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.)

REPLY BRIEF FOR APPELLANT UNITED STATES OF AMERICA

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INTRODUCTION

Defendant Hoskins, from abroad, orchestrated a corrupt scheme with his partners in the United States, including U.S. companies and U.S. citizens, to bribe Indonesian officials.[1] He repeatedly emailed and called his bribery coconspirators in the United States, and he authorized the use of U.S. bank accounts to funnel bribes to "consultants" whom he hired, including one based in Maryland, who in turn paid the Indonesian officials. Br. 6-7. We argued in our opening brief that, even if Hoskins is too high-level to be an "agent" of a domestic concern and therefore not directly covered as a principal under the Foreign Corrupt Practices Act ("FCPA"), 15 U.S.C. § 78dd-2, he is nonetheless liable for FCPA offenses based on well-established principles of conspirator and accomplice liability criminalizing his U.S.-focused conduct.

In response, Hoskins claims that this Court lacks jurisdiction under 18 U.S.C. § 3731 to hear the government's appeal, contending that the district court's rulings precluding the non-agent theory of liability merely indicated how the court "intends to instruct the jury on FCPA accessorial liability." Resp. 5. Hoskins relies, however, on inapposite cases that interpreted a prior version of Section 3731. Furthermore, Hoskins fails to acknowledge the significance of the

[1] All facts are based on the indictment's allegations.

procedural posture of this case, which arises from a district court's pretrial ruling granting a motion to dismiss the indictment "as to any one or more counts, or any part thereof," 18 U.S.C. § 3731, an appealable order under the statute.

On the merits, Hoskins argues that, because non-agent foreign nationals are not liable as principals, they are exempt from secondary liability under *Gebardi v. United States*, 287 U.S. 112 (1932). Hoskins, however, fails to persuasively rebut our explanation that his FCPA violations do not fall within the *Gebardi* exception, which the Supreme Court itself has characterized as "limited." *Pinkerton v. United States*, 328 U.S. 640, 643 (1946). Likewise, Hoskins' analysis of the text and legislative history falls flat. The FCPA's text and legislative history do not indicate any affirmative legislative policy to deviate from standard principles of conspirator and accomplice liability holding foreign nationals criminally culpable when they operate from abroad to assist their U.S. counterparts in violating U.S. law. Such an absurd interpretation of the FCPA would punish the foreign national underlings, yet insulate from culpability the top echelons of foreign nationals who, like Hoskins, use their U.S. partners to violate the FCPA.

Furthermore, the district court separately erred in dismissing in its entirety the second object of the Count 1 conspiracy, alleging that Hoskins conspired with foreign nationals acting within U.S. territory. Although Hoskins supports

that ruling, the second object is validly charged at least to the extent that Hoskins is an agent of a domestic concern, one of the expressly enumerated categories of FCPA offenders.

ARGUMENT

I. This Court Has Jurisdiction over the Government's Appeal.

Hoskins contends that the district court's rulings granting in part Hoskins' motion to dismiss Count 1 of the indictment and effectively precluding the government from relying on the aiding and abetting allegations in Counts 2-7 are not appealable because the court did not dismiss any count of the indictment "or part thereof" but instead "merely previewed how it intended to instruct the jury." Resp. 8-9. His argument is without merit.

Under 18 U.S.C. § 3731, the government may appeal an "order of a district court dismissing an indictment . . . as to any one or more counts, or any part thereof."[2] In enacting Section 3731, Congress "intended to remove all statutory barriers to Government appeals," *United States v. Wilson*, 420 U.S. 332, 337 (1975), and the statute explicitly provides that its provisions should be "liberally construed to effectuate its purposes," 18 U.S.C. § 3731. Accordingly, courts of appeals have treated district courts' rulings that dismiss legal theories

[2] Congress added the phrase "or any part thereof" in a 2002 amendment to the statute. 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, § 3004, 116 Stat. 1758, 1805.

of liability as appealable under Section 3731. *See United States v. Ali*, 718 F.3d 929, 932, 934 (D.C. Cir. 2013) (appellate court had jurisdiction over government appeal challenging district court's ruling that "restricted the charge of aiding and abetting piracy to [defendant's] conduct on the high seas"); *United States v. Schiff*, 602 F.3d 152, 161 (3d Cir. 2010) (court "treat[ed] the dismissal of legal theories proffered by the Government, and the District Court's subsequent preclusion from presenting those theories at trial, as dismissal of part of the indictment"); *United States v. Hill*, 55 F.3d 1197, 1199-200 (6th Cir. 1995) (court had jurisdiction over government's appeal of district court's ruling that limited liability under 18 U.S.C. § 1955 to principals and dismissed aiding-and-abetting theory of liability); *United States v. Bloom*, 149 F.3d 649, 653-54 (7th Cir. 1998) (holding that "a theory of liability" is a "count" under prior version of Section 3731 for purposes of determining appealability).

Here, Hoskins filed a motion "to dismiss Count One of the Third Superseding Indictment," Dkt. 255, and the district court granted the motion in part.[3] App. 118-38. Agreeing with Hoskins, the court held that the *Gebardi*

[3] The district court dismissed the first object of the FCPA conspiracy only "in part" because the government "still intend[ed]" to prove that Hoskins was an "agent of a domestic concern." App. 120 n.1, 137. The district court appeared to dismiss the second object of the conspiracy alleging that Hoskins conspired with foreign nationals acting within U.S. territory in its entirety. *See* Br. 59.

principle precluded the government from proceeding on the theory that Hoskins could be liable for conspiracy and aiding and abetting even if he is not an agent of a domestic concern. The court's order, both in form and in effect, constituted a dismissal that is appealable under Section 3731.[4]

Ignoring the plain terms of the district court's order and the liberal policy permitting government appeals, Hoskins contends that the ruling does not constitute a "dismissal" for purposes of Section 3731 because the court did not "strike an allegation that could have been set forth in a separate count of the indictment," Resp. 13, "or exclude evidence that could serve as an independent basis for a criminal penalty," Resp. 12. Hoskins' criteria are lifted from this Court's decisions in *United States v. Margiotta*, 662 F.2d 131 (2d Cir. 1981), and *United States v. Tom*, 787 F.2d 65 (2d Cir. 1986), but those cases were decided under the earlier version of Section 3731 and are no longer persuasive authority on that point.

In construing the pre-2002 version of Section 3731, this Court interpreted the phrase "dismiss[al] . . . as to one or more counts" as allowing the government

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Hoskins makes no specific argument that the wholesale dismissal of the second object is unappealable.

[4] Hoskins does not distinguish between the district court's preclusion of both conspiracy liability as well as aiding-and-abetting liability in arguing that this Court lacks jurisdiction over the government's appeal, thereby waiving such argument.

to appeal "when an order 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 139-40. The Court subsequently refined its rule as recognizing appellate jurisdiction "where the dismissed portion of a count is a discrete basis of liability, *i.e.*, capable of being framed as a separate count." *Tom*, 787 F.2d at 70 (internal quotation marks omitted).

Congress has since rejected *Tom*'s "discrete basis of liability" test for appealability. As explained in the House Conference Report accompanying the proposed amendment to Section 3731, the amendment's purpose was to resolve the "conflicting results" in the appellate courts on the reach of Section 3731, and the Report specifically cited *Tom* as inconsistent with Congress's intent "to permit the United States to appeal virtually all adverse rulings in criminal cases," unless precluded by the Double Jeopardy Clause. H.R. Rep. No. 107-685, at 188 (2002). Hoskins' adoption of the *Tom* criteria for appealability, Resp. 13, ignores Congress's implicit overruling of that test.

Margiotta also does not help Hoskins because, in addition to construing the previous language in Section 3731, it is factually and procedurally distinguishable. In *Margiotta*, a mail-fraud count alleged that the defendant defrauded the local governments and their citizens (1) of the right to have governmental affairs conducted free from corruption, and (2) of the right to the

defendant's honest participation in those affairs. After the first trial ended in a mistrial and in anticipation of the second trial, the government requested reconsideration of several jury instruction rulings on the elements of mail fraud. As relevant here, the government contended that there was no requirement that the defendant had a fiduciary relationship with the local governments under the first prong. The district court disagreed, stating that it would give a jury instruction requiring proof of a fiduciary relationship as to both prongs. The government appealed the court's pretrial ruling. 662 F.2d at 136-37.

This Court held that Section 3731 did not authorize the government's appeal because the district court's ruling on the jury instructions did not "operate as a dismissal." 662 F.2d at 140. The Court rejected the government's argument that the district court's failure to distinguish the two "prongs" of the mail fraud count "had the effect of eliminating a possible basis for conviction" because the two "prongs" were not "separate grounds but rather . . . mirror images of the single scheme" alleged in the indictment. *Ibid.* Thus, "[w]hile the jury instruction increased the Government's burden of proof beyond that which it prefers to carry, the instruction did not preclude consideration of any discrete acts or factual predicate which could give rise to criminal liability." *Ibid.*

This case is unlike *Margiotta* for the simple reason that the district court here explicitly dismissed the conspiracy count, albeit in part. That distinction is

significant. Unlike in *Margiotta*, this Court need not determine whether the district court's order "operated" as a dismissal; the parties' filings and the order itself made clear that it was. *Cf. Sanabria v. United States*, 437 U.S. 54, 67-68 (1978) (in determining whether district court's orders constituted a "dismissal" of a discrete portion of the single count in the indictment or an evidentiary ruling, Court considered the characterization of the ruling by the parties and the trial court); *id.* at 66 ("While form is not to be exalted over substance in determining the double jeopardy consequences of a ruling terminating a prosecution . . . neither is it appropriate entirely to ignore the form of order entered by the trial court.") (internal citations omitted).

Moreover, the government's two theories of criminal liability are not merely "alternate descriptions of the single . . . scheme." Resp. 13 (quoting *Margiotta*, 662 F.2d at 140). Rather, they are separate bases for criminal liability, as the district court recognized when it dismissed one theory as legally deficient while allowing the government to proceed on the other. *See Bloom*, 149 F.3d at 654 ("[u]nless the district judge perceived that the portion of Count I he dismissed provides a discrete basis for the imposition of criminal liability, he either would have dismissed the entire count or would not have dismissed any of it") (internal quotation marks omitted); *see also Hill*, 55 F.3d at 1199-200 (explaining in response to a similar claim that "the defendants' main contention

– that to allow a conviction for aiding and abetting a violation of [the statute at issue] extends the net of liability further than Congress intended – is itself evidence that § 2 provides an independent basis upon which a conviction could be secured").

Similarly, unlike the jury instruction ruling in *Margiotta*, the district court here did not "merely construe[] one of the requisite legal elements constituting [the FCPA] offense." *Margiotta*, 662 F.2d at 140. Instead, the district court applied a separate doctrine (the *Gebardi* principle) to exempt Hoskins from criminal liability as a non-agent conspirator and accomplice. *See*, *e.g.*, App. 119, 121. And, while the district court did not strike any factual allegations from the indictment, it struck a distinct theory of liability, which *Margiotta* had no occasion to address.

No question as to appealability would have arisen if the government had elected to proceed solely under conspiracy and aiding-and-abetting theories without regard to Hoskins' status as an agent of a domestic concern. The indictment's additional allegation that Hoskins is liable as an agent should not change that result. *Cf. United States v. Levasseur*, 846 F.2d 786, 790 (1st Cir. 1988) (stating that the government could have appealed the order striking several RICO predicates if those had been the only predicates charged and that the result

should not be different "merely because the government chose to include allegations of additional predicate acts").

Finally, Hoskins' characterization (Resp. 9) of the dismissal order as "merely preview[ing]" the jury instructions is meritless. Indeed, Hoskins is especially ill-situated to press that claim when he argued that the district court should dismiss Count One, and the court agreed that his claim was "properly raised on a pretrial motion to dismiss." App. 122 n.2. Hoskins also offers no support for his underlying premise that a pretrial dismissal order is not appealable if the court's ruling on a point of law also could be reflected in a jury instruction. To the contrary, courts of appeals, including this one, routinely exercise jurisdiction over government appeals of pretrial dismissals based on district courts' legal interpretations of offense elements without regard to whether the jury instructions would have led to the same outcome. *See*, *e.g.*, *United States v. Evans*, 844 F.2d 36 (2d Cir. 1988); *United States v. Weaver*, 659 F.3d 353 (4th Cir. 2011); *United States v. Rainey*, 757 F.3d 234 (5th Cir. 2014), *cert. denied*, 135 S. Ct. 1175 (2015); *see also* Anne Bowen Poulin, *Government Appeals in Criminal Cases: The Myth of Asymmetry*, 77 U. Cin. L. Rev. 1, 26 (2008) (trial court analyzes substantive law in making numerous appealable pretrial decisions).

II. Hoskins Is Liable as Charged as an FCPA Conspirator and Accomplice.

A. The *Gebardi* exception is inapplicable and does not alter standard principles of secondary liability applying to foreigners like Hoskins who affiliate themselves with domestic conduct.

1. We argued in our opening brief that conspirator and aiding-and-abetting liability apply in general to all individuals, including those not specified in the underlying substantive statute and therefore incapable of committing the substantive offense, as well as foreign nationals operating abroad who assist their U.S.-based partners in crime. Br. 18-21. This axiomatic attachment of secondary liability serves the important purpose of "enlarg[ing] the scope of criminal liability . . . so that a person who operates from behind the scenes may be convicted even though he is not expressly prohibited by the substantive statute from engaging in the acts made criminal by Congress." *United States v. Ruffin*, 613 F.2d 408, 413 (2d Cir. 1979).

With respect to the liability of defendants acting on foreign territory, we cited (Br. 20-21) cases such as the Supreme Court's decision in *Ford v. United States*, 273 U.S. 593 (1927), as well as a number of circuit cases, holding that foreign nationals acting abroad are subject to conspirator and accomplice liability, even if a statute would not otherwise apply to their foreign conduct, in order to capture their culpability in assisting domestic conduct. *Id.* at 620 (when

there is a conspiracy "directed to violation of the United States law within the United States, by men within and without it," then "all are guilty of the offense of conspiring to violate the United States law whether they are in or out of the country"). We explained that Hoskins was therefore liable under these general and widely-applied rules of secondary liability, even though a foreign national non-agent acting outside the United States is not subject to the FCPA's direct prohibitions, because he affiliated himself with and even directed criminal conduct occurring in the United States. Br. 21, 37.

Tellingly, Hoskins does not contest the principle that a normal feature of U.S. criminal law extends secondary liability to foreign nationals acting abroad for their culpability in assisting domestic conduct. What Hoskins fails to realize is that this principle substantially undercuts his argument that Congress had an affirmative legislative policy to exclude such foreign nationals from secondary liability under the FCPA. Congress was well aware of this principle at the time it enacted the FCPA and its amendments. In fact, the House Report accompanying the bill that in compromise with the Senate became the 1977 FCPA (H.R. Rep. No. 95-640, at 12 n.3 (1977)), cited to *Rivard v. United States*, 375 F.2d 882 (5th Cir. 1967), which in turn quotes extensively from the *Ford* decision for this very principle that extends liability to "an alien for a conspiracy to commit a crime against the United States, formed without the United States,

several of the overt acts having been committed in furtherance of the conspiracy within the United States by a co-conspirator." *Id.* at 886; *see also id.* at 887 & n.13 (imposing aiding-and-abetting liability on the alien). Congress repeatedly indicated, both during the FCPA's 1977 enactment and the 1998 amendment process, its intent, without qualification, that normal principles of conspirator and aiding-and-abetting liability applied to the FCPA, *see, e.g.*, Br. 41, 45-46, 50, 53, thereby confirming Hoskins' culpability.

Amicus (The New York Council of Defense Lawyers) contends that convicting Hoskins as a non-agent by relying on secondary liability "violates the presumption against extraterritoriality" (Amicus Br. 5-19), even though Hoskins himself did not deem this argument pertinent enough to raise in this Court. Hoskins was right.

The presumption against extraterritoriality states that, "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application." *RJR Nabisco, Inc. v. European Community*, 136 S. Ct. 2090, 2100 (2016). Relatedly, courts have held that, "[g]enerally, the extraterritorial reach of an ancillary offense like aiding and abetting or conspiracy is coterminous with that of the underlying criminal statute." *Ali*, 718 F.3d at 939.

Leaving aside the obvious point that the FCPA contemplates some extraterritorial application given its purpose to combat *foreign* bribery, amicus fails to acknowledge that the presumption does not apply because, as the district court held and Hoskins does not challenge here, he and his coconspirators are charged with "domestic conduct." App. 80. That ruling is in accord with the Supreme Court's recent decision in *RJR Nabisco* holding that, "[if] the conduct relevant to the statute's focus occurred in the United States, then the case involves a permissible domestic application even if other conduct occurred abroad." 136 S. Ct. at 2101.

Section 78dd-2 criminalizes a covered actor who "make[s] use of the mails or any means or instrumentality of interstate commerce corruptly in furtherance of" bribing a foreign official to obtain business. 15 U.S.C. § 78dd-2(a). The indictment alleges that Hoskins and his coconspirators orchestrated a bribery scheme that had its focal point in the United States, negotiated bogus consulting agreements with (among others) a U.S. person based in Maryland to conceal the bribes, caused the bribes to be paid from U.S. bank accounts (in part funneled through the Maryland consultant's bank account), and sent and received emails to and from the United States in furtherance of the corrupt scheme. Br. 6-8. That conduct, which satisfies all the offense elements, proves a domestic violation "even if some further conduct contributing to the violation occurred

outside the United States." *European Community v. RJR Nabisco, Inc.*, 764 F.3d 129, 142 (2d Cir. 2014), *rev'd on other grounds*, 136 S. Ct. 2090 (2016); *cf. RJR Nabisco*, 136 S. Ct at 2105-06 (assuming the correctness of that portion of the lower court ruling).

Accordingly, because a domestic application of the FCPA is at issue, normal secondary liability principles extending culpability to foreign actors who assist their U.S.-based counterparts apply, without running afoul of the presumption against extraterritoriality. *See In re Warrant to Search a Certain E-Mail Account Controlled and Maintained by Microsoft Corp.*, 829 F.3d 197, 216 (2d Cir. 2016) ("An evaluation of the presumption's application to a particular case is essentially an inquiry into whether the domestic contacts are sufficient to avoid triggering the presumption at all.") (quotation marks omitted); *United States v. Hayes*, 118 F.Supp.3d 620, 628 (S.D.N.Y. 2015) (wire fraud charge against defendant located abroad using U.S. wires to manipulate an interbank foreign currency rate "alleges a domestic application").

Amicus's reliance on *United States v. Yakou*, 428 F.3d 241 (D.C. Cir. 2005), is unavailing. Amicus Br. 12-14; *see also* Resp. 54-56. *Yakou* involved the Arms Control Export Act (ACEA) and its implementing regulations, which in relevant part applied to brokering activities in restricted munitions by "[a]ny U.S. person, wherever located, and any foreign person located in the United States." 428

F.3d at 243. After holding that Yakou was not a "U.S. person," the court held that he could not be liable for aiding and abetting his son, a U.S. person, based on alleged criminal conduct that occurred wholly outside the United States. *Id.* at 253 (indictment "refers only to brokering activities in Iraq"). The court acknowledged that accomplice liability "typically applies to any criminal statute unless Congress specifically carves out an exception," *id.* at 251 (quotation marks omitted), but held that the "presumption against extraterritoriality" prevented applying aiding-and-abetting liability where it would "expand the extraterritorial reach of the underlying statute," *id.* at 252-54.

Unlike *Yakou*, where the statute contained no requirement of domestic activity and the offense conduct took place wholly overseas, Section 78dd-2 requires use of an interstate wire and the charged conduct triggers a domestic, not extraterritorial, application of the statute.[5] Accordingly, *Yakou*'s limitation on aiding-and-abetting liability is not pertinent here because applying secondary liability to a defendant like Hoskins does not "expand the extraterritorial reach" of the statute. Indeed, there is no question that the FCPA applies to a foreign

[5] Similarly, 15 U.S.C. § 78dd-3 requires domestic conduct, and therefore conspiring to violate Section 78dd-3 is a domestic application of the FCPA.

national "agent" who never steps foot in the United States and was engaged in the exact same conduct as Hoskins.[6]

2. We argued (Br. 21-28) that the allegations against Hoskins do not fall within the narrow *Gebardi* exception to the general applicability of secondary liability. We explained that *Gebardi* applies only when the defendant's "consent or acquiescence is inherent" in the object offence (*Ocasio v. United States*, 136 S. Ct. 1423, 1432 (2016)), 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 that defendant's behavior "a crime under the [statute] itself." *Gebardi*, 287 U.S. at 121. Those are the circumstances that might warrant the extraordinary inference that Congress, by omitting an individual so central to the offense from principal liability, also intended to shield that individual from secondary liability. We explained that a defendant like Hoskins – a non-agent foreign national on the bribe-paying side of the transaction – is not so "frequently" or "normally" involved in an FCPA offense that such participant's absence from the substantive statute justifies the *Gebardi* inference.

[6] As to amicus's suggestion that the government is treading on the "space" of foreign nations' authority, Amicus Br. 25, the fact that no foreign country objects to this prosecution disproves his point.

Hoskins criticizes our formulation as overly narrow and unsupported by the case law. Resp. 17-31. To the contrary, it is based on the Supreme Court's own words, as well as the lower courts' opinions applying *Gebardi* in specific cases. Thus, in interpreting Hobbs Act extortion in *Ocasio*, the Supreme Court stated that *Gebardi* and its predecessor, *United States v. Holte*, 236 U.S. 140 (1915), both interpreting the Mann Act, "show that when [a] 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." *Ocasio*, 136 S. Ct. at 1432. Those decisions all show the narrowness of the *Gebardi* exception. Even when a substantive statute omits a necessary participant in an offense – the woman being transported under the Mann Act or the person being extorted under the Hobbs Act – the Supreme Court refused to discern a congressional intent to grant a blanket exclusion to that participant from secondary liability. Instead, the Court merely required proof of "something more than bare consent or acquiescence" before the necessary participant who is incapable of committing the substantive offense is nonetheless culpable as a conspirator. *Ibid*. Although Hoskins inexplicably contends that "[t]he *Gebardi* principle had nothing to do with [the *Ocasio*] decision," Resp. 23, the *Ocasio* Court specified that the extortion payors were

conspirators in that case, though incapable of committing the substantive offence, "under the reasoning of *Holte* and *Gebardi*." 136 S. Ct. at 1432.

Hoskins' contention (Resp. 22) that the government mistakenly conflates the *Gebardi* exception with Wharton's Rule (precluding conspiracy liability where the substantive offense necessarily requires the same concerted activity between two people) is a red herring. Certainly, a Mann Act offense (and a Hobbs Act extortion offense) "may be effected without the [victim's] consent," rendering Wharton's Rule inapplicable. *Gebardi*, 287 U.S. at 121-22. Nonetheless, the thrust of the *Gebardi* exception is that when the acquiescence of a participant who cannot be a principal is "inherent in the underlying offense" in typical prosecutions, *Ocasio*, 136 S. Ct. at 1432, or, as *Gebardi* puts it, when such participation is "frequently, if not normally" part of typical offense conduct, 287 U.S. at 121, courts may, depending on the circumstances, infer an affirmative legislative policy to leave that type of participant free from secondary liability as well. *Cf. Abuelhawa v. United States*, 556 U.S. 816, 820 (2009) (citing *Gebardi* as representing the principle that "where a statute treats one side of a bilateral transaction more leniently, adding to the penalty of the party on that side for facilitating the action by the other would upend the calibration of punishment set by the legislature"). As we explained, the lower courts have found the immunity inference applicable where the unpunished participant is

the "victim" of the crime, and in bilateral transactions where the offense "necessarily" involves participation by another, yet Congress chose to punish only one side of the transaction. *See* Br. 24-28 (citing cases); *see also United States v. Southard*, 700 F.2d 1, 19-20 (1st Cir. 1983).[7]

Hoskins instead contends that the *Gebardi* exception precludes secondary liability against "classes or persons whom Congress intended to exclude from liability under a particular statute." *E.g.*, Resp. 17. But that circular statement of the *Gebardi* principle provides no guidance or criteria for courts to apply in determining what "Congress intended." Hoskins acknowledges, as he must, that the *Gebardi* exception does not apply to all statutes that target specific categories of offenders. Resp. 19 (noting *Gebardi* Court's recognition that statute that prohibited bankrupts from concealing assets from the trustee did not immunize non-bankrupts who assisted in the commission of the offense). In other words, even where a statute carefully delineates classes of persons to be covered, as does the FCPA, that alone does not warrant application of *Gebardi*.

[7] Contrary to Hoskins (*e.g.*, Resp. 15 n.8), the government's analysis of *Gebardi*'s scope is substantially similar to our position below, where we emphasized the same two categories of *Gebardi* cases (necessary parties and victims), *see* App. 126. Our current formulation is informed by the Supreme Court's recent *Ocasio* decision and is more defendant-friendly in that it contemplates *Gebardi* applying not only where a participant is a "necessary" actor left unpunished by the substantive statute, but also where the participant is merely "frequently, if not normally" involved in the offense conduct.

See Br. 29-30, 37 (citing cases). Hoskins then tries to distinguish the FCPA and the Mann Act as statutes that "address a general harm and apply only to a subset of a larger class of individuals who could cause that harm." Resp. 20. That distinction does not hold water. The bankruptcy statute discussed in *Gebardi*, for example, also applied only to a subset of a larger class of individuals who could cause the targeted harm – it applied only to the bankrupt, rather than to "whoever conceals bankruptcy assets from a trustee," yet there is no dispute that *Gebardi* was inapplicable to that statute.

Hoskins' main argument (Resp. 25-31) in attempting to distinguish the lower court cases narrowly applying *Gebardi* is also circular. Although Hoskins contends that those cases turned on finding an "affirmative legislative policy" to exclude certain individuals from coverage, he ignores that the threshold evidence of legislative intent was the fact that the statute at issue criminalized only one side of a bilateral transaction, thereby excluding other "necessary" parties whom Congress must have contemplated for liability yet left unpunished. *See* Br. 24-28. Thus, in deciding in *United States v. Castle*, 925 F.2d 831 (5th Cir. 1991), that the foreign official bribe recipient in an FCPA case was immune from conspiracy liability, the court predicated its decision on an "affirmative legislative policy to leave unpunished a well-defined group of persons who were *necessary* parties to the acts constituting a violation of the substantive law." *Id.*

at 836 (emphasis added); *see United States v. Lake*, 472 F.3d 1247, 1265 (10th Cir. 2007) (in both *Gebardi* and *Castle*, "the role of the defendant coconspirator was so central to the commission of the substantive offense that the failure of the statute defining the substantive offense to prohibit that role explicitly was a compelling indication of legislative intent not to punish such a coconspirator").

As set out in our opening brief (Br. 27 n.6), *United States v. Bodmer*, 342 F.Supp.2d 176 (S.D.N.Y. 2004), is not helpful to Hoskins. The pre-1998 version of the FCPA interpreted in *Bodmer* imposed principal liability on an "agent" of a domestic concern, but according to the district court (under the rule of lenity), also precluded criminal penalties for a non-resident foreign national "agent." Because the pre-1998 statute treated an enumerated actor differently by expressly leaving his participation as a principal unpunished (as opposed to merely omitting an unnecessary actor), a similar exception to punishment for secondary liability applied without any need to intuit what Congress intended because Congress made clear its intent in the statute itself. The government agreed that *Gebardi* applied only given the district court's interpretation that the statute expressly exempted an *enumerated* party from criminal punishment. *Id.* at 181, 189.

Despite Hoskins' protestations to the contrary (Resp. 27 n.11), he does not fall into the category of persons who are "frequently, if not normally" a part of

the offense, such that his omission from the substantive statute might signal a congressional intent to grant immunity from secondary liability. He is not an enumerated party who has been excluded from substantive criminal penalties. Moreover, it is not typical for a non-resident foreign national to be sufficiently in cahoots with FCPA-covered actors to be a conspirator or accomplice, yet not qualify as an agent.

B. The district court erred in applying the *Gebardi* exception to immunize Hoskins and misinterpreted the FCPA's text and legislative history.

1. In arguing that the district court adopted an overly broad construction of *Gebardi*, we explained that the district court misconstrued *United States v. Amen*, 831 F.2d 373 (2d Cir. 1987). *See* Br. 28-33, 57-58. Among other things, we pointed out that the *Amen* Court itself categorized the drug kingpin statute as targeting the "leadership of the enterprise, *necessarily* excluding those who do not lead," 831 F.2d at 381 (emphasis added), and therefore this Court's exclusion of non-kingpins from secondary liability fit within the traditional *Gebardi* framework. Hoskins' main rejoinder (Resp. 26) is that the government advanced a narrower necessary party analysis (distinguishing between employees and non-employees of the kingpin) to the *Amen* Court.[8] That is

[8] As we explained, the *Amen* Court ruled that narrower distinction "totally unworkable." *See* Br. 32 n.7.

beside the point because the *Amen* Court's own analysis relied on the "necessary" party rationale. *Amen* therefore does not support application of the *Gebardi* exception here, where a defendant like Hoskins is not a necessary party to an FCPA offense.

2. We argued (Br. 33-37) that the district court, colored by its mistaken conclusion that *Gebardi* applied, then incorrectly construed the FCPA's text to support immunizing defendants like Hoskins. The FCPA's text and structure do not support excluding non-agent foreign nationals operating abroad from secondary liability. We emphasized the numerous textual provisions that seek to criminalize the conduct of a wide variety of actors on the bribe-paying side of the transaction, including those who operate exclusively on foreign soil, as long as there are threshold ties to the United States, all of which describes Hoskins' conduct in this case. *See Castle*, 925 F.2d at 835 (aside from the foreign official bribe recipient, Congress intended the FCPA to "reach as far as possible").

Like the district court and in a reprise of his *Gebardi* argument, Hoskins again relies on Congress's "careful delineation" of those covered under the statute to support his contrary argument. Resp. 32-33. In particular, Hoskins contends that, because the FCPA penalizes only certain actors who facilitate and pay foreign bribes, even though "any person who bribes a foreign official will have committed 'the evil sought to be averted' by the FCPA," that

specification proves Congress's intent to cabin not just principal liability but also secondary liability. Resp. 35.

The FCPA, however, did not seek to criminalize all foreign bribery. Congress's focus was foreign bribery that had threshold ties to the United States. That is why it enacted a statute that required specific linkages to the United States for primary liability. That same statutory text does not support similarly cabining secondary liability, however, because the FCPA's requirements for primary liability already ensure that an offense has a sufficient connection to the United States to warrant U.S. regulation. To impose the same restrictions on secondary liability would unnecessarily narrow the statute to prevent the conviction of all participants in an offense despite substantial U.S. ties.

3. We agree with Hoskins that "it is unnecessary to consider the legislative history" (Resp. 37) in light of the statute's text and structure. Nonetheless, the FCPA's legislative history not only fails to contain the strong indication of congressional intent necessary to allow an exception to normal secondary principles of liability, but instead bolsters the conclusion that defendants like Hoskins are culpable. Br. 38-56. That is particularly true given that Congress is aware that standard principles of secondary liability capture the criminal conduct of foreigners acting abroad who assist domestic conduct, even if that same foreigner would not otherwise come within a statute's direct proscriptions,

yet has given no indication that the FCPA does not encompass such conduct. *See supra* pp. 12-13.

a. As stated in our opening brief (Br. 41), the legislative history for the FCPA's most-recent amendments, enacted in 1998 to implement the Organisation for Economic Cooperation and Development's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (1997) ("OECD Convention"), is the most pertinent in construing the current statute. We noted that Congress intended the FCPA to adhere to the principles set forth in the OECD Convention, and we pointed out the numerous OECD Convention principles that confirmed that the FCPA should be interpreted to include defendants like Hoskins as a conspirator and accomplice. Br. 41-48.

In response to our contention that the United States' agreement to criminalize "any person" who commits foreign bribery indicates that the FCPA should be construed broadly (Br. 42 (citing OECD Convention, art. 1.1)), Hoskins states that the "any person" mandate was not meant to require the exercise of "universal jurisdiction over bribery offenses." Resp. 49. That is beside the point. The application of normal principles of secondary liability to encompass foreigners who assist domestic conduct is not an assertion of universal or extraterritorial jurisdiction, *see supra* pp. 13-17; it is simply a means

of ensuring that all participants in a U.S.-focused offense are held accountable, fulfilling the United States' agreement in OECD Convention Article 4.1 to criminalize bribery committed even "in part in its territory."

Even more powerfully, we relied on the United States' agreement in OECD Convention Article 1.2 that "complicity," "aiding and abetting," and "authorisation" of foreign bribery are offenses and that "attempt and conspiracy to bribe a foreign official" are criminal "to the same extent as attempt and conspiracy to bribe" a domestic official. We explained that adherence to that provision strongly supports the application of normal principles of secondary liability to FCPA offenses, given that foreign nationals who assists U.S. actors to bribe a U.S. official would be culpable. Br. 42-43.

Quoting the OECD commentaries, Hoskins responds that this language should be "'understood in terms of [its] normal content in national legal systems.'" Resp. 50 (quoting Supp. App. 214, ¶ 11). Hoskins fails to appreciate, however, that "normal" content within the U.S. legal system applies secondary liability to foreigners like Hoskins who assist domestic conduct. Hoskins also once again raises the specter of universal jurisdiction, arguing for a narrow construction of Article 1.2 because otherwise criminalizing conspiracy to bribe a foreign official "to the same extent as" a domestic official would require the United States to "prosecute wholly foreign conspiracies to bribe foreign

officials" – an "absurd result." Resp. 51. That argument again misses the mark. The FCPA's text does not provide for universal jurisdiction, nor do any associated principles of secondary liability. On the other hand, the FCPA's text, in conjunction with normal principles of U.S. law regarding secondary liability, do contemplate liability attaching to a defendant like Hoskins. The question is whether an exception to those normal principles should immunize Hoskins. Article 1.2 supports the non-applicability of any such exception.

b. In arguing that the 1977 legislative history supports the district court's ruling, Hoskins mostly relies on the same points as did the district court. Resp. 38-46. We explained the flaws in that reasoning in our opening brief and therefore do not repeat them. Br. 48-56. Hoskins offers no rejoinder to our argument that Congress's use of consistently narrow language when describing the situations when a foreign national would not be covered by the statute (*i.e.*, situations with no ties to the United States) is a powerful indicator that it did not intend to deviate from normal principles of secondary liability capturing the culpability of foreigners who assist domestic conduct.[9] *See* Br. 49, 51-52, 53, 54.

[9] As Hoskins makes clear (Resp. 46 n.17), no court has held that the 1977 Congress intended to exclude foreign national agents from criminal punishment. The *Bodmer* Court's grant of immunity to Bodmer was instead predicated on the rule of lenity and irregularities in his extradition. 342 F.Supp.2d at 187-89 ("in 1977, Congress likely intended that the FCPA's criminal sanctions applied to non-resident foreign nationals who properly appeared in United States courts"). In any event, the 1998 Congress amended the FCPA to make clear that its

Nor does he respond to our argument (Br. 55-56) that, when the Senate decided to enumerate the officers, directors, agents, and employees of companies as FCPA-covered actors, it did so not to jettison the normal application of secondary liability to others, but instead to make clear that the statute encompassed both entity and individual liability (which avoids any *Gebardi* inference, since individuals would be necessary parties) and also to make distinctions between such individuals (*e.g.*, employees and agents were given extra protections compared to officers and directors, 15 U.S.C. § 78dd-2(b)(3) (1977)).

Hoskins and amicus raise a recurring theme that the 1977 Congress's references to concerns about extraterritoriality mean that Congress did not intend to encompass defendants like Hoskins. However, those extraterritoriality concerns would apply equally to (1) a foreigner operating abroad who is an agent of an issuer or domestic concern and (2) a non-agent foreign national who is a conspirator or accomplice of domestic actors. Congress overcame any concerns about applying U.S. law to foreign conduct sufficiently to include the first category as principals. There is no indication that it nonetheless excluded the latter category from secondary liability, particularly where such an

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criminal penalty provisions apply equally to U.S. nationals and foreigners who come within the FCPA's proscriptions. *See* Br. 40.

interpretation would absolve high-level foreign nationals like Hoskins who direct U.S.-based actors in criminal conduct, while punishing foreign national underlings.

C. The district court erred in dismissing the conspiracy's second object.

We explained (Br. 59) that, at a minimum and to the extent that Hoskins was proved to be an agent of a domestic concern, the district court erred in dismissing the second object of the Count 1 conspiracy, charging that Hoskins conspired with foreign nationals acting within United States territory, in violation of 15 U.S.C. § 78dd-3. At the threshold, Hoskins incorrectly contends that foreign national agents of domestic concerns are specifically excluded from Section 78dd-3. Section 78dd-3 excludes only an "issuer" or a "domestic concern"; it does not exclude foreign "agents" of a domestic concern. Furthermore, Hoskins' contention (Resp. 52-54) that, under *Gebardi*, only actors specifically enumerated in each FCPA provision can be charged with conspiring to violate that provision makes no sense. Under that view, when a foreign national operating within the U.S. conspires with a U.S. person (a "domestic concern") to violate the FCPA, or when a U.S. issuer conspires with a domestic concern, no crime has been committed. Neither *Gebardi* nor the text requires that absurd result. Although Hoskins also contends (Resp. 54-56) that dismissal is required under the presumption against extraterritoriality, he is incorrect

because the charge involves a domestic application of the statute. *See supra* pp. 13-17.[10]

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's ruling.

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[10] Amicus's contention (Amicus Br. 20-25) that the rule of lenity requires the district court's construction of the statute, an argument not advanced by Hoskins, is not well taken. There is no "grievous ambiguity" here warranting the rule's application. *Muscarello v. United States*, 524 U.S. 125, 138-39 (1998).

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned counsel of record certifies that the foregoing Reply Brief for Appellant United States of America complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), inasmuch as the brief is proportionately spaced, has a typeface of 14 points or more, and contains no more than **6,998** words. This certification is based on the word count of the word-processing system used in preparing the government's brief: Microsoft Word 2013.

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CERTIFICATE OF SERVICE

I certify that on January 6, 2017, I caused the foregoing brief to be served upon the FILING USERS identified through the Court's Case Management/Electronic Case Files ("cm/ecf") system, including defendant's counsel of record identified below.

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