No. 16-1010

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

FREDERIC PIERUCCI (HOSKINS),
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF CONNECTICUT, D.C. NO. 3:12CR238 (JBA) (ARTERTON, D.J.)

BRIEF FOR APPELLEE LAWRENCE HOSKINS

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I. Introduction

This interlocutory appeal by the government—as to which this Court lacks jurisdiction—arises in a case where the alleged conduct occurred more than twelve years ago. *See* App. 64–65.[1] At that time, the defendant, Lawrence Hoskins, a now retired British citizen, worked at the Paris headquarters of the French conglomerate, Alstom SA. *Id*. Specifically, from October 2001 through August 2004 (the entirety of his brief tenure at Alstom), Mr. Hoskins worked in Alstom's International Network—a division of Alstom's parent company—where he served as Area Senior Vice President of Alstom's Asia region. *Id*. In that role, Mr. Hoskins was principally responsible for promoting and coordinating Alstom's various business ventures and subsidiaries across 19 different countries in Asia. His work for Alstom never brought him to the United States. *Id*.

Mr. Hoskins is thus a foreign national, who worked briefly for a foreign corporation, during which time he never entered the territory of the United States. Despite the hurdles inherent in this extraterritorial trilemma, in April 2014—nearly a decade after resigning from Alstom—the government arrested Mr. Hoskins on this matter when he and his wife attempted to enter the United States to visit their son.

[1] "App." refers to the Appendix.

II. The Indictments

The indictment upon which he was arrested—the Second Superseding Indictment—charged Mr. Hoskins with violating, and conspiring to violate, the Foreign Corrupt Practices Act ("FCPA") and money-laundering statute.[2] *See* App. 28–62. This appeal, however, only concerns the accessorial-liability aspects of the FCPA-related offenses. As relevant here, the Second Superseding Indictment charged Mr. Hoskins with violating (and conspiring to violate) the FCPA while "being . . . an agent of . . . a domestic concern," (*i.e.*, an agent of a U.S.-based subsidiary of his employer, Alstom, SA). App. 37, ¶ 26(a).

In April 2015, following motion practice regarding the sufficiency of the indictment—and in apparent response to concerns that it could not prove that Mr. Hoskins was, in fact, an "agent" of Alstom's U.S. subsidiary—a grand jury returned the Third Superseding Indictment. *See* App. 85–117. This new indictment reflected a small but significant alteration to the prefatory language for the FCPA-conspiracy count. *See* App. 93, ¶ 26(a). Namely, while still alleging that Mr. Hoskins was an "agent" of Alstom's U.S. subsidiary, the new FCPA-conspiracy count replaced the original allegation that Mr. Hoskins conspired with

[2] The prior and current indictment included one count of conspiracy to violate the FCPA (18 U.S.C. § 371), five counts of substantive FCPA violations (15 U.S.C. §§ 78dd-2; 2), one count of conspiracy to commit money laundering (18 U.S.C. § 1956(h)), and five counts of substantive money-laundering violations (18 U.S.C. §§ 1956(a)(2)(A); 2).

others while "being . . . an agent of . . . a domestic concern," with the allegation that Mr. Hoskins conspired to violate the FCPA while acting "together with" a domestic concern.[3] *Compare* App. 37, ¶ 26(a) *with* App. 93, ¶ 26(a). This modification signaled the government's intention to contend at trial that Mr. Hoskins could be held criminally liable for conspiracy to violate the FCPA, even if he was not found directly liable under the FCPA, *i.e.*, that the government failed to prove that he was an "agent" of a domestic concern.

III. Procedural History

On June 4, 2015, Mr. Hoskins moved to dismiss Count One of the Third Superseding Indictment on the grounds that the referenced change violated the principle established in the Supreme Court's decision in *Gebardi* v. *United States*, 287 U.S. 112 (1932), because it would permit a jury to convict Mr. Hoskins for conspiring to violate a statute that, based on an *affirmative* legislative policy, did not apply to him. *See* App. 123–27. The government cross-moved for an order precluding Mr. Hoskins from arguing at trial that the government must prove that he was, in fact, an agent of a domestic concern. App. 118.

On August 13, 2015, the District Court granted Mr. Hoskins's motion, in part, and denied the government's cross-motion. *Id*. Specifically, the District

[3] Count One also alleges a second object of the FCPA conspiracy: namely, that Mr. Hoskins conspired with others to violate Section 78dd-3 of the FCPA "while in the territory of the United States."

Court held that *Gebardi* and its progeny stand for the proposition that where Congress chooses affirmatively to exclude certain classes of individuals from liability under a criminal statute, prosecutors may not circumvent that exclusion by charging such individuals with conspiracy to violate that statute. App. 125. Significantly, however, the District Court did not dismiss the FCPA-conspiracy count. Rather, it held that the government could still proceed to trial on that count, but would need to prove at trial that Mr. Hoskins was, in fact, an agent of a domestic concern.[4] App. 137. The District Court also properly extended this rationale to the substantive FCPA counts (Counts Two through Seven), ruling that, while Mr. Hoskins could still be held liable for aiding and abetting another in committing those violations, the government must first establish that he was subject to direct liability under the FCPA, *i.e.*, that he was an agent of a domestic concern. *Id*. In other words, the District Court simply ruled *in limine* regarding its intended jury instruction on the limits of accessorial liability under the FCPA.

[4] The District Court also dismissed the second object of the conspiracy alleged in Count One, explaining that Congress intended to limit liability under Section 78dd-3 to acts by the defendant taken while physically present in U.S. territory, and *Gebardi* prevents the government from using the conspiracy statute to circumvent that territorial limitation. Because it is undisputed that Mr. Hoskins did not enter U.S. territory while at Alstom, the District Court correctly dismissed this object. App. 137.

On April 1, 2016, following the issuance by the District Court of an opinion and order denying the government's motion for reconsideration, App. 139–50, the government filed its notice of appeal. App. 151.

SUMMARY OF ARGUMENT

This Court does not have jurisdiction to hear this appeal. Title 18 U.S.C. § 3731, which sets forth the circumstances under which the government can appeal in a criminal case, authorizes, in relevant part, appeal of decisions that dismiss a count of an indictment, or any part thereof, or that suppress evidence. Here, the District Court's order does not strike any count, parts of any count or any allegation from the indictment; it does not preclude consideration of any discrete acts or factual predicate which could give rise to criminal liability; nor does it suppress any evidence. Rather, the decision merely indicates how the District Court intends to instruct the jury on FCPA accessorial liability. In no way does the decision below deprive the government of the ability to pursue a conviction on the FCPA-related counts based on conspiracy or aiding-and-abetting liability; it simply establishes that the government must adhere to the FCPA and first prove that Mr. Hoskins was an agent of a domestic concern for any liability to attach. Though the government may dislike that it must satisfy that element to prevail at trial, this Court's precedents make clear that such issues do not give rise to an interlocutory

appeal. *See, e.g.*, *United States* v. *Margiotta*, 662 F.2d 131 (2d Cir. 1981). Thus this appeal should be dismissed and the matter remanded to the District Court for further proceedings.

Nevertheless, even if this Court were to conclude that jurisdiction is proper, the District Court's ruling should be upheld. In two carefully reasoned opinions, the District Court correctly applied the *Gebardi* principle to prevent the government from circumventing Congress's deliberate decision to exclude from the scope of the FCPA foreign nationals, who, like Mr. Hoskins: (1) do not act within the territory of the U.S., and (2) are not officers, directors, employees or agents of a U.S. domestic concern or U.S. issuer. *See* App. 118–38; App. 139–50.

That the *Gebardi* principle applies to the FCPA is not controversial. If there was ever a statute reflecting very careful Congressional line drawing, it is the FCPA. Despite the general dearth of FCPA caselaw, beyond the District Court's decisions below, two other courts have applied the *Gebardi* principle to the FCPA, finding that the FCPA reflects Congressional intent to exclude certain categories of individuals from its reach. *See United States* v. *Castle*, 925 F.2d 831 (5th Cir. 1991); *United States* v. *Bodmer*, 342 F. Supp. 2d 176 (S.D.N.Y. 2004). Indeed, in *Bodmer*, the government actually conceded that the *Gebardi* principle precluded pursuit of a conspiracy charge against an alleged agent whose conduct, under a prior version of the FCPA, Congress chose not to criminalize. 342 F. Supp. 2d at

181. Thus, the key question on this appeal is not whether the *Gebardi* principle applies to the FCPA—it clearly does—but whether it applies to Mr. Hoskins.

The government posits that the *Gebardi* principle is "extremely narrow" and does not apply to this case. Gov. Br. 23.[5] Specifically, in a reformulation of the position it took below (and in a 180-degree turn from the position it took in *Bodmer*), the government now contends that the *Gebardi* principle only applies to statutes where either the defendant's "consent or acquiescence is inherent" in the offense, or where the defendant's participation in the crime is "frequently, if not normally" featured. *Id.* at 24. The government's new and unimproved interpretation of the *Gebardi* principle, however, is contrary to relevant precedent (including this Court's own), internally inconsistent, and unworkable.

The District Court's far simpler articulation of the *Gebardi* principle is consistent with relevant precedent and is the correct one: "[W]here Congress chooses to exclude a class of individuals from liability under a statute, 'the Executive [may not] . . . override the Congressional intent not to prosecute' that party by charging it with conspiring to violate a statute that it could not directly violate." App. 125 (citing *Castle*, 925 F2d at 833). As the District Court aptly articulated, the text and structure of the FCPA demonstrate Congress's intent to limit its application to certain defined categories of individuals, as confirmed by the

[5] "Gov. Br." refers to the Brief for Appellant.

statute's legislative history. *See* App. 137. In sum, properly understood, *Gebardi* applies to the FCPA, and requires the government to prove that Mr. Hoskins was an agent of a domestic concern in order to sustain a conviction for conspiring to violate the FCPA or for aiding and abetting substantive FCPA violations.

Finally, the District Court's decision to dismiss the second object of the conspiracy should also be upheld. This object charges Mr. Hoskins with conspiring with others, "while in the territory of the United States," to violate § 78dd-3 of the FCPA. App. 94, ¶ 26(b). Because § 78dd-3 has no extraterritorial application *and* only applies to individuals not covered by the FCPA's other provisions, and, further, because it is undisputed that Mr. Hoskins never entered U.S. territory during his time at Alstom, App. 137 n.14, *Gebardi* requires dismissal of this object of the conspiracy.

ARGUMENT

I. This Court Does not Have Appellate Jurisdiction Under 18 U.S.C. § 3731 Because the District Court Did Not Dismiss Any Part of a Count

Interlocutory appeals by the government in criminal cases are exceptional and disfavored, and are allowed only when authorized by statute. *Arizona* v. *Manypenny*, 451 U.S. 232, 245 (1981). Title 18 U.S.C. § 3731 sets out the limited circumstances in which the government can appeal a district court ruling, and, as relevant here, only authorizes the government to appeal orders dismissing an

indictment, or any count or part thereof. Here, the District Court did none of those things; rather, it merely previewed how it intended to instruct the jury on accessorial liability under the FCPA.

Eschewing labels placed on district court action, this Court has held in a closely analogous context that a count or part thereof is deemed dismissed when the legal effect of the ruling "precludes consideration of an independent ground for a conviction, even if that predicate is not formally pleaded as a separate count in the indictment." *Margiotta*, 662 F.2d at 140. To assess whether an order has such a preclusive effect, this Court considers whether the order appealed from "preclude[d] consideration of any discrete acts or factual predicate which could give rise to criminal liability." *Id*. at 140. In other words, the key inquiry is whether the challenged ruling "struck factual allegations or excluded evidence that could lay an independent basis for a criminal penalty." *Id*. at 139.

The ruling below is not appealable because it neither struck an allegation nor excluded any government evidence. Instead, the legal effect of the District Court's order is that the government must prove (as it claims it can) that Mr. Hoskins was an agent of a domestic concern in order to prevail on its conspiracy and aiding-and-abetting theories. Though—like the result in *Margiotta*—that is a higher burden than the government would like to carry at trial, so long as it meets its burden to prove that Mr. Hoskins was, in fact, an agent of a domestic concern, the

jury may properly consider both theories of accessorial liability. Because disputes over the elements of a particular theory of criminal liability are not appealable, this appeal must be dismissed.[6]

A. Applicable Law

In *Margiotta*, this Court considered the propriety of a government interlocutory appeal challenging, among other things, a jury instruction from a previous trial that ended in a hung jury. The challenged instruction related to a mail fraud charge brought against defendant Margiotta, the chairman of a local Republican Committee. 662 F.2d at 134. The indictment alleged a single mail fraud count with two prongs: that Margiotta had defrauded certain municipalities and their citizens by: (1) depriving them "of the right to have the affairs of the Town, County and State conducted honestly . . . "; and (2) by depriving them "of the right to Margiotta's honest participation in the government affairs of the Town, County, and State." *Id.* at 135. The government argued that it was not required to prove the existence of a fiduciary relationship to prevail on the first prong of the

[6] Had the parties not elected to raise this issue through pretrial motions, it certainly would have arisen in connection with requests to charge. This Court's observation in *Margiotta* is thus apt here as well: "Allowing the Government an interlocutory appeal from adverse decisions on jury instructions in this case would recognize a category of appealable rulings in which it would be difficult to draw lines. Furthermore, adopting the Government's position in this context may well have a chilling effect upon pretrial hearings and orders, which frequently serve to expedite a final and early resolution of troublesome points in a case." *Margiotta*, 662 F.2d at 140 n.23 (2d Cir. 1981).

count (apparently conceding that it would have to prove a fiduciary relationship in order to prevail on the second prong). *See id.* at 136–37. The district court, however, ruled that the government would be required to prove a fiduciary duty under both prongs. *Id.*

The government appealed, arguing that the district court's ruling "had the effect of eliminating a possible basis for conviction." *Id.* at 140. This Court disagreed, finding that the two prongs were "not independent grounds but [were] alternate descriptions of the single fraudulent scheme." *Id.* As such, this Court held that "the instruction did not preclude consideration of any discrete acts or factual predicate which could give rise to criminal liability," and was therefore not appealable. *Id.*

In *United States* v. *Tom*, this Court again considered a district court ruling that did not have the effect of eliminating a discrete basis of liability. 787 F.2d 65 (2d Cir. 1986). In *Tom*, the lower court dismissed certain predicate acts in a RICO count, and the government appealed. *Id.* at 68–70. Recognizing that the predicate acts alone could not have constituted an independent or discrete basis for liability, the government nevertheless argued that § 3731 permitted an appeal from the dismissal of any "substantial" portion of a count. *Id.* at 70. This Court, relying on *Margiotta*, rejected the government's contention and dismissed the appeal. *Id.* at 71.

This Court also considered whether a district court ruling had the legal effect of precluding the government from pursuing a discrete basis for criminal liability in *United States* v. *Pirro*, 212 F.3d 86, 88–89 (2d Cir. 2000). In contrast with the decisions in *Margiotta* and *Tom*, this Court in *Pirro* allowed a government appeal of an order striking subparts of a count charging multiple false statements on a tax return. *Id.* Though this Court ultimately affirmed the dismissal of the subparts from the count in question, it held that the dismissal was appealable by the government under § 3731 because those subparts amounted to a "dismissal of an allegation that could have provided a discrete basis for a conviction." *Id.* at 88. In other words, each subpart could have been pled separately as a standalone false-statement count and, as such, formed an independent basis for criminal liability. *See also United States* v. *Alberti*, 568 F.2d 617, 621 (2d Cir. 1977) (allowing government appeal from order striking several alleged false statements specified in perjury count because each stricken statement could have independently supported conviction).

B. Discussion

This appeal should be dismissed because, as the foregoing cases require, the District Court's order did not strike allegations or exclude evidence that could serve as an independent basis for a criminal penalty. *See Margiotta*, 662 F.2d at 139. The government is still fully able to pursue the conspiracy and substantive FCPA charges with all of its factual allegations intact. By requiring that the

government prove that Mr. Hoskins acted as an agent of a domestic concern to prevail on its theories of accessorial liability, the District Court merely clarified the elements of the charges set forth in the current indictment. Here, as in *Margiotta*, the government's two theories are "not independent grounds [for conviction] but [are] alternate descriptions of the single . . . scheme." *Id*. at 140. The decision below in no way precludes the government from presenting any evidence that it could have relied upon prior to the District Court's order.

Nor did the District Court strike an allegation that could have been set forth in a separate count of the indictment. Indeed, the government never contended that it should be permitted to pursue separately its alternative theories of accessorial liability in parallel counts. Rather, as the indictment reflects, whether Mr. Hoskins acted *as an agent* of a domestic concern, or, alternatively, acted *together with* a domestic concern, his alleged actions are the same and relate to a single alleged agreement to violate the FCPA. Thus, like the single mail fraud scheme in *Margiotta*, these two theories allege exactly the same scheme and could not be pled as separate counts. *See United States* v. *Ansaldi*, 372 F.3d 118, 125 (2d. Cir. 2004) (vacating conviction on one of two drug conspiracy counts as multiplicitous because the two counts were based on an agreement to sell a single controlled substance).[7]

[7] Similarly, an indictment setting forth in separate counts the government's alternative theories of aiding-and-abetting liability (namely that Mr. Hoskins could have either aided and abetted FCPA violations as an agent of a domestic concern,

The District Court here made a pre-trial ruling regarding the elements of accessorial liability under the FCPA that neither eliminated a discrete basis of liability nor excluded evidence that could serve as an independent basis for a conviction. The government should not be permitted to avoid the limitations of § 3731 simply because it now knows the court will instruct the jury in a manner that makes it harder for it to sustain a conviction. The appeal should be dismissed.

II. The District Court Properly Held that the Government Must Prove that Mr. Hoskins was an Agent of a Domestic Concern

It should be axiomatic that the Executive branch cannot circumvent a deliberate decision by Congress to immunize a class of persons from the reach of a criminal statute by resort to nebulous theories of accessorial liability. This is a basic separation of powers point. Yet, unfortunately, it is also a fundamental axiom that the government does not accept. This principle is at the heart of the Supreme Court's decision in *Gebardi*, 287 U.S. 112, and is carried through in the long line of its progeny. It is also the principle that is at the very heart of this appeal.

The District Court correctly applied the *Gebardi* principle in holding that the government must prove that Mr. Hoskins was an agent of a domestic concern in

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or aided and abetted a violation by a covered person, whether or not Mr. Hoskins himself was an agent) would also have been multiplicitous. Those theories are merely competing descriptions of the same alleged violation.

order to convict him of conspiracy to violate, or aiding and abetting violations of, the FCPA. As the District Court correctly observed, "[t]he *Gebardi* principle is that where Congress chooses to exclude a class of individuals from liability under a statute, 'the Executive [may not] . . . override the Congressional intent not to prosecute' that party by charging it with conspiring to violate a statute that it could not directly violate." App. 125 (quoting *Castle*, 925 F.2d at 833).

To expand its already vast FCPA empire, the government tries to navigate its way through the relevant precedent, but winds up tracking a circuitous path that leads—ironically—to the articulation of a principle that the *Gebardi* Court itself rejected. On its journey, the government surprisingly advances an entirely different construction of *Gebardi* than the one it vigorously pursued in the District Court.[8] This new test fares no better than the old, as the government

[8] In the District Court, the government argued that Gebardi only "applies in two limited circumstances: (1) where a class of persons is a *necessary party* to the crime and was specifically excluded from prosecution for the substantive violation by Congress (e.g., the foreign official who receives the bribe payment under the FCPA or the woman who is transported across state lines under the Mann Act); or (2) where the substantive statute was enacted to protect the class of person to which the individual belongs (*e.g.*, victims)." App. 126 (quoting government opposition brief (emphasis in original)). Perhaps recognizing that its previous efforts to limit *Gebardi* did not comport with logic or applicable precedent, the government now argues that *Gebardi* applies "only when the defendant's 'consent or acquiescence is inherent' in the object offense, or, at least where the defendant's participation in the crime is 'frequently, if not normally' a feature of the criminal conduct, yet the statute chooses not to make the defendant's behavior 'a crime under the [statute] itself.'" Gov. Br. 24 (citations omitted). As discussed below, the government's current deconstruction of *Gebardi* should also be rejected.

misapprehends the true holding in *Gebardi*, overlooks the *Gebardi* Court's expansion of previously applicable principles of common law, misapplies or fails to account for cases interpreting *Gebardi*, and ascribes an unjustifiably cramped reading to the Supreme Court's recent decision in *Ocasio* v. *United States*, 136 S. Ct. 1423 (2016), which was decided after this appeal was commenced.

Notwithstanding the government's misplaced efforts to cabin the *Gebardi* principle, it cannot be disputed that each time courts have considered it in the context of the FCPA, the principle has been found to apply. All three courts to consider the issue—including the District Court below—have held that the text and structure of the carefully crafted FCPA evince a Congressional intent to exclude certain classes of persons from liability. *See Castle*, 925 F.2d at 835–36; App. 137; *Bodmer*, 342 F. Supp. 2d at 190. And, of course, in *Bodmer*, the government actually *conceded* that if the defendant was found not to be directly liable under the FCPA, then *Gebardi* would preclude application of the conspiracy statute to him. 342 F. Supp. 2d at 181 n.6. This is unsurprising given that the FCPA lists the class of actors to whom the statute applies. *See, e.g.*, 15 U.S.C. § 78dd-2(a) ("It shall be unlawful for any domestic concern . . . or for any officer, director, employee, or agent of such domestic concern . . . .").

Finally, although this Court need not consider the legislative history of the FCPA because the text and structure make Congress's intent perfectly clear, the

legislative history provides further support for the District Court's conclusion that Congress intended to limit the extraterritorial reach of the FCPA to certain defined categories of persons to, among other things, avoid encroaching on the sovereignty of foreign nations.

A. The District Court Correctly Held that where Congress Affirmatively Excludes a Certain Class of Persons from Liability under a Criminal Statute, the Government Cannot Circumvent that Intent Through Theories of Accessorial Liability

The District Court correctly explained the *Gebardi* principle as one that prevents the government from applying criminal liability to classes or persons whom Congress intended to exclude from liability under a particular statute. *See* App. 125. As noted, the government offers this Court a different articulation of the *Gebardi* principle than the one it advanced—and the District Court properly rejected—below. The government's new gloss on *Gebardi*—like its previous theory—ignores an obvious point: Congress's prerogative to craft statutes surgically in order to immunize certain potentially culpable actors cannot be upended by prosecutors' use of the blunt tools of accessorial liability. The government's current "extremely narrow" approach also continues to misconstrue *Gebardi* and its progeny, and fails to account for this Court's decision in *United States* v. *Amen*, 831 F.2d 373 (2d Cir. 1987).

1. The *Gebardi* Principle

The *Gebardi* principle is simply the judiciary's recognition that the executive branch cannot undo through accessorial theories of liability the legislative line-drawing that is the sole prerogative of Congress. *Gebardi* and its progeny bear this out.

In *Gebardi*, the Supreme Court overturned a woman's conviction for conspiracy to violate the Mann Act. *Gebardi*, 287 U.S. at 123. The Mann Act outlawed the "transport" of "any woman or girl for the purpose of prostitution . . . or for any other immoral purpose," but did not expressly make the "transported" woman's participation in the transportation a crime. Though the Mann Act—*unlike* the FCPA—is a statute of "general applicability," (*i.e.*, on its face it applied to "any person,") the Supreme Court discerned an affirmative legislative intent to immunize the woman who merely acquiesced in the transportation. *See id.* ("[W]e perceive in the failure of the Mann Act to condemn the woman's participation in those transportations which are effected with her mere consent, evidence of an affirmative legislative policy to leave her acquiescence unpunished."). Thus, the Supreme Court had to consider whether a person belonging to a class of individuals effectively immunized by Congress could still be held liable through the general conspiracy statute. The Court said no.

The *Gebardi* Court was mindful that, as a general matter, it is possible for a person to conspire to commit a substantive offense that he or she otherwise lacks the capacity to commit. *Id.* at 120. Though the government here makes much out of this well-established tenet of criminal law, it is not a controversial point; indeed, Mr. Hoskins has never contested it. It is also beside the point. The rationale underlying the *Gebardi* principle is that where Congress itself has created that incapacity by affirmatively immunizing from liability certain persons, that legislative policy must be respected, and resort to concepts of accessorial liability are prohibited.

Meaningfully, the *Gebardi* Court recognized that a person who is not in bankruptcy can conspire to commit bankruptcy fraud if that person agrees with a bankrupt to conceal assets from the trustee. *Id.* at 120 n.5. Nevertheless, the Court necessarily concluded that this general precept must yield where Congress intentionally immunizes certain individuals from liability under a statute. *Id.* at 123 ("It would contravene that [legislative] policy to hold that the very passage of the Mann Act effected a withdrawal by the conspiracy statute of that immunity which the Mann Act itself confers."). Thus, the *Gebardi* principle was born.

Implicit in this holding is the *Gebardi* Court's recognition that there is a meaningful difference between certain types of statutes, such as the then-applicable bankruptcy fraud statute—where non-bankrupts can conspire to violate the

statute—and the Mann Act—where merely acquiescing women cannot conspire. The difference, which is at the foundation of *Gebardi's* holding, is an *affirmative* Congressional intent to exclude certain persons from liability. In crafting that bankruptcy fraud statute, Congress sought to prohibit *all bankrupts* from concealing assets from a bankruptcy trustee. *See id.* at 120 n.5. In other words, while the bankruptcy fraud statute targeted bankrupts to prevent a specifically defined harm, Congress gave no indication that it intended to exclude any other person from the statute's reach. The Mann Act and the FCPA are different; those statutes both address a general harm and apply only to a subset of a larger class of individuals who could cause that harm. As such, both statutes reflect a Congressional policy to affirmatively exclude certain individuals from liability.

As discussed next, numerous courts—including this Court— have applied this straightforward principle, to a variety of statutes entirely consistently with the District Court's application below. The government attempts to narrow the *Gebardi* principle—albeit in different ways than it did below—by patching together this precedent to exclude Mr. Hoskins from the principle's natural operation. This result-oriented approach—as such approaches often do—misses the broader point and fails.

2. The Government's "Extremely Narrow" Interpretation of the *Gebardi* Principle is Wrong

The government describes its appellate reformulation of its position on *Gebardi* as "extremely narrow" and as applying to bar accessorial liability in only two circumstances: (1) when the defendant's "consent or acquiescence is inherent" in the offense; or (2) when the defendant's participation is "frequently, if not normally" a part of the offense. *See* Gov. Br. at 24. Whatever these opaque formulations mean, the government is wrong on both counts.

a. The *Gebardi* Principle is not Limited to Circumstances in which the Defendant's Consent is Inherent in the Underlying Offense

The government's argument that the defendant's consent must be inherent in the underlying offense for the *Gebardi* principle to apply appears grounded in a misreading of that decision, because *Gebardi* was not predicated on consent being inherent in a Mann Act offense. In fact, to the contrary, the Court in *Gebardi* recognized that consent was *not* inherent in the Mann Act, noting that the Act could be violated where the woman is intimidated or forced into the alleged transportation. *Gebardi*, 287 U.S. at 121. Rather, the *Gebardi* Court simply concluded that evidence of Congress's intent to immunize the woman's mere consent in the Mann Act precluded a conspiracy charge. *Id.* at 123.

Gebardi's assessment of whether consent was inherent in the Mann Act related to an entirely different point—a point the Court *expressly* did not rest its decision upon—and a point that the government now wrongly seeks to hijack for its own purposes. *Id*. at 121. At the time *Gebardi* was decided, a common-law rule existed—the so-called Wharton's Rule—which stood for the proposition that where cooperative activity is inherent in the substantive offense (*e.g.*, in crimes like dueling or bribery), conspiracy liability does not lie. *Id*. at 121–22.[9] The Court thus considered whether the woman's consent was inherent in Mann Act violations merely to assess whether the application of Wharton's Rule would dispose of the issue before it, *i.e.*, whether the conspiracy charge was valid. *See id*. at 121–22. The *Gebardi* Court, however, recognized that because consent was *not* inherent in the Mann Act, Wharton's Rule did not apply. *Id*. at 122. As noted, the Court grounded its decision in a different principle—deference to Congress's clear intent to immunize the consenting woman—and not, as the government argues here, in the fact that her consent was inherent in the offense. Ironically, the government's argument that *Gebardi* only applies where consent is inherent in the underlying offense is merely a re-articulation of the now-archaic Wharton's Rule, which the *Gebardi* principle effectively replaced.

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[9] Although the *Gebardi* Court does not use the term Wharton's Rule, the cases it cites and analysis it undertakes describe that rule. *See Ianelli* v. *United States*, 420 U.S. 770, 774 n.8 (1975) ("The Court's most complete description of [Wharton's Rule] appears in *Gebardi* . . . .").

The government places great weight in the Supreme Court's recent decision in *Ocasio*. Although the District Court below did not have occasion to consider *Ocasio*, it is plain that *Ocasio* would not have affected—and in fact is entirely consistent with—the District Court's ruling.

In *Ocasio*, the Court considered whether the defendant, a police officer who accepted money from owners of an automotive shop to steer car accidents to their shop, could be convicted of conspiring with those shop-owners to violate the Hobbs Act. 136 S. Ct. at 1427. Because the Hobbs Act criminalizes, among other things, "the obtaining of property from another, with his consent . . . under color of official right," the defendant in *Ocasio* argued that he could not be convicted of conspiracy to violate the Hobbs Act because his alleged coconspirators—the shop-owners—were not capable of committing the substantive offence. *Id*. at 1429. The Court properly rejected this argument, relying on the uncontroversial principle that a person may generally be convicted of conspiring to commit a crime that he or she cannot personally commit. *Id*. at 1431–33. The *Gebardi* principle had nothing to do with this decision.

Indeed, *Ocasio* did not even address the question at the heart of *Gebardi*, *i.e.*, whether Congress in crafting the Hobbs Act intended to immunize a certain class of individuals. That is simply because that issue was irrelevant to the

resolution of the appeal. In sum, *Ocasio* has no impact whatsoever on the construction of the *Gebardi* principle.

Grabbing at a thin reed, the government focuses on the *Ocasio* Court's reference to *Gebardi* in a discussion of the term "consent" in the Hobbs Act. Specifically, after noting that *Gebardi* (and a companion case) support the general proposition that a person can conspire to commit a substantive offense that he or she cannot personally commit, the *Ocasio* Court observed that *Gebardi* also shows "that when that person's consent or acquiescence is inherent in the underlying substantive offense, something more than bare consent or acquiescence may be needed to prove that the person was a conspirator." *Id*. at 1432. Yet, this statement was not intended to be an encapsulation of the *Gebardi* principle, but, rather, an observation that where statutes involve an explicit or implied element of consent—like the Mann and Hobbs Acts—additional proof of intent on the part of the consenting party may be needed to prove a conspiracy. *See id*. at 1435 ("[j]ust as mere acquiescence in a Mann Act violation is insufficient to create a conspiracy, the minimal 'consent' required to trigger § 1951 is insufficient to form a conspiratorial agreement."). In sum, the *Ocasio* Court relied on aspects of *Gebardi*, but not on the *Gebardi* principle. In fact, the *Ocasio* Court's only reference to the *Gebardi* principle was in a footnote, where it simply noted the

holding turned on the Court's discernment of an affirmative legislative policy in the Mann Act. *Id.* at 1431 n.4.

b. The *Gebardi* Principle is not Limited to Circumstances in which the Defendant's Conduct is "Frequently" or "Normally" a Part of the Offense

While, as discussed above, the government's abstruse "inherent consent" assertion is untethered to any precedent, the government's alternative postulation is even more abstract. Under this second theory, the government asks this Court to read into *Gebardi* a requirement that district courts considering the principle must make an assessment of whether a particular defendant's participation in the alleged crime is "frequently, if not normally a feature of the criminal conduct" before deciding whether accessorial theories of liability can apply. Gov. Br. 24. Fortunately for lower courts in this Circuit, this Court's decision in *Amen*, 831 F.2d at 381, defeats this unworkable postulation.

In *Amen*, this Court considered whether a "non-employee" of a narcotics kingpin could be convicted of aiding and abetting a Continuing Criminal Enterprise ("CCE"). *Id.* In that appeal, the government—advancing what appears to be a species of its current "frequently, if not normally" argument—conceded that employees of a kingpin could *not* be liable under an aiding-and-abetting theory, but that "non-employees who knowingly provide direct assistance to the [kingpin]" could be. 831 F.2d at 381. Looking to Congressional intent, this Court rejected that

argument based on the *Gebardi* principle. Specifically, the Court concluded that the purpose of the CCE statute 'was not to catch in the [kingpin] net those who aided and abetted the supervisors' activities." 831 F.2d at 382. This Court explained that "[w]hen Congress assigns guilt to only one type of participant in a transaction, it intends to leave the others unpunished for the offense." *Id*. at 382. This Court also found the government's proposed test "totally unworkable." *Id*.

In an attempt to reconcile *Amen* with its current interpretation of *Gebardi*, the government glides past the fact that, in *Amen*, it tried to treat employees and non-employees differently, and now argues that employees and non-employees should be treated the same: "[V]iolation of the kingpin statute . . . necessarily involves the participation of two classes of persons—those who lead . . . and those who are led . . . ." Gov. Br. 31. This is further evidence that the government's view of the *Gebardi* principle is unprincipled. In *Amen* they argued employees and non-employees are different to escape *Gebardi*. Now the government argues these classes are the same to escape *Gebardi*. In any event, the District Court below rejected this "two classes" spin on *Amen*, correctly observing that *Amen's* holding turned on its conclusion that Congress only intended to sweep kingpins into its net with the CCE. App. 127. *Amen's* holding therefore had nothing to do with

"frequently if not normally associated" persons.[10] Rather, the *Amen* Court applied the *Gebardi* principle to bar application of the conspiracy and aiding-and-abetting statutes to *any* persons whom Congress deliberately excluded from criminal liability.[11]

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[10] The cases the government cites for the proposition that *Gebardi* applies uniquely "where the offense 'necessarily' involves participation by another," Govt. Brief 23–24, actually turned on whether the statute in question evinced an "*affirmative legislative policy*" to exclude certain individuals from coverage. In *United States* v. *Shear*, the court applied *Gebardi* and found that an *affirmative legislative policy* under the Occupational Safety and Health Act of 1970 ("OSHA") to place the onus of workplace safety on employers precluded finding that an employee may aid and abet his employer's criminal OSHA violation. 962 F.2d 488, 495 (5th Cir. 1992). Before *Shear*, the Fifth Circuit decided *United States* v. *Falletta*, 523 F.2d 1198 (5th Cir. 1975), another case cited—incorrectly—by the government to demonstrate *Gebardi's* inapplicability. In *Falletta*, the court declined to apply *Gebardi* to insulate from accessorial liability a person who aided and abetted a convicted felon's receipt of a firearm. 523 F.2d at 1200. The reason for this, as the Fifth Circuit explained in *Shear*, was the absence of an *affirmative legislative policy* under the firearm statute to exclude the defendant from accessorial liability. *Shear*, 962 F.2d at 495. OSHA, on the other hand, evinced a policy to bar accessorial liability for an "employee" who had been on supervisory duty during a fatal workplace accident. *Id*. at 495–96. Thus, the same "affirmative legislative policy approach" that the court had followed in *Falletta* produced "a different result [in *Shear*] because of the very different legislative context." *Id*. at 495. That the facts of *Shear* and *Falletta* involve bilateral transactions does not change the Fifth Circuit's reasoning which hinged entirely on discerning legislative intent in accordance with the *Gebardi* principle.

[11] Even if this Court is persuaded that the *Gebardi* principle only applies to persons who are "frequently, if not normally" a part of the offense in question, it should nevertheless apply the *Gebardi* principle to these facts. Because the FCPA criminalizes bribe payments made outside the United States by persons with substantial U.S. ties, the statute is usually applied to persons engaged in international business. Given the nature of international business, persons acting in that sphere will frequently—almost definitionally—engage with non-resident, non-

3. Two Courts have Previously Found that the *Gebardi* Principle Applies to the FCPA

There can be no question that the *Gebardi* principle applies to the FCPA—the only issue here is the proper application of that principle to Mr. Hoskins. To that point, prior to the District Court ruling, two other courts considered the application of the *Gebardi* principle to the FCPA, and both found *Gebardi* prevented the government from pursuing conspiracy charges against individuals that Congress deliberately excluded from the scope of the FCPA. *See Castle*, 925 F.2d 831; *Bodmer*, 342 F. Supp. 2d 176. And, in *Bodmer*, the government actually *conceded* that, under *Gebardi*, the government would be precluded from pursuing a conspiracy charge were the court to conclude that a prior version of the FCPA did not apply directly to a non-resident foreign national. *See* 342 F. Supp. 2d at 181.

In *Castle*, the Fifth Circuit applied *Gebardi* to the FCPA for the first time, and held that because foreign officials are not themselves subject to the FCPA's criminal penalties—an undisputed point—the government could not circumvent Congressional intent by charging them with conspiracy to violate the FCPA. 925 F.2d at 835–36. Because the government conceded that the FCPA did not directly apply to foreign officials, the only question before the court was whether *Gebardi* operated to preclude the conspiracy charge. *Id*. at 834. Discussing *Gebardi*, the

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agent foreigners such as Mr. Hoskins. Thus, Mr. Hoskins falls within a category of persons who are frequently, if not normally, part of an FCPA offense.

court noted that allowing a conspiracy prosecution of a Congressionally immune party "would allow the Executive Branch to extend the reach of the Act beyond the scope of Congress' intention." *Id.* at 833. Concluding that the *Gebardi* principle "squarely" applied, the Fifth Circuit stated: "[T]his Court may not allow the Executive to override the Congressional intent not to prosecute foreign officials for their participation in the prohibited acts." *Id.* The court concluded with the observation that, "[a]s in *Gebardi*, it would be absurd to take away with the earlier and more general conspiracy statute the exemption from prosecution granted to foreign officials by the later and more specific FCPA." *Id.* at 833, 836.[12]

In *Bodmer*, the defendant, a non-resident foreign national (like Mr. Hoskins), was charged with conspiracy to violate the FCPA and (like Mr. Hoskins) was alleged to have acted as an "agent of a domestic concern." 342 F. Supp. 2d 176. Bodmer contended that the pre-1998 version of the FCPA (in effect at the time of his alleged conduct), did not apply to non-U.S. agents of a domestic

[12] The government mischaracterizes *Castle* as an example of "necessary party" analysis. As the government points out, Gov. Br. 26, the court in *Castle* did discuss the fact that the participation of foreign officials "was required in every case." *Castle*, 925 F.2d at 835. But the government cherry-picks only the language in *Castle* that supports its distorted restatement of *Gebardi*. As the District Court explained below, the Fifth Circuit in *Castle* considered the legislative history of the FCPA at length and found that Congress was concerned about the jurisdictional and diplomatic difficulties covering foreign officials would entail. The Fifth Circuit excluded foreign officials because it "found an intent in the FCPA to exclude the foreign bribe recipients," and thus found "an affirmative legislative policy." App. 129 (citing *Castle*, 925 F.2d at 836).

concern and, thus, under *Gebardi*, he could not be subject to prosecution for conspiracy. After finding that version of the FCPA ambiguous as applied to Bodmer, the court concluded that the rule of lenity warranted a finding in the defendant's favor. *Id*. at 190. The court further held that, since the defendant was not directly covered by the FCPA, the *Gebardi* principle was applicable and the conspiracy count must be dismissed. *Id.* at 181 & n.6. Most notably, the government conceded the application of the *Gebardi* principle. *See id.* at 190 ("the Government concedes that pursuant to *Gebardi*, if the FCPA's criminal penalties do not apply to Bodmer, then the Government cannot circumvent that limitation by charging Bodmer with conspiracy to violate the FCPA.").[13]

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[13] The government only mentions *Bodmer* in a footnote and makes much out of the fact that the case addressed a pre-1998 version of the FCPA. Gov. Br. 27 n.6. Yet, the government does not explain how the differences between the pre-1998 version of the FCPA and the current version of the FCPA have any impact whatsoever on the *Gebardi* analysis; it merely claims that the District Court failed to appreciate how the difference informed the government's concession. That failing may be because it is a distinction without a difference: the articulation of the *Gebardi* principle was unaffected by the difference in the pre-1998 language. The court in *Bodmer* described *Gebardi* as standing for the proposition that "where Congress passes a substantive criminal statute that excludes a certain class of individuals from liability, the Government cannot evade Congressional intent by charging those individuals with conspiring to violate the same statute." 342 F. Supp. 2d at 181 n.6. As noted, the government did not contest that characterization of the *Gebardi* principle in *Bodmer* and agreed that if the court construed the pre-1998 FCPA to exclude foreign, non-resident agents from direct liability, such agents were also exempt from conspiracy liability under the *Gebardi* principle. *Id*. at 181, 190.

In sum, all courts to consider the issue have uniformly concluded that the *Gebardi* principle applies to the FCPA, so the only issue remaining is whether Congress intended the FCPA to apply to non-resident foreign nationals—such as Mr. Hoskins—who were not agents of a U.S. company and who did not act in U.S. territory. As the District Court rightly held, and as will be shown below, the text and structure of the FCPA and its legislative history demonstrate that Congress did not so intend.

B. The Text and Structure of the FCPA Demonstrate that Congress Intended To Limit Liability to Certain Defined Categories of People

"The clearest indication of legislative intent is the text and structure" of the statute at issue. App. 128 (citing *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739 (1989)). The government asserts that the text and structure of the FCPA demonstrate Congressional intent to *include* non-agent foreign nationals within the scope of criminal FCPA liability. Gov. Br. at 34–35. Aside from this sweeping pronouncement, however, the government fails to analyze the text of the FCPA. Because "[l]ogic and precedent dictate that 'the starting point in every case involving construction of a statute is the language itself,'" this marked absence of textual analysis demonstrates the weakness of the government's position. *Greyhound Corp.* v. *Mt. Hood Stages, Inc.*, 437 U.S. 322,

330 (1978) (quoting *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 756 (1975) (Powell, J., concurring)).

Both the language and structure of the FCPA evince clear Congressional intent to "delineate[] the classes of people subject to liability and exclude[] non-resident foreign nationals," except in carefully defined circumstances. App. 123. *First*, the plain meaning of the statutory language is clear: Non-agent, non-U.S. citizens are excluded from the purview of the FCPA when they do not take acts within the United States. *Second*, the structure of the FCPA illustrates Congressional intent to avoid the "jurisdictional, enforcement, and diplomatic" difficulties of prosecuting foreign citizens for extraterritorial conduct. *Castle*, 925 F.2d at 835.

The text of the FCPA demonstrates Congress's careful delineation of the classes of natural persons who would be subject to the law. The District Court explained that the criminal provisions of the current FCPA have three jurisdictional bases:

> (1) where a "domestic concern" or U.S. "issuer" of securities, or any officer, director, employee, or agent thereof (regardless of their nationality) makes use of U.S. interstate commerce in furtherance of a corrupt payment, 15 U.S.C. §§ 78dd-1(a), 78dd-2(a); (2) where a U.S. citizen, national, or resident acts outside the United States in furtherance of a corrupt payment, regardless of whether they make use of U.S. interstate commerce, id. § 78dd-2(i); and (3) where any other person, while in the territory of the United States, acts in furtherance of a corrupt payment, regardless of nationality and the use of interstate commerce, *id*. § 78dd-3.

App. 122–23. Thus, the FCPA clearly enumerates the classes of persons to whom it applies, and nothing in the statute suggests that the enumeration is non-exhaustive. As this Court has previously held, "[w]here the literal meaning of a statute is clear in its context, and where such a plain reading is not inconsistent with the scheme's objectives, that interpretation must prevail . . . ." *Bd. of Educ.* v. *Harris*, 622 F.2d 599, 609 (2d Cir. 1979). Hence, under the plain language of the statute, non-resident foreign nationals, like Mr. Hoskins, can only violate the FCPA by: (1) acting in a specified capacity on behalf of a U.S. issuer or domestic concern; or (2) acting in the United States. As the District Court correctly held, if the government fails to prove either jurisdictional prerequisite, under *Gebardi*, its accessorial-liability theories also fail.

The deliberate exclusion of non-resident foreign nationals is further evident in the structure of the statute, which reflects Congressional concerns about the difficulty of prosecuting foreigners for non-domestic conduct. The government claims that the FCPA applies where there are "threshold ties to the United States." Gov. Br. 33. That point is not controversial. The FCPA maintains that threshold in various ways, including by: (1) expressly limiting its reach to *all* U.S. citizens and *all* U.S. businesses, and *all* their officers, directors, employees, and agents; (2) imposing an instrumentality of interstate commerce requirement; and, (3) extending to those acting while in the United States. This careful line-drawing

has to mean that Congress intended to exclude those falling outside of the calibrated categories, like Mr. Hoskins. In other words, the structure of the statute demonstrates Congressional intent to capture only those entities and individuals with a *significant* connection to the United States.

The FCPA is a stark departure from Congress's normal practice of drafting criminal statutes so as to reach all persons over whom the courts could exercise jurisdiction. Unlike the FCPA, the vast majority of federal criminal laws proscribe conduct in broad strokes. Most federal criminal statutes, meaning to capture any and all wrongdoers, are drafted to begin with an all-inclusive phrase, such as "whoever" or "a person who." *See, e.g.*, 18 U.S.C. § 201(b)(1) ("Whoever[,] directly or indirectly, corruptly gives, offers or promises anything of value to any public official . . . shall be fined [or imprisoned.]"). Such statutes create universal liability. Provided there is proper venue, any person who commits the prohibited conduct may be prosecuted and punished for their actions.

That general rule of inclusivity applies in all but a small subset of federal crimes, in which the all-inclusive term at the beginning of the statute is limited by some other clause. Those statutes are typically of the sort that the D.C. Circuit in *United States v. Yakou* described as statutes for which "the evil sought to be averted inherently relates to, and indeed requires, persons in certain categories." 428 F.3d 241, 252 (D.C. Cir. 2005). For example, 18 U.S.C. § 201(b)(2) reads,

"[w]hoever . . . *being a public official* . . . directly or indirectly, corruptly demands, seeks, receives, accepts, or agrees to receive or accept anything of value . . . in return for being influenced in the performance of any official act . . . shall be [punished.]" (Emphasis added). Similarly, it is a crime to make, possess, or obtain prohibited contraband while being an inmate in federal prison. S*ee* 18 U.S.C. § 1791. Whereas any person who bribes a foreign official will have committed "the evil sought to be averted" by the FCPA, even if that person falls outside of the FCPA's enumerated categories, only a public official can commit the "evil" of public corruption interdicted by § 201(b)(2), and only a federal inmate can commit the "evil" interdicted by § 1791.

Congress rarely drafts criminal statutes that expressly apply only to certain categories of individuals, even when others besides those persons *could* commit the harm. The FCPA does precisely that: It penalizes only certain actors who facilitate and pay foreign bribes. Companies that are not "domestic concerns" or issuers of U.S. securities, foreign government officials, and non-agent, non-employee foreign citizens, like Mr. Hoskins, are all excluded from liability, despite the fact that all are capable of participating in foreign bribery schemes.

Likewise, the FCPA is anomalous in that it cabins the criminal liability of foreign individuals in terms of those individuals' particular connections to the United States. In most statutes that capture the extraterritorial conduct of foreign

citizens, the foreign actor need only act to harm a U.S. citizen or U.S. interest in order to trigger U.S. jurisdiction. *See, e.g.*, 18 U.S.C. § 1203 (making it a crime to take a hostage outside the United States when the hostage is a U.S. citizen, or when the hostage-taker seeks to compel the U.S. government). In other instances, to be prosecuted by U.S. authorities the foreign citizen need only be "found" in the United States after commission of the crime. *See* 18 U.S.C. § 2340A (asserting jurisdiction over any individual who commits torture and is later found in the United States, "irrespective of the nationality of the victim or the alleged offender"). In either instance, the wrongdoer need not have any personal ties to the United States. If the individual's motive is to manipulate the U.S. government, to harm a U.S. citizen or U.S. property, or in some cases, if the individual merely enters the United States after committing the crime, he or she has violated United States law.

By contrast, the FCPA premises a foreign citizen's liability for extraterritorial conduct on that individual's particular connection to the United States. For a foreign citizen to violate the FCPA, it is not sufficient that he or she act to harm a U.S. interest, or that he or she is found in the U.S. after committing the crime. Though Congress *could have* drafted the FCPA to create that breadth of liability, it did not. Instead, only foreign citizens who are officers, directors,

employees, agents or stockholders of U.S. issuers or domestic concerns may be prosecuted for violating the statute extraterritorially.

That Congress departed so radically from its usual practice in cabining FCPA liability further demonstrates Congress's intent to limit application of the FCPA to certain persons. Had Congress intended a broader application, it could have drafted a statute that more closely conforms to the structure of the vast majority of criminal laws. Instead, "when Congress 'listed all the persons or entities who could be prosecuted' under the FCPA, it 'intended that these persons would be covered by the [FCPA] itself, without resort to the conspiracy statute' and, as in Gebardi, that intent cannot be circumvented by resort to conspiracy and aiding and abetting liability." App. 133.

C. The Legislative History of the FCPA Further Demonstrates Congress's Intention To Limit Liability to Certain Defined Categories of People

The text and structure of the FCPA make clear Congress's intent to limit liability to certain categories of persons, so it is unnecessary to consider the legislative history. *See Harris*, 622 F.2d at 609. Nonetheless, an examination of the legislative history confirms Congress's intent. The FCPA, as enacted in 1977, applied only to certain categories of actors with close ties to the United States. Subsequent amendments in 1988 and 1998 left this core requirement undisturbed. In arguing that Congress intended a far-reaching application of the FCPA, the

government glosses over much of the legislative history from the original enactment, cherry-picking certain stray quotations to argue that the statute was intended to apply broadly. The government also mischaracterizes the 1998 amendments to the statute, which implemented the Organization for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions ("OECD Convention"). The government argues that the OECD Convention requires that the FCPA apply nearly universally. *See* App. 42–45. However, neither the OECD Convention itself nor the debate surrounding the 1998 amendments to the FCPA supports the government's position.

On each occasion that Congress considered the FCPA, Congress declined to extend the law to apply universally. Instead, Congress deliberately excluded non-agent, non-U.S. citizens acting extraterritorially such as Mr. Hoskins. The government should not now be permitted to reinterpret the statute in a manner that clearly contradicts Congressional intent.

1. Congress Drafted the FCPA Deliberately To Exclude Certain Foreign Nationals from Criminal Liability

From the beginning, the FCPA was intended to interdict conduct by U.S. persons. The FCPA was enacted to counter "widespread bribery of foreign officials by [U.S.] business interests." *United States* v. *Kay*, 359 F.3d 738, 746 (5th Cir. 2004). Following a scandal involving bribes that Lockheed Martin paid

to foreign militaries, Congress held multiple hearings on foreign bribery. *See, e.g.*, *Lockheed Bribery Hearings Before the S. Comm. On Banking, Housing & Urban Affairs*, 94th Cong. (1975).

a. The Senate Proposed Legislation Applicable Only to U.S. Citizens and Nationals

The Senate's first proposed criminal legislation, introduced on July 2, 1976, made it unlawful for any U.S "issuer" or "domestic concern" to use any means or instrumentality of interstate commerce to authorize or pay a foreign bribe. *See* S. 3664, 94th Cong., Supp. App. 24–31 (1976).[14] "Domestic concern" was defined in the bill to include only (1) U.S. citizens and nationals and (2) entities owned or controlled by U.S. citizens and nationals, which had a principal place of business in the United States or were organized under the laws of any U.S. state. S. Rep. No. 94-1031, at 9–10, Supp. App. 38–39 (1976) ("July 1976 Senate Report"). Thus, the Senate bill excluded from liability all foreign nationals, as well as foreign affiliates of U.S. companies. *See id.* The July 1976 Senate Report explained the significance of tying liability to significant U.S. interests:

> The Committee recognizes that principles of international law and comity generally operate to preclude a nation from establishing laws applicable to conduct which takes place outside that country's territorial boundaries. However, it is clear that a nation may adopt and enforce laws covering foreign conduct of its own nationals and

[14] "Supp. App." refers to the Supplemental Appendix.

> covering foreign conduct which has significant effects within that nation.

Id. at 10, Supp. App. 39 (citations omitted).

That same report noted that conspiracy and accessorial liability would apply to "responsible official[s] or employee[s] of [a] U.S. parent company," but not to a foreign national "acting entirely on his own initiative":

> The Committee fully recognizes that the proposed law will not reach all corrupt payments overseas. For example, Sections 2 and 3 would not permit prosecution of a foreign national who paid a bribe overseas acting entirely on his own initiative. The Committee notes, however, that in the majority of bribery cases investigated by the SEC, some responsible official or employee of the U.S. parent company had knowledge of the bribery and approved the practice. Under the bill as reported, such persons could be prosecuted. The concepts of aiding and abetting and joint participation in, would apply to a violation under this bill in the same manner in which they have applied in both SEC actions and in private actions brought under the securities laws generally.

Id. at 7, Supp. App. 36.[15]

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[15] The government selectively quotes the July 1976 Senate Report to argue that the Senate intended accessorial liability to apply generally. Gov. Br. at 50. But the government ignores that the quoted sentence is situated in a paragraph discussing the conduct of officers and employees of a U.S. parent company. Moreover, the bill discussed in the July 1976 Senate Report was never enacted; the Senate replaced it with an alternative bill that expressly addressed individual liability. The July 1976 Senate Report is therefore of limited utility in construing Congressional intent regarding the enacted version of the FCPA.

b. A New Senate Proposal Addressed Individual Liability

On January 18, 1977, in response to requests by President Carter for broader liability, the Senate introduced a bill (S. 305) that eventually, in compromise with a competing House proposal, became the FCPA. As reflected in an April 1977 markup session of the Senate bill, President Carter requested broader and more clearly defined individual liability for bribe payers. While requesting broader coverage for individuals, the Carter administration also cautioned that the bounds of that liability be clearly defined. *See* Markup Session on S. 305, Senate Comm. on Banking, Hous. & Urban Affairs, 95th Cong., Supp. App. 47–94 (1977) ("Markup Session"). The gist of the problem, as articulated by Treasury Secretary Blumenthal, was the bill's failure to adequately specify who would be covered:

> The Administration recognizes that great care must be taken with an approach which makes certain types of extraterritorial conduct subject to our country's laws. Moreover, a law which provides criminal penalties must describe the persons and acts covered with a high degree of specificity in order to be enforceable, to provide fair warning to American businessmen.

Hearing Before the Comm. on Banking, Hous., & Urban Affairs, U.S. Senate, Ninety-Fifth Congress, First Session, on S. 305, at 70, Supp. App. 280 (1977) (statement of Hon. W. Michael Blumenthal). The Secretary also requested protection for foreign nationals:

> There is a problem of extraterritoriality which needs to be carefully addressed. There is also a question of insuring fairness and due

> process . . . for . . . foreign citizens and foreign countries who may in some way become involved and whose reputations become involved in particular allegations. We have to deal with the question of how we can write the bill in such a way that it includes protections in this regard.

Id. at 94, Supp. App. 287.

In response to the Carter Administration's requests, the Committee revised the bill to designate four classes of natural persons—"officer[s], director[s], employee[s] [and] stockholders" of issuers and domestic concerns—who would face direct liability. *See* Markup Session at 8, 12, Supp. App. 54, 58. The Committee noted that these categorizations would replace the concepts of aiding and abetting and joint participation liability apparent in the prior proposal:

> [T]his amendment . . . reflects the Administration's position in recommending that individuals be covered. . . . [T]he Committee last year intended to cover individuals . . . as aiders, abettors and conspirators and so on . . . , and this makes clear that they are covered in their capacity in acting on behalf of the company.

Id. at 12, Supp. App. 58.[16] The Committee's May 1977 report on the amended bill, issued shortly after the markup session, omitted any reference to "aiding and

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[16] The government argues that this provision does not suggest that the Senate intended to reject accessorial liability, noting that a House Report post-dating this bill continued to refer to accessorial liability as applicable to the FCPA. *See* Gov. Br. at 55–56, *citing* H.R. Rep. No. 95-640, at 8, Supp. App. 168 (1977). However, the enacted FCPA includes the language for covering individuals proposed in the Markup Session rather than the different formulation under discussion in the House Report that the government cites. *Compare* Markup Session, at 12, Supp. App. 58 *and* H.R. Rep. No. 95-640, at 8, Supp. App. 168 *with* 15 U.S.C. §§ 78dd-1 and 78dd-2 (1977). *See also* App. 133 ("Rather than resorting to concepts of accomplice liability, the enacted version specifically delineated individuals who

abetting or joint participation" liability, see S. Rep. No. 95-114, Supp. App. 92–119 (1977)—even as it liberally borrowed other language from the portion of the July 1976 Senate Report that referred to aiding and abetting. *Compare*, S. Rep. 95-114, at 11, Supp. App. 107 *with* July 1976 Senate Report, at 7, Supp. App. 36.

c. The House Proposed Broader Legislation, which was Rejected

On February 22, 1977, the House Committee on Interstate and Foreign Commerce introduced a competing bill, which bore similarities to the Senate bill, but contemplated liability for a broader scope of actors. H.R. 3815, 95th Cong., Supp. App. 120–29 (1977). Like the Senate bill, the House bill focused on U.S. issuers and domestic concerns, who would be liable for using interstate mails or wires to bribe foreign officials. *See id.* The House bill extended liability to officers, directors, employees and control persons of U.S. issuers and domestic concerns, irrespective of nationality. *Id.* at 123, § 30A(c)(1) (issuer); *id.* at 126, § 3(c)(1) (domestic concern).

The House bill was broader than the Senate bill in two key respects. First, the bill made liable any "agent" of an issuer or domestic concern who "carried out"

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were covered directly.") (internal quotations omitted). Moreover, the House Report cited by the government merely mimicked the language of the July 1976 Senate Report, which indicated that employees of U.S. parent companies would be covered by the bill. *Compare* H.R. Rep. No. 95-640, at 8, Supp. App. 168 *with* July 1976 Senate Report, at 7, Supp. App. 36.

a bribe. *Id*. at 123, § 30A(c)(2) (issuer); *id.* at 126, § 3(c)(2) (domestic concern). Second—unlike the Senate—the House acquiesced to President Carter's proposal that the statute cover certain foreign affiliates of U.S. companies. *See id.* at 128, § 3(f)(2)(A); 127, § 3(e). These extraterritorial expansions generated significant resistance. For instance, the New York City Bar Association objected on several grounds, including "considerations of comity"; the "potential foreign relations impact" of criminalizing overseas conduct; practical difficulties of prosecuting such offenses; and fairness and due process concerns arising from the inevitable difficulties and disadvantages the accused would have in obtaining witnesses and evidence from overseas (particularly prescient objections that are reflected in the instant case). *Unlawful Corporate Payments Act of 1977: Hearings on H.R. 3815 and H.R. 1602 Before the H. Subcomm. On Consumer Prot. & Fin. of the H. Comm. on Interstate and Foreign Commerce*, 95th Cong. 55, Supp. App. 130–60 (1977). Likewise, the general counsel of the SEC, Harvey L. Pitt, gave testimony expressing jurisdictional and due process concerns. *Id*. at 232, Supp. App. 159.

d. The House Introduced a Narrower Bill

On September 28, 1977, the House Committee on Interstate and Foreign Commerce reported an amended bill, which addressed some of the extraterritorial concerns. H.R. Rep. No. 95-640, at 1, Supp. App. 159. Agents (and employees) of U.S. issuers or domestic concerns remained within the scope of liability in this

amended bill, but would only be liable if it was shown in the proceeding against them or in a separate proceeding that the issuer or domestic concern was itself liable. *Id.* at 11, Supp. App. 171. The amended bill still targeted foreign affiliates, but in a narrower fashion. *Compare id.* at 3–4, Supp. App. 163–64 *with* H.R. 3815, Supp. App. 127, § 3(e).

e. Congress Passed Compromise Legislation that Deliberately Excluded Most Foreign Businesses and Foreign Nationals from Liability

The enacted FCPA embodied a compromise between the Senate's and House's proposals by applying to any "issuer" or "domestic concern," or any "officer, director, employee, or agent" thereof. 15 U.S.C. §§ 78dd-1(a), 78dd-2(a) (1977). Despite the House's and the Carter administration's advocacy, foreign affiliates of U.S. companies were excluded from coverage. The enacted legislation covered U.S. persons, but excluded most foreign nationals because of "jurisdictional, enforcement and diplomatic difficulties[, which] may not be present in the case of individuals who are U.S. citizens, nationals, or residents." H.R. Rep. No. 95-831, at 14, Supp. App. 186. As a result:

> Individuals other than those specifically covered by the bill . . . will be liable when they act in relation to the affairs of any foreign subsidiary of an issuer or domestic concern *if they are citizens, nationals or residents of the United States*.

Id. (emphasis added).

The FCPA specified penalties for non-resident foreign nationals who were officers, directors, employees, agents, or stockholders of issuers or domestic concerns, but there was no penalty provision applicable to non-resident foreign nationals who were not among those classes, making clear Congress's intent to exclude such individuals from liability entirely. *See* §§ 78dd-1(c)(2)–(3) (1977) (penalties relating to issuers); §§ 78dd-2(b)(1)(B)-(3) (1977) (penalties relating to domestic concerns).

2. The 1988 Amendment to the FCPA Maintained Congress's Finely Calibrated Categories

In 1988, Congress amended the FCPA and made two changes with respect to agents and employees: (1) their liability would no longer be predicated on a finding of liability of the issuer or domestic concern, *see* H.R. Rep. No. 100-576, at 923-24, Supp. App. 191–92 (1988); and (2) non-resident foreign national employees and agents of a domestic concern who were not "subject to the jurisdiction of the United States" would be subject to civil FCPA liability. *See* 15 U.S.C. § 78dd-2(g)(2)(C) (1988).[17]

[17] In *Bodmer*, the court carefully considered the phrase "subject to the jurisdiction of the United States," as used in this context, finding that it had "no ordinary common-sense meaning" and that there had been no judicial interpretations of the phrase. *See* 342 F. Supp. 2d. at 182–89. The *Bodmer* court ultimately concluded that the phrase was "wholly unnecessary" to the statute, "because jurisdiction over the defendant is a prerequisite to any criminal action . . . ." *Id.* at 188. Regardless, a non-agent foreign national like Mr. Hoskins was clearly outside the scope of the statute.

3. The 1998 Amendments to the FCPA Implemented the OECD Convention while Maintaining Congress's Finely Calibrated Categories

In 1998, Congress amended the FCPA to implement the OECD Convention. S. Rep. No. 105-277, at 1, Supp. App. 244 (1998). Congress understood the OECD Convention to be the product of U.S. efforts to "achiev[e] comparable [bribery] prohibitions in other developed countries." *See* H.R. Rep. No. 105-802, at 10, Supp. App. 253 (1998). In other words, the OECD Convention was intended to compel other nations to criminalize foreign bribery carried out by their nationals and within their borders—not to vest the U.S. government with greater authority to enforce the FCPA extraterritorially.

The FCPA was largely compliant with the OECD Convention even before it was amended. However, to give the OECD Convention full effect, Congress needed to: (1) assert territorial jurisdiction to reach any person who commits an act in furtherance of a bribe while in the United States, *see* OECD Convention Art. 4.1; and (2) assert nationality jurisdiction to reach any U.S. person who commits an act in furtherance of a bribe, irrespective of where that act is committed, *see* OECD Convention Art. 4.2. The manner in which Congress gave effect to the OECD Convention demonstrated its ongoing intent to exclude non-resident foreign nationals with insufficient connection to the United States.

First, Congress created a new subsection of the FCPA for domestic conduct of non-resident foreign nationals. *See* 15 U.S.C. § 78dd-3. Section 78dd-3 covers "any person" who acts in furtherance of prohibited conduct "while in the territory of the United States," provided such person is not chargeable under § 78dd-1 or § 78dd-2. *See* 15 U.S.C. § 78dd-3(a).

Second, Congress amended § 78dd-1 and § 78dd-2 to subject U.S. persons to liability for prohibited acts overseas, irrespective of whether they used an instrumentality of interstate commerce. *See* 15 U.S.C §§ 78dd-1(g), 78dd-2(i).

Third, Congress eliminated the requirement that non-U.S. persons be "otherwise subject to the jurisdiction of the United States" for criminal penalties to apply. This ensured that all employees or agents of U.S. issuers or domestic concerns would be subject to criminal penalties for FCPA violations, irrespective of nationality. *See* 15 U.S.C § 78dd-2(g)(2).

While broadening the scope of the FCPA, each of these changes demonstrates Congress's intent to maintain limits on the application of the statutes to non-resident foreign nationals. None of the changes brought non-agent foreign nationals who act overseas into the scope of the FCPA. When Congress intends to exclude certain classes of individuals from the scope of liability under a criminal statute, *Gebardi* bars the government from using conspiracy or accessorial liability to circumvent that intent.

4. The OECD Convention does not Support a Broader Application of the FCPA

The government argues incorrectly that the language of the OECD Convention supports the view that the FCPA was meant to apply to non-agent foreign nationals. The government bases this argument primarily on: (1) the requirement in Article 1.1. of the OECD Convention that signatories criminalize bribery by "any person"; and (2) the requirement in Article 1.2 of the OECD convention that conspiracy to bribe a foreign official be a criminal offense "to the same extent as" conspiracy to bribe a public official in the United States. *See* Gov. Br. 41–42 (citing Supp. App. 206). Neither provision should be read as broadly as the government suggests.

The government suggests that the FCPA "should be construed broadly" because Article 1.1 of the OECD Convention requires signatories to criminalize bribery of foreign officials by "any person." Gov. Br. 42 (citing Supp. App. 206). But the OECD Convention's "any person" mandate was not meant to require that signatories exercise universal jurisdiction over bribery offenses. Instead, as the District Court found, "the OECD [Convention's] reference to 'any person' is cabined by Article 4 of the [OECD] Convention." App. 136. Article 4.1 of the OECD Convention requires each signatory to criminalize bribery offenses "committed in whole or in part in its territory," while Article 4.2 requires each signatory "which has jurisdiction to prosecute its nationals for offences committed

abroad" to criminalize bribery committed abroad by its nationals. *See* Supp. App. 207. There is "no indication" that Congress believed that the OECD Convention required it to criminalize "foreign bribery committed abroad by non-resident foreign nationals who conspire with United States citizens." App. 136.

Nor does Article 1.2 of the OECD Convention require that non-agent foreign nationals be subject to accessorial liability for joining with U.S. nationals to bribe foreign officials. *See* Gov. Br. at 42–43 (citing Supp. App. 206). Article 1.2 requires signatories to "take any measures necessary to establish that . . . aiding and abetting . . . an act of bribery . . . shall be a criminal offence," and further provides that "[a]ttempt and conspiracy to bribe a foreign public official shall be criminal offences to the same extent as attempt and conspiracy to bribe" a domestic public official. Supp. App. 206. However, the commentaries to Article 1.2 make clear that this language should be "understood in terms of [its] normal content in national legal systems." Supp. App. 214, ¶11. Thus, Article 1.2 merely makes clear that individuals who fit within the FCPA's delineated classes, or who act while physically present within U.S. territory, are also subject to liability for conspiracy to violate, or aiding and abetting violations of, the statute. This provision, as with every other provision in the OECD Convention, is to be carried out within the jurisdictional limits set by Article 4.

Contrary to the government's argument, the phrase "to the same extent as" should not be read to require that bribery of foreign officials be chargeable in each circumstance that bribery of a domestic official is chargeable. *See* Gov. Br. 42–43. Under this reading, the United States could prosecute wholly foreign conspiracies to bribe foreign officials. A wholly foreign conspiracy to bribe a U.S. official would be properly chargeable under 18 U.S.C. § 201, which criminalizes the bribery of U.S. government officials. If "to the same extent as" bears the rigid meaning that the government suggests, then the government would be obliged by Article 1.2 to prosecute wholly foreign conspiracies to bribe foreign officials, even when those conspiracies did not touch the United States. Article 1.2 does not require this absurd result. Instead, the Commentaries to the OECD Convention suggest that this provision should be read merely to mean that signatories that criminalize conspiracies to bribe domestic officials must also criminalize conspiracies to bribe foreign officials—not that conspiracy liability must be available in the exact same circumstances in domestic and foreign bribery contexts. *See* Supp App. 214, ¶11 ("[I]f authorisation, incitement, or one of the other listed acts, which does not lead to further action, is not itself punishable under a Party's legal system, then the Party would not be required to make it punishable with respect to bribery of a foreign public official.").

The government attempts to diminish the clear import of the text, structure and legislative history of the FCPA with a counter-factual, hypothetical scenario in which a foreign national CEO directs a "massive bribery scheme" through a U.S. subsidiary, while avoiding FCPA liability due to his status as a foreign non-agent. Gov. Br. 58. However, this Court must be guided by the statute Congress enacted—not boogeymen of the government's creation. The FCPA represents a unique and nuanced solution to an inherently extraterritorial problem. Congress recognized that it could not and should not attempt to cover every non-U.S. participant in every allegedly corrupt foreign scheme. Rather, it created distinct classes of covered persons. The OECD convention, which was designed to compel other nations to enact their own anti-bribery regimes, does not empower the government to reach actors beyond those whom Congress expressly selected for coverage. Mr. Hoskins is not a covered person under the FCPA, and the government should not be permitted to ignore Congress's will to find otherwise.

III. The District Court Properly Dismissed the Second Object of the FCPA Conspiracy Charge

A. *Gebardi* Applies to Section 78dd-3 of the FCPA

The government incorrectly argues that the District Court should not have dismissed the second object of the FCPA conspiracy charge, which charges Mr. Hoskins with conspiring to violate § 78dd-3 of the FCPA. Gov. Br. 59. In

order to violate § 78dd-3, an individual must take action in furtherance of a corrupt payment "while in the territory of the United States," *and* must not be subject to § 78dd-1 or § 78dd-2. *See* 15 U.S.C. § 78dd-3. Like § 78dd-2, § 78dd-3 evinces Congress's intent to limit liability to a subset of potential bad actors—those not otherwise subject to the FCPA who violate the statute while in U.S. territory. *Gebardi* therefore limits application of the conspiracy statute to individuals who act in furtherance of a conspiracy to violate § 78dd-3 while present in the United States.

The government argues that, "[a]t a minimum, the second object . . . is validly charged to the extent that Hoskins is an agent of a domestic concern." Gov. Br. 59. This argument improperly conflates § 78dd-2 with § 78dd-3. Section 78dd-3 expressly exempts from its coverage individuals who are capable of violating § 78dd-2. The government's theory would therefore lead to the bizarre result that Mr. Hoskins could be charged with conspiracy to violate § 78dd-3 by virtue of his capacity to violate § 78dd-2, even though that very capacity would make it impossible for him to commit a substantive violation of § 78dd-3. Mr. Hoskins's capacity to violate § 78dd-2 should therefore either preclude the government from charging him with conspiracy to violate § 78dd-3, or, at most, have no bearing on his capacity to violate § 78dd-3. The government would still have to show that Mr. Hoskins acted in the territory of the United States in order to prevail on the second

object of the FCPA conspiracy. Because it is uncontested that Mr. Hoskins did not enter the United States while a member of the alleged conspiracy, *see* App. 137 n.20, the second object of the conspiracy was properly dismissed.

B. A Charge for Conspiracy To Violate Section 78dd-3 can only be Applied Extraterritorially to the Same Extent as a Substantive Violation of Section 78dd-3

The government also argues that the FCPA's legislative history does not evince an intent to limit the reach of the conspiracy and aiding-and-abetting statutes because the Senate and House Reports on § 78dd-3 state that in enacting that section, "'Congress [did] not . . . intend to place a similar limit on the exercise of U.S. criminal jurisdiction over foreign nationals and companies under any other statute or regulation.'" Gov. Br. 45–46 (quoting S. Rep. No. 105-277, at 6, Supp. App. 196; H.R Rep. No. 105-802, at 22, Supp. App. 262).[18] However, this language is insufficient to create a greater extraterritorial reach for conspiracy to violate § 78dd-3 than exists for substantive violations of § 78dd-3. "When a statute provides for some extraterritorial application, the presumption against extraterritoriality operates to limit that provision to its terms." *Kiobel* v. *Royal*

[18] The government argues that this language implies that Congress intended to resurrect conspiratorial and accessorial liability for foreign non-agents under the 1998 amendments to the FCPA. *See* Gov. Br. 44–45. However, the District Court correctly concluded that this language does not signal a broad expansion of coverage under the FCPA for foreign non-agents, but merely affirms Congress's intent not to impose a strict territorial limitation in Section 78dd-2 similar to that embodied in Section 78dd-3. App 135 n.11.

Dutch Petroleum Co., 133 S.Ct. 1659, 1667 (2013) (quoting *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 265 (2010)). The presumption against extraterritoriality applies to criminal statutes as well as to civil statutes. *See United States* v. *Vilar*, 729 F.3d 62, 72 (2d Cir. 2013).

Because § 78dd-3 does not operate extraterritorially, Mr. Hoskins cannot be convicted of conspiracy to violate § 78dd-3 based on extraterritorial conduct. *See United States* v. *Ballestas*, 795 F.3d 138, 144 (D.C. Cir. 2015) ("[I]n the particular context of 'an ancillary offense like aiding and abetting or conspiracy,' we have held that, '[g]enerally, the extraterritorial reach of [the] ancillary offense . . . is coterminous with that of the underlying criminal statute.'") (*quoting United States* v. *Ali*, 718 F.3d 929, 939 (D.C. Cir. 2013)).

In a related context, the D.C. Circuit upheld the dismissal of an indictment charging a foreign national acting abroad with aiding and abetting a violation of the Arms Export Control Act, because application of that statute is limited to persons acting in the United States and U.S. persons acting anywhere in the world. *See Yakou*, 428 F.3d 241. The *Yakou* court reasoned that "Congress legislated against the backdrop of extraterritoriality . . . and absent an indication from Congress to the contrary, the crime of aiding and abetting confers extraterritorial jurisdiction to the same extent as the offense that underlie[s it]." *Id.* at 252. *Yakou*'s reasoning applies with equal force here: The government cannot employ

theories of accessorial liability extraterritorially to Mr. Hoskins when the underlying statute would not apply extraterritorially against him.

CONCLUSION

For all of the reasons stated above, this Court should dismiss the appeal for lack of jurisdiction. Alternatively, this Court should affirm the District Court's ruling in its entirety.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(C), the undersigned counsel of record certifies that the foregoing Brief for the Appellee Lawrence Hoskins complies with the type-volume limitation of Rule 32(a)(7)(B), inasmuch as the brief is proportionately spaced, has a typeface of 14 points or more, and contains no more than 13,898 words. This certification is based on the word count of the word-processing system used to prepare this brief.

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I hereby certify that on December 9, 2016, a copy of the foregoing was filed electronically and served by mail on anyone unable to accept electronic filing. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system or by mail to anyone unable to accept electronic filing as indicated on the Notice of Electronic Filing. Parties may access this filing through the Court's CM/ECF System.

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