign* financial institutions somehow involve "person[s]" or "property[] subject to the jurisdiction of the United States." 50 U.S.C. § 1702(a)(1); *see also* Opening Br. 10, 36-37 (quoting definition of "person subject to the jurisdiction of the United States").

The government has therefore forfeited this issue. *See United States v. Cedeño*, 644 F.3d 79, 83 n.3 (2d Cir. 2011). Accordingly, the government has implicitly conceded that "IEEPA does not authorize the Executive Branch to prohibit foreign nationals, such as Atilla, from taking actions outside of the United States to evade or avoid the imposition of secondary sanctions on foreign persons," and that

the district court erred by "instructing the jury that it could convict Atilla for engaging in such conduct."[1] Opening Br. 37. That uncontested error *alone* requires a new trial on the IEEPA-conspiracy and money-laundering-conspiracy counts. *See id.* at 44-47.

2. The government cannot salvage Atilla's convictions by arguing his allegedly misleading statements during two meetings with U.S. officials in Washington, D.C., were made while he was "subject to the jurisdiction of the United States." *See* Gov't Br. 14-15, 24-25, 44. The jury instructions did not require any finding that the sanctions-avoiding transactions occurred in the United States. The instructions thus erroneously permitted jurors to convict based on purely foreign sanctions-avoiding conduct. *Cf.* A740 (refusal to give Atilla's proposed instruction that IEEPA-violating conduct must have "some connection to the United States"). Because the instructions were "overbroad," Atilla's IEEPA-conspiracy and money-laundering-conspiracy convictions cannot stand. *United States v. Silver*, 864 F.3d 102, 118 (2d Cir. 2017).

Moreover, to the extent the Court considers the D.C. meetings in assessing the instructional error's prejudicial effect or the sufficiency of the government's

[1] The government's failure to address IEEPA's textually limited scope largely renders academic any dispute about the presumption against extraterritoriality. *See* Gov't Br. 42-44.

evidence, those meetings—standing alone—would be insufficient to support a conviction on a sanctions-avoidance theory (even assuming such a theory were legally tenable, *see infra* pp. 8-19).[2] To start, the government offers no authority for the proposition that mere statements to U.S. officials constitute "transaction[s] … that evade[] or avoid[]" within the meaning of the relevant provisions. *E.g.*, 31 C.F.R. § 561.205(a); *see also Transaction*, *American Heritage Dictionary of the English Language* (4th ed. 2000) ("transaction" refers "especially [to] a business agreement or exchange").

Even if mere conversation came within the prohibition's scope, the government offers no evidence the March 14, 2012 meeting occurred *after* Halkbank General Manager Suleyman Aslan allegedly agreed to assist Zarrab's sanctions-evasion scheme. *See* Gov't Br. 5-6 (Aslan rebuffed Zarrab when he approached Aslan "in about March 2012," *after* which Zarrab solicited Turkish Minister's assistance "to overcome Aslan's resistance"); *cf. id.* at 14 (D.C. meeting occurred "around the same time that Halkbank started working with Zarrab"). Much less does the government show Atilla knew *then* of any decision to assist that scheme. Moreover, the meeting cannot support conviction on a secondary-sanctions-

[2] Because the D.C. meetings do not support a conviction on a secondary-sanctions-avoidance theory, the instructional error cannot be harmless on the theory jurors "would have necessarily" convicted based on those meetings alone. *United States v. Ferguson*, 676 F.3d 260, 277 (2d Cir. 2011).

avoidance theory because the relevant evasion-or-avoidance provisions *were not in effect* in March 2012. *See* Exec. Order No. 13,622 §§ 9(a), 15, 77 Fed. Reg. 45,897, 45,900, 45,902 (July 30, 2012) (effective July 31, 2012); 31 C.F.R. § 561.205(a) (effective Mar. 15, 2013); Exec. Order No. 13,645 §§ 13(a), 20, 78 Fed. Reg. 33,945, 33,950, 33,953 (June 3, 2013) (effective July 1, 2013).[3]

The government does not allege Atilla's statements at the October 2014 D.C. meeting were untrue; it merely alleges Atilla was not fully forthcoming with "information about the foreign trade in which Zarrab was involved." Gov't Br. 24. Nothing in IEEPA or the relevant regulations or executive orders suggests that failing to *volunteer* information about a foreign financial institution's alleged Iranian transactions could give rise to criminal penalties. The Due Process Clause and rule of lenity preclude such a novel interpretation of the vague evasion-or-avoidance provisions here. *See* Opening Br. 39-43.

Thus, *even if* jurors had been properly instructed, Atilla's only relevant conduct within the United States—the March 2012 and October 2014 meetings—

[3] The government also cites 31 C.F.R. § 560.203(a), the Iranian Transactions and Sanctions Regulations' evasion-or-avoidance provision. Gov't Br. 38. A version of that provision was in effect in March 2012. But those regulations set forth *primary* sanctions prohibiting "exportation *from the United States* of goods and services intended for Iran or its government." *Id.* at 36 (emphasis added) (citing 31 C.F.R. § 560.204). Section 560.203(a) is irrelevant to whether IEEPA criminalizes conspiring to evade or avoid the imposition of *secondary* sanctions.

are insufficient to support conviction on the theory that Atilla conspired to avoid the imposition of secondary sanctions. And because it is uncontested that "IEEPA does not authorize … prohibit[ing] foreign nationals … from taking actions outside of the United States to evade or avoid the imposition of secondary sanctions on foreign persons," Opening Br. 37, Atilla's actions abroad are legally irrelevant to the secondary-sanctions-avoidance theory.

### B. The Relevant Regulations and Executive Orders Do Not Proscribe Conspiracies to Avoid Imposition of Secondary Sanctions

While the government tellingly avoids discussing IEEPA's language, it contends the Act's implementing regulations and executive orders proscribe "any transaction designed to prevent the imposition of a prohibition" associated with secondary sanctions, such as prohibitions on opening or maintaining U.S. correspondent accounts. Gov't Br. 39. The government's position rests primarily on a strained surplusage argument. The government notes the relevant regulations and executive orders contain provisions prohibiting "[a]ny transaction … that evades or avoids, has the purpose of evading or avoiding, causes a violation of, or attempts to violate any of the prohibitions set forth" in those regulations and executive orders. 31 C.F.R. § 561.205(a); *accord* Exec. Order No. 13,622 § 9(a), 77 Fed. Reg. at 45,900; Exec. Order No. 13,645 § 13(a), 78 Fed. Reg. at 33,950. The government does not contest that "the language addressed to 'caus[ing] a violation' of a prohibition, 'attempt[ing] to violate' a prohibition, and 'evad[ing]' a prohibition" is

"best understood to refer to existing prohibitions that have already been imposed." Gov't Br. 38-39. But the government contends that, to give the words "evade" and "avoid" "independent meanings," "the 'avoid' clause" should be interpreted as "prohibit[ing] transactions designed to prevent the imposition of future prohibitions." *Id.* at 40-41. The government claims this interpretation accords with "the ordinary meaning" of "avoid"—"to prevent the occurrence of" or "to keep from happening." *Id.* at 39. That argument cannot survive cursory review.

*First*, because "evade" and "avoid" are close synonyms, it is appropriate to treat "evade or avoid" as a unitary phrase with a single meaning. *Avoid*, *Evade*, *Roget's II: The New Thesaurus* (1988). "Avoid" means "to keep away from," to "stay clear of," or "to prevent the occurrence or effectiveness of."[4] *Avoid*, *Webster's Third New International Dictionary* (1971); *accord Avoid*, *American Heritage Dictionary of the English Language* ("[t]o stay clear of" or "[t]o keep from happening"). Highlighting the words' interchangeability, the definition of "evade" uses "avoid": "to manage to *avoid* the performance of (an obligation)" or "escape from doing or experiencing (something disagreeable)." *Evade*, *Webster's Third New International Dictionary* (emphasis added); *accord Avoid*, *Evade*, *Oxford English*

[4] The "ordinary meaning" (Gov't Br. 39) of "avoid" encompasses "keep[ing] away from," "stay[ing] clear of," or "prevent[ing] the … effectiveness of" *existing* prohibitions on—for example—opening or maintaining U.S. correspondent accounts by using straw entities. *E.g.*, 31 C.F.R. §§ 561.203-.204.

*Dictionary*, http://www.oed.com (definitions of both "evade" and "avoid" use other term). Redundant doublets, such as "evade or avoid," "null and void," and "arbitrary and capricious," "abound in legalese," and the surplusage canon does not require artificially giving the words in such phrases independent meanings. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176-77 (2012); *accord Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012); *United States v. Bronstein*, 849 F.3d 1101, 1110 (D.C. Cir. 2017); *Doe v. Boland*, 698 F.3d 877, 881-82 (6th Cir. 2012).

The provisions' punctuation confirms they use "evade[] or avoid[]" as a unitary phrase with a single meaning. *See In re Lehman Bros. Mortgage-Backed Secs. Litig.*, 650 F.3d 167, 176 (2d Cir. 2011) (interpretation "informed by … punctuation"). The provisions separate verb phrases with *different* meanings using commas: "Any transaction … that *evades or avoids*, *has the purpose of* evading or avoiding, *causes a violation* of, or *attempts to violate* any of the prohibitions set forth in [the relevant regulations] is prohibited." *E.g.*, 31 C.F.R. § 561.205(a) (emphasis added). That no comma appears between "evades" and "avoids" demonstrates "evades or avoids" is a unitary phrase.

In other contexts, the government has argued "evade" and "avoid" are synonymous. *E.g.*, Brief for Commissioner of Internal Revenue at n.6, *Xilinx, Inc. v. Comm'r*, Nos. 06-74246, 06-74269 (9th Cir. Jan. 12, 2007), 2007 WL 708301

("'[E]vasion of taxes' is synonymous with 'tax avoidance.'"); Brief for United States at 18, *United States v. Morris*, No. 04-12880 (11th Cir. Dec. 21, 2004), 2004 WL 4802525 ("evading law enforcement … is plainly synonymous with avoidance of law enforcement"). Cases the government itself cites (Br. 39) treat "evade" and "avoid" as synonyms, and do not strain to give them different meanings when used in the commonplace phrase "evade or avoid." *See SUPERVALU, Inc. v. Bd. of Trustees of Sw. Penn. & W. Md. Area Teamsters & Emp'rs Pension Fund*, 500 F.3d 334, 341 (3d Cir. 2007); *Lopresti v. Pace Press, Inc.*, 868 F. Supp. 2d 188, 201 (S.D.N.Y. 2012). And countless cases addressing evasion-or-avoidance provisions in the sanctions context have drawn no distinction between the terms.[5]

*Second*, the government's position violates the interpretive canon against giving the same word different meanings when construing regulations. *See Bank of Am., N.A. v. Caulkett*, 135 S. Ct. 1995, 2000-01 (2015); *Clark v. Martinez*, 543 U.S. 371, 378 (2005). "[E]vade[] or avoid[]," "cause[] a violation of," and "attempt[] to violate" all have the same object—the phrase "any of the prohibitions set forth" in the relevant regulations and executive orders. *E.g.*, 31 C.F.R. § 561.205(a). The

[5] *E.g.*, *United States v. Soussi*, 316 F.3d 1095, 1100-04 (10th Cir. 2002); *United States v. $396,589 in U.S. Funds*, No. 17-587, 2018 WL 4828403, at *5 (D.D.C. Oct. 4, 2018); *Shanehsaz v. Johnson*, 259 F. Supp. 3d 894, 901 (S.D. Ind. 2017); *United States v. Saboonchi*, No. 13-100, 2014 WL 1831149, at *5 (D. Md. May 7, 2014); *United States v. Quinn*, 401 F. Supp. 2d 80, 104 (D.D.C. 2005); *Looper v. Morgan*, No. H-92-0294, 1995 U.S. Dist. LEXIS 10241, at *49 (S.D. Tex. June 23, 1995).

government understandably does not contest "the language addressed to 'caus[ing] a violation' of a prohibition, 'attempt[ing] to violate' a prohibition, and 'evad[ing]' a prohibition" are "best understood to refer to existing prohibitions that have already been imposed." Gov't Br. 38-39. After all, one cannot "cause[] a violation of" a non-existent prohibition. But the government ignores the phrase "the prohibitions" must have the same meaning in connection with the word "avoid[]." Therefore, the provisions at issue only proscribe evading or avoiding *existing* prohibitions, such as those precluding U.S. banks from opening or maintaining correspondent accounts for foreign financial institutions that the Treasury Secretary has determined have engaged in sanctionable activity. *E.g.*, 31 C.F.R. §§ 561.203-.204. The provisions do not proscribe transactions designed to evade or avoid the making of such determinations, which might lead to the imposition of *additional* prohibitions.

The government's position would effectively rewrite the provisions to read: "Any transaction … that evades, has the purpose of evading, causes a violation of, or attempts to violate any of the prohibitions set forth in [these regulations] is prohibited, *as is any transaction that avoids or has the purpose of avoiding the imposition of any such prohibitions*." But this Court is "not at liberty to rewrite" the provisions. *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 494 n.7 (2001). Giving the same statutory phrase—"any of the prohibitions"—"different meaning[s]" based on the verb phrase at issue "would be to invent a [regulation]

rather than interpret one." *Clark*, 543 U.S. at 378. And it would establish "the dangerous principle that judges can give the same [regulatory] text different meanings in different cases." *Id.* at 386.

The very different statutory framework and language distinguish this case from *United States v. Bando*, 244 F.2d 833 (2d Cir. 1957). *See* Gov't Br. 39-40. The Fugitive Felon Act at issue there, 18 U.S.C. § 1073, then prohibited "mov[ing] or travel[ing] in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, [for certain crimes], or (2) to avoid giving testimony in any criminal proceedings … in which the commission of an offense punishable by imprisonment in a penitentiary is charged." 244 F.2d at 836 n.3. *Bando* rejected the argument that "it would not be an offense" for a person "who committed [a covered crime] to flee across State lines before a prosecution against him had been formally instituted." *Id.* at 842-43. Instead, the Court held, it suffices "if the fleeing felon is 'subject to prosecution.'" *Id.* at 843 (citation omitted). Emphasizing that the word "charged" appeared only in the Act's second prong (proscribing flight "to avoid giving testimony"), the Court concluded the omission of "charged" from the "avoid prosecution" prong meant that offense did not require proof of a "pending criminal proceeding." *Id.*; *see also Russello v. United States*, 464 U.S. 16, 23 (1983) ("[I]t is generally presumed that Congress acts

intentionally and purposely in the disparate inclusion or exclusion." (citation omitted)).

Here, by contrast, a series of verb phrases share a single object ("any of the prohibitions") that the government does not contest has a particular meaning (*existing* prohibitions) when used in conjunction with several of the verb phrases. Gov't Br. 38-39. Because the *Bando* statute was not structured similarly, that case does not support the government's argument that the single phrase "any of the prohibitions" can change meaning to encompass not-yet-imposed prohibitions when used with the term "avoid."

*Third*, the government's position here—and the jury instructions below—conflict with the longstanding views of OFAC, the Treasury Department office primarily responsible for administering and enforcing Iranian sanctions, which "has historically taken the position" that "punitive measures" related to "secondary sanctions" are available "only after a foreign financial institution has been sanctioned." A780; Opening Br. 33-35 & n.8. In response, the government cites (Br. 44) its carefully worded statement that OFAC had "not previously been confronted" with the supposedly "unique circumstances" presented here. A779. But regardless whether these circumstances are "unique," they fall within the scope of what OFAC long understood to be the general rule—"punitive measures" are unavailable until "a foreign financial institution has been sanctioned." A780.

Although an agency may dislike that an established regulatory interpretation fails to prohibit conduct the agency disfavors, due process precludes the agency from retroactively applying a new interpretation to punish past conduct. *See FCC v. Fox Television Stations, Inc.*, 567 U.S. 239, 253-54 (2012). That is "Rule of Law 101." *PHH Corp. v. Consumer Fin. Protection Bureau*, 839 F.3d 1, 48 (D.C. Cir. 2016).

The government cannot take refuge in OFAC's supposed "'defer[ence]' to the Department of Justice 'with respect to criminal prosecutions.'" Gov't Br. 44 (quoting A780). OFAC *authored* § 561.205's evasion-or-avoidance provision. Iranian Financial Sanctions Regulations, 78 Fed. Reg. 16,403, 16,408 (Mar. 15, 2013). Therefore, it is the agency best situated to provide an authoritative interpretation of that provision.[6] Similarly, Executive Orders 13,622 and 13,645 (Gov't Br. 38) expressly delegate regulatory authority to the Treasury Department. Exec. Order No. 13,622 § 12, 77 Fed. Reg. at 45,902; Exec. Order No. 13,645 § 12, 78 Fed. Reg. at 33,950. And it is undisputed OFAC civilly enforces the evasion-or-avoidance provisions. *See* 50 U.S.C. § 1705(b); 31 C.F.R. pt. 501, app. A.

[6] OFAC's historical understanding of the provision it authored defeats the prosecution's contention that a contrary interpretation is necessary to further the provision's "purpose." Gov't Br. 41. Moreover, the government's proffered regulatory "purpose" of "cut[ting] off indirect access by Iran to the U.S. banking system," *id.*, is served through *primary* sanctions precluding use of U.S. banks. It does not require criminalizing efforts to avoid the imposition of *secondary* sanctions on foreign financial institutions for facilitating transactions *not* involving U.S. banks.

Recognizing that OFAC's historical interpretation of the relevant regulations and executive orders would ordinarily be accorded considerable weight, the government is left in the extraordinary position of arguing the responsible agency's consistent interpretation is "unambiguous[ly]" wrong. Gov't Br. 44. But the prosecution's position is far from unambiguously correct, and conflicts with the provisions' plain text.[7] *See supra* pp. 9-14. Regardless whether OFAC's historical interpretation merits strict deference under *Auer v. Robbins*, 519 U.S. 452, 461 (1997), it is "entitled to respect," *Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000) (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)); *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 159 (2012). Giving effect to OFAC's longstanding view is especially appropriate given the serious due process problems with retroactively applying the prosecution's current interpretation to Atilla's past conduct. *Cf. PHH Corp.*, 839 F.3d at 48 (due process may preclude retroactively applying change in agency's interpretation, even if prior interpretation did not merit deference).

*Fourth*, the government's position ignores that the same "evade or avoid" language has appeared in several sanctions provisions that do *not* authorize the

[7] Because the prosecution's position is not "unambiguously correct," the rule of lenity also requires "resolv[ing] the ambiguity in [the defendant's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994); *see also* Opening Br. 39-40. *Contra* Gov't Br. 47.

imposition of further sanctions based on findings that parties have engaged in sanctionable conduct. *E.g.*, Exec. Order No. 13,570, 76 Fed. Reg. 22,291 (Apr. 18, 2011); Exec. Order No. 13,466, 73 Fed. Reg. 36,787 (June 26, 2008); Exec. Order No. 12,959, 60 Fed. Reg. 24,757 (May 9, 1995); Exec. Order No. 12,957, 60 Fed. Reg. 14,615 (Mar. 15, 1995). Thus, "evade or avoid" *cannot* have the meaning the government claims; one cannot "avoid the imposition of sanctions" under a provision that does not authorize additional sanctions. Gov't Br. 46.

*Finally*, interpreting the provisions here to proscribe transactions undertaken "to avoid the imposition of sanctions" would risk rendering them unconstitutionally vague. *Id.* The government does not dispute that its position here requires drawing a line between lawful nondisclosure that a foreign entity has engaged in potentially sanctionable transactions and unlawful sanctions avoidance. Opening Br. 41. Nor does the government dispute the language of IEEPA and the relevant regulations and executive orders provides no guidance on how to draw that line. *Id.* The government argues only that the requirement that the defendant must have acted "willfully" "alleviate[s] vagueness concerns." Gov't Br. 45-46 (citation omitted). But scienter requirements are no panacea for vagueness issues. *See Cramp v. Bd. of Pub. Instruction of Orange Cty.*, 368 U.S. 278, 285-88 (1961) (holding provision vague despite scienter requirement); *Screws v. United States*, 325 U.S. 91, 105 (1945) (plurality op.) ("[W]illful conduct cannot make definite that which is undefined.");

*McCormack v. Herzog*, 788 F.3d 1017, 1032 (9th Cir. 2015) ("scienter requirement … d[id] not make … [statutory terms] any less vague"). A "contrary rule would rob the vagueness doctrine of all of its meaning," for legislatures could enact all manner of vague laws, slap scienter requirements on them, and then leave it to the vagaries of prosecutorial discretion and individual jury verdicts to determine who suffers criminal penalties. *United States v. Loy*, 237 F.3d 251, 265 (3d Cir. 2001).

This case illustrates why scienter requirements do not exempt statutes from vagueness analysis. The district court's instructions authorized jurors to convict Atilla of "willfully" engaging in conduct—conspiring "to avoid the imposition of [secondary] sanctions"—that *OFAC itself* did not view as unlawful. SPA27; *see also* A780. Permitting jurors to find a defendant "acted with knowledge that his conduct was unlawful," *United States v. Homa Int'l Trading Corp.*, 387 F.3d 144, 147 (2d Cir. 2004) (per curiam) (citation omitted)—even though that finding conflicts with the longstanding view of the agency administering the relevant regulations—runs afoul of separation-of-powers principles and concerns regarding fair notice and arbitrary and discriminatory enforcement underlying the vagueness doctrine. *See* Opening Br. 40-42.

In any event, this Court need not decide the government's interpretation of the relevant provisions would *actually* render them unconstitutional. *See Clark*, 543 U.S. at 381-82. "[S]erious doubt of constitutionality" alone compels adopting

another "permissible" construction avoiding the constitutional concerns. *Crowell v. Benson*, 285 U.S. 22, 62 (1932). Accordingly, vagueness-based due process concerns caused the Supreme Court in *Skilling v. United States*, 561 U.S. 358, 402-12 (2010), to adopt a narrow interpretation of "honest-services fraud," rejecting the government's argument that "[t]he specific intent requirement eliminate[d] fair notice concerns," permitting a broader construction, Brief for the United States at 40-41, *Skilling v. United States*, No. 08-1394 (U.S. Jan. 26, 2010), 2010 WL 302206. Similarly here, the willfulness requirement does not dispel serious constitutional concerns presented by the government's vague interpretation of the relevant provisions.

### C. The Instructional Error Was Not Harmless

The government has not met its "burden of establishing" "beyond a reasonable doubt" that the erroneous secondary-sanctions-theory instructions were harmless. *Silver*, 864 F.3d at 119. The government's harmlessness argument relies exclusively on the contention that Atilla's bank-fraud and bank-fraud-conspiracy convictions indicate "the jury necessarily found Atilla guilty" under the primary-sanctions theory that he conspired to cause U.S. banks to provide Iran financial services. Gov't Br. 48-50. That argument fails for two reasons. First, the jury's acquittal on the substantive money-laundering count (Count 5) is inconsistent with the bank-fraud conviction, making it impossible to say "beyond a reasonable doubt" that a properly

instructed jury would have convicted on the secondary-sanctions theory. Opening Br. 46-47. By failing to address that argument, the government has forfeited the issue. *See Cedeño*, 644 F.3d at 83 n.3. Second, the bank-fraud and bank-fraud-conspiracy convictions must be reversed because the government presented insufficient evidence Atilla knew Zarrab's scheme would use U.S. banks. Opening Br. 47-56; *infra* pp. 20-27. Because the government has not established harmlessness, Atilla at minimum is entitled to a new trial on the IEEPA-conspiracy and money-laundering-conspiracy counts (Counts 2 and 6). Opening Br. 47.

## II. The Government Presented Insufficient Evidence Atilla Knew Zarrab's Scheme Would Use U.S. Banks

Thus, the government's secondary-sanctions theory of liability for the IEEPA-conspiracy count (Count 2) is legally invalid. The government's alternative *primary*-sanctions theory for that count fails for lack of evidence—and thereby renders unsustainable Atilla's convictions for bank fraud (Count 3), bank-fraud conspiracy (Count 4), and money-laundering conspiracy (Count 6). The government does not dispute its primary-sanctions theory and Atilla's convictions on Counts 3, 4, and 6 required proof Atilla knew Zarrab's sanctions-evasion scheme would use U.S. banks. Opening Br. 47-49. Because the government presented *no* evidence—much less legally sufficient evidence—that Atilla had such knowledge, the district court erred by denying his motion for a judgment of acquittal on Counts 2, 3, 4, and 6. *Id.* at 50-56.

Even if Atilla knew the "purpose of [Zarrab's] scheme" was to withdraw funds from Halkbank for use in "international payments" on Iran's behalf, Gov't Br. 29, that falls far short of establishing Atilla knew payments would be cleared through U.S. banks. To understand why, it is important to recall the government does not dispute several significant facts:

- As the government explained, "the Halkbank part of [the scheme]" and Atilla's involvement ended with funds' withdrawal from Halkbank. Opening Br. 17-18 (quoting A717).

- *Every* transaction involving Halkbank was conducted in euros or Turkish liras; *never* U.S. dollars. *Id.* at 17.

- After the withdrawals from Halkbank, Zarrab and his companies made the "international payments" on their own, without Halkbank or Atilla. *Id.* at 18; *see also* Gov't Br. 30 (quoting Zarrab: "I made the international payments").

- There is no direct evidence Atilla was ever told any "international payments" would be made in dollars or cleared through U.S. banks. Opening Br. 21.

- "International payments" routinely are made in currencies other than dollars, including euros, which the government's own expert testified are "accepted worldwide." A354.

- Since essentially "[e]very foreign bank in the world has U.S. dollars in their possession," even dollar-denominated international payments are not always cleared through U.S. banks. Opening Br. 18 (quoting former OFAC Director Adam Szubin); *cf.* Gov't Br. 31 ("U.S.-dollar transactions *usually* involve U.S. banks" (emphasis added)).

Accordingly, the government does not seriously contend jurors could legitimately have inferred *solely* from Atilla's alleged knowledge that the scheme's purpose was to facilitate "international payments" for Iran that Atilla *also* knew Zarrab would use U.S. banks after Halkbank's involvement ended.[8] *See Langston v. Smith*, 630 F.3d 310, 314 (2d Cir. 2011) ("[C]onviction[s] based on speculation and surmise alone cannot stand, and courts cannot credit inferences within the realm of possibility when those inferences are unreasonable." (citations omitted)); *United States v. Friedman*, 300 F.3d 111, 124 (2d Cir. 2002) (similar). The government thus needed to identify additional evidence from which jurors could find beyond a reasonable doubt that Atilla knew some "international payments" would clear through U.S. banks. It has not done so.

To start, the government cites Mark Dubowitz's expert testimony that "the U.S. dollar is the most important international currency in global energy markets,"

[8] The government does not assert—thus forfeiting—a "conscious avoidance" argument. *See Cedeño*, 644 F.3d at 83 n.3; *cf.* Opening Br. 53-55.

Gov't Br. 31, without addressing Atilla's explanation of why that testimony lacks relevance (Br. 50-53). The dollar's prominence in energy markets would only *potentially* be relevant if oil-rich Iran used the withdrawn funds (exclusively denominated in euros and Turkish liras while at Halkbank) *to purchase energy-related products*, such as petroleum. But the government does not claim Iran did so, and even if Iran had, liability cannot rest on such "industry-wide" data, even in civil cases. *Id.* at 51-53. Dubowitz's testimony that the National Iranian Oil Company wanted access to "convertible currencies like the U.S. dollar *or the Euro*" that are "accepted worldwide" hardly demonstrates Atilla knew Zarrab's "international payments" would be made in dollars rather than other widely accepted currencies, such as euros.[9] A354 (emphasis added). If anything, it would have been reasonable for Atilla to think Zarrab would *avoid* U.S. banks given the stringent U.S. sanctions regime.

The government also cites evidence that Atilla rejected an Iranian request at an October 2012 meeting for Halkbank to handle Iran's "international payments" directly, that Halkbank restricted "transfers of dollar accounts" (A631, A888), and that Atilla allegedly "lied to and concealed things from U.S. officials charged with

[9] The same is true of Under Secretary David Cohen's testimony that Iran was "trying to get both physical currency, in particular dollars *or euros, as well as acquiring gold*." A571 (emphasis added); *accord* A575.

sanctions enforcement." Gov't Br. 32-34. But that evidence at most suggests Atilla and Halkbank attempted to minimize the risk the bank would be subjected to secondary sanctions restricting access to the U.S. financial system—a "death sentence" for a major financial institution. A643 (Szubin); *accord* A712 (government's summation); Gov't Br. 3. Because secondary sanctions may be imposed for Iran-related transactions *not* involving U.S. banks, *see, e.g.*, 31 C.F.R. §§ 561.203-.204, the cited evidence in no way shows "Atilla was aware that [Zarrab's] scheme involved international payments through U.S. banks," Gov't Br. 34; *cf. United States v. Nusraty*, 867 F.2d 759, 765 (2d Cir. 1989) ("false exculpatory statement" insufficient to establish knowledge of "the conspiracy charged"); *United States v. Johnson*, 513 F.2d 819, 824 (2d Cir. 1975) (similar); *United States v. McConney*, 329 F.2d 467, 470 (2d Cir. 1964) (false statement insufficient to establish intent or knowledge). Indeed, Atilla took pains to ensure Halkbank would not participate in *any* Iranian transactions involving U.S. banks, even if permitted under U.S. law. Atilla firmly instructed Halkbank employees: "Do not send US banks transactions related to Iran—irrespective of whether they are licensed or not. Do not do USD [U.S. dollar] transactions in any way whatsoever."[10] A921.

[10] Atilla's alleged statement to OFAC Director Adam Szubin regarding Halkbank's restrictions on U.S.-dollar transfers merely reflects this instruction. *See* Gov't Br. 33-34 (citing A631). It in no way demonstrates Atilla knew Zarrab's scheme would

Illustrating the weakness of the government's case, of the thousands of trial exhibits, the government focuses on two documents that, so far as the record reflects, *Atilla never saw*—and which even the government's obliging witness Zarrab never connected to Atilla. Gov't Br. 31-32. The first—a June 20, 2012 email from Levent Balkan, Halkbank's foreign-operations-department head, to General Manager Suleyman Aslan, SA44-47—was among hundreds of exhibits admitted *en masse* when the government closed its case-in-chief. Trial Tr. 1884. The government made no effort to call jurors' attention to the email, for good reason. There is no evidence Atilla (who was not copied on the email) knew of it. Also, the portion of the email the government quotes (Br. 32) speaks only of "international payments" and says nothing about payments in dollars, much less using U.S. banks. Indeed, the email speculates Iran might try using "gold as [a] payment instrument[]." SA46.

The government also cites Zarrab's undated food-scheme diagram, which Turkish police purportedly seized from *Suleyman Aslan's office*. Gov't Br. 32; SA11-12; Trial Tr. 1677. There is no evidence Atilla ever saw that diagram or any similar document. The government's bald speculation that Atilla *might* have been "privy to similar discussions and documents" (Br. 32) lacks any basis in Zarrab's days of detailed testimony, and ignores Zarrab's admission that he lied to Atilla to

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use U.S. banks. To the contrary, Atilla's alleged insistence that Halkbank "never allows transfers of dollar accounts" indicates Atilla *lacked* such knowledge. A631.

conceal aspects of the scheme from him. *See* A512-13, A541. At trial, the government refrained from asking Zarrab the crucial question whether the diagram's single use of a dollar sign referred to actual payments in U.S. dollars, or whether it was instead a generic symbol representing monetary transactions in any currency. *See* A434. Furthermore, Zarrab's rough diagram is highly ambiguous—it literally contains a question mark. SA11-12. Atilla's conviction should not hinge on a couple unexplained pen strokes in a document the government *made no effort to show he ever saw*.

Finally, the government suggests that the fact that "millions of dollars" cleared through U.S. banks somehow proves Atilla knew Zarrab would use such banks. Gov't Br. 34-35. Simply assuming defendants "intended the result they achieved," *id.* at 35, would relieve the government of ever having to prove *mens rea*. It would be singularly inappropriate to assume away the very matter in dispute—whether Atilla knew Zarrab's scheme would "result" in transactions through U.S. banks. As explained above, it is undisputed that "the Halkbank part of" (and Atilla's involvement in) Zarrab's scheme ended with the funds' withdrawal from Halkbank, A717; that every transaction involving Halkbank was conducted in euros and Turkish liras; and that Zarrab and his companies alone handled Iran's international payments. *See supra* p. 21. Merely aggregating multiple transactions about which

Atilla lacked knowledge does not somehow prove his knowledge. Zero to the hundredth power is still zero.

The government's closing argument confirms that much of the evidence the government now cites is irrelevant to whether Atilla knew Zarrab's scheme would use U.S. banks. In trying to convince jurors Atilla had such knowledge, the government *never mentioned* Dubowitz's testimony, Balkan's June 2012 email, Zarrab's diagram, or Atilla's (truthful) statements to U.S. officials that Halkbank refused to permit dollar-denominated transactions with Iranian funds. Instead, it focused primarily on Zarrab's testimony that Atilla allegedly attended the October 2012 meeting where "international payments" were discussed. A715 (meeting shows "what Mr. Atilla knew"); A717 (similar). But mere knowledge of "international payments" falls far short of establishing Atilla knew some of the transactions Zarrab and his companies conducted entirely on their own would clear through U.S. banks, especially given the ready availability of euros and other foreign currencies, as well as foreign banks with ample dollar deposits. Atilla is entitled to a judgment of acquittal on Counts 2, 3, 4, and 6.

## III. Atilla's Challenge to Count 1 Is Preserved and Meritorious

### A. Atilla Preserved His Arguments

The record flatly contradicts the government's argument (Br. 52) that Atilla failed to preserve his contention that the Count 1 charge of conspiracy to defraud the

United States should have been dismissed. Here, Atilla argues 18 U.S.C. § 371 "cannot be used to supplement the sanctions regulations issued under IEEPA," which "do not prohibit the alleged secondary-sanctions evasion efforts on which the § 371 charge is premised." Opening Br. 28. That mirrors Atilla's motion to dismiss the indictment:

> Case law interpreting the [*United States v. Klein*, 247 F.2d 908 (2d Cir. 1957)] conspiracy prong of 18 U.S.C. § 371 makes clear that where a scrupulously crafted regulatory scheme articulates clear limitations on the proscription of evasive conduct—conduct identical to that addressed by Section 371—those specific limitations govern, and *Klein* cannot be used to supplement or end run those specific limitations.

A270.[11] The government's characterization of Atilla's motion below equally describes Atilla's argument here: "According to Atilla, the sanctions regime against Iran is carefully calibrated to achieve the United States' foreign policy goals, such that allowing a prosecution under a separate law, like Section 371, would upset the balance struck by Congress and the Executive branch." Gov't's Mem. of Law in Opp'n to Mot. to Dismiss 21 (Oct. 16, 2017), ECF No. 308; *accord id.* at 24 (Atilla

[11] *See also* A269 ("sanctions laws provide the exclusive basis for punishing evasive conduct" (capitalization omitted)); *id.* ("[T]he Sanctions Regime [was] intended to occupy the entire field of sanctions, to the exclusion of all other laws, … and the Sanctions Regime provides that evasion or avoidance of sanctions can be prosecuted *only* with respect to efforts to avoid or evade violations of 'prohibitions.'"); A269-70 ("foreign policy" considerations militate against applying § 371 to alleged sanctions evasion); A273 (§ 371 charge is unconstitutionally "vague" (citation omitted)).

"argues that because he cannot be prosecuted under IEEPA he also cannot be prosecuted under Section 371").

Atilla also preserved his contention that he is entitled to a judgment of acquittal on Count 1. The government ignores that Atilla's Federal Rule of Criminal Procedure 29(a) motion did not repeat in full detail his dismissal motion's § 371 argument because the district court's rejection of that argument was the law of the case. Opening Br. 57-58. But Atilla did reassert a challenge to the § 371 charge, preserving his request for a judgment of acquittal. *See, e.g.*, A810 (seeking judgment of acquittal "on all six counts," including § 371 charge); A811 (arguing "government cannot proceed … on [a sanctions] evasion theory" under § 371); A812 (applying "*Klein* to a foreigner is legally unjustifiable"); A812-13 ("no rational jury could conclude" Atilla "'impeded' Treasury's functions").

In any event, Atilla indisputably presented below his basic claim that the § 371 charge is invalid. Therefore, Atilla "can make any argument in support of that claim" here; he is "not limited to the precise arguments [he] made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *accord United States v. Litvak*, 808 F.3d 160, 175 n.17 (2d Cir. 2015).[12]

[12] The government's cited cases (Br. 51) are inapposite. *See United States v. Ubiera*, 486 F.3d 71, 73-74 (2d Cir. 2007) (defendant did not rely on guidelines provision below); *United States v. Finley*, 245 F.3d 199, 202 (2d Cir. 2001) (defendant failed to renew motion for acquittal at evidence's close after denial when government

Because Atilla preserved his Count 1 challenge, this Court's review is *de novo*. Opening Br. 57-58.

### B. This Court Should Not Use § 371 to Supplement IEEPA Sanctions Regulations

The government demands an extraordinary exercise of judicial lawmaking. Although courts have applied § 371 "to conspiracies to obstruct the functions of a variety of government agencies," Gov't Br. 54, the government cites no case affirming a § 371 conviction under remotely similar circumstances. Based on § 371's spare text, which says *nothing* about international sanctions, the government asks this Court to hold the statute criminalizes allegedly deceptive conduct to evade or avoid the imposition of secondary sanctions. It asks the Court to take that step although the Executive Branch has *declined* to use its regulatory authority to proscribe such conduct under IEEPA—which *specifically addresses* international sanctions. *See supra* pp. 8-19. More astonishingly, the government asks this Court to apply § 371 to foreign sanctions-avoidance activities by foreign persons, even though Congress in IEEPA *declined* to grant such broad extraterritorial regulatory authority—as the government effectively concedes. *See supra* pp. 3-8; *cf. United States v. Hoskins*, 902 F.3d 69, 80 (2d Cir. 2018) (no conspiracy liability "when Congress demonstrates an affirmative legislative policy to leave some type of

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rested); *United States v. Delano*, 55 F.3d 720, 726 (2d Cir. 1995) (granting plain-error relief where defendant failed to cite statutory definition below).

participant in a criminal transaction unpunished"). The government's unprecedented effort to use § 371 to arrogate authority IEEPA withheld "warrants considerable judicial skepticism." *United States v. Coplan*, 703 F.3d 46, 61 (2d Cir. 2012). And the Executive's and Congress's determinations *not* to proscribe the conduct at issue under IEEPA demonstrate judge-made prohibitions under § 371 are unnecessary for "the protection and welfare of the government." Gov't Br. 53 (quoting *McNally v. United States*, 483 U.S. 350, 358 n.8 (1987)).

The Justice Department's *post hoc* charging decision (*id.* at 55) provides no basis for applying § 371 to completed conduct the Treasury Department has historically viewed as non-criminal. *See* A780. A contrary holding would violate the bedrock due process principle that individuals are entitled to "fair notice" particular conduct may give rise to criminal penalties. *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972). Furthermore, the government's reliance on "the fact that the Department of Justice is part of the executive branch," Gov't Br. 55, is particularly misplaced because the purported "victim" here is the Treasury Department, not the Justice Department. *See* SPA22-23; A238, A721. Therefore, it is entirely appropriate for this Court's assessment of the § 371 charge to consider Treasury's "historical[] … position" that "punitive measures" are unavailable for actions taken to avoid secondary sanctions' imposition. A780.

Whether foreign nationals like Atilla should be subject to punitive measures for allegedly "making it more difficult," SPA23, for the Treasury Department to determine if a foreign state-owned bank has engaged in sanctionable conduct is a "delicate" and "complex" foreign-policy question this Court should not address through an expansive interpretation of § 371. *Chicago & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 111 (1948). Indeed, economic sanctions' highly political nature is illustrated by the government's suggestion that Treasury refrained from sanctioning Halkbank because of the "implementation of the Iran nuclear agreement." Gov't Br. 55 n.11. Consistent with Congress's and the Executive's decisions not to proscribe evading or avoiding the imposition of secondary sanctions, the alleged conduct here is properly addressed through diplomacy—or, at most, prospective rulemaking—not criminal prosecution under § 371.

### C. At Minimum, the § 371 Charge Fails Because the Government Did Not Prove Atilla Conspired to Obstruct a Particular Administrative Proceeding

To avoid vagueness and rule-of-lenity concerns, *see* Opening Br. 64-66, this Court should at minimum hold that to convict Atilla under § 371, the government had to prove he conspired to obstruct "a particular administrative proceeding," such as a formal Treasury Department investigation of Halkbank or Zarrab. *Marinello v. United States*, 138 S. Ct. 1101, 1109 (2018). The government does not dispute it made no such showing.

Instead, the government contends *Marinello* "is inapposite" because it involved an "unrelated" statute—26 U.S.C. § 7212(a). Gov't Br. 56. Section 7212(a)'s prohibition of "corrupt[] … endeavors to obstruct or impede[] the due administration" of the Internal Revenue Code, however, closely resembles the jury instruction here authorizing Atilla's conviction for conspiring "to impair, *impede*, *obstruct* or defeat" Treasury's "*administration* of the economic sanctions" against Iran. SPA22-24 (emphasis added). The government provides no persuasive reason for declining to apply *Marinello* to the similar legal theory advanced here. The most the government can muster is the *Coplan* panel's grudging recognition it was required to apply this Court's *Klein* decision to a case within *Klein*'s heartland—an alleged conspiracy to defraud the IRS. *See Coplan*, 703 F.3d at 57, 59-62. *Coplan*, which predates *Marinello*, hardly forecloses applying *Marinello* to the far more tenuous § 371 theory here. To the contrary, narrowing the permissible scope of the government's theory accords with *Coplan*'s admonition that expansive interpretations of § 371 "warrant[] considerable judicial skepticism." *Id.* at 61.

## IV. The Exclusion of Zarrab's Jailhouse Conversation Requires a New Trial

### A. Exclusion Was Erroneous

1. Atilla explained at length (Br. 68-71) why the district court erred by failing to admit as evidence of Zarrab's bias his jailhouse statements that in the United States, "you have to admit to something you haven't done," and "once you admit

your guilt, you are set free." A829-30. The government responds with a single-paragraph jumble of perfunctory assertions. Gov't Br. 70. Contrary to the government's contention, Atilla preserved his bias argument. In moving for admission of the jailhouse recording and transcript, Atilla argued Zarrab's expressed belief that a "cooperating defendant had to lie in order to obtain an acceptable deal from the Government" was relevant to "the *motive* underlying his trial testimony," because it "evince[d] the fact that he was prepared to lie in order to obtain a better deal." A824-25 (emphasis added). That is Atilla's argument here. *E.g.*, Opening Br. 71 (jailhouse conversation demonstrates "Zarrab had a motive to testify falsely because he had previously expressed an understanding that he needed to lie about his scheme to minimize his sentence"). "Bias" is a "catchall term" encompassing an "extraordinarily broad" range of factors that "might affect [a witness's] testimony, leading her to be more or less favorable to the position of a party for reasons other than the merits," and "embraces what we usually call 'motive' or 'interest.'" 3 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 6:76 (4th ed. 2018); *accord United States v. Abel*, 469 U.S. 45, 52 (1984). Accordingly, this Court has treated "bias" and "motive to falsify" as synonymous. *E.g.*, *United States v. Blackwood*, 456 F.2d 526, 530 (2d Cir. 1972).

Although the government asserts (Br. 70) Atilla's bias argument conflicts with *United States v. Coven*, 662 F.2d 162 (2d Cir. 1981), the terse, one-paragraph

discussion the government invokes only held a witness's "assertion of the attorney-client privilege" when "questioned about conversations … with his lawyers concerning his cooperation agreement" did "not deprive [the defendants] of their constitutional right to confrontation," 662 F.2d at 170-71; *see also* Opening Br. 75 n.18. *Coven*'s statement that the witness's "state of mind when signing the cooperation agreement was a collateral matter going only to … general credibility" cited no supporting authority and appeared in the context of an inquiry into whether "assertion of the privilege unduly restrict[ed]" the defendants' cross-examination—an issue not presented here. 662 F.2d at 170-71. The government cites *no* case extending *Coven* beyond the privilege context to hold that extrinsic evidence of a cooperating witness's motive to lie to obtain leniency addresses a "collateral matter" and is thus inadmissible. To the contrary, well-established precedent holds such evidence "is never collateral." *Blackwood*, 456 F.2d at 530.

Finally, the government asserts Zarrab's jailhouse conversation was "unlikely to demonstrate Zarrab's bias or lack of credibility, because it occurred more than a year before Zarrab pleaded guilty." Gov't Br. 70. But because evidence of the jailhouse conversation was relevant to Zarrab's bias and motive to lie, the court should have allowed jurors to decide what weight to accord it. *See* Fed. R. Evid. 402. Given that Zarrab falsely denied making the recorded statements, *see* A543-44, jurors likely would have viewed skeptically any government argument that the

statements were insignificant. Zarrab presumably would not have lied to cover up unimportant statements.

2. The recording and transcript were also admissible as evidence of prior inconsistent statements. *See* Fed. R. Evid. 613(b). The government renews its contention that Zarrab's jailhouse conversation and his testimony are consistent. *See* A835-36; Gov't Br. 66-68. Even the district court evidently rejected that argument, as its decision did not embrace the argument. *See* SPA35 n.1 ("[A]rguments … not specifically addressed herein have been … rejected."). That is unsurprising; the argument is meritless.

The test for inconsistency is undemanding. As this Court recently explained in vacating a conviction on this ground, statements "need not be diametrically opposed." *United States v. Stewart*, 907 F.3d 677, 687 (2d Cir. 2018) (per curiam) (citation omitted). Instead, sufficient inconsistency exists if "there is any variance" between the testimony and impeachment material "that has a reasonable bearing on credibility," or if "a jury could reasonably find that a witness who believed the truth of the facts" asserted in testimony "would have been unlikely to make a statement of the impeachment material's tenor." *Id.* (citation omitted); *accord United States v. Trzaska*, 111 F.3d 1019, 1025 (2d Cir. 1997).

The variance between Zarrab's testimony and his recorded statements easily satisfies those standards. Zarrab at trial denied he even "spoke with [his] uncle about

how you get out of jail in the United States." A544. The call transcript contradicts that assertion.[13] *E.g.*, A830 ("[O]nce you admit your guilt, you are set free."). *Contra* Gov't Br. 68 n.18 (arguing defense did not ask sufficiently "specific questions" to demonstrate "actual inconsistency").

The government is likewise wrong that the call transcript "does not reflect that the concept of admitting to something that Zarrab had not done was equated with being set free." Gov't Br. 67. Zarrab's statement that "you have to admit to something you haven't done" appeared in the context of a conversation in which Zarrab said he had "already partially admitted [his] guilt" to try to reduce his sentence, because even "a year" made "a huge difference" to him. A828-29. Zarrab therefore linked "admit[ting] to something you haven't done" with reducing his sentence. He confirmed his belief the two concepts were linked by saying, "[O]nce you admit your guilt, you are set free." A830. The government's *own* summary of Zarrab's call conflicts with the government's argument; it explains Zarrab said:

> [I]n such a country, in order to get out or get a reduced sentence, you need to admit to crimes you haven't committed. . . . [I]n America in

[13] Although the government in passing questions the transcript's authenticity and accuracy (Br. 60, 62 n.15, 67 n.16), it did not squarely raise those arguments below as grounds for exclusion, and the district court did not address the issues. *Cf.* A834 (government's opposition to defense motion contained unelaborated parenthetical phrase questioning transcript's accuracy, but did not argue transcript should be excluded for that reason). Therefore, the issues are not properly before this Court. *See United States v. Parker*, 439 F.3d 81, 106 n.21 (2d Cir. 2006).

> order to make it out of prison you need to admit to something you haven't committed.

A777. Given the government's own summary, A767-68, it is frivolous to contend jurors could not reasonably find inconsistency between the jailhouse-conversation transcript and Zarrab's testimony denying he had "told [his] uncle that, in this country, you have to admit to something you haven't done in order to become free; once you admit your guilt, you become free." A543; *see also* A544 (Zarrab denied saying "you have to admit to something you haven't done in order to get free").

The jailhouse conversation also conflicts with Zarrab's government-elicited testimony that to obtain a reduced sentence under his cooperation agreement, he needed "[t]o speak exactly the truth." A359; *accord* A551. Under Rule 613(b), Atilla was entitled to contradict that testimony with the jailhouse conversation, in which Zarrab expressed the contrary understanding that he had to lie to obtain a reduced sentence.

The government is also wrong in arguing the jailhouse conversation is "inadmissible because it relates to a collateral matter." Gov't Br. 68. In the recording, Zarrab acknowledged his motive to lie about the very sanctions-avoidance scheme at issue to achieve his objective of "getting free." A828-30. As explained above, *supra* p. 35, such "proof of bias or motive to falsify" based on a desire for "leniency" is "never collateral." *Blackwood*, 456 F.2d at 530.

Citing *United States v. McGee*, 408 F.3d 966, 979-83 (7th Cir. 2005), the government argues (Br. 69-70) the jailhouse conversation was inadmissible under Rule 613(b) because its value "derives not from a side-by-side comparison of Zarrab's trial testimony to his statements in the recording, but rather from the recording in and of itself." But the evidence in *McGee*—a recording of the witness lying to his employer—"squarely [fell] within [Rule 608(b)'s] ambit" because it "cast significant doubt" on the witness's general "character for truthfulness." *McGee*, 408 F.3d at 982. Here, by contrast, Zarrab's jailhouse statements not only evidence his generally untruthful character, but also indicate his intent to lie about the *specific scheme at issue*.

The government's own questioning of Zarrab confirms Atilla's proposed use of the jailhouse conversation "related to the matters at issue," and was not merely "designed to show that [Zarrab's] false statement about one thing implies a probability of false statements about the matters at issue." *United States v. Higa*, 55 F.3d 448, 452 (9th Cir. 1995). As explained above, *supra* p. 38, the government elicited testimony that Zarrab understood his cooperation agreement to require him "[t]o speak exactly the truth." A359. Under Rule 613(b), Atilla was entitled "to show the discrepancy" between that testimony and Zarrab's contradictory prior statements of his understanding of how the American legal system operates. *McGee*, 408 F.3d at 982.

### B. Exclusion Was Not Harmless

The government has not satisfied its burden of establishing that excluding the jailhouse conversation was harmless. Although Atilla attempted "to attack [Zarrab's] credibility" in various ways, Gov't Br. 70-71, the jailhouse conversation was far from cumulative. That conversation went beyond simply showing "Zarrab hoped to receive a lenient sentence" (*id.* at 71)—or his general "prior untruthfulness" (*id.* at 70)—by demonstrating Zarrab's understanding that he *needed to lie about the very scheme at issue* to obtain a sentence reduction. *See Stewart*, 907 F.3d at 688 (erroneous exclusion not harmless where admitted defense evidence did "not address the full breadth" of government's evidence). The conversation was thus essential to rebut Zarrab's testimony that he needed "[t]o speak exactly the truth," A359, and "ma[king] up something bad about Hakan Atilla on the stand" would "be the worst thing that could happen in [Zarrab's] life" because it might interfere with obtaining "a reasonable sentence," A551; *see also* A734 (prosecution's summation: "Zarrab was doing everything he could to make sure he told you the truth" because "he understood that that was the way that he got the relief that he wanted").

The government asserts in a single paragraph lacking record citations that the jailhouse conversation's exclusion was harmless because Zarrab's testimony was allegedly "corroborated on critical points" and the government's case was purportedly "overwhelming." Gov't Br. 71-72. Nonsense. As Atilla has explained

(*with* record citations), Opening Br. 78-79, Zarrab's testimony was essential to the government's case. For example, only Zarrab placed Atilla at the pivotal October 2012 meeting where Iranian officials allegedly discussed making "international payments." *Id.* at 79; *see also* Gov't Br. 33 ("Zarrab testified" Atilla attended meeting). Even when the government managed to present some evidence arguably corroborating Zarrab's testimony, it often used Zarrab to authenticate ambiguous evidence of dubious authenticity and explain why it implicated Atilla. Opening Br. 78-79. Moreover, objective factors demonstrate jurors struggled with this case: They deliberated four days, asked what they should do if they could not agree on all counts, and acquitted Atilla on one count. *Id.* at 80; *see also Stewart*, 907 F.3d at 689 (objective factors, like "length of jury deliberations," "useful" in evaluating prejudice). Under these circumstances, the government's boilerplate assertion of "overwhelming" evidence comes nowhere close to establishing harmlessness. *Cf. Stewart*, 907 F.3d at 686 n.3.

## CONCLUSION

The judgment below should be reversed. Alternatively, it should be vacated, and a new trial ordered.

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Respectfully submitted,

*/s/ John P. Elwood*

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the word limit of 9500 words set by this Court's December 13, 2018 order (ECF No. 91) because it contains 9497 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

Dated: January 3, 2019

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing reply brief with the Clerk of the Court for the United States Court of Appeals for the Second Circuit by using the appellate CM/ECF system on January 3, 2019. All counsel of record in this case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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