Guam Society of CPAs

Federal Tax Update [Part II]

August 23, 2023

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American Federal Tax Reports

BITTNER v. U.S., Cite as 131 AFTR 2d 2023-799, Code Sec(s) 6011, (S Ct), 02/28/2023

Alexandru **BITTNER**, PETITIONER v. UNITED STATES, RESPONDENT.

Case Information:

[pg. 2023-799]

Code Sec(s):	6011
Court Name:	**Supreme Court** of the United States,
Docket No.:	No. 21–1195
Date Decided:	02/28/2023.
Prior History:	Court of Appeals, (2021, CA5) 128 AFTR 2d 2021-6760, affirming in part, reversing in part, and vacating and remanding in part (2020, DC TX) 126 AFTR 2d 2020-5051, reversed and remanded.
Tax Year(s):	Years 2007, 2008, 2009, 2010.
Disposition:	Decision for Taxpayer.

HEADNOTE

1. Report of foreign bank and financial accounts—Bank Secrecy Act—penalties—non-willful violations—basis for penalties—reasonable cause—summary judgment. Supreme Court determined that maximum $10,000 civil penalty for *non-willful* FBAR violations applied on per-report, not per-account basis; accordingly, contrary 5th Cir. decision, upholding govt.'s imposition of multi-million dollar non-willful penalties based on taxpayer/dual U.S.- Romanian citizen's interests in dozens of foreign accounts in each of 5 years for which he failed to properly file FBARs, was reversed and remanded. In so holding, **Supreme Court** first looked to 31 USC 5314 , which didn't even speak to "accounts" and instead clearly dictated that relevant legal duty was to file reports, and then to 31 USC 5321 , which in turn set non-willful penalty amounts on basis of 31 USC 5314 violations/for not filing proper report as prescribed. Court noted that while 31 USC 5321 did also contain accounts language, such was tailored to *willful* violations and reasonable cause exception, but not non-willful violations. This conclusion was further supported by "contextual clues," found in such places as FBAR instructions and IRS's own caution letters, plus statutes' drafting history. While those materials weren't controlling, they contravened per-account theory govt. adopted here and in similar cases. Govt.'s per-account theory was also undercut by fact that such could give rise to anomalous results, in terms of amount of non-willful vs. willful penalties taxpayers could face. Finally, rule of lenity, plus "dose of common sense," otherwise mitigated in favor of per-report rather than per-account approach, especially when considering lack of fair warning/notice of possible per-account penalties for non-willful violations and that this issue had potential criminal as well as civil ramifications.

Reference(s): ¶ 60,115.01(5) Code Sec. 6011

Bittner

OPINION

Syllabus

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Bank Secrecy Act (BSA) and its implementing regulations require U.S. persons with certain financial interests in foreign accounts to file an annual report known as an "FBAR"—the Report of Foreign Bank and Financial Accounts. The statute imposes a maximum $10,000 penalty for non-willful violations of the law. These reports are designed to help the government trace funds that may be used for illicit purposes and identify unreported income that may be subject to taxation. Petitioner Alexandru **Bittner** —a dual citizen of Romania and the United States—learned of his BSA reporting obligations after he returned to the United States from Romania in 2011, and he subsequently submitted the required annual reports covering five years (2007 through 2011). The government deemed **Bittner's** late-filed reports deficient because the reports did not address all accounts as to which **Bittner** had either signatory authority or a qualifying interest. **Bittner** filed corrected FBARs providing information for each of his accounts—61 accounts in 2007, 51 in 2008, 53 in 2009 and 2010, and 54 in 2011. The government neither contested the accuracy of **Bittner's** new filings nor suggested that **Bittner's** previous errors were willful. But because the government took the view that [pg. 2023-800] nonwillful penalties apply to each account not accurately or timely reported, and because **Bittner's** five late-filed annual reports collectively involved 272 accounts, the government calculated the penalty due at $2.72 million. **Bittner** challenged that penalty in court, arguing that the BSA authorizes a maximum penalty for nonwillful violations of $10,000 per report, not $10,000 per account. The Fifth Circuit upheld the government's assessment.

Held: The BSA's $10,000 maximum penalty for the nonwillful failure to file a compliant report accrues on a per-report, not a per-account, basis. Pp. 4–14, 16.

(a) The Court begins with the terms of the most immediately relevant statutory provisions—31 U. S. C. §5314, which delineates an individual's legal duties under the BSA, and §5321, which outlines the penalties that follow for failing to discharge those duties. Section 5314 provides that the Secretary of the Treasury "shall" require certain persons to "keep records, file reports, or keep records and file reports" when they "mak[e] a transaction or maintai[n] a relation" with a "foreign financial agency." The statute states that reports "shall contain" information about "the identity and address of participants in a transaction or relationship," "the legal capacity in which a participant is acting," and "the identity of real parties in interest," along with a "description of the transaction." Section 5314 does not speak of accounts or their number but rather the legal duty to file reports which must include various kinds of information about an individual's foreign "transaction[s] or relationship[s]." Violation of §5314's reporting obligation is binary: One files a report "in the way and to the extent the Secretary prescribes," or one does not; multiple willful errors may establish a violation of §5314 but even a single mistake, willful or not, constitutes a §5314 violation. The only distinction the law draws between a report containing a single mistake and one containing multiple mistakes concerns the appropriate penalty.

Section 5321 authorizes the Secretary to impose a civil penalty of up to $10,000 for "any violation" of §5314. The "nonwillful" penalty provision in §§5321(a)(5)(A) and (B)(i) does not speak in terms of accounts but rather pegs the quantity of nonwillful penalties to the quantity of "violation[s]." Section 5314 provides that a violation occurs when an individual fails to file a report consistent with the statute's commands. Multiple deficient reports may yield multiple $10,000 penalties, and even a seemingly simple deficiency in a single report may expose an individual to a $10,000 penalty. But penalties for nonwillful violations accrue on a per-report, not a per-account, basis.

To be sure, for certain cases that involve willful violations, the statute *does* tailor penalties to accounts. Section 5321 specifically addresses a subclass of willful violations that involve "a failure to report the existence of an account or any identifying information required to be provided with respect to an account." §5321(a)(5)(D)(ii). In such cases, the Secretary may impose a maximum penalty of either $100,000 or 50% of "the balance in the account at the time of the violation"—whichever is greater. §5321(a)(5)(C) and (D)(ii). The government maintains that because Congress explicitly authorized per-account penalties for some willful violations, the Court should infer that Congress meant to do so for analogous nonwillful violations. But the government's interpretation defies a traditional rule of statutory construction: When Congress includes particular language in one section of a statute and omits it from a neighbor, the Court normally understands that difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*). Here the statute twice provides evidence that when Congress wished to tie sanctions to account-level information, it knew exactly how to do so. Congress said in §§5321(a)(5)(C) and (D)(ii) that penalties for certain willful violations may be measured on a per-account basis. And Congress said in §5321(a)(5)(B)(ii) that a person may invoke the reasonable cause exception only on a showing of per-account accuracy. But Congress did not say that the government may impose nonwillful penalties on a per-account basis. Pp. 5–8.

(b) The Court finds a number of additional contextual clues that cut against the government's theory in this case. First, the government has repeatedly issued guidance to the public—in various warnings, fact sheets, and instructions—that seems to tell the public that the failure to file a report represents a single violation exposing a nonwillful violator to one $10,000 penalty. While the government's guidance documents do not control the Court's analysis, courts may consider the inconsistency between the government's current view and its past views when weighing the persuasiveness of any interpretation it offers. *Skidmore* v. *Swift & Co.* , 323 U.S. 134, 140.

Second, the drafting history of the nonwillful penalty provision undermines the theory the government urges the Court to adopt. In 1970, the BSA included penalties only for willful violations. In 1986, Congress authorized the imposition of penalties on a per-account basis for certain willful violations. When Congress [pg. 2023-801] amended the law again in 2004 to authorize penalties for nonwillful violations, Congress could have, but did not, simply use language from its 1986 amendment to extend per-account penalties for nonwillful violations.

Still other features of the BSA and its regulatory scheme suggest the law aims to provide the government with a report sufficient to tip it to the need for further investigation, *not* to ensure the presentation of every detail or maximize revenue for each mistake. Consider that Congress declared that the BSA's "purpose" is "to require" certain "reports" or "records" that may assist the government in various kinds of investigations. §5311. Absent is any indication that Congress sought to maximize penalties for every nonwillful mistake. Similarly, the Secretary's regulations implementing the BSA require individuals with fewer than 25 accounts to provide details about each account while individuals (like **Bittner**) with 25 or more accounts do not need to list each account or provide account-specific details unless the Secretary requests more "detailed information." 31 CFR §1010.350(g)(1). Finally, the government's per-account penalty reading invites anomalies—for example, subjecting willful violators to lower penalties than nonwillful violators—avoided by reading the nonwillful penalty to apply on a per-report basis.

The government replies that the per-report interpretation risks the anomaly that the Secretary could formulate reporting requirements to require a separate report for each account and in that way effectively achieve a per-account penalty for nonwillful violations. What this proves is unclear, as the Secretary's discretion to require more (or fewer) reports is not at issue here, and in any event does not answer whether the Secretary may impose nonwillful penalties on a per-report or per-account basis. Pp. 9–14.

(c) Best read, the BSA treats the failure to file a legally compliant report as one violation carrying a maximum penalty of $10,000. P. 16. 19 F.4th 734 [128 AFTR 2d 2021-6760], reversed and remanded.

GORSUCH, J., announced the judgment of the Court, and delivered the opinion of the Court except as to Part II–C. JACKSON, J., joined that opinion in full, and ROBERTS, C. J., and ALITO and KAVANAUGH, JJ., joined except for Part II–C. BARRETT, J., filed a dissenting opinion, in which THOMAS, SOTOMAYOR, and KAGAN, JJ., joined.

SUPREME COURT OF THE UNITED STATES,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Opinion of the Court

Judge:

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.* , 200 U.S. 321, 337.

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, **Supreme Court** of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

JUSTICE GORSUCH announced the judgment of the Court and delivered the opinion of the Court with respect to Parts I, II–A, II–B, and III, and an opinion with respect to Part II–C, in which JUSTICE JACKSON joins.

The Bank Secrecy Act and its implementing regulations require certain individuals to file annual reports with the federal government about their foreign bank accounts. The statute imposes a maximum $10,000 penalty for nonwillful violations of the law. But recently a question has arisen. Does someone who fails to file a timely or accurate annual report commit a single violation subject to a single $10,000 penalty? Or does that person commit separate violations and incur separate $10,000 penalties for each account not properly recorded within a single report?

The answer makes a difference, especially for immigrants who hold accounts abroad and Americans who make their lives outside the country. On one view, penalties accrue on a per-report basis. So, for example, a single late-filed report disclosing the existence of 10 accounts may yield a maximum fine of $10,000. On another view, penalties multiply on a per-account basis, so the same report can invite a fine of $100,000 even if the individual's foreign holdings or total net worth do not approach that amount. Because the Ninth Circuit read the law one way and the Fifth Circuit the other, we agreed to take this case.

I

The Bank Secrecy Act (BSA) does not make it illegal to hold foreign accounts. Nor does the [pg. 2023-802] BSA tax those accounts. To the contrary, the federal government has acknowledged that "U.S. persons maintain overseas financial accounts for a variety of legitimate reasons including convenience and access." IRS Pub. 5569, Report of Foreign Bank & Financial Accounts (FBAR) Reference Guide, p. 1 (Rev. 3–2022). As relevant here, the BSA simply requires those who possess foreign accounts with an aggregate balance of more than $10,000 to file an annual report on a form known as an "FBAR"—the Report of Foreign Bank and Financial Accounts. 31 U. S. C. §5314; 31 CFR §1010.306 (2021). These reports are designed to help the government "trace funds" that may be used for "illicit purposes" and identify "unreported income" that may be subject to taxation separately under the terms of the Internal Revenue Code. FBAR Reference Guide, at 1.

The facts of the Ninth and Fifth Circuit cases help illuminate the particular question about the BSA now before us. The first dispute involved Jane Boyd, an American citizen who held 13 relevant accounts in the United Kingdom. The amounts in those accounts increased significantly after her father died in 2009 and she deposited her inheritance. *United States* v. *Boyd*, 991 F.3d 1077, 1079 [127 AFTR 2d 2021-1331] (CA9 2021). Because the aggregate amount in Ms. Boyd's accounts exceeded $10,000 in 2009, she should have filed an FBAR in 2010. Neglecting to do so, she corrected the error in 2012, submitting a complete and accurate report at that time. *Ibid.* The government acknowledged that Ms. Boyd's violation of the law was "non-willful." Still, the government said, it had the right to impose a $130,000 penalty—$10,000 for each of her 13 late-reported accounts. *Ibid.*

Ms. Boyd challenged the penalty in court where she argued that her failure to file a single timely FBAR subjected her to a single maximum penalty of $10,000. The district court rejected that argument and sided with the government. *United States* v. *Boyd*, 123 AFTR 2d 2019-1651 (CD Cal. 2019). But in time the Ninth Circuit vindicated Ms. Boyd's view, holding that the BSA authorizes "only one nonwillful penalty when an untimely, but accurate, FBAR is filed, no matter the number of accounts." 991 F.3d, at 1078.

More recently, the same question arose in the Fifth Circuit in a case involving Alexandru **Bittner**. Born and raised in Romania, Mr. **Bittner** immigrated to the United States at a young age in 1982. He worked first as a dishwasher and later as a plumber and along the way became a naturalized citizen. After the fall of communism, Mr. **Bittner** returned to Romania in 1990 where he launched a successful business career. Like many dual citizens, he did not appreciate that U.S. law required him to keep the government apprised of his overseas financial accounts even while he lived abroad. 19 F.4th 734, 739–740 [128 AFTR 2d 2021-6760] (CA5 2021). Shortly after returning to the United States in 2011, Mr. **Bittner** learned of his reporting obligations and engaged an accountant to help him prepare the required reports—covering five years, from 2007 through 2011. *Id.*, at 739.

But the story did not end there. The government identified a problem in the late-filed reports. While those reports provided details about Mr. **Bittner's** largest account, they neglected to address 25 or more other accounts over which he had signatory authority or in which he had a qualifying interest. *Ibid.* After the government informed him of this deficiency, Mr. **Bittner** hired a new accountant who helped him file corrected FBARs for each year in question. *Ibid.* Under governing regulations, filers with signatory authority over or a qualifying interest in fewer than 25 accounts must provide details about each account, but individuals with 25 or more accounts need only check a box and disclose the total number of accounts. 31 CFR §1010.350(g). Instead of employing that expediency, however, Mr. **Bittner** and his new accountant volunteered details for each and every one of his accounts—61 accounts in 2007, 51 in 2008, 53 in 2009 and 2010, and 54 in 2011. 19 F.4th, at 738.

The question then turned to what penalty Mr. **Bittner** should pay. The government did not contest the accuracy of Mr. **Bittner's** new filings. Nor did the government suggest that his previous errors were willful. But because the government took the view that nonwillful penalties apply to each account not accurately or timely reported, and because Mr. **Bittner's** late-filed reports for 2007–2011 collectively involved 272 accounts, the government thought a fine of $2.72 million was in order. *Id.*, at 739–740.

Like Ms. Boyd before him, Mr. **Bittner** challenged his penalty in court, arguing that the BSA authorizes a maximum penalty for nonwillful violations of $10,000 per report, not $10,000 per account. As he put it, an individual's failure to file five reports in a timely manner might invite a penalty of $50,000, but it cannot support a penalty running into the millions. The district court agreed with Mr. **Bittner's** reading of the law, *United States* v. ***Bittner***, 469 F. Supp. 3d 709, 724–726 [126 AFTR 2d 2020-5051] (ED Tex. 2020), but the [pg. 2023-803] Fifth Circuit upheld the government's assessment, 19 F.4th, at 749.

II

With those facts in mind, the question before us boils down to this: Does the BSA's $10,000 penalty for nonwillful violations accrue on a per-report or a per-account basis? Mr. **Bittner** urges us to agree with the Ninth Circuit and hold that the law authorizes a single $10,000 fine for each untimely or inaccurate report. The government defends the judgment of the Fifth Circuit and asks us to hold that a new $10,000 penalty attaches to each account not timely or accurately disclosed within a report.

A

To resolve who has the better reading of the law, we begin with the terms of the most immediately relevant statutory provisions, 31 U. S. C. §5314 and §5321. The first delineates an individual's legal duties under the BSA, the second outlines the penalties that follow for failing to discharge those duties.

Section 5314 provides that the Secretary of the Treasury "shall" require certain persons to "keep records, file reports, or keep records and file reports" when they "mak[e] a transaction or maintai[n] a relation" with a "foreign financial agency." §5314(a). When it comes to the duty to file reports, the relevant duty in our case, the statute says that reports "shall contain" information about "the identity and address of participants in a transaction or relationship," "the legal capacity in which a participant is acting," and "the identity of real parties in interest," along with a "description of the transaction." §§5314(a)(1)–(4). The law also directs the Secretary to prescribe "the way and...the extent" to which reports must be filed. §5314(a).

Immediately, one thing becomes clear. Section 5314 does not speak of accounts or their number. The word "account" does not even appear. Instead, the relevant legal duty is the duty to file reports. Of course, those reports must include various kinds of information about an individual's foreign "transaction[s] or relationship[s]." But whether a report is filed late, whether a timely report contains one mistake about the "address of [the] participants in a transaction," or whether a report includes multiple willful errors in its "description of...transaction[s]," the duty to supply a compliant report is violated. Put another way, the statutory obligation is binary. Either one files a report "in the way and to the extent the Secretary prescribes," or one does not. Multiple willful errors about specific accounts in a single report may confirm a violation of §5314, but even a single nonwillful mistake is enough to pose a problem. One way or another, §5314 is violated. The only distinction the law draws between these cases concerns the appropriate penalty.

That's where §5321 comes in. As a baseline, §5321(a)(5) authorizes the Secretary to impose a civil penalty of up to $10,000 for "any violation" of §5314. 31 U. S. C. §§5321(a)(5)(A) and (B)(i). Some call this the "nonwillful" penalty provision. And here again, one thing is immediately apparent: The law still does not speak of accounts or their number. Instead, the statute pegs the quantity of nonwillful penalties to the quantity of "violation[s]." And as we have seen, §5314 provides that a violation occurs when an individual fails to file a report consistent with the statute's commands. So multiple deficient reports may yield multiple $10,000 penalties, and even a seemingly simple deficiency in a single report may expose an individual to a $10,000 penalty. But in all cases, penalties for nonwillful violations accrue on a per-report, not a per-account, basis.[1]

To be sure, the statute's penalty provisions do not stop there. Section 5321 goes on to say that if an individual "willfully" violates §5314, he may face a maximum penalty of $100,000. §5321(a)(5)(C)(i)(I). The statute then adds an even more specific rule for a subclass of willful violations—those that involve "a failure to report the existence of an account or any identifying information required to be provided with respect to an account." §5321(a)(5)(D)(ii). In cases like that, the law authorizes the Secretary to impose a maximum penalty of either $100,000 or 50% of "the balance in the account at the time of the violation"—whichever is greater. §§5321(a)(5)(C) and (D)(ii). So here, at last, the law *does* tailor penalties to accounts. But the statute does so only for a certain category of cases that involve willful violations, not for cases like ours that involve only nonwillful violations.

No surprise, the government seeks to turn this feature of the law to its advantage. Because Congress explicitly authorized per-account penalties for some willful violations, the government asks us to infer that Congress meant to do so for analogous nonwillful violations as well. Brief for United States 20–23. But, in truth, this line of reasoning cuts against the government. When Congress includes particular language in one section of a statute but omits it from a neighbor, we normally understand that [pg. 2023-804] difference in language to convey a difference in meaning (*expressio unius est exclusio alterius*). The government's interpretation defies this traditional rule of statutory construction. See, *e.g.* , *Department of Homeland Security* v. *MacLean* , 574 U.S. 383, 391 (2015); *Gallardo* v. *Marstiller*, 596 U.S. ___, ___, ___ (2022) (slip op., at 7, 9).

The government's problem repeats itself too. Section 5321(a)(5)(B)(ii) contains a "[r]easonable cause exception." That exception allows an individual to escape a penalty (say for filing late) only if his violation was nonwillful, "due to reasonable cause," and the report he eventually files accurately reflects each and every account.[2] All of which supplies further evidence that, when Congress wished to tie sanctions to account-level information, it knew exactly how to do so. Congress said that penalties for certain willful violations may be measured on a per-account basis. Congress said that a person may invoke the reasonable cause exception only on a showing of per-account accuracy. But the one thing Congress did not say is that the government may impose nonwillful penalties on a per-account basis. Conspicuously, the one place in the statute where the government needs per-account language to appear is the one place it does not. In the end, the government's per-account theory faces not just a single *expressio unius* challenge but two.[3]

The dissent founders on the same shoals. It suggests that the "pattern" of account-specific language in the willful penalty provision and the reasonable cause exception "connot[es]" that the nonwillful penalty provision must operate on a per-account basis. *Post*, at 4, 7 (opinion of BARRETT, J.). But (again), just because two provisions in the law are similar does not mean we may ignore differences found in a third. Seeking a way around the problem, the dissent points to the fact that even a single qualifying foreign bank account "triggers" the duty to file a report, and the fact that a compliant report must contain a "list of information" about bank addresses and the like. *Post*, at 2–3. These features of the law, the dissent says, "underscor[e]" that nonwillful violations accrue per account. *Post*, at 2. But that simply does not follow. The fact that a person has a duty to file a report, or provide certain information in a report, does not tell us whether penalties for nonwillful violations accrue per report or multiply per account without regard to an individual's net worth or foreign holdings.[4]

B

Widening our view beyond §5314 and §5321, we find other contextual clues pressing against the government's theory. Consider what the government itself has told the public about the BSA. In 2010, the Department of the Treasury issued a notice of proposed rulemaking warning that, under its proposed rules, "[a] person who is required to file an FBAR and fails to properly file may be subject to a civil penalty not to exceed $10,000." 75 Fed. Reg. 8854 (2010). Elsewhere, the government has told suspected FBAR violators that "[f]or the failure to file...the penalty cannot exceed $10,000." IRS, Letter 3709, p. 1 (Mar. 2011). Instructions included with the FBAR form have cautioned that "[a] person who is required to file an FBAR and fails to properly file may be subject to a civil penalty not to exceed $10,000." IRS, Form TD F 90–22.1, p. 8 (Mar. 2011). An IRS "Fact Sheet" has advised that, "[f]or the FBAR, the penalty may be up to $10,000, if the failure to file is non-willful." IRS, Offshore Income and Filing Information for Taxpayers with Offshore Accounts, FS–2014–7 (June 2014). Ms. Boyd herself received a similarly worded letter alerting her that " `[f]or the failure to file [the FBAR]...the penalty cannot exceed $10,000.'" *Boyd*, 991 F.3d, at 1085, n. 11 (alterations in original and emphasis deleted).

None of these representations about the law's operation fits easily with the government's current theory. In all of these warnings, fact sheets, and instructions, the government seemed to tell the public that the failure to file a report represents a single violation exposing a nonwillful violator to one $10,000 penalty. Nowhere in these materials did the government announce its current theory that a single deficient or untimely report can give rise to multiple violations, that the number of nonwillful penalties may turn on the number of accounts, or that the $10,000 maximum penalty may be [pg. 2023-805] multiplied 272 times or more without respect to an individual's foreign holdings or net worth.

Doubtless, the government's guidance documents do not control our analysis and cannot displace our independent obligation to interpret the law. But this Court has long said that courts may consider the consistency of an agency's views when we weigh the persuasiveness of any interpretation it proffers in court. *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). Here, the government has repeatedly issued guidance to the public at odds with the interpretation it now asks us to adopt. And surely that counts as one more reason yet to question whether its current position represents the best view of the law.[5]

The drafting history of the nonwillful penalty provision undermines the government's theory too. When Congress adopted the BSA in 1970, the law included penalties only for willful violations and capped them at $1,000. Pub. L. 91–508, §125(a), 84 Stat. 1117. It took many years before Congress in 1986 authorized the government to impose penalties on a per-account basis for certain willful violations. Pub. L. 99–570, §1357(c), 100 Stat. 3207-25. And it took many years more before Congress in 2004 amended the law again to authorize penalties for nonwillful violations. Pub. L. 108–357, §821(a), 118 Stat. 1586. When crafting this latest provision, it would have been the simplest thing for Congress to model its work on its 1986 amendment and authorize per-account penalties for nonwillful violations just as it had for certain willful ones. But Congress didn't do anything like that. The language it adopted for nonwillful penalties in 2004 bears scant resemblance to the language it used when authorizing per-account penalties for certain willful violations in 1986.

Consider as well Congress's statement of purpose. Congress has declared that the BSA's "purpose" is "to require" certain "reports" or "records" that may assist the government in everything from criminal and tax to intelligence and counterintelligence investigations. 31 U. S. C. §5311.[6] Here we see further evidence that the relevant legal duty the BSA establishes is the duty to file certain reports. We see evidence, too, that the point of these reports is to supply the government with information potentially relevant to various kinds of investigations, criminal and civil alike. But what we do not see is any indication that Congress sought to maximize penalties for every nonwillful mistake (whether a late filing, a transposed account number, or an out-of-date bank address). See Brief for American College of Trust and Estate Counsel as *Amicus Curiae* 5–7.[7]

The Secretary's regulations implementing the BSA convey the same message. Under those regulations, individuals with fewer than 25 accounts must provide details about each account while those (like Mr. **Bittner**) with 25 or more accounts do not need to list each one or provide account-specific details about any of them. 31 CFR §1010.350(g)(1). Instead, filers with 25 or more accounts "need only provide the number of financial accounts and certain other basic information."

Ibid. Naturally, an individual must supply more "detailed information" if the "Secretary or his delegate" later chooses to follow up and request it. *Ibid.* But no detailed account-level information is required in the filer's initial report. It's yet another feature of the BSA and its regulatory scheme that suggests the law aims to provide the government with a report sufficient to tip it to the need for further investigation, *not* to ensure the presentation of every detail or maximize revenue for each mistake.

The Secretary's regulation also points to some of the anomalies that accompany the government's per-account theory. On the government's telling, an individual with, say, three accounts who makes nonwillful errors when providing details about these accounts faces a potential penalty of $30,000. He faces that penalty no matter how slight his errors, and regardless whether his foreign holdings (or even net worth) approach the same amount. Meanwhile, a person with 300 bank accounts runs far less risk of incurring any penalty. He doesn't have to provide any detail about his accounts, just correctly disclose how many he holds. See also Brief for American College of Tax Counsel as *Amicus Curiae* 15–16 (Brief for Tax Counsel). [pg. 2023-806]

Nor is this the only incongruity the government's theory invites. Consider someone who has a $10 million balance in a single account who nonwillfully fails to report that account. Everyone agrees he is subject to a single penalty of $10,000. Yet under the government's theory, another person engaging in the same nonwillful conduct with respect to a dozen foreign accounts with an aggregate balance of $10,001 would be subject to a penalty of $120,000. *Id.*, at 14–15.

On the government's view, too, those who *willfully* violate the law may face lower penalties than those who violate the law *nonwillfully.* For example, an individual who holds $1 million in a foreign account during the course of a year but withdraws it before the filing deadline and then willfully fails to file an FBAR faces a maximum penalty of $100,000. But a person who errs nonwillfully in listing 20 accounts with an aggregate balance of $50,000 can face a penalty of up to $200,000. *Id.*, at 14. Reading the law to apply nonwillful penalties per report invites none of these curiosities; the government's per-account theory invites them all.[8]

The government does not dispute any of this but replies that the per-report interpretation risks an anomaly of its own. After all, the government observes, the BSA affords the Secretary considerable discretion in formulating reporting requirements. So much so, the government contends, that the Secretary could require a separate report for each account and in that way effectively achieve a per-account penalty for nonwillful violations. Brief for United States 32. But what does this prove? Assuming the Secretary could require more frequent reports (a question not before us), that would mean the Secretary could also require less frequent reports (for example, every other year). Likewise, the Secretary could reduce the amount of information required in those reports (say, expanding the tick-box option to all filers, not just those with 25 or more accounts). Perhaps more fundamentally, whether the Secretary may lawfully ordain more or fewer reports does nothing to answer the question whether the Secretary may impose nonwillful penalties on a per-report or per-account basis. That question would still remain. Reply Brief 7–8.

C

To the extent doubt persists at this point about the best reading of the BSA, a venerable principle supplies a way to resolve it. Under the rule of lenity, this Court has long held, statutes imposing penalties are to be "construed strictly" against the government and in favor of individuals. *Commissioner* v. *Acker*, 361 U.S. 87, 91 [4 AFTR 2d 5778] (1959). Following that rule here requires us to favor a per-report approach that would restrain BSA penalties over a per-account theory that would greatly enhance them.

The government resists this conclusion by seeking to distinguish *Acker*. That case involved a penalty provision in the Internal Revenue Code, the government emphasizes, while this case involves a penalty provision in the BSA. Brief for United States 44–45. But that distinction makes no difference. The rule of lenity is not shackled to the Internal Revenue Code or any other chapter of federal statutory law. Instead, as *Acker* acknowledged, "[t]he law is settled that *penal statutes* are to be construed strictly," and an individual "is not to be subjected to a penalty unless the words of the statute plainly impose it." 361 U.S., at 91 (internal quotation marks omitted and emphasis added). Notably, too, *Acker* cited to and relied on cases applying this same principle to penalty provisions under a wide array of statutes, including the Communications Act of 1934, a bankruptcy law, and the National Banking Act. See *ibid.* (citing *FCC* v. *American Broadcasting Co.*, 347 U.S. 284, 296 (1954); *Keppel* v. *Tiffin Savings Bank*, 197 U.S. 356, 362 (1905); and *Tiffany* v. *National Bank of Mo.*, 18 Wall. 409, 410 (1874)); see also Scalia & Garner at 297 (the rule of lenity applies "to civil penalties").

Two additional features of this case make it a particularly appropriate candidate for the rule of lenity. First, the rule exists in part to protect the Due Process Clause's promise that "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *McBoyle* v. *United States*, 283 U.S. 25, 27 (1931); see also *Connally* v. *General Constr. Co.*, 269 U.S. 385, 393 (1926); *Wooden* v. *United States*, 595 U.S. ___, ___-___ –(2022) (GORSUCH, J., concurring in judgment) (slip op., at 6–9). And the government's current theory poses a serious fair-notice problem. The relevant provisions of the BSA nowhere discuss per-account penalties for nonwillful violations. A number of the government's own public guidance documents have seemingly warned of per-report, not per-account, penalties for non-willful violations. See Part II–B, supra Brief for Tax Counsel 6–24. [pg. 2023-807] We are even told that, until 2008 and 2009, when the government began aggressively enforcing FBAR penalties, "many experienced tax professionals and return preparers were not aware of the FBAR reporting obligations," let alone aware of the government's current theory about the scope of penalties for non-willful violations. Brief for Center for Taxpayer Rights as *Amicus Curiae* 24, 20–

28, and n. 21. If many experienced accountants were unable to anticipate the government's current theory, we do not see how "the common world" had fair notice of it. *McBoyle*, 283 U.S., at 27.

Second, the question before us has criminal as well as civil ramifications. Section 5321 outlines *civil* penalties for nonwillful and willful "violation[s]" of the BSA. Next door, §5322 provides *criminal* sanctions for "willfully violating" the Act. The term "violation" or "violating" is a constant between these two provisions. Accordingly, if the government were right that violations accrue on a per-account rather than a per-report basis under §5321, the same rule would apply under §5322. Each willfully misstated or late-reported account, rather than each deficient or late-filed report, would give rise to a separate criminal violation carrying the possibility of a $250,000 fine and five years in prison. In a case like Mr. **Bittner's**, involving 5 reports and 272 accounts, that would mean a person who willfully violates the BSA could face a $68 million fine and 1,360 years in prison rather than a $1.25 million fine and 25 years in prison. In these circumstances, the rule of lenity, not to mention a dose of common sense, favors a strict construction. See *Leocal* v. *Ashcroft*, 543 U.S. 1, 12, n. 8 (2004) (lenity applies when a disputed statutory provision has "both criminal and noncriminal applications"); see also *FCC*, 347 U.S., at 296; *United States* v. *Thompson/Center Arms Co.*, 504 U.S. 505, 517–518 [69 AFTR 2d 92-1493] (1992) (plurality opinion).

III

Best read, the BSA treats the failure to file a legally compliant report as one violation carrying a maximum penalty of $10,000, not a cascade of such penalties calculated on a per-account basis. Because the Fifth Circuit thought otherwise, we reverse its judgment and remand the case for further proceedings consistent with this opinion.

So ordered.

Judge: JUSTICE BARRETT, with whom JUSTICE THOMAS, JUSTICE SOTOMAYOR, and JUSTICE KAGAN join, dissenting.

Alexandru **Bittner**, an American citizen, held as much as $16 million across more than 50 bank accounts in Romania, Switzerland, and Liechtenstein.* He acknowledges that the Bank Secrecy Act (BSA) and its implementing regulations required him to report his interest in these accounts to the Federal Government annually. **Bittner** also admits that he failed to comply with that requirement for five consecutive years. Because he failed to report 272 accounts, the Government concluded that he violated the law 272 times and assessed a penalty for each violation. **Bittner**, on the other hand, argued that he violated the law just five times—once for each annual form that he failed to file.

The Court agrees with **Bittner** and holds that the failure to file a legally compliant form is a single violation, no matter how many accounts a citizen fails to report. I respectfully disagree. The most natural reading of the statute establishes that each failure to report a qualifying foreign account constitutes a separate reporting violation, so the Government can levy penalties on a per-account basis.

I

This case requires us to decide whether a violation of the BSA's reporting requirement is the failure to file an annual form, or whether there is a separate violation for each individual account that is not properly reported. The answer lies in the text of the relevant statutes, 31 U. S. C. §§5314 and 5321. The Government assessed penalties against **Bittner** under §5321(a)(5)(A), which provides that "[t]he Secretary of the Treasury may impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314." Section 5314, in turn, directs the Secretary to "require a...citizen of the United States...to keep records, file reports, or keep records and file reports, when the...person makes a transaction or maintains a relation for any person with a foreign financial agency." §5314(a). The required "records and reports shall contain" certain information "in the way and to the extent the Secretary prescribes," such as the identity, address, and legal capacity of the participants in a transaction or relationship. *Ibid.*

The text of §5314 indicates that its reporting requirement attaches to each individual account. Most notably, it provides that the Secretary "shall require" a citizen to "file reports" when he "maintains a relation...with a foreign financial agency." *Ibid.* The subject matter of the required reports, then, is "a relation" [pg. 2023-808] with a foreign financial agency—or, more colloquially, an account with a foreign bank. *Ibid.* In other words, each relation with a foreign bank triggers the requirement to file reports. And because each relation is a matter of distinct concern under the statute, each failure to report an account violates the reporting requirement.

The enumerated list of information that the reports "shall contain" underscores the point. *Ibid.* That list includes information like "the identity and address of participants in a...relationship," "the legal capacity in which a participant" in a relationship "is acting," and "the identity of real parties in interest." §§5314(a)(1)–(3). Each listed item is account specific because its contents can vary for each foreign account held. And each failure to report an account thus deprives the Government of the account-specific information that the statute requires.

That is not all. Section 5314 authorizes the Secretary to impose a recordkeeping requirement in addition to a reporting requirement. Recordkeeping violations cannot occur on a per-form basis because keeping records does not entail filing a form. Instead, they occur on a per-account basis because records naturally relate to specific accounts. And if violations of §5314's recordkeeping obligation accrue on a per-account basis, the same should be true of violations of §5314's obligation to file reports. The duties are parallel: Each kicks in "when" a citizen "maintains a relation" with a foreign financial agency, and each requires a person to collect the same account-specific information. §5314(a). Parallel duties should be susceptible to parallel violations.

The civil penalty provisions in §5321 confirm this reading of the substantive obligations imposed by §5314. Recall that §5321 allows the Secretary to "impose a civil money penalty on any person who violates, or causes any violation of, any provision of section 5314." §5321(a)(5)(A). The statute then proceeds to set the maximum penalty for nonwillful violations, provide a reasonable cause exception for those same violations, and set the maximum penalty for willful violations. §§5321(a)(5)(B)–(D). Throughout, Congress used the term "violation" in an account-specific way.

Consider the reasonable cause exception. It provides that "[n]o penalty shall be imposed...with respect to any" nonwillful "violation" of §5314 if (1) "such violation was due to reasonable cause" and (2) "the balance in *the account* at the time of the transaction was properly reported." §5321(a)(5)(B)(ii) (emphasis added). By conditioning eligibility for the *excuse* on taking steps to report accurate information about a particular account, this language suggests that the underlying *violation* of §5314 is similarly tied to a specific account. After all, "if the exception for non-willful violations applies on a per-account basis, then logically the violations the exception forgives must arise on a per-account basis too." 19 F.4th 734, 747–748 [128 AFTR 2d 2021-6760] (CA5 2021).

The willful penalty provisions sing the same tune. The maximum penalty for a willful violation is the greater of $100,000 or, "in the case of a violation involving a failure to report the existence of an account or any identifying information required to be provided with respect to an account," 50 percent of "the balance in the account at the time of the violation." §§5321(a)(5)(C)(i), (D)(ii). "This language makes clear that a violation may involve `a failure to report the existence of'" a particular account. *United States* v. *Boyd*, 991 F.3d 1077, 1089 [127 AFTR 2d 2021-1331] (CA9 2021) (Ikuta, J., dissenting). By making the maximum penalty for a willful violation in some cases a function of "the balance in the account at the time of the violation," the provision contemplates that discrete violations correspond to discrete accounts. §5321(a)(5)(D)(ii).

This pattern matters. The "normal rule of statutory interpretation" is that "identical words used in different parts of the same statute are generally presumed to have the same meaning." *IBP, Inc.* v. *Alvarez*, 546 U.S. 21, 34 (2005). If a "violation" of §5314 has account-specific connotations in the reasonable cause and willful penalty provisions, it follows that a "violation" of §5314 has account-specific connotations when it comes to nonwillful penalties too.

The Secretary's implementing regulations follow the BSA's lead. They require regulated persons to report the existence of each foreign financial account to the Government each year. Start with 31 CFR §1010.350 (2011). It says that "[e]ach United States person having a financial interest in...a bank, securities, or other financial account in a foreign country shall *report such relationship* to the Commissioner of Internal Revenue for each year in which such relationship exists and shall provide such information as shall be specified in a reporting form prescribed under 31 U. S. C. 5314 to be filed by such persons." §1010.350(a) (emphasis added). The reporting form is known as an FBAR—a Report of Foreign Bank and Financial Accounts. *Ibid.* A separate regulation establishes the deadline for reporting these relationships. "Reports required to be filed by [pg. 2023-809] §1010.350 shall be filed" by "June 30 of each calendar year with respect to foreign financial accounts exceeding $10,000 maintained during the previous calendar year." §1010.306(c), as amended, 81 Fed. Reg. 76864 (2016). Put together, these provisions impose a substantive obligation to report interests in foreign bank accounts each year in which those interests exist. See §1010.420 (referring to "accounts required by §1010.350 to be reported to the" Government).

Notably, the regulations distinguish between the form used to report accounts and the reports themselves. See §1010.306(d) (the "*[r]eports* required by" §1010.350 "shall be filed on *forms* prescribed by the Secretary" (emphasis added)); §1010.306(e) (the "*[f]orms* to be used in making the *reports* required by" §1010.350 "may be obtained from" the Government (emphasis added)). This underscores that FBAR forms are not themselves the "reports" required by the statute; rather, they are the procedural mechanism used to implement the duty to report each foreign account. This distinction tracks §5314, which emphasizes a citizen's duty to file "reports" but nowhere mentions FBARs—or, for that matter, forms of any sort. §5314(a). So far as §5314 is concerned, the Secretary could have chosen a different mechanism to implement the statute. For instance, rather than instructing citizens to report all accounts on a single form, he could have instructed citizens to report each account on a separate form. And if the Secretary had taken that route, **Bittner** would be hard pressed to deny that he would have violated the statute 272 times by failing to file 272 forms. That difficulty illustrates **Bittner's** fundamental misunderstanding of the account-specific obligation imposed by §5314, which is indifferent to the mechanism by which the obligation is discharged.

In the end, "the applicable statute and regulations make clear that any failure to report a foreign account is an independent violation, subject to independent penalties." *Boyd*, 991 F.3d, at 1089 (Ikuta, J., dissenting). A person who fails to report multiple foreign accounts on a single annual form violates the BSA and its implementing regulations multiple times, not just once. So the Government was within its rights to assess a separate penalty against **Bittner** for each qualifying foreign account that he failed to report properly.

II

A

The Court reads the relevant provisions differently. It reasons that the legal duty imposed by §5314 is "the duty to file reports." *Ante*, at 5. In the Court's view, that "statutory obligation is binary":

"Either one files a report 'in the way and to the extent the Secretary prescribes,' or one does not." *Ante*, at 5–6. So penalties for nonwillful violations must "accrue on a per-report, not a per-account, basis." *Ante*, at 6. And because **Bittner** failed to file timely FBARs for five years, the Court concludes that he violated the law only five times.

The Court's core error is to conflate the *reports* referred to in §5314 with the annual FBAR *form.* To reiterate, the two are distinct. And because the FBAR is not itself the statutorily required "report," the Court's conclusion—that **Bittner** violated §5314 just five times because he untimely filed five FBAR forms—does not follow. The BSA and its implementing regulations required **Bittner** to file one report per year of each qualifying foreign financial account that he maintained. Each failure to report an account is a discrete violation regardless of whether the violations were clustered on a single form.

The Court does not just misread §5314; it misreads §5321 too. It points out that account-specific language is present in the reasonable cause and willful penalty provisions but absent in the provisions setting the nonwillful penalty. Because "Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another," *Department of Homeland Security* v. *MacLean*, 574 U.S. 383, 391 (2015), the Court takes the contrast as evidence that nonwillful penalties cannot apply on a per-account basis. *Ante*, at 6–8 (invoking the *expressio unius* canon).

Not so. The *expressio unius* canon is a general rule, inapplicable where context suggests otherwise—as it does here. Congress capped the penalty for a nonwillful violation at a flat $10,000. §5321(a)(5)(B)(i). Because the penalty amount does not depend on the balance in an account, Congress had no reason to use account-specific language. By contrast, the maximum penalty for a willful violation is the greater of $100,000 or 50 percent of the account balance at the time of the violation, and the reasonable cause exception lifts a penalty only if the account balance was properly reported. §§5321(a)(5)(B)(ii), (C)(i), (D)(ii). Because the application of both provisions depends on the account *balance*, Congress needed to use account-specific language. The reason why Congress included account-specific language in only two of these three provisions is therefore readily apparent. Regardless, the variation in language does not do much for the Court. These provisions in §5321 explain the [pg. 2023-810] varying *penalties* that the Secretary may assess for a violation of §5314 but do not alter the nature of the underlying conduct that constitutes a *violation. Boyd*, 991 F.3d, at 1089 (Ikuta, J., dissenting). That conduct, as discussed, is account specific.

B

The Court also invokes a handful of "contextual clues" to support its conclusion. *Ante*, at 9. None of these "clues" justifies a departure from the best reading of the text.

Begin with the Government's guidance to the public about what the BSA requires. The Court identifies a handful of statements, primarily from Internal Revenue Service (IRS) fact sheets and form instructions, indicating that a failure to file an annual FBAR may result in a penalty of up to $10,000. The Court acknowledges that these materials do not control the analysis, yet it still goes on to suggest that they cut against the Government's interpretation. *Ante*, at 9–10.

I am surprised that the Court is moved by this administrative guidance. For one thing, even **Bittner** concedes that the materials do not speak directly to the question presented in this case: whether additional penalties may accrue when a person fails to report *multiple* accounts on a single form. Reply Brief 18; Tr. of Oral Arg. 39–40. For another, the Court neglects to mention administrative materials that endorse the Government's per-account interpretation. See, *e.g.* , Brief for American College of Tax Counsel as *Amicus Curiae* 18, 21 (identifying IRS staff guidance materials from 2008 and 2015 explaining that FBAR penalties may be assessed per account). But in any event, guidance materials add little, if anything, to the interpretive enterprise when the traditional tools of construction supply an answer.

The Court also highlights the Secretary's regulatory decision to allow the rare covered person with 25 or more foreign financial accounts to "only provide the number of financial accounts and certain other basic information on the report." §1010.350(g)(1). According to the Court, this special rule is a knock against the Government's reading because it does not require detailed account-level information in such a filer's initial report. *Ante*, at 12.

But the Secretary's accommodation does not advance the Court's cause. A person with 25 or more accounts still "will be required to provide detailed information concerning each account when so requested by the Secretary or his delegate." §1010.350(g)(1). And the Secretary's recordkeeping regulation requires covered persons to retain the same detailed information about each account that otherwise would be reported on the annual form. See §1010.420. So a person with 25 or more accounts violates the BSA for each account with a reporting or recordkeeping problem just the same as a person with fewer than 25 accounts. In both cases, the violation is the failure to report the account properly or to keep records of it.

That consequence is consistent with the statute's purpose. In arguing otherwise, the Court leans on what the preamble does *not* say: "[T]hat Congress sought to maximize penalties for every nonwillful mistake." *Ante*, at 11. Notably, though, the Court skims over what the preamble *does* say: that the BSA is designed to "require certain reports or records" that assist the Government in "criminal, tax, or regulatory investigations" and in "intelligence or counterintelligence activities, including analysis, to protect against terrorism." 31 U. S. C. §5311. When analyzing complex webs of money laundering or funding for international terrorism, knowing about every account matters—and lacking information about 15 accounts is certainly more harmful to law enforcement than lacking information about 1 account. See Brief for United States 38. Given the stated purpose, authorizing a penalty for each undisclosed account makes sense.

Finally, the Court insists that a per-account reading leads to absurd results. Its concerns range from the overstated to the incorrect, and they are in any event of limited relevance to the statutory interpretation question before us.

First, the Court posits a comparison between a person who nonwillfully violates the law once by failing to report a single account with a balance of $10 million and a person who nonwillfully violates the law 12 times by failing to report 12 accounts with an aggregate balance of $10,001. Because the first is subject to a maximum penalty of $10,000 and the second is subject to a maximum penalty of $120,000, the Court concludes that there is an "incongruity" in the statutory scheme. *Ante*, at 13. But a person who violates the law many times might naturally pay a steeper price than a person who violates the law just once, regardless of the balances in their unreported accounts. Indeed, the Court seems untroubled by the incongruity that flows from its own reading: The Secretary is constrained by the same maximum penalty ($10,000) for a person who nonwillfully fails to report 100 accounts on an annual FBAR as he is for a person who nonwillfully fails to report just 1 account. The perform reading makes it difficult for the Government to assess stiffer penalties for more serious noncompliance. [pg. 2023-811]

Consider next the Court's claim that, on the Government's reading, those who willfully violate the law may face lower penalties than those who nonwillfully violate the law. *Ibid.* The Court provides the example of a person who holds $1 million in a foreign account during the course of a year but withdraws those funds before the filing deadline and willfully fails to report the account. Under §5321(a)(5)(C), that person faces a maximum penalty of $100,000, while a person who nonwillfully fails to report 20 accounts with an aggregate account balance of $50,000 might face a penalty of up to $200,000 under §5321(a)(5)(B)(i). This is not an apples-to-apples comparison: The first person willfully violated the law once, while the second nonwillfully violated the law 20 times. That the latter might face a higher penalty than the former is therefore beside the point. An actual apples-to-apples comparison shows that willful violators do face a much heavier fine: The maximum penalty for a single willful violation will always be at least 10 times greater than the maximum penalty for a single nonwillful violation. See §§5321(a)(5)(B)(i), (C)(i).

III

There is no denying that the Government opted to pursue a substantial penalty in this case: $10,000 for each of **Bittner's** 272 alleged violations, for a total penalty of $2.72 million. Yet while the statutory scheme allows for substantial penalties, it also offers a safe haven. No penalty shall be imposed for a nonwillful violation of §5314 if (1) "such violation was due to reasonable cause" and (2) "the balance in the account at the time of the transaction was properly reported." §5321(a)(5)(B)(ii).

Bittner raised this defense below, and the Government conceded that he satisfied its second prong by properly reporting the balances in his accounts on his late-filed FBARs. 19 F.4th, at 740, and n. 2. But the District Court and Court of Appeals both roundly rejected **Bittner's** argument that he had reasonable cause for failing to timely report his accounts. After evaluating the pertinent facts and circumstances, both courts concluded that **Bittner** "did not exercise ordinary business care and prudence in failing to fulfill his reporting obligations." *Id.*, at 742; see also 469 F. Supp. 3d 709, 729 [126 AFTR 2d 2020-5051] (ED Tex. 2020). On the contrary, **Bittner** "put no effort into ascertaining" those obligations despite operating as a sophisticated business professional who held "interests in dozens of companies, negotiated purchases of Romanian government assets, transferred his assets into holding companies, and concealed his earnings in `numbered accounts.'" 19 F.4th, at 742. **Bittner** abandoned his reasonable cause argument when he came to this Court, so we have no occasion to consider its merit. Brief for Petitioner 11, n. 9. But the defense is available to litigants who can satisfy it.

***

The most natural reading of the BSA and its implementing regulations establishes that a person who fails to report multiple accounts on the prescribed reporting form violates the law multiple times, not just once. Because the Court declines to adopt that reading, I respectfully dissent.

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1 What, if any, *mens rea* the government must prove to impose a "nonwillful" penalty is not before us.

2 At argument, the government explained that the reasonable cause exception works in this fashion to protect those who file a late FBAR so long as the report they eventually file accurately provides the required information. Tr. of Oral Arg. 57–58.

3 What if an individual (like Mr. **Bittner**) fails to file a timely report and later files an inaccurate one—would the statute classify that as two violations of the duty to file a statutorily compliant report rather than one? The parties do not join issue on the question and we do not pass upon it. Nor does the answer matter for present purposes. Either way, the statute conditions nonwillful penalties on the number of reports, not on the number of accounts.

4 The dissent also stresses that 31 U. S. C. §5314 imposes two duties—a duty to file reports *and* keep records. *Post*, at 3. From this, the dissent reasons, "if violations of [the] recordkeeping obligation accrue on a per-account basis, the same should be true of violations of [the] obligation to file reports." *Ibid.* But the question whether violations of the recordkeeping duty accrue per account or on some other basis is not before us. Nor is it obvious why violations of two separate statutory duties must accrue in the same way—especially when the law authorizes the Secretary to "prescrib[e]" different "way[s]" the two duties may be discharged. §5314(a).

5 The dissent expresses "surpris[e]" that we cite the government's guidance documents. *Post*, at 8. We don't see why. Our point is not that the administrative guidance is controlling. Nor is it that the government's guidance documents have consistently endorsed Mr. **Bittner's** reading of the law. It is simply that, when the government (or any litigant) speaks out of both sides of its mouth, no one should be surprised if its latest utterance isn't the most convincing one. This is no new principle in the law any more than it is in life. In *Skidmore*, this Court noted that the persuasiveness of an agency's interpretation of the law may be undermined by its inconsistency "with earlier [agency] pronouncements." 323 U.S., at 140.

6 "A preamble, purpose clause, or recital is a permissible indicator of meaning." A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts 217 (2012). See also 1 J. Story, Commentaries on the Constitution of the United States §459, p. 443 (1833) ("[T]he preamble of a statute is a key to open the mind of the makers, as to the mischiefs, which are to be remedied, and the objects, which are to be accomplished by the provisions of the statute").

7 The dissent insists that its per-account theory would better advance "the statute's purpose" of cracking down on criminals and terrorists. *Post*, at 9. But few statutes pursue their stated " `purpose at all costs.'" *Kucana* v. *Holder*, 558 U.S. 233, 252 (2010). Nor is it clear how calculating *nonwillful* penalties on a per-account basis would advance the purpose the dissent attributes to the BSA. Are we to imagine that drug cartels and terrorists often make innocent mistakes when filing their FBARs?

8 The dissent suggests that these examples bear "limited relevance" because it is only "natura[l]" that a person "who violates the law many times" might incur more penalties. *Post*, at 9–11. But this assumes that violations accrue on a per-account basis, which begs the very question at issue before us.

* In 2007, for example, he held over $10 million across 61 foreign bank accounts. The pattern continued: $10 million across 51 accounts in 2008, $3 million across 53 accounts in 2009, $16 million across 53 accounts in 2010, and $15 million across 54 accounts in 2011.

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American Federal Tax Reports

McCUTCHEON v. COLGATE-PALMOLIVE CO., Cite as 131 AFTR 2d 2023 -1008, Code Sec(s) 417; 411, (CA2), 03/13/2023

Rebecca McCUTCHEON, on behalf of themselves and on behalf of all others similarly situated, Paul Caufield, on behalf of themselves and on behalf of all others similarly situated, PLAINTIFFS-APPELLEES v. COLGATE-PALMOLIVE CO., Colgate-Palmolive Co. Employee's Ret. Income Plan, Laura Flavin, Daniel Marsili, Employee Relations Committee of Colgate-Palmolive Co., DEFENDANTS-APPELLANTS.The Clerk of the Court is respectfully instructed to amend the caption to conform with the above. .

Case Information:

[pg. **2023** -1008]

Code Sec(s):	417; 411
Court Name:	U.S. Court of Appeals, **Second Circuit**,
Docket No.:	Docket No. 20-3225,
Date Decided:	03/13/**2023**.
Prior History:	District Court affirmed.

Disposition:	Decision for Taxpayers.

HEADNOTE

1. Retirement plans—ERISA—defined benefit plans—annuity; present value requirements; actuarial equivalence; rates—summary judgment. District court decision, granting taxpayers summary judgment on their claims that co. made discrete errors in administering amendment to defined benefit plan that provided for residual annuity benefits to certain plan participants, was affirmed. Errors included miscalculation of class members' residual annuities, resulting in impermissible forfeiture of benefits, and improper use of pre-retirement mortality discount to determine actuarial equivalence, in violation of Code Sec. 417(e) and ERISA. Co's arguments, including that plan's death benefit was incidental benefit vs. "the accrued benefit" or that proposed, unadopted IRS reg supported its position, were rejected accordingly.

Reference(s): ¶ 4175.02(15) Code Sec. 417;Code Sec. 411

OPINION

EVAN R. CHESLER (Darin P. McAtee, Lauren R. Kennedy, on the brief), Cravath, Swaine & Moore LLP, New York, NY; Robert A. Long, Jr., Robert S. Newman, on the brief, Covington & Burling LLP, Washington, DC, for Defendants-Appellants.

LEON DAYAN (Elizabeth Oppenheimer, on the brief), Bredhoff & Kaiser, P.L.L.C., Washington, DC; Eli Gottesdiener, on the brief, Gottesdiener Law Firm, P.L.L.C., Brooklyn, NY, for Plaintiffs-Appellees.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

Before: LIVINGSTON, Chief Judge, SACK, Circuit Judge, and COGAN, District Judge.**

Judge: SACK, Circuit Judge:

August Term, 2021

Plaintiffs-appellees brought this class action under the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 et seq., arguing, *inter alia*, that defendant-appellant Colgate-Palmolive Co. miscalculated residual annuities based on an erroneous interpretation of its retirement income plan and improperly used a pre-retirement mortality discount to calculate residual annuities, thereby working an impermissible forfeiture of benefits under ERISA. The district court granted summary judgment to plaintiffs-appellees on these claims. For the reasons set forth below, we agree. We therefore AFFIRM the district court's order and final judgment.

At its core, this appeal presents what seems to be a simple question of contract interpretation, obscured by the argot of federal law governing employee retirement income plans. On one hand, the plaintiffs-appellees—a class of former employees of Colgate-Palmolive Co. ("Colgate")—assert that certain provisions of Colgate's retirement plan have a single, unambiguous meaning that entitles them to greater benefits. On the other, the defendants-appellants—Colgate and some of its affiliated entities and officers—argue that those provisions are ambiguous, and that we must therefore defer to their preferred interpretation, which would result in lesser cumulative benefit payments to the plaintiff class.

After extensive litigation in which summary judgment was granted to the defendants on several counts,[1] the United States District Court for the Southern District of New York (Schofield, *J.*) granted summary judgment to the plaintiff class on a subset of its claims. In particular, the district court entered summary judgment for the plaintiffs on Count II, Errors 1 and 3, reasoning that Colgate had denied benefits based on two discrete errors in administering a 2005 amendment to the plan that provided for residual annuity benefits to certain plan participants. Colgate now appeals that order and final judgment of the district court. We conclude that the plaintiffs-appellees' interpretation of Colgate's retirement plan is the unambiguously correct reading of the plan's text, and therefore AFFIRM the district court's order and final judgment granting summary judgment to the plaintiffs-appellees on Count II, Errors 1 and 3.

BACKGROUND

A. Factual Background

Defendant-appellant Colgate is a global consumer products company that sponsored the Colgate-Palmolive Co.'s Employees' Retirement Income Plan (the "Plan"), an employee pension benefit plan.

1. The Plan's conversion to a cash balance plan

The issues in this appeal stem from the Plan's conversion from a final-average-pay plan [pg. **2023** -1010] to a cash-balance plan in 1989.[2] Prior to 1989, the Plan operated as a final-average-pay plan, meaning that a member's "accrued benefit" was calculated based on her final average earnings, along with her years of service and estimated Social Security benefits. Under this earlier iteration of the Plan, each member (also referred to as a participant) could receive a retirement benefit *only* in the form of a monthly annuity beginning at the normal retirement age of 65 (hereinafter referred to as the "grandfathered" annuity, for reasons that should soon become clear).

In 1989, Colgate converted the Plan to a cash-balance plan which provided participants with an accrued benefit expressed as a hypothetical cash balance in a Personal Retirement Account, or PRA (the "PRA benefit"). Over time, Colgate credited each member's PRA with a fixed percentage of her annual pay plus interest. Unlike the pre-1989 version of the Plan (in which members could receive grandfathered benefits only as an annuity), the cash-balance plan offered participants a choice to receive their PRA benefit as *either* a lump sum *or* a lifetime monthly annuity.

After the Plan shifted from final-average-pay to cash-balance, Colgate needed to account for those participants who had already accrued benefits under the pre-1989 plan but remained employed after the conversion. To do so, Colgate grandfathered participants who had already accrued benefits under the prior final-average-pay plan and offered them the option to purchase the continuing accrual of grandfathered benefits while *also* accruing PRA benefits under the new Plan formula. These participants' rights are contained in Plan Appendices A, B, C, and D. *See* App'x 464–87.[3] As relevant here, those grandfathered participants could elect to receive their ultimate benefit as either a lump sum payment or an annuity. According to Appendix C § 2(b), if a grandfathered participant chose to receive an annuity, she was "eligible" to receive the "larger of" the two different annuities that were accruing: (i) her grandfathered annuity, or (ii) her PRA annuity adjusted to include her contributions toward maintaining the grandfathered annuity.[4] *Id.* at 480–81. If, on the other hand, a grandfathered participant chose to receive a lump sum, Appendix C § 2(a) provides that the lump sum would reflect the value of her accrued PRA benefit plus the value of any contributions she made to continue her prior grandfathered benefits. *See id.* at 480.[5]

2. Colgate's calculation of benefits leads to two distinct forfeitures

To resolve the issues raised on appeal, we must first review some of the legal requirements that govern the Plan and how Colgate's failure to comply with those requirements led to two distinct forfeitures of benefits.

The parties agree that at all relevant times the Plan was a "defined benefit plan" under the Employee Retirement Income Security Act of 1975 ("ERISA"), 29 U.S.C. § 1001 et seq., because the plan guarantees a defined level of benefits known as accrued benefits. For defined benefit plans, ERISA defines the term "accrued benefit" to mean "the individual's accrued benefit determined under the plan and...expressed in the form of an annual benefit commencing at normal retirement age." ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A). In other words, "the accrued benefit under a defined benefit plan must be valued in terms of the annuity that it will yield at normal retirement age," which here is 65. *Esden v. Bank of Bos.*, 229 F.3d 154, 163 [86 AFTR 2d 2000-6095] (2d Cir. 2000).[6]

The value of the age-65 annuity to which a participant is entitled under the Plan terms serves as the baseline against which a participant's actual benefits are measured. That said, ERISA does not restrict an employer to providing a benefit only in the form of an annuity; it can also offer an employee the option to receive benefits in a lump sum instead. But the "present value" requirements of § 417(e) of the Internal Revenue Code ("I.R.C.") and § 205(g) of ERISA require that, under a defined benefit plan, any lump sum distribution be the [pg. **2023** -1011] actuarial equivalent of a member's normal retirement benefit. *See* I.R.C. § 417(e); ERISA § 205(g), 29 U.S.C. § 1055(g); *see also Esden*, 229 F.3d at 163–64. In other words, any lump sum's value must be equal to the value of the age 65 single life annuity to which the member is otherwise entitled, accounting for, among other things, the time value of money and the life expectancy of the recipient. This actuarial-equivalence requirement is designed to protect employees from employers who might entice them "to sell their pension entitlement back to the company cheap" by offering a lump sum option that is less valuable than the delayed annuity they would receive upon reaching retirement age. *Berger v. Xerox Corp. Ret. Income Guarantee Plan*, 338 F.3d 755, 762 [94 AFTR 2d 2004-5882] (7th Cir. 2003).

The first forfeiture caused by Colgate's implementation of the Plan involves a so-called "whipsaw violation," which relates to the inequivalence of the two optional forms of the PRA benefit: the PRA lump sum and the PRA annuity. To ensure that a lump sum is actuarially equivalent to the retirement-age annuity guaranteed by a cash-balance plan, the plan administrator (here, Colgate) must perform what is known as a whipsaw calculation. *See Laurent v. Pricewaterhouse Coopers LLP*, 794 F.3d 272, 275 (2d Cir. 2015) (explaining that a whipsaw calculation is used to determine the "difference between the hypothetical value of a cash balance plan account at any given time and the value of the account as an annuity payable at normal retirement age"). Generally speaking, to perform the whipsaw calculation, a plan administrator typically projects a participant's hypothetical cash balance forward to normal retirement age using a certain interest rate (the "projection rate") and then discounts that amount back to present value with a certain interest rate (the "discount rate"). Projection rates may be set by a plan, but the discount rate is statutorily capped. *See Esden*, 229 F.3d at 159. In the context of the Plan, to properly compute a participant's lump sum benefit, Colgate had to increase the participant's hypothetical cash balance to age 65 using the plan-prescribed "projection rate," convert that amount into the age 65 annuity (i.e., the PRA annuity), convert that age 65 annuity to a lump sum, and finally discount the lump sum back to present value using the statutorily-prescribed "discount rate."[7]

As relevant to the class members before us, § 1.3 of the Plan selected as a projection rate the 20-year Treasury bill interest rate plus 1% (the "20+1% rate"). *See* App'x 405–06 (requiring that the 20+1% rate must be used "[f]or purposes of converting a Member's Account into a single life annuity payable for the life of the Member starting at Normal Retirement Date"). In the whipsaw calculation, that rate was used to project the hypothetical PRA account balance forward to the age of 65 and to convert that projected balance into the PRA annuity. The discount rate used to bring the age 65 projected lump sum back to present value is set by I.R.C. § 417(e). From 1989 to 2002, federal law mandated that the discount rate could not be higher than the Pension Benefit Guaranty Corporation rate (the "PBGC rate"). *See McCutcheon v. Colgate-Palmolive Co.* (*Colgate II*), 481 F.

Supp. 3d 252, 257 (S.D.N.Y. 2020) (citing I.R.C. § 417(e)(3)(C); I.R.S. Notice 87-20, 1987-1 C.B. 456 (Feb. 9, 1987)).

For the relevant period, however, Colgate used the 20+1% rate as *both* the projection rate *and* the discount rate, despite the 20+1% rate being considerably higher than the PBGC rate during that time. *See* App'x 1367. As a result of using the same rate to project and discount, a member who elected to receive her benefits as a lump sum received a payment that was necessarily equal to her hypothetical PRA account value. Insofar as this undervalued lump sum was not actuarially equivalent to a member's accrued benefit, these participants suffered a forfeiture.

The second forfeiture at issue is a "grandfathered benefit forfeiture," which relates to the Plan's failure to compare the PRA lump sum to the grandfathered annuity for certain members who continued to make contributions to maintain their grandfathered benefits. As previously noted, these grandfathered participants effectively had two benefits accruing at the same time, and the Plan gave them the option to choose to receive either an annuity or a lump sum—the values of which were required to be actuarially equivalent. For the purposes of present-value requirements under federal law, a grandfathered member's "accrued benefit"—i.e., the baseline annuity to which her lump sum payment must be actuarially equivalent—was the age 65 single life annuity to which she was entitled under the Plan. *See* I.R.C. § 411(a)(7) (defining "accrued benefit"); *accord* ERISA § 3(23)(A). Under Appendix C § 2(b), that "accrued benefit" would be her "winning" annuity, i.e., whichever of the PRA annuity or grandfathered annuity was [pg. **2023** -1012] more valuable. But because there was no lump-sum form of the grandfathered benefit, under Appendix C § 2(a), a participant who elected to receive a lump sum would obtain a payment that (at least in theory) reflected only the value of her PRA annuity, even if her winning annuity—and, thus, her legally defined accrued benefit—was her grandfathered annuity.[8] As a result, some members whose larger grandfathered annuities were their "winning" annuities received lump sum payments that (if properly calculated) would only be actuarially equivalent to their smaller PRA annuities.

Thus, a member with a winning grandfathered annuity who elected a lump sum payment suffered two nested forfeitures: first, her PRA lump sum was not actuarially equivalent to her PRA annuity because of Colgate's whipsaw violation, and second, even if the two forms of the PRA benefit had been actuarially equivalent, her properly calculated PRA lump sum still would have been worth less than the present value of her winning grandfathered annuity.

3. The Residual Annuity Amendment

In 2005, Colgate amended the Plan through a Residual Annuity Amendment (the "RAA"). The RAA applied retroactively "[e]ffective as of July 1, 1989," and granted a residual annuity benefit to any participant who (i) elected a lump sum payment and (ii) was "entitled to a greater benefit than h[er] Accrued Benefit" as defined under the Plan. App'x 366.[9]

The core of the issues on appeal concern Colgate's interpretation and implementation of the RAA. In pertinent part, the RAA provides that a qualifying member's residual annuity "shall be computed by subtracting the age 65 single life annuity Actuarial Equivalent amount of the Member's lump sum payment from the age 65 single life annuity benefit otherwise payable to the Member under Appendices B, C, or D, as applicable." App'x 366. Parsing this clause, the amount of a qualifying member's residual annuity under the RAA equals the difference between two values. The first value is "the age 65 single life annuity Actuarial Equivalent amount of the Member's lump sum payment." *Id.* In less technical terms, this figure reflects the value of the lump sum payment that the member actually received, converted into an annuity payable at the age of 65 for the purpose of comparison. The first value is therefore a hypothetical annuity that is the actuarial equivalent of the lump sum payment that Colgate paid to a member (the "AE of LS").

The second value (from which the AE of LS is subtracted to calculate the residual annuity) is the "age 65 single life annuity benefit otherwise payable to the Member under Appendices B, C or D, as applicable." *Id.* As the precise meaning of this clause is critical to this appeal, it is discussed at some length below. According to the defendants-appellants, in 2004, Colgate discovered the grandfathered benefit forfeiture described above and adopted the RAA to address *only* that forfeiture. *See* Appellants' Br. 14. Thus, Colgate contends that the "age 65 single life annuity benefit otherwise payable to the Member under Appendices B, C or D, as applicable," refers only to the grandfathered annuity (and not to the PRA annuity, even if it is a member's winning annuity). *Id.* at 14–15 (quoting App'x 366). The plaintiffs-appellees, on the other hand, contend that this language unambiguously refers to a member's winning annuity under Appendix C § 2(b) and argue that whatever the RAA's purpose, its plain language operates to remedy both the grandfathered benefit forfeiture and the whipsaw forfeiture for covered participants. *See* Appellees' Br. 11.

Although the RAA was technically effective as of July 1, 1989, Colgate initially implemented the RAA only prospectively, granting residual annuities to qualifying employees who retired after its adoption in 2005. Thus, at first, there was no retroactive application of the RAA to participants who retired between July 1989 and February 2005.

4. The Colgate I settlement and retroactive RAA application

In 2007, an ERISA class action was initiated against Colgate on behalf of thousands of Plan participants who alleged that Colgate had miscalculated their pension benefits as a result of the whipsaw violation. *See In re Colgate-Palmolive Co. ERISA Litig.* (*Colgate I*), 36 F. Supp. 3d 344, 347 (S.D.N.Y. 2014). The class was comprised of former Colgate employees—including both those whose employment started before and after the 1989 plan conversion—who had elected to receive their PRA benefit as a lump sum, but who received lump sums worth less than the actuarial equivalent of the PRA annuity benefit to which they were entitled, in violation of § 417(e)'s present-value requirements. [pg. **2023** -1013]

In May 2010, the parties in *Colgate I* reached a preliminary agreement to settle the plaintiffs' claims. At the time of this preliminary agreement, plaintiffs' counsel was unaware of the existence of the RAA. Upon learning of the RAA in July 2011, the plaintiffs continued their efforts to settle *Colgate I*, which eventually culminated in a settlement agreement that excluded from its scope "any and all past, present and future" claims "that are based upon, or arise under the Residual Annuity Amendment." App'x 304. In July 2014, the United States District Court for the Southern District of New York (Schofield, *J.*) approved this $45 million settlement. *See Colgate I*, No. 07–cv–9515, 2014 WL 7929831 (S.D.N.Y. July 8, 2014) (final order and judgment); *see also Colgate I*, 36 F. Supp. 3d at 346.

After disclosure of the RAA during the *Colgate I* settlement proceedings, Colgate began to implement the RAA retroactively, granting millions of dollars of additional annuity benefits to several hundred former participants who had opted to receive lump sum payments between 1989 and 2005. Based on Colgate's reading of the RAA, it calculated those members' residual annuities by subtracting the AE of LS from the grandfathered annuity exclusively, even when a member's PRA annuity—rather than the grandfathered annuity—was her "winning" annuity under the Plan.

5. McCutcheon's administrative claim and appeal

Plaintiff-appellee Rebecca McCutcheon was a Colgate employee from 1979 to 1994. McCutcheon made contributions to continue her eligibility for grandfathered benefits after the Plan's 1989 conversion and elected to receive her pension benefit as a lump sum at the time of her resignation. She also received a settlement payment as part of the *Colgate I* litigation.

On July 30, 2014, McCutcheon filed an administrative claim alleging that she was entitled to a residual annuity under the RAA.[10] By letter dated November 4, 2014, the Employee Relations Committee of Colgate-Palmolive Co. (the "Committee") denied her claim, determining that she was not entitled to any additional benefit under the RAA because the age 65 actuarial equivalent of her lump sum plus her *Colgate I* settlement proceeds was greater than her grandfathered annuity. On April 6, 2015, McCutcheon appealed the Committee's denial, identifying four errors that the Committee allegedly committed when calculating her residual annuity. On June 4, 2015, the Committee denied her appeal.

B. District Court Proceedings

After her administrative appeal was denied, McCutcheon filed this action in the United States District Court for the Southern District of New York on behalf of a putative class against Colgate, the Plan, the Committee, and two Colgate Vice Presidents who served on the Committee, Laura Flavin and Daniel Marsili.[11] Count I, which is not a class claim and is not before us on appeal, alleged that the defendants violated 29 C.F.R. § 2560.503-1 by failing to produce all relevant documents and information during McCutcheon's claim and appeal. Count II, which is before us, alleged that the class plaintiffs were wrongly denied residual annuities under the RAA based on four distinct errors Colgate made when interpreting and calculating such benefits. The district court granted the motion for class certification as to Count II and appointed McCutcheon as the class representative. *Caufield v. Colgate-Palmolive Co.*, No. 16-cv-4170, 2017 WL 3206339, at *6, *8 (S.D.N.Y. July 27, 2017). As explained by the district court, "each Class Member (1) was a Colgate employee in July 1989, (2) received a lump sum payment from the Plan and (3) is entitled to a greater benefit under any of Appendices B, C or D than his or her Accrued Benefit as defined in Plan § 1.2." *Colgate II*, 481 F. Supp. 3d at 260. The plaintiffs estimate that the class contains approximately 1,200 people with claims totaling some $300 million.

After two years of discovery, Colgate moved for summary judgment. The district court granted the motion in part, dismissing (i) Count I; (ii) Count II, Error 2; and (iii) Count II, Error 4 as to the Class but not as to McCutcheon herself. *See McCutcheon v. Colgate-Palmolive Co.*, No. 16-cv-4170, 2020 WL 3893303, at [pg. **2023** -1014] *16 (S.D.N.Y. July 10, 2020).[12] The district court denied summary judgment to Colgate on Count II, Errors 1 and 3. *See id.* The plaintiffs subsequently moved for summary judgment on Count II, Errors 1 and 3, and sought entry of a final judgment in their favor. On August 24, 2020, the district court issued an order granting the plaintiffs' motion for summary judgment. *Colgate II* , 481 F. Supp. 3d at 256.

In Error 1, the plaintiffs claimed that Colgate miscalculated residual annuities, leading to a forfeiture. *Id.* at 261. The district court determined that Colgate's reading of the RAA—that both eligibility and the amount of the residual annuity is determined by comparing the lump sum paid with only the grandfathered annuity—was erroneous as a matter of law. *Id.* As to eligibility, the district court agreed with the plaintiffs that "if either the Grandfathered benefit exceeds the Accrued Benefit as defined in Plan § 1.2 [i.e., the PRA annuity] or the participant elected to make Employee Contributions, then the participant will be entitled to a Residual Annuity." *Id.* at 262. The court then concluded that "[b]ased on a plain reading of the RAA," "the amount of the Residual Annuity is determined by comparing the Age 65 AE of LS...with the *greater of* the Grandfathered Benefit *or* the Member's Accrued Benefit as defined in Plan § 1.2 [i.e., the PRA annuity] plus Employee Contributions." *Id.* (emphasis in original).

In Error 3, the plaintiffs asserted that Colgate violated ERISA when it used a pre-retirement mortality discount ("PRMD") to determine actuarial equivalence when calculating residual annuities. *See id.* at 266–67. Generally speaking, when calculating the present value of a retirement benefit, a mortality discount can be used to account for the possibility that a participant may die before reaching the eligibility age for that benefit. Here, pursuant to the Plan's terms, Colgate incorporated a PRMD when calculating a participant's AE of LS and age 65 annuity benefit, thereby diminishing the value of the residual annuities under the RAA. The district court granted summary judgment to the plaintiffs on Error 3 on the ground that the defendants failed to respond to the plaintiffs' arguments in their opposition brief. *Id.* at 267. Nevertheless discussing the merits, the court explained that, under the Plan, a member's benefit "must be paid in all events and does not decrease if the Participant dies prior to reaching age sixty-five." *Id.* at 268. That is, if a member were to die prior to retirement age, a benefit of substantially similar value is nonetheless paid to that member's beneficiary. The district court adopted reasoning from cases in our sister circuits that "applying a pre-retirement mortality discount to a retirement benefit that does not decrease if the participant dies would result in a lump sum that was less than the actuarial equivalent of the annuity it [was] supposed to replace," and would "result in a forfeiture prohibited by ERISA." *Id.* at 267 (alteration in original) (citation omitted).

Finally, the district court ordered Colgate to recalculate all class members' RAA annuities using the 20+1% rate as the projection rate to convert a below-retirement-age participant's cash balance into an age 65 annuity and the PBGC rate as the discount rate to determine the Age 65 AE of LS. *Id.* at 269.

The defendants-appellants now appeal the district court's grant of summary judgment to the plaintiffs-appellees on Count II, Errors 1 and 3, and the district court's determination that Colgate must use the above-mentioned rates to recalculate participants' residual annuities.

DISCUSSION

I. Standard of Review

"We review a district court's decision to grant summary judgment *de novo*, construing the evidence in the light most favorable to the party against which summary judgment was granted and drawing all reasonable inferences in its favor." *Halo v. Yale Health Plan, Dir. of Benefits & Recs. Yale Univ.*, 819 F.3d 42, 47 (2d Cir. 2016) (citation omitted). Summary judgment is appropriate if the record establishes that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "A genuine issue of material fact exists if `the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" *Nick's Garage, Inc. v. Progressive Cas. Ins. Co.*, 875 F.3d 107, 113 (2d Cir. 2017) (citation omitted). In ERISA cases where a pension plan participant moves for summary judgment against a plan administrator, summary [pg. **2023** -1015] judgment is appropriate when the plan language "unambiguously" supports the participant's interpretation. *See O'Neil v. Ret. Plan for Salaried Emps. of RKO Gen., Inc.*, 37 F.3d 55, 58–59 (2d Cir. 1994).

II. Error 1

With respect to Error 1, the plaintiffs claimed that Colgate had miscalculated class members' residual annuities, resulting in an impermissible forfeiture of benefits. Based on its interpretation of the RAA's text, Colgate had calculated residual annuities by comparing the AE of LS only with a member's grandfathered annuity. The district court granted summary judgment to the class, concluding that the unambiguous language of the Plan required Colgate to calculate residual annuities by comparing the AE of LS with the greater of (i) the grandfathered annuity or (ii) the PRA annuity plus employee contributions made to maintain eligibility for grandfathered benefits. *See Colgate II*, 481 F. Supp. 3d at 262. Under the district court's interpretation, an eligible member would receive a residual annuity if either of those annuities is greater than the value of the lump sum they were paid.

We agree with the district court that the text of the RAA is unambiguous and requires Colgate to calculate a member's residual annuity by subtracting the AE of LS from that member's winning annuity under Appendix C § 2(b).

A. Relevant Plan Provisions

Central to this appeal is the language of the RAA and the related language of Plan Appendix C § 2(b), which the parties agree is the relevant appendix provision for purposes of the analysis.

The RAA states, in relevant part:

> Effective as of July 1, 1989, a Member who, under any of Appendices B, C or D, is entitled to a greater benefit than his Accrued Benefit..., and who chooses to receive his benefit under this Lump Sum Payment Option, which is the Actuarial Equivalent of his Accrued Benefit..., shall receive in addition to such lump sum payment an additional benefit, commencing at the same time and payable in the standard form applicable to such Member....A Member may not elect any other form of payment option with respect to this additional benefit.
>
> Such additional benefit shall be computed by subtracting the age 65 single life annuity Actuarial Equivalent amount of the Member's lump sum payment [i.e., the AE of LS] from *the age 65 single life annuity benefit otherwise payable* to the Member under Appendices B, C or D, *as applicable*, and applying to such remainder early retirement reductions applicable to the Member's benefit based on the Member's age at benefit commencement.

App'x 366 (emphases added).

Appendix C § 2(b) states, in relevant part:

> If [a member] elects to receive an annuity settlement instead of a single lump sum payment, he *shall be eligible* for an annuity pursuant to Section 6.2..., Section 6.3...or Section 6.4(a)(ii)...of the Plan that provides for him to receive *the larger of*:
>
> ((i)) the benefit that he would have received had he continued under the Plan as in effect prior to July 1, 1989, pursuant to Appendix B...[i.e., his grandfathered annuity]; or

((ii)) the benefit payable pursuant to Section 6.2..., Section 6.3...or Section 6.4(a)(ii)...of the Plan [i.e., his PRA annuity], which is the Actuarial Equivalent of the Member's Accrued Benefit...plus his Contributions to Maintain Prior Plan Benefits with interest...at his Benefit Commencement Date.

App'x 480–81 (emphases added).

B. Principles for Construction of Plans

"ERISA plans are construed according to federal common law," *Fay v. Oxford Health Plan*, 287 F.3d 96, 104 (2d Cir. 2002), and general principles of contract law apply to their interpretation, *Burke v. PriceWaterHouseCoopers LLP Long Term Disability Plan*, 572 F.3d 76, 81 (2d Cir. 2009) (per curiam). The first step in interpreting a plan is to determine whether the plan's terms are ambiguous. *See Strom v. Siegel Fenchel & Peddy P.C. Profit Sharing Plan*, 497 F.3d 234, 244 n.6 (2d Cir. 2007); *O'Neil* , 37 F.3d at 58–59. "Whether ERISA plan language `is ambiguous is a question of law that is resolved by reference to the contract alone.'" *Strom*, 497 F.3d at 244 n.6 (quoting *O'Neil* , 37 F.3d at 59). "Language is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement." *O'Neil* , 37 F.3d at 59 (ellipsis, internal quotation marks, and citation omitted).

If a plan's terms are unambiguous, they must be enforced according to those terms without regard for how the plan administrator has otherwise interpreted the language "because unambiguous language leaves no room for the exercise of discretion." *Id.* Thus, "[w]here the language is plain and unambiguous, a court may construe the [plan] and grant summary [pg. **2023** -1016] judgment." *Brass v. Am. Film Techs., Inc.*, 987 F.2d 142, 148 (2d Cir. 1993). Conversely, if a plan's language is ambiguous and the "plan[] invest[s] the administrator with broad discretionary authority to determine eligibility," it will be "reviewed under the arbitrary and capricious standard." *Celardo v. GNY Auto. Dealers Health & Welfare Tr.*, 318 F.3d 142, 145 (2d Cir. 2003); *accord O'Neil*, 37 F.3d at 59. When a plan's language is ambiguous and "both the [administrator] of [the plan] and a rejected applicant offer rational, though conflicting, interpretations of plan provisions, the [administrator's] interpretation must be allowed to control." *Novella v. Westchester Cnty.*, 661 F.3d 128, 140 (2d Cir. 2011) (citation omitted).

Therefore, whether the language of the plan is ambiguous effectively determines the outcome of our analysis. That is, if the RAA unambiguously requires the plaintiffs-appellees' interpretation, we must affirm the district court's grant of summary judgment. But if the RAA is ambiguous and Colgate's preferred reading is reasonable, we would almost surely defer to that reasonable interpretation.

C. Ambiguity Analysis

We conclude that the text of the RAA unambiguously requires comparing the AE of LS to a participant's Appendix C § 2(b) winning annuity. We are unpersuaded by Colgate's attempt to discredit the district court's assertedly unambiguous reading as "illogical." *See* Appellants' Br. 29. We also reject Colgate's proposed alternative interpretation of the RAA, which is not, we think, a reasonable reading of the RAA's text, but rather an impermissible effort to introduce ambiguity by reference to extrinsic evidence of the RAA's alleged purpose. Accordingly, we affirm the district court's grant of summary judgment to the class members on Error 1.

1. The Plan unambiguously requires residual annuities to be calculated by comparing the AE of LS to the Appendix C § 2(b) winning annuity

The ambiguity dispute in this case focuses primarily on one sentence in the RAA, which states that the amount of the residual annuity "shall be computed by subtracting the age 65 single life annuity Actuarial Equivalent amount of the Member's lump sum payment [i.e., the AE of LS] from *the age 65 single life annuity benefit otherwise payable to the Member under Appendices B, C or D, as applicable.*" App'x 366 (emphasis added). We begin our analysis of whether this language is ambiguous, as we must, "by reference to the contract alone." *Strom* , 497 F.3d at 244 n.6 (citation omitted).

Under the RAA, a residual annuity is computed by calculating the difference between (1) the AE of LS—which represents the "amount of the Member's lump sum payment" expressed as an annuity for comparison's sake—and (2) the "annuity benefit" that is" *otherwise payable* to the Member under Appendices B, C or D, *as applicable.*" App'x 366 (emphases added). Thus, to determine that second value, the plan administrator must first find the Appendix provision that is "applicable" and then identify which "annuity benefit" is "otherwise payable to the Member under" that Appendix provision.

In McCutcheon's case, there is no doubt which Appendix provision is referenced by the words "as applicable" in the RAA: the first portion of Appendix C § 2 states that "[i]f a Member elects to make Contributions to Maintain Prior Plan Benefits [i.e., grandfathered benefits] starting July I, 1989 and continues to do so until h[er] separation from service"—as McCutcheon did—"the following provisions *shall be applicable.* " *Id.* at 480 (emphasis added).[13]

Having identified the "applicable" appendix provisions, we must then determine which "annuity benefit" is "otherwise payable" to the member under that portion of Appendix C § 2. The applicable language in Appendix C § 2 is structured as a binary between lump sums, in § 2(a), and annuities, in § 2(b). *See id.* at 480–81. Subsection 2(a) states that members "shall be entitled to receive a single lump sum payment," as McCutcheon chose to do. Id. at 480; see also id. at 542. Subsection 2(b) identifies which annuity benefit a member like McCutcheon would have received had she "elect[ed] to receive an annuity settlement instead of a single lump sum payment." *Id.* at 480. In that circumstance, a member "shall be eligible for...the larger of" (i) the grandfathered annuity or (ii) the PRA annuity plus employee contributions. *Id.* at 480–81. To summarize, under the "applicable" appendix provision, if a lump sum recipient had instead elected to receive an annuity, the "annuity benefit" that she "otherwise" [pg. **2023** -1017] would have been paid is her Appendix C § 2(b) winning annuity, i.e., the larger of her grandfathered annuity or her PRA annuity.[14]

The clear text of the Plan, without more, thus settles the question of ambiguity: the RAA is not ambiguous. The text plainly requires a comparison between the AE of LS and, in this case, a member's winning annuity under Appendix C § 2(b).

Before engaging with Colgate's preferred alternative reading, first we address Colgate's primary textual counterargument that the interpretation outlined above is, in fact, a wholly unreasonable construction of the RAA's text. For some members (like McCutcheon), our interpretation of the RAA requires a comparison between the values of the PRA lump sum and the PRA annuity. Colgate warns that "[a] comparison of the `new' PRA lump sum and the `new' PRA-based annuity is illogical because...the [PRA] Annuity is expressly defined in the Plan to be the *same benefit* the Participant already received as a lump sum," and therefore cannot be the "otherwise payable" benefit specified in the RAA. Appellants' Br. 29 (emphasis in original). Colgate asserts that "[t]he District Court side-stepped the question of whether, as a matter of plan interpretation, the `new' PRA lump sum and the `new' [PRA] Annuity are the *same benefit.*" *Id.* at 32 (emphasis in original). But, for the reasons explained below, Colgate's question is a red herring.

First, Colgate asserts that once a member has been paid a PRA lump sum, the PRA annuity "cannot be the `otherwise payable' *benefit* specified in the RAA because that *benefit* was already paid" to the member in a different form. *Id.* at 29 (emphases in original). But Colgate omits a significant word from the text of the Plan: the RAA does not direct the Plan administrator to identify the" *benefit* otherwise payable" to a member (as Colgate insists); rather, it refers to the" *annuity benefit* otherwise payable." *See* App'x 366 (emphases added). Even if the PRA lump sum and the PRA annuity are different forms of the same benefit, the lump sum is not an "annuity benefit." Therefore, the fact that a lump sum version of the PRA benefit had already been paid does not have an impact on whether the PRA annuity could be an "otherwise payable" "annuity benefit."[15] To the contrary, the annuity benefit McCutcheon would otherwise have been paid is her PRA annuity had she not elected to receive a lump sum payment.

Second, Colgate is too quick to dismiss the significance of the RAA's invocation of the AE of LS, a computational construct representing the hypothetical annuitized value of the lump sum payment actually paid to a member for the sake of comparison. *See* Appellants' Br. 34 (referring to the district court's focus on the distinction between the PRA annuity and the AE of LS as "an attack on a straw man"). It would be undeniably odd—perhaps even "illogical"—if the RAA required comparison of a benefit to itself, such that the two values would always be perfectly actuarially equivalent and the resulting residual annuity would always equal zero. But that is not what the RAA does.

As an initial matter—and as emphasized by the district court—from a mathematical perspective, the two values are not equivalent because they are based on different interest rate assumptions. For reasons discussed in more detail infra Section III, we agree that the AE of LS is calculated using the PBGC rate, while the PRA annuity is projected using the higher 20+1% rate. *See Colgate II*, 481 F. Supp. 3d at 264–65. Further, the RAA compares the undervalued lump sum that a member actually received—represented in the AE of LS—with the full annuity benefit to which they were legally entitled. The RAA, which was adopted in 2005, was intended to apply retroactively to 1989, thereby covering the entire whipsaw violation period.[16] During that period, a member's lump sum payment was not actuarially equivalent to her PRA annuity, even though it should have been under federal law. This discrepancy—between the legally mandated equivalence of the two forms of the PRA benefit and their real-world inequivalence—makes it wholly reasonable for the RAA to compare the undervalued lump sum that a member re[pg. **2023** -1018] ceived to the PRA annuity to which she would have otherwise been entitled.[17]

Thus, Colgate's "same-benefit" argument does not disturb our conclusion that the RAA's language is unambiguous. We find nothing inherently "illogical" or ambiguous about the RAA's comparison of the AE of LS to a winning annuity, and that comparison does not become any more ambiguous if the lump sum is technically an alternate form of the PRA annuity. Because "unambiguous language in an ERISA plan must be interpreted and enforced in accordance with its plain meaning," *Strom*, 497 F.3d at 244 n.6 (citation omitted), we affirm the district court's grant of summary judgment to the class plaintiffs as to Error 1.

2. Colgate's preferred reading of the RAA is not a reasonable interpretation of the text

When Colgate first moved for summary judgment, it unsuccessfully argued that the text unambiguously required its preferred reading; now, it adopts the position that the RAA is "susceptible to more than one reasonable interpretation." Appellants' Br. 27. However, we do not think that Colgate's alternative interpretation of the RAA is a reasonable construction of the Plan's text.

Colgate argues that the "annuity benefit otherwise payable to the Member" refers only to the grandfathered annuity, not the larger of the grandfathered annuity or PRA annuity. According to the defendants-appellants:

> Colgate interprets the term "otherwise payable" in the text of the RAA to direct the Committee only to those portions of the Appendices that relate to the "old" Grandfathered Formula benefit that would otherwise have been payable to Participants *had the plan conversion not occurred* , and not the "new" PRA annuity benefit referenced elsewhere in the Appendices (*i.e.*, the "new" 2(b)(ii) Annuity). The reason for this is straightforward: the RAA ensures that a Grandfathered Participant receives the full value of the "old" benefit that the Participant would have received if there were no "new" PRA benefit. The phrase "otherwise payable" means the benefit that would otherwise be paid if there were no "new" benefit.

Id. at 28–29 (emphasis added). That is, Colgate argues that it is reasonable to interpret the phrase "otherwise payable" as drawing a distinction between pre-and post-Plan conversion benefits. The "straightforward" reason Colgate gives for its pre-/post-conversion interpretation is that it would fulfill the alleged purpose of the RAA, which Colgate claims is to remedy a forfeiture of grandfathered benefits. Colgate also argues that the words "as applicable"—used in reference to the Plan's appendices—is similarly ambiguous and could reasonably be read to refer to "only those sections of the Appendices that apply to the `old' Grandfathered Formula benefit." *Id.* at 35. Again, Colgate's only support for this interpretation of "as applicable" appears to be that it comports with that RAA's alleged purpose "to ensure that the value of the `old' Grandfathered Formula benefit is not forfeited, to the extent it is not fully paid by the `new' PRA lump sum." *Id.*

We find nothing in the text of the Plan that suggests that the phrases "otherwise payable" and "as applicable" refer specifically to the annuity that Colgate would have paid had the Plan not been converted to a cash-balance plan in 1989. Indeed, this reading requires inserting into the RAA an additional qualification, namely, that "benefit otherwise payable" actually means "benefit otherwise payable *had the plan conversion not occurred* in 1989." Nevertheless, Colgate's proffered interpretation begins with the proposition that the RAA is simply not concerned with the whipsaw forfeiture, and Colgate urges us to find this interpretation reasonable because it would align with that alleged purpose. But Colgate does not divine that purpose from the text of the Plan; instead, it draws on "substantial extrinsic evidence demonstrating that the purpose of the RAA was to ensure that Grandfathered Participants received the full value of their `old' Grandfathered Formula benefit even if they elected to receive their benefit under the `new' PRA formula as a lump sum." *Id.* at 39. Colgate thus asks us to put the extrinsic evidence cart before the textual horse. The law does not permit us to do so.

We repeat: "It is axiomatic that where the language of a [plan] is unambiguous, the parties' intent is determined within the four corners of the contract, without reference to external evidence." *Feifer v. Prudential Ins. Co. of Am.*, 306 F.3d 1202, 1210 (2d Cir. 2002). And "[w]hether ERISA plan language `is ambiguous is a question of law that is resolved *by reference to the contract alone.*'" *Strom*, 497 F.3d at 244 n.6 (emphasis added) (quoting *O'Neil*, 37 F.3d at 59). Therefore, we will not invoke extrinsic evidence of a Plan's purpose to inject ambiguity into otherwise unambiguous language. It may be true that Colgate's intent when adopting the RAA was different from the [pg. **2023** -1019] actual effect of the text's unambiguous language, but that does not control our analysis. *See* , *e.g.*, *AEP Energy Servs. Gas Holding Co. v. Bank of Am., N.A.*, 626 F.3d 699, 729 (2d Cir. 2010) ("The `primary concern when interpreting a contract is to ascertain and give effect to the intent of the parties as that intent is expressed in the contract.'" (citation omitted)).

3. The language of the RAA is not rendered ambiguous by its effects

For largely the same reasons, we also conclude that any allegedly unusual effects flowing from the RAA's plain meaning do not change our ambiguity analysis. That said, we also note that certain effects of our interpretation, which may seem odd at first, may not be so confounding upon closer review.

First, the RAA was adopted in 2005 and was intended to apply both retroactively (to 1989) and prospectively. Colgate notes, however, that by 2005 "the Plan had already been amended to eliminate the whipsaw issue for the `new' PRA benefit on a going-forward basis, meaning that there was no prospective § 417(e) issue for the RAA to address." Appellants' Br. 50 (internal citation omitted). In our view, the fact that the RAA also applied prospectively does not refute the conclusion that, as drafted, it also remedies prior whipsaw violations. Rather, the RAA's combined prospective and retrospective application comports with an interpretation of the RAA that addresses both of the Plan's forfeiture problems—one limited to the past and one continuing—for a large subset of members at once.

That "two-birds-one-stone" approach to resolving the Plan's overlapping forfeiture issues also helps to answer a second question related to the RAA's effect. Under the RAA, a residual annuity is available only to a lump sum recipient who is "entitled to a greater benefit than h[er] Accrued Benefit," App'x 366—i.e., any participant whose grandfathered annuity exceeds her PRA annuity or who elected to make employee contributions. Yet there are some participants, such as those who joined after the Plan's conversion in 1989, who are not eligible for a residual annuity but who still suffered a whipsaw forfeiture. Colgate insists that "it would have been illogical for [it] to attempt to remedy the [whipsaw] forfeiture issue through residual annuities available only to Grandfathered Participants, as opposed to remedying the issue for *all* Plan participants who elected to receive their `new' PRA benefit as a lump sum rather than an annuity." Appellants' Br. 50–51 (emphasis in original).

We think it makes perfectly good sense to conclude that while Colgate was in the process of fixing an issue related to forfeiture of grandfathered benefits, it would use the same mechanism to partially remedy a contemporaneous whipsaw violation, inflicted upon those same grandfathered participants. While the Committee was already considering the unique plights of grandfathered participants, it would have been convenient for it to adopt a single amendment that remedied all forfeitures that those members had suffered. Thus, we see nothing inherently illogical about the RAA's scope, as conceived on our construction of its terms.

Third, Colgate raises concerns about the relationship between the RAA and the *Colgate I* settlement. Colgate asserts that under the plaintiffs-appellees' reading the class would receive an unwarranted windfall because members were already "compensated for the alleged underpayment of their PRA lump sum in *Colgate I*," and "the current class is claiming again the difference between their *Colgate I* settlement award and their PRA annuity." Reply Br. 17. In Colgate's view, when *Colgate I* was settled, the unlawfulness of the whipsaw violation was resolved, even though class members received a settlement award that was less than the full gap between the PRA annuity and the lump sum that they had received. The reason for the incomplete remedy, Colgate explains, is that the settlement award "was discounted to reflect the plaintiffs' likelihood of success (as most settlements are)." *Id.* at 16. That "settled" difference is also the amount that the instant class is attempting to recoup via their RAA claims, which Colgate describes as "a second bite at the apple." Id. On our read, the class plaintiffs do not stand to earn any undue windfall from a favorable judgment in this case.

Colgate's complaint is premised on the notion that *Colgate I* settled all claims alleging an impermissible gap between the value of the PRA lump sum and the value of the PRA annuity. However, that settlement agreement explicitly excluded any claims that were "based upon, or ar[o]se under" the RAA. App'x 304. Colgate does not dispute that the *Colgate I* settlement exempted all future RAA claims; instead, Colgate again relies on extrinsic evidence of the RAA's purpose in an effort to avoid this aspect of the settlement. Colgate begins with the assumption that the instant class members' claims could not possibly arise under the RAA because "the RAA...was never intended to address them." Appellants' Br. 52. According to Colgate, "the RAA is about reconciling `new' with `old'" (i.e., the PRA lump sum [pg. **2023** -1020] with the grandfathered annuity) and" *not* comparing `new' and `new'" (i.e., the PRA lump sum and PRA annuity). *Id.* at 51–52 (emphasis in original). But this is a circular argument, essentially claiming that Colgate's current interpretation of the RAA must be correct because, otherwise, Colgate's interpretation of the RAA (when it settled *Colgate I*) was incorrect.

We conclude otherwise. The plaintiffs are not "attempting to relitigate the settled claims in *Colgate I*," *id.* at 52, by asserting their claims under the unambiguous language of the RAA. When Colgate agreed to carve out all future RAA claims from the *Colgate I* settlement, it presumed that its reading of the RAA was correct. Now, when faced with a determination that its interpretation is erroneous, it seeks to rewrite the settlement. But the settlement clearly excludes any claims under the RAA, whatever they may be. App'x 304; *see also id.* at 303 (listing all "Released Claims" and noting "[f]or avoidance of doubt, the foregoing does not include *any claims* arising under the Residual Annuity Amendment" (emphasis added)). These plaintiffs, having demonstrated that the plain text of the RAA guarantees them an annuity that covers the gap between their lump sum and their winning PRA annuity,[18] are now entitled to recover that full difference.

Thus, we decline to read ambiguity into the otherwise unambiguous text of the RAA based on these effects-based arguments.[19]

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We are faced with a choice between (1) the unambiguous meaning of the Plan's text that may have some peculiar, though not inexplicable, effects, and (2) an interpretation that appears to us to be unreasonable, but that—when viewed in light of extrinsic evidence of purpose—results in outcomes that seem more in line with the defendants-appellants' preferences. Under these circumstances, as we read our case law, we have no choice but to adopt what we see as the unambiguous reading. We therefore affirm the district court's grant of summary judgment to the plaintiff class on Error 1.

III. Required Projection Rates

Colgate argues that irrespective of our decision to affirm the district court's grant of summary judgment on Error 1, we should reject the court's conclusion that Colgate must use specific rates when calculating the AE of LS and PRA annuity for the purpose of determining residual annuities. Colgate insists that, instead, the Committee should be entitled to retroactively determine which interest rates to use for those calculations. We disagree, and, instead, affirm the district court's conclusion that Colgate must use the PBGC rate to calculate the AE of LS and the 20+1% rate to calculate the PRA annuity.

A. PBGC Rate for AE of LS Calculations

The district court held that Colgate must use the PBGC rate when calculating the AE of LS largely because that was the rate required by I.R.C. § 417(e) during the period at issue for present valuing benefits. *See Colgate II*, 481 F. Supp. 3d at 264–65, 269. We agree with the district court's conclusion, but for a simpler reason: The Plan itself requires the use of the PBGC rate.

According to minutes of a meeting held on February 6, 2014, the Committee met to discuss the calculation of residual annuities. *See* App'x 854–56. Liza LeAndre, the Chief Benefits Counsel, "provided the Committee...with an overview of the [RAA]" that aligned with the interpretation Colgate unsuccessfully advanced in this litigation. *Id.* at 855. The minutes then explain:

> Ms. LeAndre indicated that to calculate the residual annuity, determining the age 65 Actuarial Equivalent amount of the PRA benefit [i.e., the AE of LS] is required. Ms. LeAndre explained that the interest rate to be used for this calculation for benefits paid between 1989 and 2002

> needed to be determined. Ms. LeAndre recommended that the applicable interest rate statutory basis of PBGC rates be used to calculate residual annuities for such pre-2002 calculations. The Committee, acting in its settlor capacity, approved this recommendation.

Id. Put simply, the Committee adopted a resolution related to "determining the [AE of LS]" for the purpose of "calculat[ing] residual annuities." *Id.* That resolution specified that "the interest rate to be used for this calculation for benefits paid between 1989 and 2002" is the PBGC rate. *Id.* Because these documents were adopted by the Committee "in its settlor capac[pg. **2023** -1021] ity," *id.*, the terms of the resolution are part of the Plan itself. *See Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 444 (1999) (noting that a "settlor" has the power to amend a Plan and to determine "who is entitled to receive Plan benefits and in what amounts, or how such benefits are calculated").

Colgate does not dispute that this resolution is a binding part of the Plan. Rather, it emphasizes that LeAndre's pre-resolution summary of the RAA maintained (incorrectly) that "the [RAA] provided for residual annuities to be paid to eligible employees who elected a lump sum equal to the excess value of the *grandfathered formula* benefit over the personal retirement (PRA) benefit." App'x 855 (emphasis added). Colgate then argues that the selection of the PBGC rate was limited to "this calculation of [*sic*] benefits." Reply Br. 26–27 (emphasis omitted).[20]

We disagree. The "calculation" to which the resolution applies is set forth in the immediately preceding sentence of the minutes, which instructs that "to calculate the residual annuity, determining the [AE of LS] is required." App'x 855. And the selection of the PBGC rate was made "for this calculation for benefits paid between 1989 and 2002." *Id.* The plaintiffs' benefits were paid during this time, and the resolution clearly establishes that the PBGC rate shall be used to "determin[e] the [AE of LS]" in order "to calculate residual annuities" for such members. It matters not that Colgate maintained a more limited, atextual interpretation of the RAA at the time of the resolution. The Committee adopted an unqualified resolution that "the applicable interest rate statutory basis of PBGC rates be used to calculate residual annuities for such pre-2002 calculations." *Id.*

More broadly, we think it would be arbitrary to construe the text of the Plan to allow for distinct calculations of the AE of LS depending on the annuity to which it is compared. A comparison of the AE of LS to the PRA annuity is not a "new calculation." *See* Reply Br. 27. It is part of a longstanding calculation that, in the past, Colgate incorrectly interpreted. The RAA has always called for only a single calculation using two variables: (1) the AE of LS and (2) a member's winning annuity under Appendix C § 2(b). It would be unreasonable for Colgate to calculate the first variable—the AE of LS—differently depending on a characteristic of the distinct second variable in the RAA's formula. Having already resolved to calculate the AE of LS for some participants with the PBGC rates (and having consistently used that rate in such calculations thus far, *see* Appellants' Br. 56 n.10), we would decline to let Colgate change those rates for other participants simply because their winning annuity is different.

Because we conclude that the Plan itself requires the use of the PBGC rate when calculating the AE of LS, we need not address the district court's alternative reasons for reaching the same determination.

B. 20+1% Rate for Appendix C § 2(b) PRA Annuity Calculations

We also agree with the district court that for the purpose of calculating the Appendix C § 2(b)(ii) PRA annuity, Colgate must use the 20+1% rate to project a participant's cash balance account forward and convert it into an age 65 annuity. *Colgate II*, 481 F. Supp. 3d at 264, 269. Section 1.3 of the Plan states that the 20+1% rate must be used "[f]or purposes of converting a Member's Account into a single life annuity payable for the life of the Member starting at Normal Retirement Date." App'x 405–06. A brief recitation of the relevant plan mechanics reveals that this is the appropriate rate for calculating a participant's PRA annuity.

As explained supra Section II.C.1, the RAA requires determining a member's winning annuity under Appendix C § 2(b), which is the greater of the grandfathered annuity (described in Appendix C § 2(b)(i)) and the PRA annuity (described in Appendix C § 2(b)(ii)). *See* App'x 366, 480–81. Where a member's winning annuity is the PRA annuity, it is that member's "Accrued Benefit,"[21] which the Plan defines as "a monthly annuity for the life of the Member...commencing at Normal Retirement Age." See id. at 405. This definition matches the specifications of § 1.3, which applies "[f]or purposes of converting a Member's Account into a single life annuity payable for the life of the Member starting at Normal Retirement Date." App'x 405–06. As such, when calculating a member's PRA annuity, § 1.3 of the Plan requires Colgate to use the 20+1% projection rate.

Colgate takes issue with this reading, asserting that § 1.3 prescribes the 20+1% rate only for the "calculation done at age 65 for a Participant who elects the annuity form of the [pg. **2023** -1022] [PRA] benefit." Appellants' Br. 56–57. Colgate insists that "Section 1.3 says nothing about how to project a cash balance account to age 65 when a participant chooses to receive his or her benefit *prior* to normal retirement age." *Id.* at 57 (emphasis in original). That is, Colgate breaks the conversion of a member's PRA account into two steps, each permitting different interest rates: (1) projection of the account to age 65 and (2) conversion of the age 65 projected account into an annuity. Colgate argues that § 1.3 only requires using the 20+1% rate in step 2 to convert an age 65 PRA account into an annuity, but not in step 1 to project the account of a younger member forward to the age of 65 prior to conversion. Therefore, Colgate argues that it should be able to decide anew which rate to use when projecting PRA accounts to age 65 for residual annuity determinations.

We are not convinced. First, under the plain text of the Plan, § 1.3's rate selection applies to the whole process of "converting" a member's account into an age 65 annuity, without distinguishing between the steps of that conversion calculation. The Plan selects the 20+1% rate "[f]or purposes of converting a Member's Account" without reference to the age of that account. App'x 405. If a member is not yet 65, the process of "converting [that] Member's Account" into an age 65 single life annuity requires projection. Therefore, for a pre-retirement-age member, § 1.3 contemplates that the 20+1% rate will be used to project her PRA account to the age of 65 and to convert that projected PRA balance into an annuity.

Second, even if we were to determine that § 1.3 is ambiguous, we would not defer to Colgate's interpretation because it would render the plan unlawful. "[C]ontracts should not be interpreted to render them illegal and unenforceable where the wording lends itself to a logically acceptable construction that renders them legal and enforceable...." *Walsh v. Schlecht*, 429 U.S. 401, 408 (1977). Colgate notes that the Plan "says nothing about how to project a cash balance account to age 65" and that "the applicable interest rate for projection remains an open question" that Colgate should have the discretion to resolve. Appellants' Br. 57; *see also* App'x 1560 ("Neither Section 1.3 nor any other section of the Plan explains how to project a cash balance account forward to age 65 when a participant has *not* reached normal retirement." (emphasis in original)). But if we were to adopt this interpretation, we would, in effect, be concluding that the Plan contains no instructions for calculating the accrued benefit for anyone under the age of 65. This omission would render the Plan unlawful because I.R.C. § 401(a)(25) requires that a participant's accrued benefit be "definitely determinable," i.e., calculated under a formula with no employer discretion. *See* I.R.C. § 401(a)(25) ("A defined benefit plan shall not be treated as providing definitely determinable benefits unless, whenever the amount of any benefit is to be determined on the basis of actuarial assumptions, such assumptions are specified in the plan in a way which precludes employer discretion."); Treas. Reg. § 1.401-1(b)(1) (as amended in 2007) (requiring "definitively determinable benefits").[22]

Third, and finally, we find it difficult to credit Colgate's proposed approach because the company's past practice undercuts its interpretation of the Plan. In this litigation, Colgate argues that the Plan does not set a projection rate, but in practice Colgate consistently used the 20+1% rate as a projection rate to calculate the PRA annuity for members who departed during the relevant period. Consistent with the text of the Plan, Colgate informed these members that their PRA annuities were worth a certain amount based on a 20+1% projection rate when they left the company. Colgate cannot arbitrarily adopt a lower projection rate to retroactively change those prior valuations.

For these reasons, we affirm the district court's conclusion that Colgate is required to use of the 20+1% projection rate when calculating the Appendix C § 2(b)(ii) PRA annuity for the purpose of determining a member's residual annuity.

IV. Error 3

A mortality discount accounts for the possibility that the participant might die before reaching retirement age when calculating the present value of a benefit. The Plan clearly [pg. **2023** -1023] calls for the application of a PRMD, but the plaintiffs argued to the district court that Colgate's use of a PRMD to calculate residual annuities violated I.R.C. § 417(e)'s and ERISA § 203(a)(2)'s actuarial equivalence rules. The district court granted summary judgment to the class plaintiffs on this error. *See Colgate II*, 481 F. Supp. 3d at 266–69. We affirm.[23]

In theory, under a plan with no survivorship—i.e., a plan in which a member's right to collect her accrued benefit does not pass to her surviving beneficiary in the event of her premature death—the promise of an age 65 annuity may be less valuable to a pre-retirement-age member than an upfront lump sum payment: the member is guaranteed to get paid now if she elects a lump sum, but if she waits for an annuity, she may forfeit her accrued benefit if she dies before the age of 65. Colgate claims that its use of a PRMD in calculating the AE of LS accurately reflects this risk of early death. However, if a member's pre-retirement death would have little or no effect on the value of the benefit that she or her beneficiary receives, there is no risk that she will forfeit her benefit. Therefore, if a plan guarantees survivor benefits that are substantially similar in value to a member's accrued benefit, it is improper to use a PRMD to discount the present value of a future annuity.

This issue appears to be a matter of first impression in this Circuit, but we are persuaded—as the district court was—by the careful reasoning of our sister circuits finding ERISA and I.R.C. violations in similar circumstances.[24]

For example, in *West v. AK Steel Corp.*, 484 F.3d 395 (6th Cir. 2007), the Sixth Circuit held that an impermissible forfeiture occurred when a plan administrator applied a PRMD to reduce the present value of a lump sum distribution when the death benefit was equal to a participant's accrued benefit, *id.* at 411. Under the plan in *West*, "[i]f a Plan participant die[d] before reaching the age of 65, the Plan's terms provide[d] that the surviving spouse or other beneficiary receive[d] a death benefit `equal to the participant's pension benefit.'" *Id.* The death benefit was defined as "the actuarial equivalent of the participant's accrued benefit." *Id.* On those facts, the court determined that "[b]ecause the beneficiary receives a death benefit equal to the participant's accrued benefit, he or she `steps into [the participant's] shoes and is entitled to his entire pension benefit.'" *Id.* (second alteration in original) (quoting *Berger* , 338 F.3d at 764). "Even if the participant were to die before the age of 65, his or her beneficiary is still entitled to the entire accrued benefit," and the "[u]se of a mortality discount for the period before age 65 would, accordingly, result in a partial forfeiture of benefits in violation of the ERISA vesting rules (i.e., the anti-forfeiture rules)." *Id.* (citation omitted).

We find this logic persuasive here, inasmuch as the Plan also defines the death benefit as "the Actuarial Equivalent of the Accrued Benefit." App'x 429. As a result, in the event of a member's death, her beneficiary would receive a benefit that is effectively equal to the accrued benefit such that the beneficiary "steps into the participant's shoes and is entitled to [her] entire pension benefit." *West*, 484 F.3d at 411 (internal alteration and citation omitted). The RAA functions to remedy the underpayment of lump sums with an additional residual annuity such that the lump sum and residual annuity together ensure compliance with the I.R.C.'s and ERISA's present value requirements. *See* ERISA § 203(a)(2); I.R.C. § 417(e); *see also* 26 C.F.R. § 1.417(e)-1(d)(1)(i) ("The present value of any optional form of benefit cannot be less than the present value of the normal retirement benefit...."). Because the value of the benefit paid if a member dies before 65 is the same as the Plan's normal retirement benefit, we conclude that Colgate's use of a PRMD to determine the present value of the lump sum when calculating a make-whole residual annuity results in an optional form of benefit that is less than the corresponding normal retirement benefit.

Colgate's primary response is to argue that the Plan's "death benefit...is an incidental benefit and not the *accrued retirement benefit*," so that when a participant dies, she forfeits her entire accrued benefit and her beneficiary becomes entitled to a distinct benefit of essentially equal value. Appellants' Br. 59 (emphasis in original). But as reflected in this case law, a Plan administrator cannot undervalue a member's accrued benefit simply because a death benefit is defined as the "actuarial equivalent of the accrued benefit" rather than being the "accrued benefit" itself. To hold otherwise [pg. **2023** -1024] would defeat the purpose of ERISA's and the I.R.C.'s present value requirements.

Additionally, Colgate relies on a proposed 2016 IRS regulation which it claims explicitly rejects our approach regarding the unlawful use of a PRMD in this context. *See* Update to Minimum Present Value Requirements for Defined Benefit Plan Distributions, 81 Fed. Reg. 85,190 (proposed Nov. 25, 2016). Regardless of whether the document was intended to reflect the IRS's view of "current law" as Colgate suggests, *see* Appellants' Br. 60, the proposed regulation has no legal effect. *See LeCroy Rsch. Sys. Corp. v. Comm'r of Internal Revenue*, 751 F.2d 123, 127 [55 AFTR 2d 85-475] (2d Cir. 1984) ("Proposed regulations are suggestions made for comment; they modify nothing."). Nor is it clear that the proposed regulation—if adopted—would support Colgate's argument.[25] In any event, an unadopted IRS regulation does not disturb our reasoning.

We therefore affirm the grant of summary judgment to the plaintiffs on Error 3.

CONCLUSION

We have considered the defendants-appellants' remaining arguments on appeal and conclude that they are without merit. For the foregoing reasons, we AFFIRM the order and final judgment of the district court.

* The Clerk of the Court is respectfully instructed to amend the caption to conform with the above.

** Judge Brian M. Cogan, United States District Court for the Eastern District of New York, sitting by designation.

1 The initial grant of summary judgment with respect to those claims is not before us on appeal.

2 To be precise, the Plan was amended in 1994, with retroactive effect as of July 1, 1989. This amendment is therefore applicable to all class members paid between July 1, 1989, and the effective date of the new 2003 Plan. For the purpose of simplifying the complex timeline of relevant events, we refer to the Plan's conversion to a cash-balance model as occurring in 1989.

3 Generally, Appendix A defines various terms used in calculating grandfathered benefits, Appendix B specifies how to calculate grandfathered benefits, and Appendices C and D describe the benefits available to certain participants who remained employed after the Plan's 1989 conversion.

4 We refer to the larger of these two annuities hereinafter as a participant's "winning" annuity.

5 Because of the way in which Appendix C is drafted, there are multiple provisions that could be identified as "Appendix C § 2(a)" or "Appendix C § 2(b)." In this opinion, we use those terms to refer to the corresponding provisions found in the record at App'x 480–81, which "shall be applicable" "[i]f a Member elects to make Contributions to Maintain Prior Plan Benefits starting July 1, 1989 and continues to do so until h[er] separation from service." App'x 480.

6 Federal law defines an "accrued benefit" as an "annual benefit," i.e., an annuity. ERISA § 3(23)(A), 29 U.S.C. § 1002(23)(A). Somewhat oxymoronically, the Plan offers a "monthly annuity." *See, e.g.*, App'x 405, 434–35. For the sake of simplicity, because the Plan's monthly benefit is effectively a traditional annuity paid out in more frequent installments, we treat the "monthly annuity" to which a member is entitled under the Plan as the legally defined "accrued benefit" against which any optional form of the benefit should be compared.

7 Colgate amended the Plan in 2003 so that the projection rate used to convert a member's cash balance to age 65 was the same as the discount rate prescribed by I.R.C. § 417(e). The whipsaw violation was therefore resolved on a prospective basis as of the date of this amendment, but it remained an issue retrospectively for participants who had been underpaid while the higher projection rate was in effect.

8 We say "in theory" because, as noted above, a member's PRA lump sum was *not* the actuarial equivalent of her accrued PRA benefit due to the separate whipsaw violation.

9 Section 1.2 of the Plan defines "Accrued Benefit" as "a monthly annuity for the life of the Member...commencing at Normal Retirement Age or any later date, which is the Actuarial Equivalent of the Member's Account[.]" App'x 405. In other words, this aspect of the Plan's definition of "Accrued Benefit" refers to a participant's PRA annuity.

10 Colgate calculated McCutcheon's grandfathered annuity as $731.31 per month and her PRA annuity as $1,125.38 per month. *See* App'x 790 ¶ 211. Therefore, her winning annuity under Appendix C § 2(b) was her PRA annuity. She elected to receive a lump sum of $22,425.64, and she received a *Colgate I* settlement of $11,226.03 before expenses and fees. *See* App'x 373. Based on the value of her lump sum and settlement, Colgate calculated her AE of LS as $752.84. *See* App'x 374. Therefore, based on Colgate's calculations, her lump sum payment was worth more than her grandfathered annuity, but less than her winning PRA annuity.

11 The complaint originally asserted five causes of action, but the magistrate judge overseeing the pre-trial proceedings bifurcated the case and ordered only Counts I and II to proceed.

12 In Error 2, the plaintiffs argued that Colgate used the wrong Plan provision to determine the Estimated Social Security Primary Insurance Amount when calculating benefits under the grandfathered formula. *See* App'x 193. In Error 4, the plaintiffs argued that, while the *Colgate I* settlement agreement required future residual annuities to be offset by any settlement proceeds, the Plan itself was not amended prior to applying the offsets to the payments, and retroactively amending the plan after applying the offsets would result in an impermissible cutback in benefits under ERISA and the I.R.C. *See* App'x 195. The district court denied summary judgment on Error 4 as to McCutcheon because it found a more generous standard of review applied to her claim specifically than the class's Error 4 claim. *McCutcheon*, 2020 WL 3893303, at *15–16. McCutcheon subsequently waived her right to de novo review of her claim based on this Error, which effectively merged her individual claim with the class's claim that the district court dismissed. *See Colgate II*, 481 F. Supp. 3d at 270. Neither of these alleged Errors is before us on appeal.

13 While these provisions of Appendix C § 2 are applicable here, there are numerous other provisions that could be "applicable" depending on a member's particular circumstances. To provide a few examples, Appendix B includes "Special Rules Applicable to Certain Employees" specified therein, App'x 469; Appendix C § 2 includes many other provisions, including some that "shall be applicable" to any member who "rescind[s] h[er] decision to make Contributions to Maintain [grandfathered benefits]" "[a]t any point before termination of employment," *see* App'x 481–82; Appendix C § 3 includes provisions that "shall be applicable" when "a Member elects not to make Contributions to Maintain [grandfathered] Benefits," *see* App'x 482; and Appendix D § 2 includes provisions that "shall be applicable" to certain "Older Employees," see App'x 485.

14 Further, for a member like McCutcheon (whose PRA annuity plus employee contributions is larger than her grandfathered annuity), the grandfathered annuity is decidedly *not* "otherwise payable" because, per Appendix C § 2(b), she is only "eligible for" the "larger" PRA annuity.

15 To the extent that Colgate argues that the PRA annuity is not otherwise payable because a member is not entitled to receive the same benefit twice in different forms, this argument would render the RAA a nullity. This argument is premised on the unavailability of a PRA annuity once the lump sum option has already been elected. But under that premise, neither the PRA annuity nor the grandfathered annuity would be "otherwise payable" because a member would not be "eligible for [either] annuity" once she elected the lump sum option. App'x 480.

16 The RAA also applied prospectively, but for reasons we address infra Section II.C.3, we conclude that the RAA's prospective application—despite the Plan's amendment to eliminate the whipsaw issue in 2003—has no bearing on whether the RAA can also remedy past whipsaw violations.

17 Colgate argues that the whipsaw forfeiture was entirely resolved by the *Colgate I* settlement. *See* Appellants' Br. 40–41; 51–52. We address the relationship between the RAA and the *Colgate I* settlement in detail infra Section II.C.3. For now, we simply note that the RAA was drafted prior to the initiation of the *Colgate I* lawsuit, so its settlement has no impact on our analysis of textual ambiguity.

18 The *Colgate I* settlement clarifies that "any claims under the Residual Annuity Amendment are subject to [an] offset" in "an amount based upon the individual net settlement benefit" a participant received. App'x 305. This prevents a member from collecting more than the full gap between the AE of LS and her PRA annuity.

19 These arguments about odd effects of the unambiguous text of the RAA might presume that Colgate drafted the Plan clearly and administered it rationally. Of course, the history of the Plan is one of flawed design and implementation. From not performing whipsaw calculations and failing to achieve equivalence between lump sums and grandfathered annuities, to neglecting to retroactively apply amendments to correct those original errors, Colgate's cornucopia of missteps has led to a patchwork resolution and years of assorted litigation, including this case. Given these past events, it is unsurprising that the Commission enacted an RAA that only partially resolves the whipsaw forfeiture, or that Colgate would reach a legal settlement that does not preclude quite as many future claims as it might have hoped. Ultimately, our duty is to interpret the text of the RAA faithfully, not to imagine another version that might seem more rational or practical.

20 Colgate's reply brief incorrectly quotes the Committee minutes. The minutes did not say "the interest rate to be used *for this calculation of benefits* paid between 1989 and 2002 needed to be determined," Reply Br. 26 (emphasis added); rather, it stated that "the interest rate to be used *for this calculation for benefits* paid between 1989 and 2002 needed to be determined," App'x 855 (emphasis added).

21 This is so because Appendix C § 2(b)(ii) defines the PRA annuity through cross-references to the "benefit payable pursuant to Section 6.2..., Section 6.3...or Section 6.4(a)(ii)," App'x 481, each of which describes "the benefit payable to such Member" as "h[er] Accrued Benefit" or some optional form of benefit that is the actuarial equivalent thereof, App'x 433–34.

22 Colgate seeks to avoid this issue by noting that "there is no private right of action to enforce a tax-qualification provision" like the "definitely determinable" requirement. Reply Br. 29. But this is irrelevant. The plaintiffs-appellees do not bring any claim based on that requirement but merely urge us to consider it when evaluating Colgate's own interpretation.

Colgate additionally argues that it would be reasonable for it to select the lower "interest crediting rate" as an alternative. *See* Appellants' Br. 57; Reply Br. 29. In offering this rate, Colgate appears to make conflicting arguments: on one hand it claims that the Plan does not offer any explanation for how to project an account forward, while on the other, it suggests a reasonable interpretation of the text would lead to applying the Plan's interest crediting rate. We see nothing in the text that would suggest the Plan selected the interest crediting rate as a projection rate when converting accounts into age 65 annuities. The interest crediting rate is defined as the rate at which a member's PRA account actually accrues interest, without any reference to projecting hypothetical, future account growth. *See* App'x 423. Although the Plan cannot select a projection rate that is "less than the interest credits provided under the plan," *Esden*, 229 F.3d at 166, it does not follow that the Plan could neglect to select a projection rate and simply afford the plan administrator the discretion to either select a higher rate or default to the interest crediting rate.

23 The district court noted that, "[a]s a threshold matter, Defendants d[id] not oppose Plaintiffs' arguments regarding Error 3 in their opposition brief," and thus concluded that "[s]ummary judgment [was] granted on this ground alone." *Colgate II*, 481 F. Supp. 3d at 267. On appeal, Colgate makes no effort to contest the district court's determination regarding its failure to respond.

24 *See*, *e.g.*, *West v. AK Steel Corp.*, 484 F.3d 395, 411 (6th Cir. 2007); *Berger*, 338 F.3d at 764; *see also Ruppert v. Alliant Energy Cash Balance Pension Plan*, No. 08-cv-127-bbc, 2010 WL 5464196, at *2, *16–18 (W.D. Wis. Dec. 29, 2010); *Crosby v. Bowater Inc. Ret. Plan For Salaried Emps. of Great N. Paper, Inc.*, 212 F.R.D. 350, 360–62 (W.D. Mich. 2002), *vacated on other grounds*, 382 F.3d 587 (6th Cir. 2004).

25 As the district court noted, "the proposed regulation appears to forbid the application of a PRMD to determine the present value of the entire accrued benefit if any portion of the accrued benefit is derived from contributions made by the employee, as is the case here." *Colgate II* , 481 F. Supp. 3d at 269.

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American Federal Tax Reports

MANCHANDA v. IRS, Cite as 131 AFTR 2d 2023 -1322, Code Sec(s) 7433; 7431, (CA2), 04/06/2023

Rahul MANCHANDA, PLAINTIFF-APPELLANT v. INTERNAL REVENUE SERVICE, T Fahman, Susan McNamara, Erica Farrell, United States Government, DEFENDANTS-APPELLEES, JANE DOES 1-10, current and former employees of IRS, DEFENDANT.

Case Information:

[pg. **2023** -1322]

Code Sec(s):	7433; 7431
Court Name:	U.S. Court of Appeals, **Second Circuit**,
Docket No.:	22-753-cv,
Date Decided:	04/06/**2023**.
Prior History:	District Court, (2022, DC NY) 129 AFTR 2d 2022-1281, affirmed. Earlier proceeding at (2020, DC NY) 127 AFTR 2d 2021-301.
Tax Year(s):	Years [pg. **2023** -1323] 2008, 2009, 2010, 2011, 2012, 2013, 2014.
Disposition:	Decision against Taxpayer.

HEADNOTE

1. Actions against IRS and U.S.—damages—Federal Tort Claims Act; wrongful collection; wrongful disclosure of return information. District court properly dismissed taxpayer/immigration attorney's tort, wrongful collection, and wrongful disclosure claims, alleging that IRS personnel engaged in harassing and other wrongful actions in effort to collect tax debts allegedly discharged in bankruptcy. Notably, tort claims were precluded under FTCA's tax bar; and wrongful collection and wrongful disclosure claims under Code Sec. 7433 and Code Sec. 7431 failed due to taxpayer's failure to exhaust his administrative remedies in accord with Reg § 301.7433-1(e) . Although he did file Standard Forms 95, he didn't do so in manner that would have given notice of his claims to IRS officials charged with handling them.

Reference(s): ¶ 76,557.53(12);¶ 74,335.01(5);¶ 74,315.01 Code Sec. 7433;Code Sec. 7431

OPINION

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the **Second Circuit**, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 6th day of April, two thousand twenty-three.

For Plaintiff-Appellant: Anthony Motta, Manchanda Law Office, New York, NY.

For Defendants-Appellees: Dana Walsh Kumar (Benjamin H. Torrance, on the brief), for Damian Williams, United States Attorney for the Southern District of New York, New York, NY.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

Present: GUIDO CALABRESI, DENNY CHIN, EUNICE C. LEE, Circuit Judges

Appeal from a judgment of the United States District Court for the Southern District of New York (Carter, *J.*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Plaintiff-Appellant Rahul Manchanda ("Manchanda") appeals from an order of the district court dismissing his claims of unauthorized tax collection and other statutory and tort claims against Defendants-Appellees the Internal Revenue Service, the United States, and several Internal Revenue Service officers and employees (collectively, "Appellees" or the "IRS"). Specifically, Manchanda argues that the district court erred in finding a lack of subject matter jurisdiction for the tort claims and a failure to administratively exhaust the statutory claims.

We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal. For the reasons that follow, we affirm the district court.

Manchanda alleged that the IRS made multiple harassing phone calls to him, his business associates, and his wife, in which the IRS disclosed Manchanda's outstanding unpaid taxes and attempted to collect money from him. At the time the IRS made the calls, Manchanda had made settlement offers to the IRS—known as "Offers-in-Compromise" ("OIC")—to settle his outstanding tax debts. Manchanda alleged that "a taxpayer is entitled to having all collection activity frozen...once an Offer-in-Compromise is filed." Joint App'x 14. A few months after the phone calls, in both January of 2019 and June of 2020, Manchanda filed Standard Form 95s (the "SF-95s") with the IRS to seek damages for the phone calls.

Manchanda filed this action in December of 2020, and he filed the operative Amended Complaint in March of 2021. His Amended Complaint asserts claims for the torts of intentional and negligent infliction of emotional distress, abusive and unauthorized tax collection practices under 26 U.S.C. §§ 7433, and unauthorized disclosure of taxpayer information under 26 U.S.C. §§ 7431.

On March 28, 2022, the district court dismissed the operative Amended Complaint. It reasoned that it lacked subject matter jurisdiction over the tort claims because the government has not waived sovereign immunity for claims relating to tax collection. On the merits of the statutory claims, it found that Man[pg. **2023** -1324] chanda's claim under § 7433 for unauthorized tax collection could not proceed because Manchanda did not make the administrative filings required to exhaust administrative remedies. Similarly, because Manchanda agreed that his § 7431 claim was governed by the same exhaustion requirements, the district court held he had not exhausted administrative remedies necessary for that claim, either. This appeal followed.

***

"On appeal of a dismissal for lack of subject matter jurisdiction, we review the district court's factual findings for clear error and its legal conclusions *de novo.*" *Collins v. United States*, 996 F.3d 102, 108 (2d Cir. 2021). "We review a district court's grant of a motion to dismiss *de novo*, `accepting as true all factual claims in the complaint and drawing all reasonable inferences in the plaintiff's favor.'" *Henry v. County of Nassau*, 6 F.4th 324, 328 (2d Cir. 2021) (quoting *Fink v. Time Warner Cable*, 714 F.3d 739, 740–41 (2d Cir. 2013) (per curiam)).

Through the Federal Tort Claims Act ("FTCA"), Congress explicitly waived the federal government's sovereign immunity, *see* 28 U.S.C. § 2674, in connection with certain "claims against the United States...under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred," *id.* § 1346(b)(1); *see also Kosak v. United States*, 465 U.S. 848, 851–52 (1984). However, Congress also provided "13 enumerated exceptions" to the FTCA's "broad waiver of sovereign immunity." *Kosak*, 465 U.S. at 852. One such exception preserves the government's immunity as to "[a]ny claim arising in respect of the assessment or collection of any tax or customs duty." 28 U.S.C. § 2680(c). This Court has previously held that "[w]e understand the § 2680(c) exception to cover claims arising out of the operation of the government's mechanism for assessing and collecting taxes." *Aetna Cas. & Sur. Co. v. United States*, 71 F.3d 475, 478 [76 AFTR 2d 95-7853] (2d Cir. 1995); *see also Weiner v. IRS*, 986 F.2d 12, 12 [71 AFTR 2d 93-984] (2d Cir. 1993) (per curiam) (holding § 2680(c) bars tort claims related to "erroneous and improperly executed [tax] levies"). And we have recognized that "there is no `negligence' exception to § 2680(c)'s retention of sovereign immunity." *Adeleke v. United States*, 355 F.3d 144, 154 (2d Cir. 2004).

In spite of § 2680(c), Manchanda argues that the district court had jurisdiction over his tort claims because the IRS's tax collection efforts had "no realistic nexus to the function of assessing or collecting taxes" because the conduct was merely "harassment...in no way aimed at legitimate tax collection." Appellant's Br. 11–12 (internal quotation marks omitted). In other words, Manchanda concedes that the complained-of conduct constitutes tax collection efforts, but he asks us to carve out an exception for what he believes are wrongful tax collection efforts. This we cannot do. In *Kosak*, the Supreme Court abrogated prior law holding that government negligence may provide an exception to § 2680(c)'s retention of sovereign immunity. *See* 465 U.S. at 854–55. In so doing, the *Kosak* Court emphasized that "the fairest interpretation of the crucial portion of [§ 2680(c)] is the one that first springs to mind: `any claim arising in respect of'" matters covered by the statute are not amenable to suit. *Id.* at 854. In light of *Kosak*, we have since held "that there is no `negligence' exception to § 2680(c)'s retention of sovereign immunity." *Adeleke* , 355 F.3d at 154. Given precedent and the plain language of § 2680(c), the IRS is immune from Manchanda's tort claims.

Manchanda also argues that his 26 U.S.C. and §§ 7431 and 7433 claims should not have been dismissed for his failure to exhaust administrative remedies. He agrees that his SF-95s did not provide the IRS with all the information demanded by the governing exhaustion regulation, 26 C.F.R. § 301.7433-1(e). He also agrees that the same exhaustion requirements apply to both statutory claims. In spite of this, he asks that the exhaustion requirements be set aside in his case, on the ground that the SF-95s he filed amounted to "informal notice of claim[s]," because they provided enough "information" for the IRS "to discern the nature of [his] claim[s]," even if Manchanda "didn't provide every bit of information required by" § 301.7433-1(e). Appellant's Br. 19. In the district court below, however, Manchanda only argued that he filed his SF-95s in a sufficiently timely manner to comply with § 301.7433-1(e), not that he should be relieved from providing all the information § 301.7433-1(e) requires. Accordingly, this argument is waived. *Wal-Mart Stores, Inc. v. Visa U.S.A., Inc.*, 396 F.3d 96, 124 n.29 (2d Cir. 2005).

The argument also fails on the merits. In a similar case, we found that a plaintiff asserting a claim under 26 U.S.C. §§ 7430(b) had "failed to exhaust the administrative remedies available to her" because she had not filed with the IRS the "letter detailing her claim" required by regulation. *Kuhl v. United States*, 467 F.3d 145, 148 [98 AFTR 2d 2006-7379] [pg. **2023** -1325] (2d Cir. 2006) (per curiam). We found that the plaintiff could not sue the IRS in court despite "her argument that the IRS had notice in fact of her claim," because such informal notice "does not amount to the required showing that the IRS official designated by the regulation was on notice and thus in a position to resolve her claim administratively." *Id.* at 149. This reasoning applies equally in Manchanda's case, as he did not file his forms in a manner that would have given notice of his claims to the IRS officials charged with handling them. Specifically, the applicable regulation seeks to give the appropriate IRS officials notice by requiring a claimant to send his claims "in writing to the Area Director, Attn: Compliance Technical Support Manager of the area in which the taxpayer currently resides." 26 CFR § 301.7433-1(e)(1). Manchanda's SF-95s, however, are addressed generally to "Internal Revenue Service ("IRS")" and "US Treasury/IRS," respectively. Joint App'x 82, 85.

***

We have considered Manchanda's remaining arguments and find them to be without merit. Accordingly, we AFFIRM the judgment of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

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American Federal Tax Reports

BRODSKY v. N.Y.C. CAMPAIGN FIN. BD., Cite as 131 AFTR 2d 2023 -1531, Code Sec(s) 7431; 6103, (CA2), 05/01/2023

Meryl BRODSKY, PLAINTIFF-APPELLANT v. THE NEW YORK CITY CAMPAIGN FINANCE BOARD, James E. Johnson, New York City Corporation Counsel, New York City Sheriff (Non-Party), DEFENDANT-APPELLEE.

Case Information:

[pg. **2023** -1531]

Code Sec(s):	7431; 6103
Court Name:	U.S. Court of Appeals, **Second Circuit,**
Docket No.:	No. 22-1824-cv,
Date Decided:	05/01/**2023**.
Prior History:	District Court affirmed.
Disposition:	Decision against Taxpayer.

HEADNOTE

1. Actions against city agencies and officials—damages for wrongful disclosure of return information—disclosures incident to litigation—res judicata. District court decision dismissing taxpayer/politician's Code Sec. 7431 and Code Sec. 6103 claims against city campaign finance board, city counsel and city sheriff, alleging that board unlawfully disclosed her returns during state garnishment proceedings to collect on judgment that board was awarded against her, was affirmed. Taxpayer was precluded from relitigating her tax claims as they were resolved on merits in earlier suit which involved same parties or those in privity. Her fraud on court claim was also barred by res judicata.

Reference(s): ¶ 74,315.01;¶ 61,035.03(3);¶ 74,337.503(75) Code Sec. 7431;Code Sec. 6103

OPINION

SUMMARY ORDER

Rulings by summary order do not have precedential effect. Citation to a summary order filed on or after January 1, 2007, is permitted and is governed by Federal Rule of Appellate Procedure 32.1 and this court's Local Rule 32.1.1. When citing a summary order in a document filed with this court, a party must cite either the Federal Appendix or an electronic database (with the notation "summary order"). A party citing a summary order must serve a copy of it on any party not represented by counsel.

At a stated term of the United States Court of Appeals for the **Second Circuit**, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 1st day of May, two thousand twenty-three.

For Plaintiff-Appellant: Meryl Brodsky, pro se, New York, NY.

For Defendant-Appellee: Jane L. Gordon, MacKenzie Fillow, for Sylvia O. Hinds-Radix, Corporation Counsel of the City of New York, New York, NY.

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

PRESENT: Rosemary S. Pooler, Richard C. Wesley, Steven J. Menashi, Circuit Judges.

Appeal from a judgment of the United States District Court for the Southern District of New York (Ramos, J.).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Appellant Meryl Brodsky ran unsuccessfully for a seat on the New York City Council in 2005. Her campaign received money from a city matching program. Following her loss in the primary, the New York City Campaign Finance Board determined that Brodsky was required to repay $35,415 in public campaign funds. Brodsky brought an Article 78 proceeding challenging the determination of the Board but lost. *Brodsky v. N.Y.C. Campaign Fin. Bd.*, No. 0118316/2006, 2007 WL 2176918 (N.Y. Sup. Ct. June 21, 2007). The Appellate Division, First Department, upheld the decision on appeal. *Matter of Brodsky v. N.Y.C. Campaign Fin. Bd.*, 57 A.D.3d 449 (1st Dep't 2008). Brodsky returned only $26,010 of the funds and refused to repay the rest; as a result, the New York Supreme Court directed a garnishee to sell shares of Brodsky's stock to pay the remaining sum. The First Department of the New York State Appellate Division affirmed the order. *Matter of Brodsky v. N.Y.C. Campaign Fin. Bd.*, 107 A.D.3d 544 (1st Dep't 2013).

Brodsky has filed two prior *pro se* federal lawsuits arising out of these events. In the first, which she brought in 2015, she sued the Board and the New York City Corporation Counsel, alleging that the Board had violated her constitutional rights, federal criminal law, section 6103 of the Internal Revenue Code, and state and local law by disseminating her tax information during the state court proceedings. The district court dismissed the case on the grounds that Brodsky's section 1983 claims were time-barred, her section 6103 claim failed to state a cognizable claim, and the remaining claims were not a recognized personal cause of action. *Brodsky v. Carter* (*Brodsky I*), No. 15-CV-3469, 2015 WL 13746671, at *9-13 (S.D.N.Y. Dec. 15, 2015). This court affirmed the judgment, in part because Brodsky had failed to state a claim and in part because the district court lacked jurisdiction under the *Rooker -Feldman* doctrine to hear her section [pg. **2023** -1532] 1983 claims. *Brodsky v. Carter* (*Brodsky II*), 673 F. App'x 42, 43-44 (2d Cir. 2016).

Brodsky returned to federal court in 2017, suing the same defendants and bringing nearly identical claims. The district court ruled that *res judicata* barred relitigation of her tax claims and declined to exercise supplemental jurisdiction over her state law claims. *Brodsky v. Campaign Fin. Bd.* (*Brodsky III*), No. 17-CV-3186, 2018 WL 3910825 [124 AFTR 2d 2019-6608], at *2 (S.D.N.Y. Aug. 15, 2018). This court again affirmed, concluding that the application of *res judicata* was proper because *Brodsky I* "involved an adjudication on the merits," both lawsuits had named the same parties or those in privity, and the latest claims either were raised or could have been raised in *Brodsky I. See Brodsky v. N.Y.C. Campaign Fin. Bd.* (*Brodsky IV*), 796 F. App'x 1, 6 [124 AFTR 2d 2019-6610] (2d Cir. 2019).

Brodsky initiated this lawsuit in 2021 by again suing *pro se* substantially the same defendants. She alleged violations of sections 6103 and 7431 of the Internal Revenue Code for the "illegal dissemination" of her tax returns, and she included a new "fraud on the court" claim pursuant to Federal Rule of Civil Procedure 60(d). Brodsky alleged that Board lawyers falsified the amount of money her election committee had spent, that the state court judge knowingly incorporated those falsifications into her judgment, and that the defendants and the court had conspired to perform abusive discovery. Brodsky sought money damages related to her garnishment, an amendment to the "Campaign Finance Summary" indicating the amounts due at litigation, a possible amendment or reversal of the state court judgment, the expungement of her lien at the New York City Sheriff's Office, and any pre-or post-judgment interest and costs. *See* Complaint at 24-25, *Brodsky v. N.Y.C. Campaign Fin. Bd.*, No. 1:21-CV-05004 (S.D.N.Y. June 7, 2021), ECF. No. 1.

The district court decided that *res judicata* barred her tax claims. The district court also decided that it lacked jurisdiction over her fraud-on-the-court claim pursuant to the *Rooker-Feldman* doctrine and that *res judicata* would bar the claim nonetheless. *Brodsky v. N.Y.C. Campaign Fin. Bd.* (*Brodsky V*), No. 21-CV-5004, 2022 WL 2819090, at *3-8 (S.D.N.Y. July 19, 2022). Brodsky now appeals the decision of the district court. We agree with the district court that Brodsky's claims are barred by *res judicata.* We assume the parties' familiarity with the underlying facts, the procedural history of the case, and the issues on appeal.

I

We review *de novo* a district court's dismissal on the ground of *res judicata. Soules v. Conn. Dep't of Emergency Servs. & Pub. Protection*, 882 F.3d 52, 55 (2d Cir. 2018). *Res judicata* bars relitigation if "(1) the previous action involved an adjudication on the merits; (2) the previous action involved the plaintiffs or those in privity with them; [and] (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action." *Id.* (*quoting Monahan v. N.Y.C. Dep't of Corr.*, 214 F.3d 275, 285 (2d Cir. 2000)). "Where all requirements are met, *res judicata* can act as a bar to virtually any sort of claim." *Monahan*, 214 F.3d at 290.

Here, with regard to the tax claims, all the conditions are met. Indeed, we have already recognized in affirming *Brodsky III* that *Brodsky I* should be given preclusive effect. *See Brodsky IV*, 796 F. App'x at 6.

First, *Brodsky I* disposed of Brodsky's tax claims on the merits because a "dismissal for failure to state a claim is a final judgment on the merits and thus has *res judicata* effects." *Berrios v. N.Y.C. Hous. Auth.* , 564 F.3d 130, 134 (2d Cir. 2009). That we affirmed in part on jurisdictional grounds does not undermine the judgment's preclusive effect because our *Rooker -Feldman* discussion was limited to Brodsky's section 1983 claims. The district court remained a "court of competent jurisdiction" to decide Brodsky's other claims, *Cho v. Blackberry Ltd.*, 991 F.3d 155, 168 (2d Cir. 2021), and she specifically disavows any attempt to relitigate those section 1983 claims now, *see* Appellant's Br. 16.

Second, the parties in the current action either were parties in *Brodsky I* or are in privity with those parties. "Whether there is privity between a party against whom [*res judicata*] is asserted and a party to prior litigation is a functional inquiry in which the formalities of legal relationships provide clues but not solutions." *Chase Manhattan Bank, N.A. v. Celotex Corp.* , 56 F.3d 343, 346 (2d Cir.

1995). While Brodsky has added as a defendant James E. Johnson, the acting New York City Corporation Counsel at the time of filing, Brodsky sued the acting Corporation Counsel in her previous suits. Here, Brodsky does not allege that Johnson had any personal involvement. Even though the current complaint names former City or Board employees not named in *Brodsky I*, those persons were in privity with the Board because Brodsky's allegations relate to conduct taken in their official capacities. [pg. **2023** -1533]

Third, the claims in *Brodsky I* sufficiently relate to the current claims to trigger preclusion. We treat a new claim as precluded if it is based on the same "nucleus of operative fact" as the prior claim. *Interoceanica Corp. v. Sound Pilots, Inc.*, 107 F.3d 86, 90 (2d Cir. 1997) (quoting *Apparel Art Int'l, Inc. v. Amertex Enters. Ltd.*, 48 F.3d 576, 583 (1st Cir. 1995)). The relevant inquiry is whether the incidents are part of the same transaction or a connected series of transactions, applying "a flexible, common-sense construction that recognizes the reality of the situation." *Id.* at 91. All of the claims Brodsky brings here arise from the state proceedings that resulted in her stock being garnished.

In sum, the tax claims comprising Brodsky's 2021 lawsuit are barred by the doctrine of *res judicata* because the claims she asserted were or could have been raised in *Brodsky I*, which was resolved on the merits and involved the same parties or those in privity. The district court correctly dismissed those claims.

II

The district court also determined that Brodsky's claim alleging fraud on the court under Federal Rule 60(d) was barred not only by *res judicata* but also by the *Rooker-Feldman* doctrine because the claim attacked the underlying state-court judgments. Brodsky now suggests on appeal that the claim may be moot due to the "abrupt departure" of the judge in the state court proceeding, Appellant Br. 23, which purportedly means that "the bulk of Brodsky's allegations of fraud on the court can have no remedial effect nor can they be proven by witnesses or affidavits since no staff remain," *id.* at 2. However, assuming it was previously possible to obtain relief for her fraud-on-the-court claim, we do not see how the resignation of a state court judge would render the claim un-redressable or otherwise moot.

Assuming the claim survives on appeal, we think it is worth noting that the *Rooker-Feldman* doctrine "generally does not affect a federal court's jurisdiction over claims for damages against third parties for alleged misconduct occurring in the course of a state court proceeding, because the adjudication of such claims would not require the federal court to sit in review of the state court judgment." *Hansen v. Miller* , 52 F.4th 96, 100 (2d Cir. 2022) (internal quotation marks omitted). *Rooker-Feldman* does not apply to claims that "speak not to the propriety of the state court judgments, but to the fraudulent course of conduct that defendants pursued in obtaining such judgments." *Sykes v. Mel S. Harris & Assocs., LLC*, 780 F.3d 70, 94-95 (2d Cir. 2015). That is because *Rooker-Feldman* precludes federal jurisdiction over suits challenging state court decisions only "when doing so would `essentially amount to appeals of state court judgments.'" *Hansen*, 52 F.4th at 100 (quoting *Vossbrinck v. Accredited Home Lenders, Inc.* , 773 F.3d 423, 426 (2d Cir. 2014)).

In this case, Brodsky sought, among other things, damages for "alleged misconduct occurring in the course of a state court proceeding." Complaint at 24-25, *Brodsky v. N.Y.C. Campaign Fin.*, No. 1:21-CV-05004 (S.D.N.Y. June 7, 2021), ECF. No. 1. We do not believe that *Rooker-Feldman* would bar such a claim. Still, we agree with the district court that her fraud-on-the-court claim is barred by *res judicata* because it could have been raised in prior litigation but was not. *See St. Pierre v. Dyer*, 208 F.3d 394, 399 (2d Cir. 2000) ("Under the doctrine of res judicata...a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action.") (internal quotation marks and alteration omitted). Therefore, we affirm the judgment of the district court on that ground.

III

Last, Brodsky challenges the district court's decision to dismiss without leave to amend. The denial of leave to amend is typically reviewed for abuse of discretion. *Green v. Mattingly*, 585 F.3d 97, 104 (2d Cir. 2009). As discussed above, all of Brodsky's claims are barred by *res judicata.* She appears to propose amending out a party, but it is unclear how eliminating a defendant from her pleadings would cure the core *res judicata* defect of her complaint. Accordingly, we see no abuse of discretion in the district court's decision to deny leave to amend.

***

We have considered Brodsky's remaining arguments, which we conclude are without merit. We affirm the judgment of the district court.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

END OF DOCUMENT -

American Federal Tax Reports

OSUAGWU, M.D. v. HOME POINT FINANCIAL CORP., Cite as 131 AFTR 2d 2023 -XXXX, (CA2), 05/10/2023

CHINONYEREM OSUAGWU, M.D., Plaintiff-Appellant, v. HOME POINT FINANCIAL CORPORATION, HOME POINT CAPITAL, INC., AMTRUST TITLE INSURANCE COMPANY, MARIANNE GONZALEZ, PHYLLIS SIMON, ARVIND GALABAYA, LEATICIA OSUGWU OR ASUZU, THOMAS AMADEO, YANIRA AMADEO, JOHN DOE, JANE DOE, AMTRUST FINANCIAL SERVICES, INC., Defendants-AppelleesThe Clerk of Court is directed to amend the caption as set forth above. .

Case Information:

Code Sec(s):	
Court Name:	UNITED STATES COURT OF APPEALS FOR THE **SECOND CIRCUIT**,
Docket No.:	No. 22-1403,
Date Decided:	05/10/**2023**.
Prior History:	
Disposition:	

HEADNOTE

Reference(s):

OPINION

SUMMARY ORDER

RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO A SUMMARY ORDER FILED ON OR AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY FEDERAL RULE OF APPELLATE PROCEDURE 32.1 AND THIS COURT'S LOCAL RULE 32.1.1. WHEN CITING A SUMMARY ORDER IN A DOCUMENT FILED WITH THIS COURT, A PARTY MUST CITE EITHER THE FEDERAL APPENDIX OR AN ELECTRONIC DATABASE (WITH THE NOTATION "SUMMARY ORDER"). A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF IT ON ANY PARTY NOT REPRESENTED BY COUNSEL.

At a stated term of the United States Court of Appeals for the **Second Circuit**, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 10th day of May, two thousand twenty-three.

FOR PLAINTIFF-APPELLANT: Chinonyerem Osuagwu, pro se, New City, NY

FOR DEFENDANTS-APPELLEES HOME POINT FINANCIAL CORP. AND HOME POINT CAPITAL, INC.: Marc James Ayers, Evan A. Ward, Bradley Arant Boult Cummings LLP, Birmingham, AL

FOR DEFENDANTS-APPELLEES AMTRUST TITLE INSURANCE CO., AMTRUST FINANCIAL SERVICES, INC., THOMAS AMADEO, AND YANIRA AMADEO: Nathaniel Z. Marmur, The Law Offices of Nathaniel Z. Marmur, PLLC, New York, NY

FOR DEFENDANT-APPELLEE MARIANNE GONZALEZ: Rachel Aghassi, Furman Kornfeld & Brennan LLP, New York, NY

FOR DEFENDANTS-APPELLEES PHYLLIS SIMON, ARVIND GALABAYA, AND LEATICIA OSUGWU OR ASUZU: No appearance

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT,

PRESENT: JOSÉ A. CABRANES, GERARD E. LYNCH, RAYMOND J. LOHIER, JR., Circuit Judges.

Judge:

Appeal from a judgment of the United States District Court for the Southern District of New York (Cathy Seibel, *Judge*).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the District Court is AFFIRMED.

Plaintiff-Appellant Chinonyerem Osuagwu, proceeding *pro se*, appeals from a June 27, 2022 order of the United States District Court for the Southern District of New York (Seibel, *J.*) dismissing his federal claim under § 7434 of the Internal Revenue Code, 26 U.S.C. § 7434(a), for failure to state a claim, dismissing his state claims for lack of subject-matter jurisdiction, and declining to exercise supplemental jurisdiction over those claims. We assume the parties' familiarity with the underlying facts and the record of prior proceedings, to which we refer only as necessary to explain our decision to affirm.

The following facts are drawn from Osuagwu's *pro se* pleadings, which we construe liberally. *See Weixel v. Bd. of Educ. of City of N.Y.*, 287 F.3d 138, 145-46 (2d Cir. 2002). During Osuagwu's divorce proceedings, the New York Supreme Court, Rockland County issued orders allowing Osuagwu's former wife to sign documents on his behalf to facilitate the sale of his home against his wish. While his appeal from the divorce proceedings was pending in state court, Osuagwu brought this federal action against the buyers of his former home, the buyers' mortgage bank and its attorney, his former wife and her attorney, and others, alleging that the sale of his home violated state law and that the mortgage bank's attorney filed fraudulent tax forms reflecting what Osuagwu contends was an inaccurate statement of his share of the proceeds from the purportedly illegal sale, in violation of § 7434(a).

In a May 24, 2022 order, the District Court of its own accord dismissed Osuagwu's § 7434(a) claim for failure to state a claim and his state claims for lack of diversity jurisdiction and as barred by either the *Younger* abstention doctrine, *see Younger v. Harris* , 401 U.S. 37 (1971), or the *Rooker-Feldman* doctrine, *see District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413 (1923). In the same order, the District Court permitted Osuagwu to replead his § 7434(a) claim against the mortgage bank and its attorney, cautioning that "[i]f [Osuagwu] fails to file an amended complaint within the time allowed, the Court will enter judgment" dismissing the complaint. App'x 29. The District Court further explained that, in addition to the reasons for dismissal discussed in the order, it would decline to exercise supplemental jurisdiction over Osuagwu's state claims in the absence of a viable federal claim. *Id.* Instead of amending his federal claim, however, Osuagwu moved for reconsideration and leave to amend the complaint in its entirety. On June 10, 2022, the District Court denied Osuagwu's motion. On June 27, 2022, the District Court entered a final order dismissing Osuagwu's complaint.

I. Sua Sponte Dismissal

On appeal, Osuagwu argues that the District Court's *sua sponte* dismissal of his complaint constituted a denial of due process. While we have cautioned district courts against *sua sponte* dismissals without giving the plaintiff prior notice and an opportunity to be heard, *see Catzin v.*

Thank You & Good Luck Corp., 899 F.3d 77, 82 (2d Cir. 2018), vacatur is not warranted in this case. By initially dismissing Osuagwu's complaint with leave to amend, the District Court provided Osuagwu with notice and an opportunity to be heard before issuing a final order of dismissal. *See Slayton v. Am. Exp. Co.*, 460 F.3d 215, 224 (2d Cir. 2006) ("A dismissal with leave to amend is a non-final order "); *see also Curcio v. Abrams*, No. 22-693, **2023** WL 31183, at *2 (2d Cir. Jan. 4, **2023**) (summary order) (affirming the district court's *sua sponte* dismissal because "the [*pro se*] plaintiff had an opportunity to file an amended complaint in an initial action but instead began a new action with a complaint largely identical to the first"). While leave to amend extended only to the claim brought under § 7434, the District Court explained that it would decline to exercise supplemental jurisdiction over the remaining state claims only absent a valid federal claim.

Moreover, while the District Court did not afford Osuagwu the same opportunity to amend or defend his other claims before dismissing them, we have approved such dismissals where "it is unmistakably clear that the court lacks jurisdiction" over the claims in question. *Catzin v. Thank You & Good Luck Corp.*, 899 F.3d 77, 82 (2d Cir. 2018) (quotation marks omitted); *see, e.g., Digitel, Inc. v. MCI Worldcom, Inc.*, 239 F.3d 187, 189-90 (2d Cir. 2001) (affirming the district court's *sua sponte* dismissal on subject-matter jurisdiction grounds). Here, for the reasons discussed below, it was unmistakably clear that the District Court lacked subject-matter jurisdiction over Osuagwu's state claims. And in any event, by permitting Osuagwu to cure his federal claim, the District Court left open an avenue for Osuagwu to pursue his state claims under the court's supplemental jurisdiction. Osuagwu declined to avail himself of that opportunity. We conclude that, under these circumstances, granting leave to amend the federal claim—the only basis for federal jurisdiction over his lawsuit—provided Osuagwu with adequate process. The District Court's *sua sponte* dismissal was therefore not "reversible error." *Catzin*, 899 F.3d at 82.

II. Claim Under § 7434

We agree with the District Court that Osuagwu failed to state a claim under § 7434(a), a provision that creates a civil damages remedy for the willful filing of "fraudulent information return[s]." We review dismissals under Federal Rule of Civil Procedure 12(b)(6) *de novo*. *See Dolan v. Connolly*, 794 F.3d 290, 293 (2d Cir. 2015).

"The private right of action created by § 7434(a) applies only '[i]f any person *willfully files* a fraudulent information return.'" *Katzman v. Essex Waterfront Owners LLC*, 660 F.3d 565, 568 [108 AFTR 2d 2011-7039] (2d Cir. 2011) (quoting 26 U.S.C. § 7434(a)). Osuagwu argues that he raised a plausible § 7434(a) claim because the mortgage bank, through its attorney, prepared a Form 1099 that "indicated or intended to indicate to the [Internal Revenue Service] that the transaction from which [the form] arose was a legitimate one, when the opposite is the case." Pl.-Appellant's Br. 48. But even accepting those allegations as true, we agree with the District Court that Osuagwu has failed to demonstrate how the mortgage bank and its attorney's reliance on a court order expressly authorizing the sale (and the means by which it was conducted) could possibly amount to a *willful* filing of a fraudulent return. *Cf. Maness v. Meyers*, 419 U.S. 449, 458 (1975) (articulating the "basic proposition that all orders and judgments of courts must be complied with promptly"). We therefore conclude that Osuagwu failed to state a claim under § 7434.

III. Claims Under State Law

We also affirm the District Court's dismissal of Osuagwu's state claims for lack of subject-matter jurisdiction based on an absence of complete diversity among the parties. Diversity jurisdiction under 28 U.S.C. § 1332 requires "complete diversity," meaning that "all plaintiffs must be citizens of states diverse from those of all defendants." *Pa. Pub. Sch. Emps.' Ret. Sys. v. Morgan Stanley & Co.*, 772 F.3d 111, 117–18 (2d Cir. 2014). This case fails that statutory requirement. Osuagwu is a citizen of New York, and although two of the defendants are citizens of Michigan, several other defendants are New York citizens. The District Court therefore properly concluded that it lacked diversity jurisdiction over the state claims.

We also conclude that the District Court did not abuse its discretion when it declined to exercise supplemental jurisdiction over Osuagwu's state claims given its dismissal of the sole federal claim. *See Kolari v. N.Y.-Presbyterian Hosp.*, 455 F.3d 118, 123 (2d Cir. 2006) ("Plaintiffs' federal-law claims were eliminated on a motion to dismiss, prior to the investment of significant judicial resources, and we can discern no extraordinary inconvenience or inequity occasioned by permitting the [state] claims to be refiled in state court.").[1]

IV. Denial of Reconsideration and Leave to Amend

Osuagwu also appeals from the District Court's June 10, 2022 order denying his motion for reconsideration and leave to amend his complaint.

We review the denial of a motion for reconsideration for abuse of discretion. *See Trikona Advisers Ltd. v. Chugh*, 846 F.3d 22, 29 (2d Cir. 2017). As noted, the District Court properly dismissed Osuagwu's complaint, and in his motion seeking reconsideration Osuagwu identified no controlling decisions or facts that the court had overlooked. Accordingly, we conclude that the District Court did not abuse its discretion in denying his motion for reconsideration. *See Cho v. Blackberry Ltd.*, 991 F.3d 155, 170–71 (2d Cir. 2021).

Osuagwu also appeals the denial of his request for leave to amend his complaint. "Although we generally review" such denials "for abuse of discretion, in cases in which the denial is based on futility, we review de novo that legal conclusion." *Melendez v. Sirius XM Radio, Inc.* , 50 F.4th 294, 309 (2d Cir. 2022) (quoting *Shimon v. Equifax Info. Servs. LLC*, 994 F.3d 88, 91 (2d Cir. *Diamond "D" Const. Corp. v. McGowan*, 282 F.3d 191, 198-201 (2d Cir. 2002). 2021)). By the time it issued its May 24, 2022 order dismissing the complaint, the District Court had already granted Osuagwu leave to amend his federal claim. Instead of amending his federal claim, however, Osuagwu filed a motion for leave to amend his *entire* complaint. The June 10, 2022 order denied that motion on the ground that "[t]he arguments advanced by [Osuagwu] in his motion do not convince [the court] that [its] original ruling was incorrect." Dist. Ct. Dkt. No. 19 at 1. But the order also reminded Osuagwu that he "may still replead his claims under 26 U.S.C. § 7434(a) ... before the thirty-day deadline, as set forth in [the District Court's] original ruling." *Id.* Later that month, on June 27, 2022, the District Court dismissed Osuagwu's complaint with prejudice because he failed to replead his federal claim. We therefore construe the June 10, 2022 denial of Osuagwu's request for leave to amend as affecting his state claims only.

We agree with the District Court's conclusion that any amendment to Osuagwu's state claims would have been futile. As discussed above, the District Court properly determined that it lacked subject-matter jurisdiction over Osuagwu's state claims due to the absence of complete diversity of citizenship, among other jurisdictional problems. To the extent a viable federal claim may have allowed the District Court to exercise supplemental jurisdiction over Osuagwu's state claims, Osuagwu was given the chance to amend his federal claim but failed to do so. In any case, supplemental jurisdiction is a matter of discretion, not of right. *See United Mine Workers v. Gibbs*, 383 U.S. 715, 725-26 (1966). We therefore affirm the District Court's denial of Osuagwu's request for leave to amend his state claims.

We have considered Osuagwu's remaining arguments and conclude that they are without merit. For the foregoing reasons, the judgment of the District Court is AFFIRMED.

FOR THE COURT:

Catherine O'Hagan Wolfe, Clerk of Court

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* The Clerk of Court is directed to amend the caption as set forth above.

1 While these are sufficient grounds on which to affirm the District Court's dismissal of Osuagwu's state claims, we also agree with the District Court's initial assessment that Osuagwu's state claims are barred by the *Younger* abstention doctrine because the relief he seeks would "countermand the state court's orders" directing the sale of his home. App'x 17. As Osuagwu acknowledges on appeal, "his appeal to the New York state [A]ppellate [D]ivision is pending." Pl.-Appellant's Br. 40. *Younger* abstention applies where, as here, a "federal lawsuit implicates the way that New York courts manage their own divorce and custody proceedings – a subject in which the states have an especially strong interest." *Falco v. Justs. of the Matrim. Parts of Sup. Ct. of Suffolk County*, 805 F.3d 425, 427 (2d Cir. 2015) (quotation marks omitted). Osuagwu has failed to allege anything about the "subjective motivation of the state [court]" (whether "bad faith" or "bias"), nor any other extraordinary circumstances, that would warrant an exception to this rule.

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American Federal Tax Reports

U.S. v. AKOTO, Cite as 131 AFTR 2d 2023 -767, (CA1), 02/23/2023

UNITED STATES, APPELLEE v. Emmanuel AKOTO, a/k/a Kofi, DEFENDANT, APPELLANT.

Case Information:

[pg. **2023** -767]

Code Sec(s):	
Court Name:	U.S. Court of Appeals, **First Circuit**,
Docket No.:	No. 21-1804,
Date Decided:	02/23/**2023**.
Prior History:	District Court affirmed.
Disposition:	Decision for Govt.

HEADNOTE

1. Tax crimes—tax fraud; identity theft—evidence—appeals. Defendant's conviction, for identity theft and other fraud offenses relating to his participation in international scheme to use stolen identities to file fraudulent returns, was affirmed. While defendant argued that he received ineffective assistance of counsel because his counsel didn't raise limitations period defense to one of identity theft counts, in respect to which indictment was returned more than 5 years after false return associated with that count was filed, this argument couldn't be heard on direct appeal. Alternate argument that certain fraud counts of indictment were constructively amended in jury instructions also failed.

Reference(s): ¶ 73,446.517(30)

2. Tax crimes—tax fraud; identity theft—sentencing. Defendant's sentence, for identity theft and other fraud offenses relating to his participation in international scheme to use stolen identities to file fraudulent returns, was affirmed. Defendant's loss computation challenges, including that there wasn't sufficient evidence to connect him to over 300 false returns on which loss calculations were based, [pg. **2023** -768] were belied by record.

Reference(s): ¶ 73,446.516(55)

OPINION

Sara E. Silva, with whom Hogan Lovells US LLP was on brief, for appellant.

Hannah Cook, Attorney, Tax Division, Department of Justice, with whom David A. Hubbert, Deputy Assistant Attorney General, S. Robert Lyons, Chief, Criminal Appeals & Tax Enforcement Policy Section, Katie Bagley, Attorney, Tax Division, Joseph B. Syverson, Attorney, Tax Division, and Jane E. Young, United States Attorney, were on brief, for appellee.

United States Court of Appeals For the First Circuit,

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Before Barron, Chief Judge, Selya and Lynch, Circuit Judges.

Judge: LYNCH, Circuit Judge.

[Hon. Steven J. McAuliffe, U.S. District Judge]

A New Hampshire federal jury convicted Emmanuel Akoto of one count of conspiracy to commit wire fraud, three counts of substantive wire fraud, and two counts of aggravated identity theft. These charges were based on evidence of Akoto's participation in an international scheme, involving individuals in the United States, Nigeria, and Ghana, that used stolen identities to file fraudulent federal income tax returns with the Internal Revenue Service ("IRS"). At sentencing, the district court determined that Akoto and his coconspirators had filed at least 310 fraudulent tax returns seeking $1,326,633 in refunds, $551,601 of which the IRS paid out. Based in part on this loss amount, the district court sentenced Akoto to 70 months' imprisonment, which represented a downward variance from his Guidelines range.

On appeal, Akoto makes three arguments. First, he contends that his conviction on one of the aggravated identity theft counts should be vacated because his trial counsel's failure to raise a statute of limitations defense to this count amounted to ineffective assistance of counsel. Second, he argues that his convictions on the three substantive wire fraud counts should be vacated because the district court's jury instructions constructively amended the indictment. Third, Akoto asserts that his sentence should be vacated because the district court erred in calculating the loss amount attributable to his conduct. We affirm.

I.

A.

We recount the background facts in the light most favorable to the jury's verdict, consistent with record support. *See United States* v. *Tkhilaishvili*, 926 F.3d 1, 8 (1st Cir. 2019).

Between 2011 and 2013, Akoto and his coconspirators used stolen identities to file fraudulent federal income tax returns. The scheme worked as follows.

Akoto and his coconspirators first purchased stolen identity information from Hieu Minh Ngo, a Vietnamese hacker. Between 2007 and 2013, Ngo ran an illicit business selling personal identifying information ("PII") over the internet. This information came as "fullz" (or "fulls") packages–short for "full information"–that typically included information like an individual's name, Social Security number, date of birth, address, driver's license number, and bank account numbers. Much of this information constituted "means of identification" ("MOI"), as defined at 18 U.S.C. § 1028(d)(7). Ngo maintained an inventory of more than 176,000 fullz and sold fullz to at least 1,300 individuals around the world. Ngo often resold the same fullz to different individuals.

Akoto purchased between 900 and 1,000 fullz from Ngo. Ngo sent Akoto these fullz in email attachments. Akoto routinely requested newly hacked information that would work for the tax fraud scheme. He asked Ngo for "fresh ones" and "the newest info that you have," specified the timeframes he was looking for, and sought information that "would pass"–i.e., could be successfully used in the scheme.

Ngo was eventually apprehended by American law enforcement and agreed to cooperate. He allowed Secret Service Special Agent Matthew O'Neill to take over his email accounts. Agent O'Neill used Ngo's email to communicate with Ngo's customers, including Akoto, for investigatory purposes.

After receiving the stolen identities, Akoto and his coconspirators "washed" each identity by submitting a tax return to the IRS using that information but deliberately using the wrong date of birth. The IRS typically responded with a rejection letter stating either that (1) the date of birth was incorrect or (2) the date of birth was incorrect and a return for that individual had already been filed. If the former, the coconspirators knew they could file a potentially successful fraudulent tax return using that person's name because the person had not yet filed a tax return for that year. The purpose of [pg. **2023** -769] "washing" was to avoid purchasing prepaid debit cards (the next step of the scheme) in the names of individuals for whom a fraudulent return could not be successfully filed.

After a name had been successfully "washed," Akoto and his coconspirators purchased a prepaid debit card in that person's name, filed a fraudulent tax return (this time with the correct date of birth), and routed the refund to the prepaid debit card. The fraudulent returns were often filed by conspirators in Nigeria and Ghana. If the IRS did not detect the fraud and issued a refund to the prepaid debit card, Akoto or a coconspirator withdrew the refund in cash from an ATM.[1] Some of this money was sent to the overseas conspirators by depositing it in different accounts, with the conspirator who withdrew the cash also keeping some.

B.

On November 29, 2017, a federal grand jury returned an indictment charging Akoto and codefendant Jeffrey Quaye with six counts: one count of conspiracy to commit wire fraud (Count One), *see* 18 U.S.C. §§ 1343, 1349; three counts of substantive wire fraud and aiding and abetting wire fraud (Counts Two, Three, and Four), *see id.* §§ 2, 1343; and two counts of aggravated identity theft (Counts Five and Six), *see id.* § 1028A(a)(1).

Quaye entered into a plea agreement with the government before trial and testified against Akoto at trial. The government also presented testimony from two other cooperating witnesses: Ngo, the hacker and fullz seller, and Abiola Adeyemo, who was present for a conversation between Akoto and Quaye regarding the scheme and pleaded guilty to participation in a related tax fraud scheme. The government further called as witnesses four government agents and six victims whose PII had been used in the scheme.

Akoto's central defense at trial was that the government could not tie him to the scheme because he did not control the kwa2kg@yahoo.com email account that was used to communicate with Ngo, receive fullz, share fullz with coconspirators, and share other information such as "washed" names. The government introduced evidence that emails sent from the account were sent from an IP address tied to 2047 Paducah Lane, Grand Prairie, Texas, the address where Akoto was living. Quaye also testified that the email account belonged to Akoto. And the government introduced other documentary evidence that the account belonged to Akoto, including messages in the account referring to his business, regarding airplane tickets for him and his wife, and addressing him by his nicknames. The government further established that the kwa2kg@yahoo.com account was used to correspond with two other email accounts (kwa22kg@yahoo.com and nana2kg@gmail.com) to further the conspiracy–i.e., by sharing fullz and washed names.

Following a three-day trial, the jury convicted Akoto on all counts.

At sentencing, the district court adopted the findings and recommendations set forth in the presentence investigation report ("PSR"). It accepted that Akoto and his coconspirators had filed at least 310 fraudulent tax returns seeking $1,326,633 in refunds, of which the IRS actually paid out $551,601. Based on this intended loss amount of $1,326,633 and several other enhancements, the court calculated a total offense level of 25, resulting in a Guidelines range of 57 to 71 months plus a mandatory consecutive 24-month sentence for the aggravated identity theft charges. The court varied downward and sentenced Akoto to 70 months' imprisonment: 46 months on the conspiracy count and on each substantive wire fraud count, to be served concurrently, and 24 months on each aggravated identity theft count, to be served concurrently to each other and consecutively to the 46 months.[2]

II.

A.

As to Akoto's first argument on appeal, based on alleged ineffective assistance of counsel, such arguments are rarely entertained on direct appeal if not previously raised below, and we decline to do so here. *See United States* v. *Miller*, 911 F.3d 638, 641-42, 646 (1st Cir. 2018).

Counts Five and Six of the indictment charged Akoto with committing aggravated identity theft in violation of 18 U.S.C. § 1028A by "knowingly possess[ing] and us[ing], without lawful authority, means of identification of other people, that is, the names and Social Security Numbers of two individuals for the purpose of filing false and fraudulent United States Income Tax Returns claiming tax refunds...during and in relation to a...conspiracy to commit wire fraud." The indictment alleged that these offenses "continu[ed] to a date uncertain, but at least as late as March 13, 2013." The indictment also specified that the false tax [pg. **2023** -770] returns associated with these counts were filed on November 20, 2012 (Count Five) and January 31, 2013 (Count Six).

Akoto argues that Count Five was untimely "from the face of the indictment" because the indictment was not returned until November 29, 2017, more than five years after the false tax return associated with Count Five was filed on November 20, 2012. *See* 18 U.S.C. § 3282(a) (setting a five-year statute of limitations period for most noncapital offenses). He claims that his trial counsel's failure to raise this statute of limitations defense amounted to ineffective assistance of counsel in violation of the Sixth Amendment.

The government responds that (1) it is premature to address Akoto's ineffective assistance claim in the present appeal, not least because further factual development is needed, and (2) should this court entertain Akoto's ineffective assistance claim, it fails on the merits for multiple reasons. The government argues that Count Five was timely for three reasons: First, the charging language in the indictment expressly alleged that the offense continued "at least as late as March 13, 2013," and the inclusion of the earlier date on which the tax return was filed should not override this charging language. Second, Count Five was timely as a continuing offense: aggravated identity theft requires the commission of a predicate felony, the statute of limitations does not begin to run until the predicate felony is completed, and the predicate felony here–the conspiracy to commit wire fraud–lasted well into the statute of limitations period. Third, Count Five was timely as proven at trial because the refund associated with the false tax return was not issued until December 5, 2012, within the statute of limitations period, and because Akoto continued to "possess" the stolen identity information in his email account within this period.

At the very least, the government argues, the uncertain viability of a statute of limitations defense is such that trial counsel's failure to raise it does not constitute ineffective assistance and Akoto has also not met his burden to show prejudice. The government makes the point that Akoto faced a mandatory two-year sentence based on the other aggravated identity theft count (Count Six), which Akoto does not challenge as untimely, so trial counsel's choice to pursue an alternative defense theory which could have resulted in acquittal on all counts was reasonable.

We reach only the threshold question and decline to review the merits of Akoto's ineffective assistance claim on direct appeal. This court has "held with a regularity bordering on the monotonous that fact-specific claims of ineffective assistance of counsel cannot make their debut on direct review of criminal convictions, but, rather, must originally be presented to, and acted upon by, the trial court." *Tkhilaishvili*, 926 F.3d at 20 (quoting *United States* v. *Mala*, 7 F.3d 1058, 1063 (1st Cir. 1993)). The trial court, "by reason of [its] familiarity with the case, is usually in the best position to assess both the quality of the legal representation afforded to the defendant...and the impact of any shortfall in that representation" in the first instance. *Id.* (quoting *Mala*, 7 F.3d at 1063). "Thus, a criminal defendant who wishes to pursue a claim of ineffective assistance not advanced in the trial court is ordinarily required to defer that claim to collateral proceedings." *Miller* , 911 F.3d at 642.

We have recognized a potential exception to this rule "where the critical facts are not genuinely in dispute and the record is sufficiently developed to allow reasoned consideration" of the claim on direct appeal. *Id.* (quoting *United States* v. *Natanel*, 938 F.2d 302, 309 (1st Cir. 1991)). That exception is not applicable here. It is by no means clear, for reasons articulated by the government, that a statute of limitations defense was obviously available to Akoto in this case. Further factual development, which is not present in the record before us, is necessary to appraise counsel's performance.[3] *See, e.g.*, *Tkhilaishvili* , 926 F.3d at 20 (declining to review an ineffective assistance claim on direct appeal for similar reasons); *Miller*, 911 F.3d at 646 (same); *United States* v. *Leahy*, 473 F.3d 401, 410 (1st Cir. 2007) (same).

Akoto contends that our recent decision in *Miller* not to take up an ineffective assistance of counsel claim on direct appeal "turned on" the fact that counsel in that case was at least aware of a potential statute of limitations issue–and that the absence of evidence of a similar awareness in this case is grounds to decide Akoto's claim on direct appeal. Nothing in *Miller* supports that proposition. *Miller* noted by way of background that counsel was aware of a potential statute of limitations issue, *see* 911 F.3d at 641, but that fact did not guide our analysis. *Miller*'s holding rested instead on the general rule that we will not resolve an ineffective assistance claim on direct review if the record is not sufficiently developed to allow for thoughtful consideration of the claim. *See id.* at [pg. **2023** -771] 646 ("We are left to guess at trial counsel's thought processes....When all is said and done, we know little more than that trial counsel chose not to file a motion to dismiss."); *see also Leahy*, 473 F.3d at 410 (declining to credit the defendant's assertion that his trial counsel was simply unaware of a key case in the absence of developed factual support for that assertion).

We thus affirm Akoto's conviction on Count Five, without prejudice to his ability to raise his claim of ineffective assistance of counsel in a collateral proceeding should he wish to do so. *See* 28 U.S.C. § 2255.

B.

Akoto next argues that the district court constructively amended the three substantive wire fraud counts charged in the indictment (Counts Two though Four) in its jury instructions. Akoto did not object to the jury instructions in the district court, so our review is for plain error. *See United States* v. *Brandao*, 539 F.3d 44, 57 (1st Cir. 2008). Under that standard, Akoto must show "(1) that an error occurred (2) which was clear or obvious and which not only (3) affected [Akoto's] substantial rights, but also (4) seriously impaired the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Valdés-Ayala*, 900 F.3d 20, 36 (1st Cir. 2018) (quoting *United States* v. *George* , 841 F.3d 55, 64 (1st Cir. 2016)). We conclude that, reading the challenged instructions in context, no error occurred.

Counts Two through Four alleged, in relevant part, that Akoto and Quaye "devised and intended to devise and aided and abetted each other in devising a scheme and artifice to defraud" and, in furtherance of that scheme, "transmitted and caused to be transmitted by means of wire communications, as more particularly described below, in interstate and foreign commerce, certain writings." The three counts were specifically charged as follows:

Count Number	Description of Wire	Location of Wire	Date of Wire

Two	AKOTO e-mail sent to monitored e-mail account requesting 200 MOI	Sent to District of New Hampshire	February 14, 2013
Three	AKOTO e-mail sent to monitored e-mail account requesting MOI "that wld pass"	Sent to District of New Hampshire	February 16, 2013
Four	AKOTO e-mail sent to monitored account requesting "new info that is almost 9 or 6 months old."	Sent to District of New Hampshire	February 19, 2013

In the jury instructions, the district court defined the term "interstate wire communication," in relevant part, as follows:

> An "interstate wire communication" includes a telephone communication from one state to another, as well as an email transmission or other internet communication. It also includes the electronic filing of a tax return with the Internal Revenue Service from one state to another.

The district court also instructed the jury on aider and abettor liability as to Counts Two through Four.

Akoto argues that the instruction that an interstate wire communication includes "the electronic filing of a tax return," given in conjunction with the aiding and abetting instruction, "permitted the jury to convict [Akoto on Counts Two through Four] upon a finding that he aided and abetted any co-conspirator in electronically filing any tax return despite the fact that those counts were expressly premised on specific emails." (Emphasis omitted.) He contends that this amounted to an impermissible constructive amendment to the indictment.[4]

"A constructive amendment occurs when the charging terms of an indictment are altered, either literally or in effect, by prosecution or court after the grand jury has last passed upon them." *Brandao*, 539 F.3d at 57 (quoting *United States* v. *Pierre*, 484 F.3d 75, 81 (1st Cir. 2007)). "The prohibition on constructive amendment exists to preserve the defendant's Fifth Amendment right to indictment by grand jury, to prevent re-prosecution for the same of[pg. **2023** -772] fense in violation of the Sixth Amendment, and to protect the defendant's Sixth Amendment right to be informed of the charges against him." *Id.* In assessing whether a district court's jury instructions constructively amended the indictment, we evaluate the challenged instructions not in isolation but in the context of the entire charge. *See United States* v. *McBride*, 962 F.3d 25, 33 (1st Cir. 2020); *United States* v. *Lopez-Cotto*, 884 F.3d 1, 9-11 (1st Cir. 2018).

Taken in context, the district court's definition of "interstate wire communication" did not constructively amend the indictment and did not amount to error, let alone plain error.

The district court began by instructing the jurors that they "should not single out any one instruction, but instead apply these instructions as a whole to the evidence in the case." Turning to the substantive instructions, the district court told the jury that it would explain "the elements of the substantive crime of wire fraud" before explaining conspiracy, "because [the conspiracy] instructions will be better understood if the substantive counts have been explained first." The district court then explained that Counts Two through Four "allege that [Akoto]...devised and intended to devise, and aided and abetted another in devising, a scheme and artifice to defraud, and for obtaining money and property by means of materially false and fraudulent pretenses, representations, and promises" and "[i]n furtherance of, and for the purpose of executing such schemes and artifice to defraud...transmitted and caused to be transmitted by means of wire communications, as more particularly described below, in interstate and foreign commerce, certain writings." The district court then read the description of the three specific emails charged for Counts Two through Four verbatim from the indictment.

The district court then provided definitions. The district court defined terms such as "scheme," "defraud," and aider and abettor liability. The district court also provided the definition of "interstate wire communication" discussed above.

The district court went on to explain Count One, conspiracy to commit wire fraud. The court referred the jury back to its earlier discussion of wire fraud before turning to the conspiracy-specific elements of the count: "As I instructed you earlier, section 1343 of Title 18 makes it unlawful to commit wire fraud and provides that...." The court provided definitions for terms like "conspiracy" and "overt act," but did not repeat the substantive wire fraud definitions it had previously given, including the definition of "interstate wire communication."

The district court defined the substantive elements of wire fraud only once and had the jury use that definition for both the substantive wire fraud counts and the conspiracy to commit wire fraud count. The court sensibly noted that the filing of a tax return could be a wire communication, because Count One alleged that such filings were overt acts in furtherance of the conspiracy. This definition did not shift the theory of the case as to Counts Two through Four. Indeed, the jury instructions on those counts described the specific email which served as the basis for each count.

The challenged jury instruction did not constructively amend the indictment and was not error, let alone plain error. *See McBride*, 962 F.3d at 33 (rejecting constructive amendment challenge after reviewing jury instructions as a whole); *Lopez-Cotto*, 884 F.3d at 10-11 (same).

C.

Akoto's final contention on appeal is that the district court erred in calculating the loss amount attributable to his conduct during sentencing. Akoto makes two arguments. First, he asserts that there is not sufficient evidence connecting him to the 310 fraudulent tax returns on which the district court based its loss calculations. He argues that the fact that PII used in these fraudulent returns was found in the conspiracy's email accounts is insufficient, because other fraudsters may have had access to this same PII.[5] Second, Akoto contends that the district court should have used the same loss amount for him as for Quaye, which would have resulted in a 12-level (rather than 14-level) increase in his total offense level and potentially a shorter sentence.

“'In a fraud case resulting in financial loss, the defendant's guideline sentencing range is determined in part' by the amount of loss.” *United States* v. *Flete-Garcia*, 925 F.3d 17, 28 [123 AFTR 2d 2019-1929] (1st Cir. 2019) (quoting *United States* v. *Naphaeng*, 906 F.3d 173, 179 (1st Cir. 2018)). The loss amount “is the greater of actual loss or intended loss,” with intended loss being “the pecuniary harm that the defendant purposely sought to inflict.” USSG § 2B1.1 cmt. n.3(A). “Since intended loss normally subsumes actual loss, intended loss is often the greater of the two.” *Flete-Garcia*, 925 F.3d at 28. [pg. **2023** -773]

District courts have “considerable discretion in determining what evidence should be regarded as reliable in making findings as to the amount of loss.” *Id.* And a district court's loss calculations “need not be precise: the sentencing court need only make a reasonable estimate of the range of loss.” *Id.*; *accord* USSG § 2B1.1 cmt. n.3(C). For example, a district court can estimate loss by looking to factors like “[t]he approximate number of victims multiplied by the average loss to each victim” and “the scope and duration of the offense.” USSG § 2B1.1 cmt. n.3(C).

The government bears the burden of proving the loss amount by a preponderance of the evidence. *Flete-Garcia*, 925 F.3d at 28. We review the district court's factual findings as to the loss amount for clear error. *Id.* at 26, 32-33.

Here, the district court accepted the government's submission that Akoto and his coconspirators had filed at least 310 fraudulent tax returns seeking $1,326,633 in refunds, $551,601 of which was paid out. The government reached these figures through a multistep process. First, the IRS examined emails in three email accounts that the trial evidence established were used in the conspiracy (kwa2kg@yahoo.com, kwa22kg@yahoo.com, and nana2kg@gmail.com).[6] The IRS flagged any PII found in these emails, and then determined whether this PII had been used in tax returns. If so, the IRS took further steps to identify whether these tax returns were in fact fraudulent, such as by comparing the wage information reported on the return with wage information reported to the IRS by employers. This process identified the 310 fraudulent returns that utilized PII found in the email accounts used in the conspiracy.[7] The government provided Akoto with a list of these 310 returns, including the tax return ID number, the names and Social Security numbers used, the tax year, the bank information used, the refund amount requested, and the refund amount paid. The total refund amount fraudulently requested was $1,326,633, and the total refund amount paid was $551,601. Akoto did not challenge any of these specific fraudulent returns as not being associated with the conspiracy.

Based on these figures, the district court determined that the intended loss, and thus the amount of loss, was $1,326,633. Because this loss amount was over $550,000, it resulted in a 14-level increase in Akoto's total offense level. *See* USSG § 2B1.1(b)(1).

As to Akoto's first challenge, we conclude that the district court did not clearly err in determining that the 310 fraudulent returns were tied to Akoto and his coconspirators by a preponderance of the evidence.

Each of the 310 returns at issue utilized PII found in the conspiracy's email accounts. And the methodology the government used to identify these 310 returns was virtually identical to that which we approved in *Flete-Garcia.*[8] In that case, as here, the government took PII possessed by the conspirators, identified tax returns that utilized this information, determined whether the returns were in fact fraudulent, then prepared summary charts cataloging the losses. *See id.* at 31-32. In affirming the district court's loss calculation, we emphasized the fact that "the record shows with conspicuous clarity that the IRS used the PII" possessed by the coconspirators "to identify the suspect tax returns." *Id.* at 32.

The fact that unrelated fraudsters may also have possessed some of this PII does not render the loss amount clearly erroneous so long as there is sufficient evidence tying Akoto to the loss. Indeed, Akoto concedes that the government did not have to "eliminate the possibility" that an unrelated culprit filed some of the fraudulent returns at issue. *Flete-Garcia* is again instructive. There, we held that the district court did not clearly err in accepting a $5 million intended loss figure even though one of the defendant's coconspirators had "admitted to doing some `freelancing,'" including by selling lists of PII to others, and certain tax returns in the government's summary charts could be read to have been filed by individuals outside of the defendant's conspiracy. *Id.* (noting Flete-Garcia's argument that the addresses and W-2 forms associated with some returns pointed toward other culprits). We reasoned that "the [district] court reasonably credited the government's explanation that [the freelancer's] sepa[pg. **2023** -774] rate activities were not included in the loss calculation" and that, viewing the record as a whole, there was no clear error. *Id.*; *see id.* at 32-33. The mere possibility that others possessed the PII at issue was not dispositive.

So too here. The fact that the conspiracy possessed the PII used in the fraudulent returns is itself strong evidence of culpability. *See United States* v. *Clayton*, 108 F.3d 1114, 1118-19 (9th Cir. 1997) (holding that the fact that the defendant possessed 29 stolen phone ID numbers and had illegally cloned at least two of them "support[ed] the district court's inference that he was responsible for the loss associated with the remaining stolen numbers found in his possession"). And there was also additional evidence beyond this fact of possession which tied Akoto and his coconspirators to the fraudulent returns.

To begin, Akoto overstates the potential for overlap between the PII found in the conspiracy's email accounts and PII possessed by unrelated fraudsters. Ngo sold PII to individuals around the world and often resold the same fullz. But Ngo maintained a total inventory of more than 176,000 fullz; not all of his clients necessarily possessed the fullz found in the conspiracy's email accounts, which constituted a tiny fraction of Ngo's total inventory. And Ngo sold fullz between 2007 and 2013, whereas Akoto was charged based on conduct between 2011 and 2013. All 310 of the fraudulent tax returns at issue were for tax years 2010 through 2012 (corresponding to calendar years 2011 to 2013), the time period when Akoto and his coconspirators were actively filing such returns.

Further, Akoto's practice was to specifically request new information that would work for the scheme. He asked Ngo for "fresh one[s] that no one has" and "the newest info that you have." In November 2011, he asked for information "for 2011." In April 2012, he asked for "2011 and 2012, if possible." His goal was to obtain information that "would pass" for purposes of the fraud. Ngo testified that Akoto wanted to purchase "up-to-date," newer information, and that newer fullz were less likely to have been sold to many other purchasers. And Agent O'Neill testified that, in the context of this investigation, he understood "fresh ones" to mean "PII that ha[d] been recently stolen or acquired and not sold to anyone else." Fullz that had already been used by other fraudsters would not work for purposes of Akoto's fraud scheme, so he specifically requested newer fullz that "would pass."

We add a final point. As in *Flete-Garcia*, the district court here "was operating with a substantial cushion." 925 F.3d at 32. The court found that the amount of loss was $1,326,633. Any loss amount above $550,000 would have led to the same 14-level increase in Akoto's offense level. *See* USSG § 2B1.1(b)(1). So to demonstrate reversible error, Akoto must convince us that roughly $775,000–or almost sixty percent of the loss amount attributed to him by the district court–was the product of clear error. *See Flete-Garcia*, 925 F.3d at 32. He has not done so.[9]

As to Akoto's second argument, we conclude that the district court did not clearly err by declining to adopt Quaye's $364,758 loss amount as the loss amount attributable to Akoto. The government calculated the loss attributable to each defendant using the same multi-step methodology. The difference was that the universe of emails associated with Akoto was simply broader. For Quaye, the government limited its review to emails exchanged between Quaye's email address and Akoto's email address, whereas for Akoto, the government reviewed emails in his kwa2kg@yahoo.com account and in the two other accounts he corresponded with to advance the conspiracy (accounts with which Quaye did not correspond). And the government persuasively contends that this difference in scope reflects Akoto's deeper involvement in the conspiracy–as evidenced by, for example, his initial recruitment of Quaye into the scheme and his more extensive connections with coconspirators. [pg. **2023** -775]

III.

For the foregoing reasons, the judgment of the district court is *affirmed.*

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1 Some refunds were routed directly to bank accounts rather than to prepaid debit cards.

2 The district court also imposed two years of supervised release, $551,601 in restitution, and a $600 assessment.

3 Akoto points to certain portions of the trial transcript he claims "affirmatively show[]" that counsel was unaware of the statute of limitations defense. Not so.

4 In his reply brief, Akoto disclaims any separate challenge based on the aiding and abetting instruction.

5 Akoto points to the facts that Ngo sold PII to at least 1,300 individuals around the world, that Ngo often resold the same fullz to multiple individuals, and that at least 13,673 fraudulent tax returns were filed using information from the fullz.

6 There was evidence that the second two accounts were also controlled by Akoto. For example, Quaye testified that nana2kg@gmail.com was one of Akoto's accounts (in addition to kwa2kg@yahoo.com), and that Akoto identified himself by placing "2kg" in the usernames of his accounts. The government did not seek to directly establish Akoto's control over the second two accounts, presumably because the evidence showed that he controlled the first account and that, at the least, the second two accounts were used by coconspirators to further the conspiracy.

7 The IRS initially identified at least 490 fraudulent tax returns that utilized PII found in these email accounts, amounting to $2,363,349 in requested refunds and $665,728 in paid refunds. However, after further consideration the government opted for a more conservative loss amount figure based on the 310 tax returns.

8 We focus on *Flete-Garcia*'s treatment of the $5 million in intended loss resulting from tax returns that the conspirators in that case filed but which were rejected by the IRS. *See* 925 F.3d at 31-33. The government was able to substantiate the $7.7 million actual loss figure in *Flete-Garcia* by reviewing the conspirators' bank accounts for evidence of tax-refund checks. *Id.* at 29. Such an approach to actual loss was not viable in this case because Akoto and his coconspirators structured their scheme to conceal receipt of the proceeds (by routing the refunds to prepaid debit cards in others' names and then making withdrawals in cash).

9 Akoto directs our attention to *United States* v. *Cabrera*, 172 F.3d 1287 (11th Cir. 1999), a case in which the defendant was prosecuted for knowingly possessing telephone cloning equipment. *Id.* at 1289. At sentencing, the government offered a loss amount based on the electronic serial number/mobile identification number ("ESN/MIN") combinations found in Cabrera's possession. *Id.* at 1290-91. The Eleventh Circuit rejected this approach. Reasoning that "[m]ultiple unauthorized users often use the same ESN/MIN combinations simultaneously" and "sellers provide the same ESN/MIN combinations to multiple buyers," the Eleventh Circuit held that, to attribute telephone cloning fraud loss to a defendant, the government must "provide evidence specifically linking the amount of fraud loss to the defendant's cloning activities." *Id.* at 1292; *see also id.* 1293-94.

It is first worth noting that the Ninth Circuit reached the opposite conclusion as *Cabrera* on similar facts. *See Clayton*, 108 F.3d at 1118-19. In addition, our case is distinct from *Cabrera* in an important way: while in *Cabrera*, the government's loss amount was based on ESN/MIN combinations that it found "on Cabrera's handwritten list," "computer" and "computer disks," 172 F.3d at 1293, here, the government's loss amount is based exclusively on PII that Akoto exchanged by email, often with coconspirators. It is fair to presume, then, that Akoto intended this PII to be used in the scheme, and therefore "intended" the "loss" that would result from its successful use. *See also Flete-Garcia* , 925 F.3d at 31 (approving intended loss amount based on PII that defendant "gave" to coconspirator). Thus, even if we were to agree with Akoto that the government did not sufficiently tie him to the fraudulent returns to support its "actual loss" calculation, the government has certainly done enough to support its "intended loss" calculation, which is sufficient to establish the "loss amount" for the purposes of sentencing. *See* USSG § 2B1.1 cmt. n.3(A) ("[L]oss is the greater of actual loss or intended loss.").

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American Federal Tax Reports

U.S. v. ABDELAZIZ, Cite as 131 AFTR 2d 2023 -XXXX, (CA1), 05/10/2023

UNITED STATES, Appellee, v. GAMAL ABDELAZIZ, Defendant, Appellant., UNITED STATES, Appellee, v. JOHN WILSON, Defendant, Appellant.

Case Information:

Code Sec(s):	
Court Name:	United States Court of Appeals For the **First Circuit**,
Docket No.:	No. 22-1129; No. 22-1138,
Date Decided:	05/10/**2023**.
Prior History:	
Disposition:	

HEADNOTE

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Reference(s):

OPINION

Joshua C. Sharp, with whom Brian T. Kelly, Lauren A. Maynard, and Nixon Peabody LLP were on brief, for appellant Abdelaziz.

Noel J. Francisco, with whom Yaakov M. Roth, Marco P. Basile, Harry S. Graver, Jones Day, Michael Kendall, Lauren M. Papenhausen, White & Case LLP, Andrew E. Tomback, and McLaughlin & Stern, LLP, were on brief, for appellant Wilson.

Elliott M. Davis, Kateland R. Jackson, Scott A. Chesin, and Shook, Hardy & Bacon L.L.P. on brief for Former United States Attorneys, amici curiae.

Michael J. Iacopino, Brennan Lenehan Iacopino & Hickey, Steven F. Molo, Leonid Grinberg, Justin V. Shur, Kenneth E. Notter III, and MoloLamken LLP on brief for the National Association of Criminal Defense Lawyers and the American Board of Criminal Lawyers, amici curiae.

Robert T. Smith, Mary Fleming, Timothy H. Gray, and Katten Muchin Rosenman LLP on brief for Law Professors, amici curiae.

Alexia R. De Vincentis, Assistant United States Attorney, with whom Rachael S. Rollins, United States Attorney, and Donald C. Lockhart, Ian J. Stearns, Stephen E. Frank, Leslie A. Wright, and Kristen A. Kearney, Assistant United States Attorneys, were on brief, for appellee.

United States Court of Appeals For the First Circuit,

APPEALS FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS [Hon. Nathaniel M. Gorton, U.S. District Judge]

Before Barron, Chief Judge, Lynch and Lipez, Circuit Judges.

Judge: LYNCH, Circuit Judge.

The convictions underlying this appeal arise from a government criminal prosecution of alleged misconduct related to college admissions. The government alleged that Rick Singer – a college admissions consultant – and his clients engaged in various forms of bribery and fraud to help secure those clients' children's admission to competitive universities. Singer, who pleaded guilty in a separate case to multiple charges[1] and cooperated with the government's investigation, is not a defendant here, and his culpability is well established.

The defendants-appellants in this case are two parents, Gamal Abdelaziz and John Wilson, who hired Singer. Both men agreed with Singer to make payments purportedly to university accounts in exchange for university employees' securing their children's admission as athletic recruits – a path to admission Singer referred to as the "side door."[2] Their defense at trial and on appeal is that they believed Singer's services and the side door to be legitimate and that they acted in good faith.

The government charged Abdelaziz and Wilson with multiple offenses based on their work with Singer. It alleged that both defendants had participated in an overarching conspiracy not only with Singer but also with other Singer clients to corruptly influence university employees through payments to university accounts, in violation of the federal programs bribery statute. *See* 18 U.S.C. § 666. It further alleged that Abdelaziz and Wilson conspired with other parents to commit two types of mail and wire fraud: honest services fraud, by using their payments to deprive the universities of the honest services of their employees, and property fraud, by depriving the universities of property in the form of "admissions slots." *See id.* §§ 1341, 1343, 1346, 1349. It also charged Wilson with several substantive counts of federal programs bribery and wire fraud, and with filing a false tax return in connection with his payments through Singer. *See* 26 U.S.C. § 7206(1).

A jury convicted both Abdelaziz and Wilson of all charges. The defendants challenge those convictions on a number of grounds. They contend that payments to university accounts cannot violate § 666 or constitute honest services fraud because the payments were intended for accounts owned by the universities – the alleged victims of the scheme. They argue that the property fraud theory is invalid because admissions slots are not property, or, in the alternative, that their convictions must be vacated because the district court erred by instructing the jury that admissions slots are property as a matter of law. And they argue that the government proved only a narrower conspiracy than the one alleged by the indictment and that this variance prejudiced them on all counts. Wilson also asserts that various forms of trial error require us to vacate his conviction for filing a false tax return. Our task in this appeal is to assess these arguments and determine whether the charged conduct falls within the specific crimes of which these defendants were convicted and whether the manner in which this case was charged and tried unacceptably deprived these two defendants of a fair trial on their own conduct, rather than the conduct of others. Nothing in this opinion should be taken as approval of the defendants' conduct in seeking college admission for their children.

We reject the defendants' argument that payments to accounts controlled by the alleged victim of a bribery scheme cannot violate § 666, which lacks any basis in the provision's text, and so deny their request for judgment of acquittal on that basis. And we affirm Wilson's conviction for filing a false tax return.

We do hold that the government's honest services theory is invalid as a matter of law under the Supreme Court's decision in *Skilling* v. *United States*, 561 U.S. 358 (2010), and that, on the arguments offered by the government, the district court erred in instructing the jury that admissions slots constitute property. Accordingly, we vacate the defendants' mail and wire fraud convictions. We also hold that the government failed to prove that Abdelaziz or Wilson agreed to join the overarching conspiracy among Singer and his clients charged in the indictment, and that this variance prejudiced the defendants by allowing the government to introduce a significant amount of powerful evidence related to other parents' wrongdoing in which these defendants played no part, creating an unacceptable risk that the jury convicted Abdelaziz and Wilson based on others' conduct rather than their own. On that basis, we vacate the conspiracy convictions and Wilson's substantive convictions under § 666.[3]

I. Background

We begin by laying out the basic facts and procedural history. We elaborate on this background information as necessary in our analysis of the legal issues.

A.

1.

The charges against Abdelaziz stem from his work with Singer in 2017 and 2018 to secure his daughter's admission to the University of Southern California ("USC"). Abdelaziz had previously paid Singer to work with his two older children in 2012 and 2013; the government does not argue or cite any evidence that these 2012 and 2013 services for Abdelaziz's children were improper.

It is undisputed that Abdelaziz agreed with Singer in approximately June 2017 to pursue side-door admission to USC for his daughter. Abdelaziz maintains that he believed this option to be at least tacitly approved by the school and to entail "preferential admissions treatment to students like [Abdelaziz's daughter] who could assist athletic teams as practice players or team managers and whose parents donated to the athletic department." At the time, Abdelaziz's daughter had not played competitive basketball in over a year; she had played for her school's junior varsity team until January or February 2016 but had stopped playing after failing to make the varsity team. A USC admissions officer testified that Abdelaziz's daughter was also not an academically competitive applicant outside the athletic recruitment process.

On July 16, 2017, Singer sent Abdelaziz an email with the subject line "For Me to complete USC athletic profile" that requested information about Abdelaziz's daughter's scholastic and athletic accomplishments, including "If they play the sport-Basketball," "Accolades if they have them," and "Action Picture." Abdelaziz forwarded the email to his wife, but the record does not otherwise show any response. Eleven days later, Singer emailed Abdelaziz again to request "an action photo or two of [Abdelaziz's daughter] playing basketball." Abdelaziz responded: "Got it." He then sent Singer five photos of high school girls' basketball games, four of which – as Abdelaziz represents in his brief and the government does not dispute – contained his daughter, and one of which did not. The file names for the photos used generic letters and numbers (for example, "DSC_0007.JPG") and differed only in the numbers. Singer responded: "We will use this one." His email identified the chosen photo – the one that did not contain Abdelaziz's daughter – only by the file name.

Singer instructed one of his associates to prepare the profile. The associate did so; the result included the photo Singer had selected and various basketball statistics and accolades that the associate invented and that Abdelaziz's daughter had not earned. Singer sent this profile to Abdelaziz in early August, together with a message from his associate: "Let me know if you want me to add any other awards to her profile or if you think that is enough."

As he did at trial, Abdelaziz disputes whether he saw this message. Singer originally sent the profile to gamalaziz@cox.net. This address generated an automatic reply that stated: "Please be advised that I have changed my e-mail address to gamalaziz797@gmail.com." An FBI agent testified that he was not aware of any evidence that Abdelaziz opened or responded to the message, although Abdelaziz later responded to messages Singer sent to the same cox.net address, having apparently forwarded them to the gmail.com account mentioned in his automatic reply. The next day, Singer also sent the profile to amalaziz797@gmail.com – the address mentioned in the automatic reply, but without the opening "g." The same FBI agent testified that, because of the typo, this message would be "off in cyberspace."

Singer then sent the profile to an administrator in the USC Athletics Department who had agreed with Singer to facilitate Abdelaziz's daughter's side-door admission. That administrator added additional falsehoods to the profile – including a photo of a different girl. This version of the profile became the basis for the profile presented to "Subco," a subcommittee of USC admissions officers responsible for overseeing admission of athletic recruits. Based on this profile, Subco considered and approved Abdelaziz's daughter's admission on October 5, 2017.

On October 10, the same athletics administrator who revised Abdelaziz's daughter's profile sent Singer a letter from the Dean of Admissions conditionally admitting Abdelaziz's daughter as a recruited athlete, pending her submission of a full application packet and other administrative tasks. Singer emailed this letter to Abdelaziz the same day.

In early November, Abdelaziz forwarded the letter to a Singer employee, together with an email that stated: "[Singer] asked that we work with you to complete USC's application ...." Abdelaziz later exchanged emails with this employee, Singer, and another Singer associate about his daughter's application. In these emails, Singer noted that it was important for the application to discuss "basketball as apassion [sic]." Abdelaziz later "reminde[d]" the others of this "direction" when it came time to edit his daughter's application essays.

In early January 2018, Abdelaziz's daughter sent Abdelaziz and the Singer employee an application essay in which she described "[t]he basketball court [as her] art studio" and wrote: "Whether I am playing alone or in a pickup game with friends or in front of a crowd of two hundred people at school, I feel an enormous release from my everyday life when I am on the court." Abdelaziz responded in the same email thread that he had "read [his daughter's] essays," and opined that "overall [they were] ... good." His daughter had not played on the school basketball team for nearly two years at the time. The Singer employee submitted Abdelaziz's daughter's USC application the following day.

Abdelaziz and the government agree that Abdelaziz's daughter was formally admitted in March 2018, although they do not cite any exact date in the record.

On March 16, 2018, a foundation run by Singer sent Abdelaziz an invoice for $300,000,[4] purportedly for a "[p]rivate [c]ontribution." Abdelaziz wired that sum to the foundation ten days later. Where that money ultimately went is unclear from the record, but an FBI agent testified that Singer's "general pitch [to parents] was that [a side-door payment] was a donation to a program," and government counsel acknowledged at trial that Singer told Abdelaziz the payment would go to a university account. The government does not argue on appeal that the jury could have found that Abdelaziz intended the payment to go to any USC employee personally.

Abdelaziz's daughter enrolled at USC in fall 2018. She never played for or otherwise associated with the women's basketball team.

In September 2018, the FBI approached Singer, and he agreed to cooperate with the government's investigation of his clients and university insiders. As part of this cooperation agreement, Singer made various recorded calls at the government's direction.

The government cites two such calls involving Abdelaziz. The first occurred on October 25, 2018. During the call, Singer told Abdelaziz that his foundation was being audited and that the IRS had "asked ... about" Abdelaziz's payment. Singer further stated that he was "not going to tell the IRS anything about the fact that your $300,000 ... was paid to ... [an athletics administrator] at USC to get [Abdelaziz's daughter] into school even though she wasn't a legitimate basketball player at that level." Abdelaziz responded: "OK." Singer asked: "You're OK with that, right?" Abdelaziz answered: "Of course." A moment later, he added:

> No, I – I mean, I – you know, I mean ... my intention was to, uh, donate the money to the foundation and, uh, what – you know, and then from there obviously, uh – I don't think – Uh, do they have the intention of reaching out to the people that sent those payments?

Singer said he did not know and that he "wanted to make sure our stories are correct." He told Abdelaziz that he was "going to essentially say that [the] $300,000 payment ... was made to our foundation to help underserved kids," and "wanted to make sure [Abdelaziz was] OK with that." Abdelaziz replied: "I am."

In the same exchange, Singer told Abdelaziz that the USC athletics administrator with whom Singer had arranged the side door had called Singer to say that she "loved" the profile created for Abdelaziz's daughter and that "going forward, anybody who isn't a real basketball player that's a female, [she] want[ed] [Singer] to use that profile." Abdelaziz responded: "I love it."

The second call took place on January 3, 2019. Singer told Abdelaziz that the same athletics administrator had called him to "give [him] a heads up" that the Admissions Department had "asked ... why [Abdelaziz's daughter] did not show up for Women's Basketball in the fall," and that the administrator had "told them that [Abdelaziz's daughter] had an injury." Abdelaziz asked whether the Admissions Department would ask his daughter about the situation and whether he needed to "prepare her." Singer stated that they would not contact Abdelaziz's daughter and that he had "wanted [Abdelaziz] to know what" the administrator had told the Admissions Department. Abdelaziz responded: "I will answer the same, uh, should they call me."

2.

Wilson engaged Singer's services to facilitate side-door admission for his children on multiple occasions between 2013 and 2019: first for his son, and then, years later, for his twin daughters.

Beginning in spring 2013, Wilson worked with Singer to secure his son's admission to USC through the side door as a purported water polo recruit. Singer explained to Wilson by email that the USC men's water polo coach was "giving [him] 1 boys slot," available on a "first come first [sic]" basis. In response to Wilson's asking when payment was due, Singer responded: "No payment of money till [sic] [the USC men's water polo coach] gets a verbal and written [sic] from admissions ...."

Wilson's son did play high school water polo, but his high school coach testified that he was not a player of the level ordinarily recruited by USC, a noted water polo powerhouse. In emails sent at the time, Wilson expressed doubts about whether his son would fit in on the team, asking Singer whether "it w[ould] be known that [his son was] a bench warming candidate" and whether his son would "be so weak as to be a clear misfit at practice," and stating that "[o]bviously his [son's] skill level m[ight] be below the other freshmen" and that he "want[ed] to be sure [his son would] not [be] a lepper [sic]." Singer responded that "the commitment is to be on the roster[,] not attend all practices[;] ... he will have to attend drug tests and other mandatory functions for 1 year [but then can] walk away/ frankly after the 1st semester he can move on."

In August 2013, Singer noted in an email to Wilson that the water polo coach needed "a player profile so he [could] add [Wilson's son] to his recruit list and present him to admissions in October," and that Singer had the necessary materials to create the profile. Wilson responded: "Great - let me know when [you] have verified [you] have it all completed and into [sic] [the water polo coach]." In October, Singer updated Wilson: "[The water polo coach] has [Wilson's son's] stuff and asked me to embellish his profile more, which I am doing." A few days later, Singer emailed the profile to Wilson. It misrepresented several aspects of Wilson's son's athletic qualifications – for instance, by erroneously describing him as a captain of his high school team and listing implausibly fast swim times. Wilson's counsel argued both at trial and on appeal that the government did not prove Wilson was aware of the falsehoods in the profile. Wilson's counsel emphasized that an FBI agent whose testimony the government used to introduce the email containing the profile acknowledged that he was not aware of emails or other evidence showing Wilson read or responded to Singer's message, and that the profile listed the wrong home address and used Wilson's son's SAT scores rather than his more impressive ACT scores, which Wilson purportedly would have wanted included.

An assistant water polo coach at USC relied on this profile to prepare the athletic profile used by Subco to consider whether to admit Wilson's son.

Subco considered and approved Wilson's son's admission on February 28, 2014, relying in part on the falsified athletic profile.

The day after Subco approved his son's admission, Wilson emailed Singer to "[t]hank[] [him] again for making this happen." He asked about "the options for the payment" and requested an invoice "for consulting or whatever from [Singer's business] so that [Wilson could] pay it from [his private equity firm's] corporate account." After some further discussion of payment mechanics, Wilson's firm wired $220,000 to a combination of Singer, his business, and his foundation on April 7, 2014. The government does not contend that any USC employee personally received a portion of this payment. Singer passed $100,000 along to the USC men's water polo team and, so far as the record shows, retained the other $120,000.

Wilson's son quit the water polo team after his first semester at USC.

Several years later, in September 2018, Wilson called Singer about the possibility of helping Wilson's twin daughters, then juniors in high school, with their college applications. The government recorded this call, which took place before Singer began cooperating with the government, without the participants' knowledge. Singer explained that for Wilson's daughters to gain admission to the highly competitive schools they were interested in "on their own" would require "essentially perfect grades" and excellent standardized test scores, but added that "if you said you wanted to ... go through a different door you c[ould] do that." Wilson inquired about "the other door," asking if it was "like ... water polo and [a] donation," and Singer explained the price and availability of admission through the side door at various universities. Singer informed Wilson that side-door admission to Stanford or Harvard would cost "a minimum of [$]1.2 million," since a coach would have to "giv[e] up his spot" to a purported recruit who is "not a good enough athlete[] to compete," but would provide a "done deal. Just like with [Wilson's son]." Singer explained that the sport "d[id]n't matter," saying he "would make them a sailor or something." Wilson laughed in response. Wilson observed that they were discussing "big numbers," since "there's so many people that want to do th[is]," and asked if "there [was] any way to make [the payments] tax deductible as like donations to the school." Singer stated that payments would be deductible as contributions to his foundation.

Wilson and Singer continued to discuss the use of the side door for Wilson's daughters after Singer began cooperating with the government. From this point on, Singer's references to university insiders willing to facilitate side-door admission were part of a ruse created by investigators.

In a September 29 call, Wilson confirmed that, while his daughters remained undecided on what schools they wanted to attend, he was "interested about the side door and that stuff" and asked what schools and sports were available. Singer assured him that the side door "is gonna ... happen where you want it to happen," and that crew or sailing might be potential sports options. Wilson asked: "[W]hat if they're not really that good?" Singer responded: "[A]t the end of the day ... I may be able to go to the sailing coach and say, 'Hey, this family's willing to make the contributions.... [The child] may not be up to the level you are, but ... you're gonna get a benefit, and the family's gonna get [a] benefit.'" Wilson also asked how the payment would work. Singer stated that "the money [went] into [his] foundation," and that he would then "split the money potentially to the coach or other ... parties that are at that school that need the money[.] ... Or it may go right to the coach, ... depend[ing] on the school."

In October, Wilson called Singer to discuss "making some donations now, whatever – how that can work." Singer stated that he worked with "a bunch of schools," including Harvard and Stanford, on a "first come, first served" basis, and that, "if [he] were to get a deposit ... [of] like half a million dollars in the bank," they could "figure out where [Wilson's daughters] wanna go" later. "[H]aving the money already, in advance, [would] make[] it much easier" because coaches "don't want to give up a spot" unless "the family guarantee[s] ... that they're gonna ante up and they're gonna make a payment." Wilson asked whether his daughters "actually ha[d] to do th[e] sport" or whether "[t]hey could just go in and ... be like ... the scorekeeper[,] ... water girl[,] ... [or] manager." Singer confirmed that they could be "[m]anager[s] or whatever you want to call 'em," and that Wilson's daughters were "athletic and ... big" enough that he could "sell to anybody that they're athletic enough to be able to take 'em and there'll be no question." Singer further assured Wilson that, if he used the side door, admission would be "a done deal." Wilson requested that Singer send him wiring information, and confirmed with Singer that if he sent "[h]alf a million" he would be "locked in for 2." Wilson's private equity firm wired $500,000 to Singer's foundation two days later at Wilson's direction.

Later that month, Singer told Wilson that he had spoken with Stanford's sailing coach, that the coach was willing to "guarantee[] a spot for next year," and that Wilson could "have first dibs" if

Singer sent the coach the "[$]500,000 that [Wilson] wired into [Singer's] account to secure the spot for one of [Wilson's] girls." Singer also mentioned that he had "asked [the coach] for a second spot in sailing and [the coach] said he c[ould]n't do that because he ha[d] to actually recruit some real sailors so that Stanford d[id]n't ... catch on." Wilson laughed and said "[r]ight." Wilson asked for more time for his daughters to decide where they wanted to go, and inquired whether there was "any news on the Harvard side." Singer promised to get back to him.[5]

On November 29, Singer informed Wilson that they had "got a spot if ... [Wilson's daughter] want[ed] to go to Harvard." He claimed that "the senior women's administrator at Harvard [was] going to give [Wilson's daughter] a spot," in exchange for which Wilson would "have to give ... her ... $500,000" through Singer's foundation to "fund the senior women's administrator." He added: "I've already paid [the Stanford sailing coach] the [$]500 [thousand] and now we'll give the senior women's administrator [$]500 [thousand] .... [Y]our total's going to be [$]1.5 [million]. [$]250 [thousand] will come in the spring for Stanford and [$]250 [thousand] for Harvard in the spring and we'll ... be done." Wilson responded: "OK, great." When Wilson asked what sport his daughter would need to play, Singer answered: "[The Harvard administrator will] figure it out.... [I]t doesn't matter the sport at this point. She will ... just get her in through ... athletics in one of the sports but it won't matter." Singer also noted that Wilson's other daughter "w[ould]n't have to sail but we're going to put her through sailing" at Stanford. Wilson responded that "sailing is actually a logical thing. She could be even the mascot, whatever, but she knows sailing." He confirmed that the plan "sound[ed] fantastic" and was "great news." Wilson's private equity firm wired a further $500,000 to Singer's foundation on December 11, again at Wilson's direction.

As with Abdelaziz, the government acknowledged at trial that Singer "told the parents," including Wilson, "that the money would go to the athletic program at the schools." On appeal, it does not argue that the jury could have found that Wilson intended any of his payments to go to insiders' personal accounts, rather than to university-owned accounts related to the insiders' positions.

B.

On March 5, 2019, a federal grand jury in the District of Massachusetts returned a single-count indictment charging David Sidoo – a parent who had worked with Singer – with conspiracy to commit mail and wire fraud in connection with Sidoo's allegedly having paid Singer to have one of his associates take various standardized tests for Sidoo's children. The indictment further alleged that Singer had also paid his associate "to secretly take the SAT and ACT for the children of other co-conspirators known and unknown to the Grand Jury."

Six days later, the government filed a separate criminal complaint alleging that roughly thirty other parents, including Abdelaziz and Wilson, had conspired with Singer and others to commit mail fraud and honest services mail fraud. The complaint alleged varying forms of misconduct by the named parents; some were alleged to have schemed to help their children cheat on standardized tests, while others – like Abdelaziz and Wilson – were alleged to have conspired to bribe university employees to secure their children's admission.

Many of the parents named in the complaint elected to enter plea agreements with the government. For example, Gordon Caplan, Agustin Huneeus, and Bruce Isackson – three parents whose interactions with Singer would later figure in the evidence at Abdelaziz's and Wilson's trial – agreed to waive the requirement of indictment by a grand jury and plead guilty to various offenses pursuant to criminal informations.

On April 9, 2019, a grand jury returned a superseding indictment in the government's case against Sidoo that named as codefendants eighteen parents from the complaint who had not entered plea agreements, including Abdelaziz and Wilson. The government superseded this indictment twice more in the following months. During this period, four more parents pleaded guilty without written plea agreements.

The operative fourth superseding indictment in this case, returned on January 14, 2020, charged fifteen parents with an overlapping set of offenses. All fifteen defendants were charged with conspiracy to commit mail and wire fraud and honest services mail and wire fraud. *See* 18 U.S.C. §§ 1341, 1343, 1346, 1349. This count alleged an overarching conspiracy among the defendants and others, including Singer, to defraud two standardized test firms and five universities – Georgetown; Harvard; Stanford; the University of California, Los Angeles ("UCLA"); and USC – in two alternative ways: first, by depriving them of property in the form of "standardized tests and test scores" (for the standardized test companies) and "admission to the [u]niversities" (for the universities), and second, by depriving them of the honest services of their employees through the use of "bribes and kickbacks." Notably, although the indictment contained detailed allegations of fraud related to standardized testing with respect to several other defendants, it did not allege that either Abdelaziz or Wilson had engaged in or even been aware of that form of misconduct.

Eleven parents, including both Abdelaziz and Wilson, were also charged with conspiracy to commit federal programs bribery. *See id.* §§ 371, 666(a)(2). The indictment alleged that the parents had "conspired ... to bribe agents of USC to secure their children's admission to that university."

Wilson – but not Abdelaziz – was charged with three substantive counts of wire fraud and honest services wire fraud, *see id.* §§ 1343, 1346, and two substantive counts of federal programs bribery, *see id.* § 666(a)(2), all in connection with his efforts to secure admission to Harvard and Stanford for his daughters. In addition, Wilson alone was charged with filing a false tax return, *see* 26 U.S.C. § 7206(1), in connection with his treatment of his payments to secure his son's admission to USC on his 2014 tax return.[6]

The defendants moved to dismiss on a number of grounds. Three of those grounds previewed arguments Abdelaziz and Wilson now make on appeal: First, the defendants moved to dismiss the federal programs bribery and honest services fraud charges, arguing that payments made to the alleged victim of a bribery scheme – here, the universities – cannot constitute bribes. Second, they moved to dismiss the mail and wire fraud charges insofar as these charges alleged that the defendants had defrauded the universities of property, arguing that admissions slots do not constitute property. Third, they moved to dismiss the conspiracy counts, arguing that the indictment alleged a "rimless wheel" conspiracy barred by the Supreme Court's decision in *Kotteakos* v. *United States* , 328 U.S. 750 (1946), and to dismiss the entire indictment because it did not allege that the defendants had participated in a single act, transaction, or series of transactions, such that joinder was improper.

The district court denied these motions in a memorandum opinion and order issued June 23, 2020. *United States* v. *Sidoo*, 468 F. Supp. 3d 428, 435 [125 AFTR 2d 2020-2611] (D. Mass. 2020). It reasoned that "[p]ayments made to accounts controlled by university insiders, even if such payments were ultimately received by the universities," could support the § 666 and honest services fraud charges. *Id.* at 445; *see id.* at 444-45. It further concluded that admissions slots "are property interests owned by the university cognizable under the mail and wire fraud statutes."[7] *Id.* at 441; *see id.* at 440-42. And it determined that the indictment adequately alleged a single overarching conspiracy and that, as a result, joinder was appropriate. *See id.* at 437-39.

Before trial, twelve of the defendants reached plea agreements with the government, and one received a presidential pardon. After unsuccessfully moving to sever, Abdelaziz and Wilson were tried jointly before a jury in fall 2021.

Singer himself did not testify at trial, despite having cooperated with the investigation. The government did, however, introduce a substantial amount of evidence related to other parents' work with Singer without showing that Abdelaziz or Wilson were personally aware of those activities. For example, Bruce Isackson – one of the parents who worked with Singer who entered a plea agreement with the government – was the government's first witness, and described his knowing misconduct in his dealings with Singer. He testified, for instance, that he had paid to have his daughter's standardized test scores altered and that he "knew a good portion of th[e] money [he paid Singer to facilitate his children's college admission] was going into [Singer's] pockets and [to] the people who helped him" rather than to the university accounts for which it was purportedly intended. The government also introduced recorded calls between Singer and other parents, but not between Singer and Abdelaziz or Wilson, in which Singer and those other parents discussed obviously wrongful activities, such as schemes to cheat on standardized tests. And the prosecution drew the jury's attention to this evidence during its opening statement and closing argument. For instance, during closing argument, government counsel stated: "[One] thing that you need to find

... [is] that the defendants ... knew that what they were doing [was] wrong. One way you know that [they did] is because Bruce Isackson told you that he knew it, from the witness stand."

The defendants argued through counsel that they had believed Singer's services to be legitimate and had acted in good faith.

The jury found both Abdelaziz and Wilson guilty on all counts. Abdelaziz and Wilson moved for judgment of acquittal or a new trial, raising, as most relevant here, arguments similar to those made in the pretrial motions to dismiss. The district court denied the motions, relying on the reasoning from its decision denying the motions to dismiss. *See United States* v. *Abdelaziz*, 578 F. Supp. 3d 110, 113-14, 116 (D. Mass. 2021). The court sentenced Abdelaziz and Wilson to twelve and fifteen months' imprisonment, respectively.

These timely appeals followed.

II. Rejection of the Defendants' Theory that Their Convictions Under 18 U.S.C. § 666 ("Theft or bribery concerning programs receiving Federal funds") Fail as a Matter of Law

We begin with the defendants' argument that the charges under 18 U.S.C. § 666 (as well as the related § 666 conspiracy counts) "fail as a matter of law." We review these questions of law about the scope of § 666 de novo, *see United States* v. *Fernandez*, 722 F.3d 1, 8 (1st Cir. 2013), and reject the defendants' argument.

The text of § 666 criminalizes "corruptly giv[ing], offer[ing], or agree[ing] to give anything of value to any person, with intent to influence or reward an agent of an organization ... in connection with any business, transaction, or series of transactions of such organization ... involving anything of value of $5,000 or more."[8] 18 U.S.C. § 666(a)(2). The parties agree that the "agent[s]" in this case are the university employees who worked with Singer and that the "organization[s]" are the universities. The defendants do not make any developed argument that their dealings with Singer and, through him, the university insiders were not "in connection with ... business, transaction[s], or [a] series of transactions of [the universities] involving anything of value of $5,000 or more." Nor do the defendants argue that the payments were not "inten[ded] to influence" the insiders in conducting that business or those transactions.

The focus of the defendants' arguments is instead on whether payments intended for university accounts – which the government does not dispute the defendants' payments were – can violate § 666. That is, the defendants dispute that the phrase "any person" in § 666 can refer to the "organization" which is the agent's principal. Here, the organization which is the agent's principal is a university. The defendants contend that a payment to a university principal is not covered by § 666's text and does not align with common or historical understandings of the terms "bribe" and "bribery" or the purposes of "bribery" statutes. In particular, the defendants emphasize that the government cannot produce a single case in the history of Anglo-American law in which a payment to an agent's principal was prosecuted as a bribe. Thus, the defendants contend that construing the provision to proscribe such payments would violate several canons of construction requiring that "ambiguous" criminal statutes be construed narrowly.

A.

We turn to the plain language of § 666. *See, e.g., Baker* v. *Smith & Wesson, Inc.*, 40 F.4th 43, 48 (1st Cir. 2022) ("We start with the [statutory] text ...."); *see also Salinas* v. *United States* , 522 U.S. 52, 55-57 (1997) (interpreting § 666 based on its "plain language"). That text refers to a thing of value given "to any person." 18 U.S.C. § 666(a)(2). At oral argument, defense counsel conceded that the "person" to whom a "[]thing of value" is given could be an organization.[9] *See* 1 U.S.C. § 1 (defining "person" to include "corporations, companies, associations, firms, partnerships, societies, and joint stock companies" "unless the context indicates otherwise").

Given this concession, we see no textual reason to exclude the organizational principal from the set of entities that qualify as "any person" for purposes of § 666. The Supreme Court has explained that courts should give effect to § 666's "expansive, unqualified language," including in its use of the word "any." *Salinas*, 522 U.S. at 56-57; *see also Sabri* v. *United States*, 541 U.S. 600, 605 (2004) (declining to read § 666 to require proof that crime itself had nexus with federal money); *Fischer* v. *United States*, 529 U.S. 667, 677 (2000) (reading "benefit" in § 666 to include Medicare funds). *Salinas*, for example, reasoned that Congress's use of "any" before "the business or transaction clause ... undercut[] [a defendant's] attempt to impose [a] narrowing construction" that would limit § 666's application to bribes affecting federal funds. 522 U.S. at 57. Here, the use of "any" before "person" militates against excluding principals from the set of eligible "person[s]."

Section 666's context and history buttress the conclusion that "any person" includes the agent's principal. *See Fernandez*, 722 F.3d at 20-27 (considering "statutory context," including history of § 666 and related statutes, in interpreting § 666). Congress amended § 666 into essentially its current form in 1986. *See id.* at 21-22. In so doing, Congress used the same operative language as used in 18 U.S.C. § 215, the bank bribery statute, which it had also revised earlier that year. Indeed, the committee report on the § 666 amendment explained that "[t]he provision parallels the bank bribery provision (18 U.S.C. [§] 215)." H.R. Rep. No. 99-797, at 30 n.9 (1986). *Compare* 18 U.S.C. § 215(a)(1), *with id.* § 666(a)(2).

Before 1986, § 215 prohibited "directly or indirectly, giv[ing], offer[ing], or promis[ing] anything of value to any [agent] of any financial institution ... or offer[ing] or promis[ing] any such [agent] to give anything of value to any person or entity, *other than such financial institution*, for or in connection with any transaction or business of such financial institution." Act of Oct. 12, 1984, Pub. L. No. 98-473, § 1107(a), 98 Stat. 1837, 2146 (emphasis added). The 1986 amendment to § 215 revised the statute to bar "corruptly giv[ing], offer[ing], or promis[ing] anything of value to any person, with intent to influence or reward an officer, director, employee, agent, or attorney of a financial institution in connection with any business or transaction of such institution." Act of Aug. 4, 1986, Pub. L. No. 99-370, § 2, 100 Stat. 779, 779.

This history of § 215 and thus of § 666 shows that Congress knew how to exclude the agent's principal from the set of "person[s]" who could receive the thing of value, and it chose not to do so in revising § 215 or importing its language into § 666. *Cf. Univ. of Tex. Sw. Med. Ctr.* v. *Nassar*, 570 U.S. 338, 357 (2013) (comparing the text of antidiscrimination statutes and concluding that "when Congress elected to address [a concept] as part of a detailed statutory scheme, it did so in clear textual terms"). Section 666 itself includes no express carveout – the statute refers only to "any person." That context further undercuts the defendants' effort to introduce a carveout for payments to the agent's principal.[10]

The defendants' textual counterarguments are unpersuasive. They first respond that the "person" and the "organization" must be distinct in order "to give each term independent meaning." Even when "person" and "organization" happen to refer to the same entity, however, each term does independent work in defining the offense: the former describes the recipient of the thing of value, while the latter identifies the agent's principal. *See* 18 U.S.C. § 666(a)(2); *cf. Littlefield* v. *Mashpee Wampanoag Indian Tribe*, 951 F.3d 30, 38 (1st Cir. 2020) (finding no surplusage where a statute contained multiple definitions of potential benefit recipients even though a particular person might qualify under multiple definitions). Further, the defendants do not explain – and we can think of no explanation – why their reasoning would not require concluding that the "agent" must also be distinct from the "person" who receives the thing of value. Yet even the defendants acknowledge that a payment to the agent himself "in exchange for an exercise of his powers" is a paradigmatic form of bribery covered by § 666.

The defendants turn for support to the Supreme Court's decision in *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158 (2001), but that case does not help their cause. *Cedric Kushner* involved a suit under the Racketeer Influenced and Corrupt Organizations ("RICO") Act, which "makes it 'unlawful for any person employed by or associated with any enterprise'" to engage in certain conduct. *Id.* at 160 (quoting 18 U.S.C. § 1962(c)). The Court concluded that the RICO Act's text contemplates "two distinct entities: (1) a 'person'; and (2) an 'enterprise' that is not simply the same 'person' referred to by a different name," because, by the statute's terms, the "person" must be "employed by or associated with" the "enterprise," and "[i]n ordinary English one speaks of employing, being employed by, or associating with others, not oneself." *Id.* at 161.

The premise of the defendants' argument is that § 666 "follows a similar structure" to that of the RICO statute and so, under *Cedric Kushner*, the "person" and the "organization" must be distinct. The defendants' premise is wrong: § 666's language does not parallel the RICO statute in the relevant respect. The RICO statute sets out a particular relationship between the "person" and the "enterprise" – the former must be "employed by or associated with" the latter – that is incompatible with the "person" and the "enterprise" being synonymous. In contrast, § 666's text does not require such a relationship between the "person" and the "organization." Instead, it refers broadly to "any person" and, separately, to an "organization."

At oral argument, Wilson's counsel also asserted that "the thing of value" required by § 666 cannot "be the type of professional benefit that the government has been relying on." *See* 18 U.S.C. § 666(a)(2) (requiring, inter alia, "giv[ing], offer[ing], or agree[ing] to give anything of value"). We need not decide whether professional benefits can qualify as "anything of value" for purposes of § 666 because that phrase, as used in the statute, refers not to what the agent personally receives from the arrangement but to what the defendants "g[a]ve[], offer[ed], or agree[d] to give ... to any person" – here, the money the defendants paid or agreed to pay to the universities. Money is indisputably a thing of value. *See, e.g., Salinas*, 522 U.S. at 57. That is all § 666 requires.

B.

The defendants also offer nontextual arguments to support their view that § 666 cannot criminalize payments to the university principals. They contend first that a payment to a university principal does not fall within ordinary or historical understandings of the terms "bribe" or "bribery" or implicate the purpose of antibribery provisions, and second that a series of statutory construction canons favor their reading: They assert that § 666 is "ambiguous," such that the rule of lenity applies. The government's reading, they argue, alters the balance of state and federal criminal jurisdiction, which should not be done without a clear statement by Congress. They conclude by arguing there are vagueness concerns which require a narrow reading of § 666.

Given the clear meaning of the language chosen by Congress, arguments about the meaning of "bribe" and "bribery" or the generalized purposes of "bribery" laws are beside the point.[11] As the Supreme Court said in *Bostock* v. *Clayton County*, 140 S. Ct. 1731 (2020), "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest." *Id.* at 1737. Nor does the fact that the government has not identified any historical bribery prosecution involving a payment to the agent's principal override § 666's clear text. *Cf. id.* at 1750-53 (rejecting narrow reading of Civil Rights Act of 1964 based on historical applications).

The defendants' arguments based on various canons calling for narrow constructions of ambiguous criminal statutes fail because the text of § 666 is not ambiguous with respect to whether it covers payments to the university principals. *See Salinas*, 522 U.S. at 66 ("The rule [of lenity] does not apply when a statute is unambiguous or when invoked to engraft an illogical requirement to its text."); *id.* at 59-60 (holding that the canon of construction requiring a clear statement to alter the federal-state balance of criminal jurisdiction "does not warrant a departure from [§ 666's] terms" where the statute's "text ... is unambiguous on the point under consideration"); *cf. Skilling* v. *United States* , 561 U.S. 358, 412 (2010) (finding no vagueness problem where it was "as plain as a pikestaff that" the conduct at issue would violate a statute (quoting *Williams* v. *United States*, 341 U.S. 97, 101 (1951))). The rule of lenity, for example, does not apply because "there is [no] '"grievous ambiguity or uncertainty" in the statute.'" *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (quoting *Staples* v. *United States*, 511 U.S. 600, 619 n.17 (1994)). The Supreme Court has consistently commanded that § 666 be interpreted in keeping with its "expansive, unqualified language," which "undercuts ... attempt[s] to impose ... narrowing construction[s]." *Salinas*, 522 U.S. at 56-57; *see also Sabri*, 541 U.S. at 605; *Fischer*, 529 U.S. at 677.

Further, the defendants' policy argument that our interpretation of § 666 would upset the state-federal balance and "criminalize a large swath of ordinary transactions" suffers from several flaws. That policy argument would arrogate to the federal judiciary choices which have been made by Congress. And the argument disregards that there are meaningful restrictions on § 666's scope.

The statutory text of § 666 imposes several restrictions on the type of conduct proscribed by the provision. First, the reach of § 666 is limited by two dollar thresholds. Section 666 applies only if the organization at issue "receives, in any one year period, benefits in excess of $10,000 under a Federal program." 18 U.S.C. § 666(b); *see id.* § 666(a). And "to fall within the purview of § 666, [a bribe] must be made 'in connection with any business, transaction, or series of transactions of [the covered] organization, government, or agency involving anything of value of $5,000 or more.'" *Fernandez*, 722 F.3d at 12 (second alteration in original) (quoting 18 U.S.C. § 666(a)(2)); *see id.* at 12-13 (discussing this "transactional element").

Most importantly, § 666 requires that a defendant have acted "corruptly." 18 U.S.C. § 666. This "corruptly" element provides a meaningful limit on the provision's sweep. *See, e.g.*, *Cooper Indus., Inc.* v. *Aviall Servs., Inc.*, 543 U.S. 157, 167 (2004) (describing "the settled rule" that courts "must, if possible, construe a statute to give every word some operative effect").

The government stresses that the requirement that the defendant act "corruptly" restricts the scope of permissible prosecutions. Its brief does not argue that any payment which violates any university policy could violate § 666. Instead, the government focuses on payments intended to induce university insiders to act contrary to the schools' underlying interests. But the definitions of "corruptly" that appear in the legislative histories of other federal bribery statutes point against the conclusion that the term somehow operates to exclude agents' principals from the set of "person[s]" who can receive the thing of value under § 666. *See* H.R. Rep. No. 87-748, at 18

(1961) ("The word 'corruptly' [in 18 U.S.C. § 201, the federal officials bribery statute,] ... means with wrongful or dishonest intent."); H.R. Rep. No. 99-335, at 6 n.24 (1985) ("The term 'corruptly' [in § 215, the bank bribery statute,] means that the act is done 'voluntantly [sic] and intentionally, and with the bad purpose of accomplishing either an unlawful end or result, or a lawful end or result by some unlawful methods or means. The motive to act corruptly is ordinarily a hope or expectation of either financial gain or other benefit to one's self, or some aid or profit or benefit to another.'" (quoting 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* § 34.08 (3d ed. 1977))). Nothing in those definitions appears uniquely incompatible with payments made to agents' principals.

Moreover, because the defendants' argument for the reversal of the § 666 counts does not squarely raise the meaning of "corruptly" in this context, we see no basis for reversing their convictions on any contention about the meaning of "corruptly."[12]

We reject the defendants' argument that the charges under § 666 fail as a matter of law because the payments at issue were intended for university accounts.[13]

We address the defendants' more successful argument that the § 666 convictions must be vacated for trial error in Section IV, set forth below.

III. Acceptance of the Defendants' Defenses as to Convictions Under 18 U.S.C. §§ 1341, 1343, and 1346 ("Honest Services Fraud" and "Property Fraud")

The defendants argue that the charges under the mail and wire fraud statutes, *see* 18 U.S.C. §§ 1341, 1343, 1346, fail as a matter of law. These mail and wire fraud charges were based on two distinct legal theories: honest services fraud and property fraud.[14] The defendants argue that the conduct charged in the indictment does not involve the core honest services doctrine identified in *Skilling*. They also argue that the statutory requirement that "property" be the subject of the alleged scheme or artifice to defraud cannot be met here.

While the question is close, in the end we agree with the defendants. Considering each theory de novo, *see United States* v. *Correia*, 55 F.4th 12, 41 (1st Cir. 2022); *Fernandez*, 722 F.3d at 8, we conclude that the honest services fraud theory fails as a matter of law and that the government's arguments with respect to the property theory are not adequate to support the jury instructions given at trial. We vacate the defendants' mail and wire fraud convictions, including the related conspiracy convictions (Counts One, Six, Eight, and Nine of the operative indictment).

A.

The government's honest services fraud theory essentially charges the defendants with a non-traditionally recognized form of bribery. Understanding this theory and the defendants' objections to it requires some background on the history of the mail and wire fraud statutes. In particular, it is important to understand (1) the law in this area before the Supreme Court's decision in *McNally* v. *United States*, 483 U.S. 350 (1987); (2) the congressional reaction to *McNally*; and (3) the Court's 2010 decision in *Skilling* interpreting the current scope of the mail and wire fraud statutes after those developments and in light of constitutional concerns. *See generally Skilling*, 561 U.S. at 399-402 (recounting this history).

1.

Sections 1341 and 1343 both prohibit "any scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretenses, representations, or promises."[15] 18 U.S.C. §§ 1341, 1343 (emphasis added). As the Supreme Court said in *Skilling*: "Emphasizing Congress' disjunctive phrasing, the Courts of Appeals, [beginning in the 1940s], interpreted the term 'scheme or artifice to defraud' to include deprivations not only of money or property, but also of intangible rights." 561 U.S. at 400. This "honest services doctrine" proscribed forms of fraud in which,

> [w]hile the offender profited, the betrayed party suffered no deprivation of money or property; instead, a third party, who had not been deceived, provided the enrichment. For example, if a city mayor (the offender) accepted a bribe from a third party in exchange for awarding that party a city contract, yet the contract terms were the same as any that could have been negotiated at arm's length, the city (the betrayed party) would suffer no tangible loss. Even if the scheme occasioned a money or property *gain* for the betrayed party, courts reasoned, actionable harm lay in the denial of that party's right to the offender's "honest services."

Id. (citation omitted). While honest services cases "[m]ost often ... involved bribery of public officials," courts also applied the theory to the private sector. *Id.* at 401 (quoting *United States* v. *Bohonus* , 628 F.2d 1167, 1171 (9th Cir. 1980)). The defendants do not assert that the statutes cannot reach purely private actors. "[B]y 1982, all Courts of Appeals had embraced the honest-services theory of fraud." *Id* . (citation omitted).

But the Supreme Court's 1987 decision in *McNally* "stopped [the theory] in its tracks." *Id.* "*McNally* involved a state officer who, in selecting Kentucky's insurance agent, arranged to procure a share of the agent's commissions via kickbacks paid to companies the official partially controlled." *Id.* at 401-02 (citing *McNally*, 483 U.S. at 360). The prosecution did not allege that the scheme had cost the state money or resulted in worse insurance; rather, it argued that the scheme had deprived Kentucky of its right to honest services. *Id.* at 402 (citing *McNally*, 483 U.S. at 353, 360). The Court rejected this argument and the honest services doctrine, which, it reasoned, "le[ft] [the mail and wire fraud statutes'] outer boundaries ambiguous and involve[d] the Federal Government in setting standards of disclosure and good government for local and state officials." *Id.* (quoting *McNally*, 483 U.S. at 360). The Court "read the statute 'as limited in scope to the protection of property rights,'" and stated that "[i]f Congress desire[d] to go further, ... it must speak more clearly." *Id.* (quoting *McNally*, 483 U.S. at 360).

Congress responded the following year by enacting 18 U.S.C. § 1346, which provides: "For the purposes of [the mail and wire fraud statutes], the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." *See Skilling*, 561 U.S. at 402.

In 2010, the Supreme Court considered a vagueness challenge to § 1346 in *Skilling*. *See id.* The defendant, a private sector actor, was "charged ... with conspiring to defraud [a company's] shareholders by misrepresenting the company's fiscal health, thereby artificially inflating its stock price" and allowing the defendant to profit through his salary, bonuses, and stock sales. *Id.* at 413. He contended that § 1346 did not provide fair notice of the conduct it prohibits and that its "standardless sweep" would enable arbitrary prosecutions. *Id.* at 403 (quoting defendant's brief); *see also, e.g.*, *Kolender* v. *Lawson*, 461 U.S. 352, 357 (1983) ("As generally stated, the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.").

Recognizing the constitutional due process concerns, including fair notice and vagueness, raised by the statute, the Court chose to narrow the statute, rather than invalidate it, to "preserve what Congress certainly intended the statute to cover," that is, what the Court called the "core" of the pre-*McNally* honest services doctrine. *Skilling*, 561 U.S. at 404. This core "involved fraudulent schemes to deprive another of honest services through bribes or kickbacks supplied by a third party who had not been deceived." *Id.*; *see also id.* at 407 ("Although some applications of the pre-*McNally* honest-services doctrine occasioned disagreement among the Courts of Appeals, these cases do not cloud the doctrine's solid core: The 'vast majority' of the honest-services cases involved offenders who, in violation of a fiduciary duty, participated in bribery or kickback schemes." (quoting *United States* v. *Runnels*, 833 F.2d 1183, 1187 (6th Cir. 1987))). "To preserve the statute without transgressing constitutional limitations, [the Court] ... h[e]ld that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law." *Id.* at 408-09. The defendants here argue that the conduct charged in the indictment does not involve the core honest services doctrine identified in *Skilling*.

The Court explained that when the narrowed § 1346 is "[c]onfined to these paramount applications," it "presents no vagueness problem." *Id.* at 404. Turning to the issue of notice, the Court said that, "'whatever the school of thought concerning the scope and meaning of' § 1346, it has always been 'as plain as a pikestaff that' bribes and kickbacks constitute honest-services fraud." *Id.* at 412 (quoting *Williams*, 341 U.S. at 101). And the narrowing construction limited the risk of arbitrary prosecutions by the fact that § 1346's "prohibition on bribes and kickbacks draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing – and defining – similar crimes," *id.* (citing, inter alia, 18 U.S.C. § 666(a)(2)), such that a "criminal defendant who participated in a bribery or kickback scheme ... cannot tenably complain about prosecution under § 1346 on vagueness grounds," *id.* at 413.

Because there was no allegation – or plausible way of reading the facts to suggest – that Skilling himself had participated in a bribery or kickback scheme, the Court concluded that he had not committed honest services fraud. *Id.*

2.

The defendants contend that their payments to the universities, the parties whose interests were purportedly betrayed by their agents, cannot constitute bribes under *Skilling*'s interpretation of § 1346. There is no charge of kickbacks in the indictment.

In response, the government relies on *Skilling*'s statement that its narrow construction of § 1346's "prohibition on bribes ... draws content not only from the pre-*McNally* case law, but also from federal statutes proscribing – and defining – similar crimes. See, *e.g.*, 18 U.S.C. §§ 201(b), 666(a)(2); 41 U.S.C. § 52(2) ...." 561 U.S. at 412. The government relies on this language to argue that § 1346 effectively incorporates a version of § 666, such that – borrowing the language of § 666 – § 1346 covers "[w]hoever ... corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of [a principal]." 18 U.S.C. § 666.

Although the question is a close one, we conclude that the government's reliance on this single statement in *Skilling* is misplaced. The government's reading is, for several reasons, impossible to reconcile with *Skilling*'s language and its core holding that § 1346 covers only "the bribe-and-kickback core of the pre-*McNally* case law." 561 U.S. at 409. The government has not identified any pre-*McNally* case involving a purported bribe paid to the victim of an alleged bribery scheme. Further, the statutes in force while courts developed the pre-*McNally* case law defining "bribery" do not support the conclusion that payments to the purportedly betrayed party constitute "bribes" as that term is traditionally understood or used in *Skilling.* Nor is there any support for that view in other legal sources defining "bribery." Rather than interpreting the language the government cites to override these considerations, we understand it instead to constrain the honest services doctrine's sweep. And this understanding that *Skilling*'s reference to other statutes does not mean that § 1346 is coextensive with these other statutes draws additional support from the facts that those statutes define offenses broader than traditional bribery and that those statutes may vary from each other in their coverage.

The government's reading ignores *Skilling*'s core "hold[ing] that § 1346 criminalizes *only* the bribe-and-kickback core of the pre-*McNally* case law." *Id.*; *accord id.* at 408 (confining the scope of § 1346 "to the core pre-*McNally* applications"); *see id.* at 404-09 (looking to "the doctrine developed in pre-*McNally* cases in an endeavor to ascertain the meaning of the phrase 'the intangible right of honest services'" (quoting 18 U.S.C. § 1346)). The government has not cited any pre-*McNally* honest services case involving a purported bribe paid to an agent's purportedly betrayed principal, and does not dispute that *no* pre-*McNally* case involved such a payment. *Skilling* embodies a narrower understanding of the meaning of "bribery" for purposes of honest services fraud that cuts against concluding that the conduct involved here, which does not fall "[i]n the main ... [of] the pre-*McNally* cases," is a "bribe" in the sense meant by *Skilling*.[16] *Id.* at 404.

The government emphasizes *Skilling*'s characterization of pre-*McNally* case law as recognizing the potential for honest services fraud "[e]ven if [a] scheme occasioned a money or property *gain* for the betrayed party." *Id.* at 400 (citing *United States* v. *Dixon*, 536 F.2d 1388, 1400 (2d Cir. 1976)). But the government does not contend that the Court had in mind a case like this one, where the alleged bribe was paid directly to the purportedly betrayed party. In fact, the cases to which the Court referred appear to have involved traditional bribery fact patterns that happened incidentally to benefit the agent's principal financially. *See id.* (citing, inter alia, *Shushan* v. *United States*, 117 F.2d 110, 115, 119 (5th Cir. 1941)). *Dixon*, the case the Court cited for the proposition that schemes that financially benefitted the principal could still be actionable under pre-*McNally* doctrine, did not involve bribery at all; it simply stated in passing that honest services fraud could cover schemes that "enriched" the principal. 536 F.2d at 1400 (citing *United States* v. *Isaacs*, 493 F.2d 1124 (7th Cir. 1974) (per curiam)). In support of that proposition, *Dixon*, in turn, cited a Seventh Circuit decision in which racing interests bribed certain Illinois officials to allow additional racing events, which incidentally increased tax revenues. *See Isaacs*, 493 F.2d at 1135, 1139, 1149-51. That is a classic bribery fact pattern, distinct from the direct payments to the university principals involved here.

Nor do statutes in effect during the pre-*McNally* period show that a payment to the purportedly betrayed party would have been considered a "bribe." As discussed above, until its amendment in 1986, shortly before the Court decided *McNally*, the bank bribery statute, 18 U.S.C. § 215, expressly excluded payments to an agent's principal from its coverage. *See* Act of Oct. 12, 1984, § 1107(a), 98 Stat. at 2146 (prohibiting "directly or indirectly, giv[ing], offer[ing], or promis[ing] anything of value to any [agent] of any financial institution ... or offer[ing] or promis[ing] any such [agent] to give anything of value to any person or entity, *other than such financial institution*, for or in connection with any transaction or business of such financial institution" (emphasis added)). This limitation in scope undercuts any argument that it was clear before *McNally* that "bribery" would encompass a payment to the purportedly betrayed party.

Other legal sources defining "bribery" either weigh against the government's position or are at most ambiguous. *Black's Law Dictionary*, for example, defines "bribery" as "[t]he corrupt payment, receipt, or solicitation of a *private* favor for official action." *Bribery*, *Black's Law Dictionary* (11th ed. 2019) (emphasis added). While the government contends that the university insiders stood to benefit professionally from the defendants' payments, describing this type of indirect benefit from a payment to a university principal – the alleged victim of the scheme – as a "private favor" is at best a stretch. *Cf. United States* v. *Thompson*, 484 F.3d 877, 884 (7th Cir. 2007) (observing, in a pre-*Skilling* prosecution for honest services fraud under § 1346, that "[t]he United States has not cited, and we have not found, any appellate decision holding that an increase in official salary, or a psychic benefit such as basking in a superior's approbation (and thinking one's job more secure), is the sort of 'private gain' that makes an act criminal" under § 1346, and rejecting the prosecution's theory (quoting *United States* v. *Bloom*, 149 F.3d 649, 655 (7th Cir. 1998))); *see also, e.g.*, H. James, *When Is a Bribe a Bribe? Teaching a Workable Definition of Bribery*, 6 Teaching Bus. Ethics 199, 209–16 (2002) ("Any payment made to a principal, for any purpose, is not by definition a bribe.").

The government's attempt to circumvent this lack of authority by relying on *Skilling*'s citation to other anticorruption statutes fails. The government's reading of § 1346 to incorporate a version of § 666 eliminates the important limitations on liability included in § 666, including the requirement that affected programs receive federal funds and the threshold dollar value involved, which we described above.[17] *See* 18 U.S.C. § 666(a)-(b). More importantly, the Supreme Court in *Skilling* emphasized these specific limitations in describing the statutes. *See* 561 U.S. at 413 n.45.

Critically, the statement on which the government relies appears in the Court's discussion of why its construction of § 1346 will prevent arbitrary prosecutions. *See id.* at 412-13. In that context, the citation is best read as constraining honest services prosecutions by referring prosecutors to statutes that collectively offer general guidance as to whether particular conduct may be actionable, rather than as expanding the concept of "bribery" to incorporate even the outermost limits of the cited statutes' scopes. Indeed, the government's argument would stretch criminal liability beyond those statutes' context-specific limitations. *Skilling* does not hold, as the government argues, that any conduct that might violate those other statutes also violates § 1346.

Our reading properly accounts for the fact that Congress crafted § 666 and other federal anticorruption statutes to target particular classes of misconduct, and thus did not necessarily confine those statutes to criminalizing the classic crime of "bribery" in the sense described in *Skilling* and at the core of the pre-*McNally* case law. The Supreme Court has repeatedly observed that § 666 uses "expansive, unqualified language" in service of Congress's unique interest in protecting federal funds from misuse. *Salinas*, 522 U.S. at 56; *see id.* at 56-59; *see also Sabri*, 541 U.S. at 606-07. That language sweeps beyond the type of "bribery" reflected in pre-*McNally* law and the other legal sources discussed above. We do not think that while narrowly construing §

1346 to cover "the bribe-and-kickback core of the pre-*McNally* case law," *Skilling*, 561 U.S. at 409, the Court meant simultaneously to extend § 666's broad language to apply outside the particular context for which Congress designed it.

Indeed, the government's reading would threaten to render § 666 (and other specialized anticorruption statutes) superfluous, since § 1346 would cover the same ground while also extending to other contexts. *Cf. id.* at 413 n.45 (addressing potential "superfluous[ness]" between § 1346 and more specialized anticorruption statutes).[18] Our reading recognizes the statutes' distinct roles, with § 666 covering a broader set of types of conduct but applying only in a narrower context. Section 666's breadth is inseparable from its narrow focus.

The government ignores the fact that *Skilling* itself recognized that other federal anticorruption statutes may vary in scope. *See id.* at 412-13 (describing these statutes as "defining ... similar [but not necessarily identical] crimes"). Given the number of potentially relevant statutes, the variation resulting from the government's reading would be problematic. For example, this variation would have existed in this case under the pre-1986 version of the bank bribery statute, § 215, which explicitly excluded payments to an agent's principal. *Compare* Act of Oct. 12, 1984, § 1107(a), 98 Stat. at 2146 (pre-1986 § 215), *with, e.g.*, 18 U.S.C. § 666(a)(2), *and* Act of Oct. 23, 1962, Pub. L. No. 87-849, 76 Stat. 1119, 1119 (enacting 18 U.S.C. § 201, the federal officials bribery statute, which potentially applies to payments to "any public official" or "any other person").

Construing § 1346 to cover conduct not covered by the core pre-*McNally* understanding of "bribes" would not provide sufficient notice for "ordinary people [to] understand what conduct is prohibited." *Skilling*, 561 U.S. at 402 (quoting *Kolender*, 461 U.S. at 357). An ordinary person would not be on notice that a payment to a purportedly betrayed party was bribery within the core of pre-*McNally* law, raising the same concern which motivated the Supreme Court in *Skilling* to construe honest services fraud as it did. Our holding that § 666 may cover the defendants' conduct does not cure this concern: § 1346 does not have § 666's clear text, and, as we have explained, *Skilling* did not hold that liability under any other federal anticorruption statute suffices to render an act criminal under § 1346.

Various canons and other interpretive methodologies employed by the Supreme Court reinforce our conclusion that, after *Skilling*, § 1346 does not cover the defendants' conduct as honest services fraud. Unlike in our interpretation of § 666, these interpretive tools do apply here because the applicability of § 1346 to the charged conduct has little historical antecedent and would introduce ambiguity. And the Supreme Court "ha[s] instructed that 'ambiguity concerning the ambit of criminal statutes[, including the mail and wire fraud statutes,] should be resolved in favor of lenity.'" *Cleveland* v. *United States*, 531 U.S. 12, 25 (2000) (quoting *Rewis* v. *United States*, 401 U.S. 808, 812 (1971)) (applying rule of lenity in non-honest services mail fraud prosecution). Similarly, in the honest services context, the Court has repeatedly "decline[d] to 'construe [federal criminal] statute[s] in a manner that leaves [their] outer boundaries ambiguous and involves the Federal Government in setting standards' of 'good government for local and state officials.'" *McDonnell* v. *United States*, 136 S. Ct. 2355, 2373 (2016) (quoting *McNally*, 483 U.S. at 360); *see, e.g.*, *Skilling*, 561 U.S. at 408-12; *McNally*, 483 U.S. at 360. Indeed, embracing the government's reading of § 1346 would go beyond "'setting standards' of 'good [state and local] government,'" *McDonnell*, 136 S. Ct. at 2373 (quoting *McNally*, 483 U.S. at 360), and stretch honest services bribery to potentially criminalize such parental actions as, for example, donations to preschools by parents who hope to gain admission for their children. Further, the contrast between the Court's repeated instruction to apply the honest services doctrine narrowly and its broad, textualist application of § 666 supplies another reason not to read *Skilling* as incorporating § 666 into § 1346.

We should not be misunderstood. We do not say the defendants' conduct is at all desirable. That is far different from the issue we face of whether that conduct is in violation of § 1346's honest services language as interpreted by the Supreme Court in *Skilling*. As *Skilling* explained, "[i]f Congress desires to go further, ... it must speak more clearly than it has." 561 U.S. at 411 (quoting *McNally*, 483 U.S. at 360). The government's honest services theory cannot support the defendants' mail and wire fraud convictions.

B.

Independently of honest services fraud, the government argues that we should affirm the defendants' mail and wire fraud convictions on the distinct property fraud theory. The mail and wire fraud statutes prohibit use of the mails or wires, respectively, to effect "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises." 18 U.S.C. §§ 1341, 1343. A prosecution for property fraud under these statutes requires the government to prove "that the 'object of the fraud ... [was] [money or] property in the victim's hands.'" *Pasquantino* v. *United States*, 544 U.S. 349, 355 [96 AFTR 2d 2005-5392] (2005) (second alteration and omission in original) (internal quotation marks omitted) (quoting *Cleveland*, 531 U.S. at 26).

The asserted "property" that the government argues was obtained here is "admissions slots." Indeed, the district court instructed the jury that, "[f]or purposes of the mail and wire fraud statutes, admission[s] slots are the property of the [u]niversities."

The defendants contend, however, that admissions slots can never qualify as property for purposes of the mail and wire fraud statutes, and thus that their convictions under these statutes must be reversed for that reason alone. As a fallback argument, they also contend that even if some admissions slots could be property for purposes of those statutes, we must vacate the convictions because, given the limitations of the government's arguments and evidence in this case, the district court's instruction that "admissions slots" are property was error.

The government responds to these two different defense arguments with one categorical assertion. It contends that "admissions slots" at the universities supply the necessary property because admissions slots by their nature constitute property.[19]

We reject the government's argument that admissions slots at any university always qualify as property for purposes of the mail and wire fraud statutes. The government's categorical argument fails, for example, to recognize even the well-known variations in types of admissions slots offered at the university level; for instance, early admission, rolling admission, conditional admission, waiting-list admission, and deferred admission. Nor does the government's categorical approach account for the fact that admissions occur at all levels of education, from nursery school through postgraduate studies, and involve millions of students and parents. We reject, too, the defendants' equally categorical contention to the contrary and so reject their argument that their property-based convictions under these statutes must be reversed on the ground that the government did not prove that property was involved in the commission of those offenses because "admissions slots" cannot be property.

But we do agree with the defendants' more limited fallback argument that the jury instruction erred in stating, based on the arguments and record in this case, that "admission[s] slots are the property of the [u]niversities." We see no basis for concluding that such a categorical statement is invariably true of any admissions slot, and the government has not identified any basis in the record that would indicate that the instruction could be upheld on the ground that there was evidence that the admissions slots in question in the charged offenses in this case qualified as property as a matter of law.

We emphasize the narrowness of our holding: We do not hold that admissions slots cannot ever be property. Nor do we hold that the jury instruction given by the district court could never be appropriate. The resolution of these questions will require much more detail, both legal and factual, on the nature of the purported property interest at issue. It may well be that there must be resolution of disputed facts by a jury and resolution of the ultimate legal question by the court. A court may well be able to validly conclude on the evidence in a particular case that admissions slots constitute property. Such increased detail would better position a district court to consider, for example, whether dictionaries, case law, treatises, or other legal sources establish that similar interests are treated as property, *see, e.g.*, *id.* at 356 (citing such sources); *Carpenter* v. *United States*, 484 U.S. 19, 26 (1987) (similar), and whether expert educational and/or economic evidence is warranted. But here, the government does not identify from the record of this case adequate details about the admissions slots at issue, or admissions slots generally, that would support the instruction given. Thus, we see no basis for concluding that the district court validly instructed the jury that, "[f]or purposes of the mail and wire fraud statutes, admission[s] slots are the property of the [u]niversities."

1.

The fundamental problem with the government's argument as to why the instruction was not in error is that the government fails to describe the purported property interest in anything other than highly general, abstract terms, leaving us no firm basis on which to assess whether the admissions slots at issue here constitute property. The government's brief describes such slots as economically valuable and exclusively within the power of a university to issue, revoke, or prohibit transfer of, and on that basis alone it asks us to conclude that they are property.

Under controlling Supreme Court precedent, we do not accept the government's argument that admissions slots always qualify as property for purposes of the mail and wire fraud statutes merely because they may bear some hallmarks of traditionally recognized forms of property. A series of Supreme Court decisions have counseled that courts should resort to traditional notions of property in construing the mail and wire fraud statutes. *See Pasquantino*, 544 U.S. at 356 (citing treatises and case law in conducting property analysis); *Cleveland*, 531 U.S. at 24 ("We reject the Government's theories of property rights [in part] because they stray from traditional concepts of property."); *Carpenter*, 484 U.S. at 26; *cf. Shaw* v. *United States*, 137 S. Ct. 462, 466-67 (2016) (citing treatises and case law in analyzing whether property requirement was satisfied under bank fraud statute, 18 U.S.C. § 1344). *Carpenter*, for example, held that "[c]onfidential business information" constitutes property under §§ 1341 and 1343 because it "has long been recognized as property"; the Court cited in support of its conclusion an array of cases, a statute, and a treatise. 484 U.S. at 26. Based on these decisions, the parties agree that "[i]ntangible rights can qualify [as property] ... if they have historically been treated as property or bear its traditional hallmarks."

The Supreme Court's decision in *Pasquantino* explained that we must determine whether the alleged property interest constitutes "'property' as that term ordinarily is employed." 544 U.S. at 356; *see id.* ("When interpreting a statute, we must give words their ordinary or natural meaning." (quoting *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004) (internal quotation marks omitted))). The Court's mail and wire fraud decisions offer several potentially relevant guideposts for that inquiry, including whether the purported property at issue falls within a dictionary definition of that term, whether it has been recognized as property in case law or other legal sources, and whether it exhibits traditional attributes of property. *See, e.g.*, *id.* at 355-57. We consider these factors in turn, none of which support the government's categorical position, in defending the instruction, that admissions slots always constitute property.

Pasquantino itself relied in large part on *Black's Law Dictionary*'s definition of "property" for guidance on the term's ordinary meaning. *See id.* at 356 (citing *Property*, *Black's Law Dictionary* (4th ed. 1951)). Here, however, the government does not make any argument based on the dictionary definition of "property."

The government does offer two cases recognizing interests purportedly analogous to admissions slots as property, but both are easily distinguishable. The government cites the Supreme Court's decision in *Bridge* v. *Phoenix Bond & Indemnity Co.*, 553 U.S. 639 (2008), which allowed a group of plaintiffs who regularly sought to purchase tax liens at county auctions to pursue a RICO claim against a rival bidder based on allegations that the rival had committed mail fraud by fraudulently attesting that it had complied with a county rule regulating the number of bids that an entity could make. *See id.* at 642-44, 647-48, 661. In fact, *Bridge*'s analysis did not address the money or property requirement – the Court accepted the case to answer a different question about the interaction between the RICO and mail fraud statutes. *Id.* at 641-42. Nonetheless, the government argues that it held "that [the] false representation[s] to secure ... extra bid[s] ... , thereby depriving other bidders of the opportunity to obtain the liens, w[ere] ... 'act[s] ... indictable as mail fraud.'" (Quoting *id.* at 648.) To the extent the government seeks to use this case, it misses the fact that the property the fraudulent bidder in *Bridge* sought to obtain, and of which the plaintiffs claimed to be defrauded, was not the bids, but the "valuable liens" available in the auctions. *Id.* at 648; *cf.* *Pasquantino*, 544 U.S. at 356 (recognizing a "right to be paid money" as property under mail and wire fraud statutes).

The government's other authority, *United States* v. *Frost*, 125 F.3d 346 (6th Cir. 1997), held that a university "ha[d] a property right in [unissued] degree[s]." *Id.* at 367. The government contends that admissions slots are analogous to unissued degrees. We agree with the defendants, however, that unissued degrees are meaningfully different from admissions slots, at least insofar as the government has described such slots. *Frost* itself observed that a degree represents the culmination of the transaction between the university and the student, in which the university, "in return for tuition money and scholarly effort, ... agrees to provide an education and a degree." *Id.* So far as the government's arguments show, an admissions slot, in contrast, involves an offer to participate in that transaction – one that a potential student may or may not accept. Even assuming *Frost*'s correctness, it does not establish that admissions slots are a historically recognized form of property interest.

The government falls back to an argument that admissions slots are necessarily property because they "bear the primary traditional hallmarks of property."[20] It contends that an interest qualifies as property if it exhibits (1) "exclusivity," *see Carpenter*, 484 U.S. at 26-27 (observing that "exclusivity is an important aspect of confidential business information and most private property"), and (2) "economic value," *see Pasquantino*, 544 U.S. at 355-57 (holding that "[v]aluable entitlement[]" to be paid taxes is property); *Cleveland*, 531 U.S. at 22 (observing that unissued licenses had economic value to Louisiana, but concluding that this value alone did not make the licenses property in the State's hands). It then asserts that admissions slots always have these features. We conclude that this purported test is too broad, as it would construe "property" to reach abstract interests that the Court, as well as several circuits, have concluded fall outside the statutes' scope.

Portions of the government's brief could be read to argue that economic value alone suffices to turn an intangible interest into a property right under the mail and wire fraud statutes. In particular, the brief asserts that *Pasquantino* defined property as simply "something of value." While the Court did use that phrase, *Pasquantino*, 544 U.S. at 355 (quoting *McNally*, 483 U.S. at 358), it did not state that economic value alone brought the purported property at issue within the scope of §§ 1341 and 1343; instead, it looked to a legal dictionary, treatises, and case law to determine whether the particular "[v]aluable entitlement[]" at issue constituted property,[21] *id.* at 356; *see id.* at 355-57.

But even to the extent the government argues that admissions slots are always property because they are, by their nature, *both* exclusive and economically valuable, its proposed test sweeps too broadly. *McNally* illustrates the problem. The purported right to honest services that *McNally* declined to recognize as property would satisfy both of the test's prongs: the right belonged exclusively to the entity to which honest services were owed, *cf. Skilling*, 561 U.S. at 401 (characterizing pre-*McNally* honest services doctrine as proscribing "breache[s of an employee's] allegiance to his employer" (quoting *United States* v. *McNeive*, 536 F.2d 1245, 1249 (8th Cir. 1976))), and plainly held economic value for that entity. The proposed test's failure to reach the right result on *McNally*'s facts demonstrates its overinclusiveness.[22]

The proposed test is also incompatible with multiple circuit decisions holding that various intangible interests that are both exclusive and valuable fall outside the scope of §§ 1341 and 1343. For example, the government's theory conflicts with the Sixth Circuit's decision in *United States* v. *Sadler*, 750 F.3d 585 (6th Cir. 2014). There, the government charged one of the defendants, Nancy Sadler, with wire fraud in connection with the purchase of controlled substances. *See id* . at 588-89. The prosecution did not dispute that Sadler paid full price for the pills at issue; instead, to satisfy the property requirement, it argued that Sadler had lied to the sellers about the patients to whom she would distribute the pills, "depriv[ing] the [sellers] of ... a right to accurate information before selling the pills." *Id.* at 590-91. The court rejected this argument, reasoning that "the ethereal right to accurate information" did not qualify as a property right, in part because it did not "amount[] to an interest that 'has long been recognized as property.'" *Id.* at 591 (quoting *Cleveland*, 531 U.S. at 23); *accord United States* v. *Yates*, 16 F.4th 256, 265 (9th Cir. 2021). The government's proposed test would call for the opposite result, since a party's purported right to accurate information before engaging in a transaction would presumably both have economic value for and belong exclusively to that party. *See also United States* v. *Bruchhausen*, 977 F.2d 464, 467-68 (9th Cir. 1992) (declining to recognize as property a seller's right to control "the destination of [its] products after sale," even though such a right would, by hypothesis, be exclusive to the seller and potentially economically valuable).

The government's highly general argument would criminalize a wide swath of conduct. Under the government's broad understanding of property applied to admissions slots as a class, embellishments in a kindergarten application could constitute property fraud proscribed by federal law. *Cleveland* explained that it "reject[ed] the Government's theories of property rights not simply because they stray[ed] from traditional concepts of property," but also "because [they] invite[d the Court] to approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." 531 U.S. at 24; *cf. Yates*, 16 F.4th at 265 (rejecting property theory that "would transform all deception into fraud").

Further, as the Court stated in *Cleveland*:

> [T]o the extent that the word "property" is ambiguous as placed in [the mail and wire fraud statutes], we have instructed that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." This interpretive guide is especially appropriate in construing [the mail and wire fraud statutes] because ... mail [and wire] fraud [are] predicate offense[s] under RICO .... In deciding what is "property" [in this context], we think "it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite."

531 U.S. at 25 (citations omitted) (first quoting *Rewis*, 401 U.S. at 812; and then quoting *United States* v. *Universal C.I.T. Credit Corp.*, 344 U.S. 218, 222 (1952)); *see* 18 U.S.C. § 1961(1)(B) (defining mail and wire fraud as predicate offenses for purposes of RICO statute).

2.

At the same time, we must also reject the defendants' argument that no admissions slot at any university can qualify as property for purposes of the mail and wire fraud statutes and thus that their property-based convictions under those statutes must be reversed on this basis. The defendants characterize admissions slots as mere "offer[s] to engage in a transaction: The college is offering to provide educational services to a student in exchange for tuition payments." However, the defendants do not address the complexities that would arise were there to be evidence that a particular admissions slot is more than a mere offer to transact. The same complexities which undercut the government's argument undercut this argument by the defense. *Cf. Tamboura* v. *Singer*, No. 19-cv-03411, 2020 WL 2793371, at *1-5 (N.D. Cal. May 29, 2020) (dismissing for lack of standing two class action lawsuits to recover application fees from universities at which Singer arranged side doors alleging that the plaintiffs "did not receive the 'fair' and 'objective' admissions process that they were promised" in a "bargain-for-exchange," only because the plaintiffs did not allege that they “applied for, were being considered for, or were denied ... athletic spot[s],” which were the “focus[]” of “Singer's scheme”).

We thus cannot accept the defendants' contention that admissions slots can never be property, such that we could reverse their property-based convictions on that ground alone.

3.

There remains the defendants' argument that their property-based convictions must be vacated because, even if admissions slots could constitute property in some circumstances, the jury instruction here was incorrect. The defendants advance two distinct arguments in this regard, one of which we cannot accept but the other of which we do.

The defendants take aim at the instruction in part because they contend that the question whether admissions slots constitute property is – as a matter of law – a question of fact to be decided by the jury. But neither party has provided any briefing on whether the question whether an interest constitutes property is, regardless of the facts of the case, a question of law to be decided by the judge. Indeed, the parties' arguments are simply not clear as to what issues would present questions of fact to be determined by a jury, much less what are questions of law to be determined by a court. Neither party has cited any Supreme Court case law resolving this issue, and, as best we can tell, the Supreme Court has not resolved the matter. Perhaps it will in upcoming cases. But we do not decide important issues of law based on vague, broad, and unsupported assertions by the parties in a case. We need not resolve the issue here, and nothing in this opinion should be taken to suggest that the ultimate determination of whether admissions slots are property is an issue for the jury.

That said, we do find persuasive the defendants' separate contention that the jury instruction was erroneous here because it instructed that “admission[s] slots are the property of the [u]niversities.” There is some ambiguity as to whether, in making this instruction, the district court accepted the government's contention that any admissions slot at any university necessarily qualifies as property. If so, then we have already explained why that conclusion is incorrect.

If, however, the instruction was based on a more specific determination regarding the admissions slots at the universities at issue here, we fail to see the basis in the record for such a conclusion. We do not understand admissions processes to be universally the same across universities, and the meaning of “admissions slot” may differ across institutions, yet the government's argument treats them interchangeably and in sweeping terms. Indeed, the government has cited no evidence and offered no argument specific to the admissions slots at the schools at which these two defendants sought admission for their children. Nor does the government offer any guidance – or record citations – for understanding the contours of these specific universities' admissions policies and processes or the rights, benefits, or obligations, if any, associated with obtaining an admissions slot at these universities. It develops no argument, for example, that either a student's application or a university's offer of admission creates a contractual relationship between the applicant and the school. Nor does it argue that every student awarded an admissions slot will eventually enroll – in fact, it acknowledges, as it clearly must, that some will not.

With respect to what a proper jury instruction would say, or even whether one would be proper in this case given a more developed record on remand, we are not in a position to address the question, given the nature of the arguments that have been made to us. We do emphasize, though, that the argument that admissions slots are categorically property because they are exclusive and have economic value is insufficient. And, to the extent there are more case-specific arguments about the specific admissions slots involved in the charged offenses in a given case, we emphasize only that any argument that those admissions slots constitute property would have to show that, in light of what the record revealed about the nature of those particular slots, they would satisfy the standards that we have described above that the Supreme Court requires us to apply to determine whether an intangible right is a species of property.

We recognize that our analysis leaves considerable uncertainty as to how district courts should apply the mail and wire fraud statutes' property requirement in cases involving admission to educational institutions. There are sound reasons to be prudent and cautious about criminalizing conduct, even unethical conduct, in this complicated area affecting so many students and parents.

4.

We hold that, based on the arguments made by the government, the district court's jury instruction was error. We therefore vacate the defendants' convictions on the mail and wire fraud charges, including the related conspiracy charges.

IV. Acceptance of the Defendants' Argument that There Was a Prejudicial Variance with Respect to the Conspiracy Charges

We turn to the defendants' core contention that under Supreme Court and **First Circuit** precedent the conspiracy charges are of an impermissible "rimless wheel" type forbidden by law, depriving them of fair trials.[23] Count One of the indictment alleged an overarching nationwide conspiracy among Singer, his staff, university insiders, and parents to facilitate the parents' children's admission to Georgetown, Harvard, Stanford, UCLA, and USC by means of mail and wire fraud, in violation of §§ 1341, 1343, and 1346. Count Two alleged an overarching nationwide conspiracy among a subset of the same individuals to secure children's admission to USC by means of federal programs bribery, in violation of § 666. The defendants contend that the evidence is at most sufficient to show, however, that they agreed to join only a narrower conspiracy, which was to gain admission for each's *own* respective child or children (rather than to gain admission also for other parents' children). As a result, they contend that there was a variance as to both counts, because that narrower conspiracy is not the broader one charged.[24]

The defendants' characterization of the charged conspiracy as a "rimless wheel" derives from the Supreme Court's decision in *Kotteakos* v. *United States*, 328 U.S. 750 (1946). There, the government alleged that a single hub figure had assisted otherwise unrelated clients or groups of clients in fraudulently obtaining separate loans. *See id.* at 752-55. The government indicted the hub figure and his clients as part of one overarching conspiracy. *Id.* at 752-53. The Court concluded that the evidence did not show that several client-defendants had agreed to participate in a single conspiracy with the other clients.[25] *See id.* at 754-55. Instead, "the pattern was that of separate spokes meeting at a common center ... without the rim of the wheel to enclose the spokes," which "made out a case, not of a single conspiracy, but of several." *Id.* at 755 (internal quotation marks omitted); *see id.* at 754-55. Further, the Court held that, while the failure to prove the single conspiracy charged might amount to harmless error in some cases, the defendants had been prejudiced by a defect in the jury instructions. *See id.* at 767-72. More generally, the Court warned of the danger of prejudice to defendants in cases where the government charges a broad conspiracy but proves only a collection of narrower ones, as the overbroad charge increases the risk that a jury will be exposed to and weigh against a defendant evidence that is actually relevant only to a separate conspiracy in which the defendant was not a participant. *See id.* at 766-67.

Abdelaziz and Wilson contend that the evidence fits *Kotteakos*'s "rimless wheel" model, with Singer and his associates as the hub and parents as the spokes. They assert that, whatever agreements might have existed among Singer and other parents, the evidence would not allow a reasonable jury to find that each of Abdelaziz and Wilson agreed to conspire with those parents. And they argue that this variance between the charges in the indictment and the proof at trial prejudiced them because the overarching conspiracy charges allowed the government to introduce evidence related to other parents' activities that undermined Abdelaziz's and Wilson's defenses and led the jury to convict them for those other parents' conduct and not for their own actions. In particular, the defendants contend that the overarching conspiracy charge enabled the prosecution to present to the jury inflammatory evidence, in the form of both witness testimony and recorded calls, of other parents' obviously culpable conduct in which Abdelaziz and Wilson played no part.

This court determines whether convictions for conspiracy must be vacated on the ground that the scope of the conspiracy proved at trial varied from the conspiracy that was charged in the indictment by answering three questions:

> (1) Is the evidence sufficient to permit a jury to find the [conspiracy] that the indictment charges? (2) If not, is it sufficient to permit a jury, under a proper set of instructions, to convict the defendant of a related, similar conspiracy [to violate the same statute]? (3) If so, does the

> variance affect the defendant's substantial rights or does the difference between the charged conspiracy and the conspiracy proved amount to "harmless error?"

United States v. *Glenn*, 828 F.2d 855, 858 (1st Cir. 1987) (Breyer, J.); *see also United States* v. *Wihbey*, 75 F.3d 761, 773 (1st Cir. 1996) ("[S]o long as the statutory violation remains the same, the jury can convict even if the facts are somewhat different than [those] charged – so long as the difference does not cause unfair prejudice." (quoting *United States* v. *Twitty*, 72 F.3d 228, 231 (1st Cir. 1995))).

The answer to the second question is not in dispute: the government contends – and the defendants do not make any developed argument to the contrary – that the evidence was sufficient to permit a jury to convict each defendant of conspiring with Singer, his staff, and university insiders to secure his own child's or children's admission. That leaves only the first and third questions at issue.

We analyze first whether there was sufficient evidence to convict the defendants of the broader charged conspiracy, and second whether, if not, the resulting variance from the indictment prejudiced the defendants. We conclude that the evidence was insufficient to prove that these defendants agreed to join the broader charged conspiracy and that the defendants were prejudiced by the variance, and so we vacate the defendants' conspiracy convictions.[26] We also vacate Wilson's substantive § 666 convictions.

A.

To assess whether the claimed variance occurred, we must determine whether the evidence sufficed for a rational juror to find beyond a reasonable doubt that the defendants agreed to join the broader charged conspiracy. *Glenn*, 828 F.2d at 858. As with all sufficiency challenges, our review is de novo, and we must review the evidence in the light most favorable to the verdict. *United States* v. *Dellosantos*, 649 F.3d 109, 115, 117 (1st Cir. 2011). The evidence cannot suffice to support the verdict through the kind of inference-stacking that "would require impermissible speculation on the jury's part." *Glenn*, 828 F.2d at 860. We begin this inquiry by providing the relevant legal background, which reveals the relevance to the inquiry of three specific factors. We then turn to the record in this case regarding each of those factors.

1.

The three factors that we have found to be helpful in guiding the inquiry into whether the evidence suffices to show that a defendant agreed to join a conspiracy as broad as the one charged rather than only a smaller, narrower one are "(1) the existence of a common goal [among the alleged participants in the charged conspiracy], (2) interdependence among [the alleged] participants [in the charged conspiracy], and (3) overlap among the [alleged] participants [in the charged conspiracy].'"

Dellosantos, 649 F.3d at 117 (quoting *United States* v. *Mangual-Santiago*, 562 F.3d 411, 421 (1st Cir. 2009)). The analysis is "pragmatic," *United States* v. *Fenton*, 367 F.3d 14, 19 (1st Cir. 2004), and no single factor "is necessarily determinative," *United States* v. *Díaz-Arias*, 717 F.3d 1, 21 (1st Cir. 2013); *see, e.g.*, *Dellosantos*, 649 F.3d at 120-21 (considering factors collectively).

It is particularly important in this inquiry to look not only to how these three factors bear on individuals alleged to have performed a similar role in the charged conspiracy to the role allegedly played by the specific defendants before us in these appeals, but also to whether these specific defendants agreed to join *that* broader conspiracy rather than at most only a narrower one. As then-Judge Breyer described:

> [W]e recognize that conspiracy law, like most criminal law, focuses upon the activities of an individual defendant. It is therefore dangerous to think of a conspiracy as a kind of "club" that one joins or a "business" in which one works. Those metaphors falsely suggest that the "member" or "employee" *automatically* becomes legally responsible for the entire enterprise. Instead, "the gist of the [conspiracy] offense remains the agreement, and it is therefore essential to determine what kind of agreement or understanding existed *as to each defendant*."

Glenn, 828 F.2d at 857 (second alteration in original) (citation omitted) (quoting *United States* v. *Borelli*, 336 F.2d 376, 384 (2d Cir. 1964)). And while an agreement to conspire may be express or tacit and can be proven using direct or circumstantial evidence, *see id.* at 857-58, "[the government] can prove only the agreement or understanding that the evidence ... implies beyond a reasonable doubt," *id.* at 858.

In *Glenn*, the court held that the evidence did not suffice to show that a defendant, Glenn, had joined the single conspiracy charged by the government to import marijuana from Thailand and hashish from Pakistan. *See id.* at 858-60. Instead, the court held that the evidence sufficed to show only that Glenn had joined a narrower conspiracy to import hashish, although that conspiracy was with some of those alleged to be part of the broader conspiracy described in the indictment. *See id* .

Glenn emphasized that the inquiry into whether a defendant has agreed to join the conspiracy charged focuses on the scope of the activity in which the defendant agreed to join. *See id.* at 857. It explained that the record might have sufficed to show that several other individuals in what it referred to as "the core group" had conspired to import both marijuana and hashish. *Id.* at 859. But *Glenn* further explained that while the evidence showed that Glenn had dealings with that core group with respect to the distribution of hashish and was aware that the core group was involved in a broader conspiracy than one just to distribute hashish, that did not mean that the evidence sufficed to show that he had agreed to join that marijuana-hashish conspiracy. *See id.* The court explained that, while the evidence showed that Glenn was aware of efforts to import marijuana by those in the core group, there was no evidence that he understood himself to have a stake in the success of those efforts or saw them as interdependent with his efforts to import hashish. *See id.* As a result, the court determined that the government had not proven Glenn's participation in the broader multidrug conspiracy – just his participation in a narrower, hashish-only scheme. *Id.*

2.

With this legal framework in mind, we begin by considering what the evidence shows with respect to whether the defendants shared a common goal with the other alleged participants in the broader charged conspiracy. We do so because if the evidence does show as much, then it would point in favor of finding that the defendants had agreed to join in the charged conspiracy.

We acknowledge that, as the government emphasizes, the common goal factor "is given wide breadth." *Dellosantos*, 649 F.3d at 117 (internal quotation marks omitted) (quoting *Mangual-Santiago*, 562 F.3d at 421). In the context of drug distribution rings, this court has repeatedly recognized that "selling cocaine for profit" can qualify as a common goal. *Mangual-Santiago*, 562 F.3d at 422; *accord, e.g.*, *United States* v. *Portela*, 167 F.3d 687, 695 (1st Cir. 1999).

But this is not a drug distribution case, and the Supreme Court has distinguished between fact patterns in which members of a broader conspiracy seek to "achiev[e] a single unlawful end" and those in which the alleged coconspirators each pursue "an end in itself, separate from all others, although all [a]re alike in having similar illegal objects." *Blumenthal* v. *United States*, 332 U.S. 539, 558 (1947). In the latter class of cases, there is no common goal shared by the alleged participants in the single broader charged conspiracy, even though each alleged participant may have a "similar illegal object[]" as the other participants. *Id.*

Several decisions from this circuit have also found that alleged coconspirators lacked a common goal where they pursued similar but distinct ends or acted based on different motives from those common to the charged conspiracy. *See United States* v. *Monserrate-Valentín* , 729 F.3d 31, 44 (1st Cir. 2013) (finding no common goal between alleged coconspirators who aimed to commit one robbery and others who sought to commit a series of robberies, and noting that the former group was motivated by a desire to seek revenge against the victim while the latter's objective was "purely pecuniary"); *United States* v. *Franco-Santiago*, 681 F.3d 1, 9-10 (1st Cir. 2012) (contrasting goal of committing one robbery with goal of committing a series of robberies), *abrogated on other grounds by Musacchio* v. *United States*, 577 U.S. 237 (2016); *cf. Glenn*, 828 F.2d at 859-60 (distinguishing between agreement to import marijuana, agreement to import hashish, and agreement to import both). Other circuits have held the same. *See, e.g.*, *United States* v. *Swafford*, 512 F.3d 833, 842 (6th Cir. 2008) (finding no "common goal" where alleged coconspirators engaged in similar conduct but were unaware of and indifferent to one another's activities); *United States* v. *Rosnow*, 977 F.2d 399, 406 [70 AFTR 2d 92-5930] (8th Cir. 1992) (finding no common purpose where defendants "engaged in similar acts for similar reasons ... in order to benefit themselves individually[or] to gain revenge on their individual perceived enemies, and not to benefit the group as a whole"); *United States* v. *Harrison*, 942 F.2d 751, 757 (10th Cir. 1991) (distinguishing between an overarching conspiracy with a "*common*" goal and multiple conspiracies with "*identical*" – but not common – goals).

We ask then whether the government's evidence as to each defendant was sufficient to show that that defendant falls into the former class of cases. The government offers two kinds of arguments to show that the cases at hand fall into the former class – the first of which concerns what the evidence shows about the nature of the alleged scheme and the second of which concerns what the evidence shows as to more specific conduct by each defendant.

a.

The government's contention that the nature of the alleged scheme here itself provides a basis for concluding that these defendants shared a goal in common with the other alleged participants faces an immediate difficulty: the alleged scheme has the hallmarks of a hub-and-spoke conspiracy. On the government's own account, the evidence shows that a hub figure or figures (Singer and others working directly with him to assist parents in gaining admission for their children) had dealings with many separate spokes (the individual parents who obtained services from Singer and his group). We consider whether the hub-and-spoke nature of the scheme charged would, in and of itself, support a reasonable inference that any "spoke" shared a common goal with the other "spokes," and reject the government's argument.

Blumenthal is a case of a hub-and-spoke conspiracy in which the evidence was deemed sufficient to show that the spokes shared a common goal due to the nature of the scheme. There, several individuals were charged with conspiring to sell whiskey at rates above a government price ceiling. *See* 332 U.S. at 541. The Court held that the evidence was sufficient to show that the defendants, each of whom was charged with purchasing whiskey from a single supplier to distribute and then selling it to others, had a common goal – "to sell ... whiskey unlawfully [at an above-market rate]" – with the other defendants, which included not only the supplier but other distributors. *Id.* at 559. That was so because the other potential explanations for those defendants' conduct in purchasing the whiskey at an above-market price from the conspiracy's hub were so economically irrational as to be "scarcely conceivable." *Id.* at 550. And the Court concluded that the fact that they shared that goal with the other alleged conspirators supported a finding that they had tacitly agreed to join the single, charged conspiracy. *See id.* at 550, 559.

Blumenthal explicitly contrasted the scenario involved in that case with the contrary outcome in the scenario at issue in *Kotteakos*, where a hub figure had helped otherwise unconnected clients or groups of clients fraudulently obtain loans. *See id.* at 558; *Kotteakos*, 328 U.S. at 753-55. The Court explained that although each client (or group of clients) in *Kotteakos* pursued a "similar illegal object[]," none "was interested in whether any loan except his own went through," and that this lack of common purpose cut against treating the clients as participants in a single overarching conspiracy. *Blumenthal*, 332 U.S. at 558. Rather, the evidence "made out a case, not of a single conspiracy, but of several." *Kotteakos*, 328 U.S. at 755; *see id.* at 754-55.

The defendants here do not dispute that the evidence suffices to show that all parents alleged to have conspired with Singer and his core group had *similar* unlawful goals in one sense: getting their own children into particular universities through illicit means. And the evidence does suffice to show that Singer and others in his core group shared a goal of facilitating admissions into universities for the children of parents who sought the group's services, as the business model of the alleged scheme depended on their ability to secure those side doors.

The relevant question, though, is whether the nature of the alleged scheme is such that it would be reasonable to infer that *any* parents who sought the assistance of the core group shared a goal of getting children *other* than their own into any university just because they sought such assistance for their own children. We do not see how the nature of the alleged scheme would support such an inference.

The defendants were purchasing a service from the core group in the way that any consumer of a service would purchase it from a service provider. We do not commonly infer, however, that a buyer shares a common goal with a seller just because the two transact with one another. *See United States* v. *Bedini*, 861 F.3d 10, 15 (1st Cir. 2017) (looking for "more than a mere buyer-seller relationship" (quoting *United States* v. *Ortiz-Islas*, 829 F.3d 19, 25 (1st Cir. 2016) (Souter, J.))); *Ortiz-Islas*, 829 F.3d at 25 (finding "more than a mere buyer-seller relationship" due to evidence that "seller" fronted wholesale quantities of cocaine to "buyer," showing "act of trust that assumed an ongoing enterprise with a standing objective"); *cf. Kotteakos*, 328 U.S. at 753 (explaining that hub figure's relationship to each alleged coconspirator was that of a "broker ... charging a five per cent commission for his services").

Moreover, this is not a case like *Blumenthal*, in which there is some straightforward reason to draw an inference that the defendants had a goal beyond benefiting themselves. Here, unlike in *Blumenthal*, the two defendants had a clear self-interest in dealing with the hub figures: obtaining their own children's admission in a discrete buyer-seller transaction. Thus, there is a quite "conceivable" explanation for their willingness to seek Singer's assistance that by no means entails their having a broader goal of ensuring that other parents could obtain similar assistance from Singer for their children and thus a common goal with other spokes. *Cf. Blumenthal*, 332 U.S. at

550 (describing alternative explanation for defendants' conduct other than participation in a broader conspiracy as "scarcely conceivable").

Indeed, the nature of the defendants' status as buyers in this scheme much more easily leads to the opposite inference: that the defendants were indifferent or even adverse to whether other parents' children were admitted to the schools to which they sought admission, and had no interest in what happened to parents seeking admission at other universities. It is commonplace that universities' admissions processes are competitive and often highly competitive. The defendants argue that, far from proving pursuit of a common goal, the evidence showed that "Singer's clients were at times led to believe they were *competitors*." They cite as an example an email exchange involving Singer, Wilson, and Wilson's wife in which Singer stated that USC's water polo coach was "giving [him] 1 boys [sic] slot" and that he had "5 + wanting in that are boys [–] 2 polo[,] 3 others."

Of course, as the government points out, this court and others have explained that competition among alleged coconspirators does not itself preclude a finding of an overarching conspiracy where there is other evidence supporting a finding of an overarching conspiracy notwithstanding that competition. *See, e.g., United States* v. *Rivera Calderón*, 578 F.3d 78, 92 & n.2 (1st Cir. 2009) (concluding that "even if there was some competition [among coconspirators in a drug ring], that alone d[id] not detract from the various ways the appellants conspired together," particularly because the evidence did not show "serious competition," such as undercutting one another's sales). However, that does not make competition irrelevant; indeed, competition cuts against the reasonableness of inferring that the defendants shared a common goal with all the alleged coconspirators here. *See United States* v. *Townsend*, 924 F.2d 1385, 1397 (7th Cir. 1991) ("The evidence does not suggest that [a defendant conspired with other individuals]; rather, it shows that he was competing with them.").

We do not say that, on different evidence, it would be impossible for any parent who sought out services from Singer and the core group to have adopted the common goal of advancing the success of children seeking admission though side doors. Some parents may have had an interest in the broader success of the venture. Here, the government cites to testimony from Bruce Isackson, an alleged unindicted coconspirator parent who pleaded guilty and cooperated with the government as its lead evidence,[27] that he thought it was "good" that lots of parents worked with Singer because "[m]ost of these people have very complicated [tax] returns," which "would [make it] pretty hard [for the IRS] to figure things out."

As *Glenn* instructs, however, we must keep our attention focused on whether each individual defendant agreed to join the broader conspiracy that was charged. There is no evidence that either defendant before us on appeal ever spoke with or even was aware of Isackson's dealing with the core group, let alone that they shared his view that the participation of other parents was "good" for the success of the core group's venture.[28] Isackson's testimony about his own understanding of how the breadth of participation by other parents mattered does not support a reasonable inference that any parent who worked with Singer was similarly interested in ensuring that other parents were participating, too.

The government also points to evidence that "a stock part of Singer's pitch" included describing the benefits of broad participation, and urges us to conclude that it would be reasonable to infer that each defendant heard that pitch. While the pitch may help clarify the nature of the scheme, the evidence that the government cites at most shows that Singer told at least some parents, including Wilson, that his operation worked with a large number of parents and schools. That is the usual assertion of any successful venture. The idea that a larger venture is more likely to succeed than a smaller one is not necessarily true.

Moreover, while the evidence suffices to show that Singer and his core group had a financial interest in whether children of parents other than the defendants obtained admission, no parent had any similar financial stake in how successful other children were in getting admitted through the services of the core group. *Glenn* and *Kotteakos* do not permit us to conclude that the defendants' mere awareness that Singer and the core group had other parents enrolled suffices to permit a rational juror to infer that the defendants shared the goal of advancing the success of that broader conspiracy. *Glenn*, 828 F.2d at 859; *Kotteakos*, 328 U.S. at 755.

b.

The government also points to evidence that is more defendant specific to show that the common goal factor favors its position. For example, the government points to evidence that the Wilson family referred other parents to Singer, and that Abdelaziz responded "I love it" when told that Singer would be using his daughter's profile as a model when creating profiles for children of other parents seeking admission to USC. The government thus contends that even if the nature of the scheme – even as fleshed out through the Isackson testimony and the evidence of Singer's pitch – does not in and of itself suffice to support the reasonable inference that the defendants had the common goal of advancing the success of the broader venture, this defendant-specific evidence does when considered in the context of the evidence as a whole.

In pressing this point, the government asks us to accept that the common goal of the charged conspiracy was merely to advance the conspiracy's success. By defining a common goal at that high level of generality, the government's argument threatens to drain the common goal factor of any independent significance in the inquiry into whether the evidence suffices to show that the scope of the conspiracy that the defendants joined is the same as the one charged. Nor does the government identify any prior precedent of ours that treats as the common goal of the conspiracy charged merely advancing the conspiracy's success. Even in *Blumenthal*, the "common end" was described not merely as ensuring the conspiracy's success, but more specifically as "to sell the whiskey unlawfully" and "to aid in disposing of the whiskey." 332 U.S. at 559.

The defendant-specific evidence that the government puts forward to show that these defendants shared a common goal is more relevant to the factor that we discuss in the next section – interdependence. Interdependence, after all, "concerns whether 'the activities of one aspect of the scheme are necessary or advantageous to the success of another aspect of the scheme.'" *Dellosantos*, 649 F.3d at 117 (quoting *Mangual-Santiago*, 562 F.3d at 422).

Indeed, in connection with the interdependence factor, the government does point to the same evidence about the specific conduct of the defendants in allegedly aiding other parents in obtaining admission for their children through Singer's venture. We discuss this body of evidence – and the weakness of it – in the next section. The same weaknesses which lead us to conclude, as we next explain, that this evidence does not supportably show based on the interdependence factor that the defendants tacitly agreed to join the broader charged conspiracy also leads us to conclude that it fails to do so based on the common goal factor.

3.

We turn to the other factor in dispute: interdependence. *Glenn* is instructive once again. As then-Judge Breyer explained in the context of an alleged drug-distribution conspiracy:

> [K]nown interdependence ... makes it reasonable to speak of a tacit understanding between the distributor and others upon whose unlawful acts the distributor knows his own success likely depends. When such interdependence is missing, when the distributor is indifferent to the purposes of others in the enterprise – say, other distributors – the tacit understanding does not exist.

Glenn, 828 F.2d at 857-58 (citation omitted). Thus, as we have explained, "[e]ach individual must think the aspects of the venture interdependent, and each defendant's state of mind, and not his mere participation in some branch of the venture, is key." *Dellosantos*, 649 F.3d at 117 (quoting *Mangual-Santiago*, 562 F.3d at 422).

The indictment here alleged that the defendants agreed to conspire not only with Singer and the core group but also with the purported coconspirator parents. *See Glenn*, 828 F.2d at 857 (observing that conspiracy requires agreement among coconspirators). It is therefore insufficient for the government to show only that each of the defendants conspired individually with Singer and the core group to secure admission for their own children to prove the broad overarching conspiracy charged. The government must show that each of these two defendants agreed to conspire with the other parents charged as coconspirators in the larger conspiracy. *See Kotteakos*, 328 U.S. at 755 (recognizing that no single conspiracy existed where the evidence showed only "separate spokes meeting at a common center ... without the rim of the wheel to enclose the[m]"). For, as other circuits have explained, where the government has charged a hub-and-spoke conspiracy like that alleged here, interdependence must exist between the spokes, and not simply between the hub and each spoke, for the interdependence factor to support a finding of a single conspiracy. *See, e.g.*, *United States* v. *Chandler*, 388 F.3d 796, 811 (11th Cir. 2004) (evaluating whether there was "interdependence of the spokes"); *United States* v. *Mathis*, 216 F.3d 18, 24 (D.C. Cir. 2000) (rejecting an argument that the government must "show interdependence only among the hub ... , not among the spoke[s]" because the "spoke[s] ... in a hub conspiracy must not only have a connection to the hub ... but must also have interdependence among each other in order to form a rim and constitute a single conspiracy"). Without interdependence between the defendants and other parents, the "tacit understanding" necessary for these defendants to have agreed to conspire with the other parents does not exist. *Glenn*, 828 F.2d at 858; *see id.* at 857-58.

We look at whether the evidence of the conduct of each of these two defendants shows interdependence with the other parents in the broader charged conspiracy. *See, e.g.*, *Dellosantos*, 649 F.3d at 119-20 (assessing interdependence of two branches of alleged drug conspiracy, one of which distributed cocaine and one of which distributed both cocaine and marijuana).

a.

Here, too, the government argues, relying on drug distribution cases, that the jury could infer from "the nature of the scheme" that the defendants must have understood themselves to be interdependent with other parents. We cannot agree.

This court has found that form of inference appropriate in the context of defendants selling "wholesale quantit[ies]" of drugs to drug distribution rings for resale to individual buyers/users, *e.g.*, *Portela*, 167 F.3d at 697; *see id.* at 697-98, but that fact pattern is not at all analogous to this case. It is clearly reasonable to infer that a drug supplier must understand that "[t]he success of [his] transaction [i]s dependent on [the existence of] a conspiratorial network capable of disposing profitably of the [drugs], and the very existence of such a network [i]s necessarily dependent on the existence of other wholesale suppliers." *Id.* at 697. The wholesale supplier knows there must be a further distribution chain for the distribution of his wholesale quantities of drugs. *See id.*

Singer, though, is not a wholesaler of any good, and neither defendant is a distributor. The evidence here is that Singer brokered such arrangements as he made for the admission of these two defendants' children on an individual basis, with each "an end in itself" rather than an integrated part of a larger conspiracy. *Blumenthal*, 332 U.S. at 558. Indeed, as with "common goal," the competitive nature of college admissions would, if anything, cut against a finding of interdependence. *See United States* v. *Carnagie*, 533 F.3d 1231, 1240 (10th Cir. 2008) (noting that "direct competition" between alleged coconspirators cut against finding interdependence). Nor is there any evidence here of anything akin to coconspirators' "fronting" each other money or drugs, which we have looked to even in drug conspiracy cases to substantiate the notion that coconspirators were interdependent. *See, e.g.*, *Bedini*, 861 F.3d at 16.

The government also argues that a rational jury could infer interdependence between the defendants and other parents from just the nature of the scheme because "[b]road participation allowed ... parents to rely on ... the scheme's success," as "Singer [could] recruit more coaches and ... offer parents ... more options at more schools." To support this "nature of the scheme"-based method of proving interdependence, the government cites a phone call between Singer and parent Agustin Huneeus, an alleged unindicted coconspirator.[29] In that call, according to the government, Huneeus "motivat[ed] himself to participate in the scheme based on the experience of" another parent who worked with Singer and "the scheme's track record."

Even if a parent chose to work with Singer based on his past success with other parents, the government must prove as to interdependence that "the activities of one aspect of the scheme are necessary or advantageous to the success of another aspect of the scheme." *Dellosantos*, 649 F.3d at 117 (quoting *Mangual-Santiago*, 562 F.3d at 422). A track record of success may have made parents more confident that Singer could help their children, but it does not mean that those parents necessarily viewed their children's admission as in some way dependent on Singer's work with other parents. Thus, even accepting the government's interpretation of the inferences to be drawn from the call about Huneeus's understanding of the scheme, they do not supportably show that Abdelaziz and Wilson had the same view. *See id.* (noting focus on each defendant's own state of mind). To draw such a conclusion would require stacking inference upon inference through "impermissible speculation on the jury's part." *Glenn*, 828 F.2d at 860.

The government separately argues that a rational jury could find the required interdependence from the nature of the scheme because the inclusion of additional parents in the scheme benefited the defendants by making "the interconnected web of relationships and finances ... more difficult to unravel." In support of this "nature of the scheme"-based theory for finding that the interdependence factor points in favor of the convictions, the government again cites Isackson's testimony that he thought it was "good" that lots of parents worked with Singer because "[m]ost of these people have very complicated [tax] returns," which "would [make it] pretty hard [for the IRS] to figure things out." The government also asserts that "Wilson and Abdelaziz ... join[ed] the other parents in channeling millions of dollars through [Singer's operation]," that they discussed "the mechanics of money flow" with Singer, and that "both were sophisticated and successful businessmen" who would understand "the advantages of this feature of the scheme."

We disagree with the government: this evidence does not support a finding of interdependence. Isackson's testimony reflected his own personal view that it was "good" that other parents of means had also engaged Singer because in his view that made a coverup easier. Neither

Abdelaziz nor Wilson discussed Singer's services with Isackson, and there was no evidence they shared his views or even would have thought those views plausible. *See Portela*, 167 F.3d at 695 (emphasizing that interdependence depends on defendant's own state of mind); *Glenn*, 828 F.2d at 859 (evaluating evidence of defendant's state of mind). While sometimes a defendant's efforts to cover up a conspiracy may be probative of his agreement to join the conspiracy, in which case a cover-up effort interdependent with other coconspirators might suffice to show interdependence, the proof the government offered here was of a different actor's guilt.

Further, the discussions about "the mechanics of money flow" that the government cites involved basic logistical questions about payment due dates and wiring instructions; at no point during those exchanges did the defendants allude to any perceived benefit from intermingling their payments with other parents'. That parents made their payments to the universities through Singer is naturally explained by Singer's role in coordinating the transactions. The government stretches too far in arguing that the payments through Singer necessarily show that any parent who hired Singer intended to allow Singer to commingle funds for the purpose of making it more difficult for prosecutors to show Singer was engaged in a criminal conspiracy with other parents by means of transmission of funds to the universities.

We conclude that the nature of the alleged scheme is not such that, because the evidence suffices to show that the defendants sought Singer's services in connection with their own children, the evidence also suffices to show that the defendants were interdependent with other parents for whom Singer coordinated side-door deals.

b.

As with the "common goal" factor, the government also contends that there is more defendant-specific evidence that suffices to show that the interdependence factor supports the conclusion that each of the defendants before us agreed to join the broader charged conspiracy, even if the evidence of the scheme's nature in and of itself does not. We conclude, however, that this evidence, when considered in the context of the record as a whole, does not so suffice without the sort of inference-stacking that "would require impermissible speculation on the jury's part." *Glenn*, 828 F.2d at 860.

The parties do not dispute that both Abdelaziz and Wilson were at least aware that Singer conducted side doors for other parents.[30] However, as the defendants point out, mere awareness of a common figure's involvement in similar dealings with similarly situated people is far from enough to show interdependence. Indeed, in *Glenn* we concluded that even though Glenn had "attended one meeting where the core conspirators discussed the smuggling of both marijuana *and* hashish," this showed "at most that Glenn *knew* about the marijuana venture," not "that [he] thought [it] interdependent" with the hashish venture in which he was involved. *Id.* at 859.

As evidence that Abdelaziz thought his work with Singer interdependent with other parents', the government relies on a phone call between Abdelaziz and Singer in October 2018 – after Abdelaziz's daughter had been admitted to and enrolled at USC. During the call, which Singer initiated at the government's request after agreeing to cooperate with investigators, Singer told Abdelaziz that a USC athletics administrator had "loved" the basketball profile they had used to facilitate his daughter's admission and wanted Singer to use it for other applicants who "[are]n't ... real basketball player[s]" in the future. Abdelaziz responded: "I love it."

That response by a father about his daughter, ambiguous as it is, does not bear the weight the government posits. Further, Abdelaziz's daughter had already been admitted to USC well before Singer made that call. It is not an admission by Abdelaziz that he joined an interdependent conspiracy with other parents in advancement of his own interests. Construing this conversation as evidence that Abdelaziz considered himself interdependent with other parents would again require impermissible inference-stacking on the jury's part.

As evidence of interdependence related to Wilson, the government relies on evidence that Wilson as well as other parents "referred and recruited other parents." And the government adds that Wilson had a motive to make such referrals because he had other teenage children for whom he might seek Singer's services in the future, and thus he was likely to be a repeat player.

The government points to four such referrals in its brief, only one of which involved Wilson as the speaker: First, a 2013 email from Wilson's wife to Singer asking about the possibility of two of Wilson's son's friends' taking part in a "UCLA workshop/internship" and "college counseling" run by Singer.[31] Second, a 2017 email, also from Wilson's wife, to Marci Palatella – a codefendant in this case, including in both conspiracy counts – which states: "I had a few thoughts about [Singer] & USC – easier to talk on the phone." The third is not from Wilson or his wife, but from Palatella – a 2018 phone call between Palatella and Singer in which Palatella mentioned telling a neighbor about Singer's services and assured Singer that she "d[id]n't say much to anybody unless [she] th[ought] they'd be a good candidate" and that she would "hand [him] the right people." And fourth, a 2018 text exchange and phone call between Singer and Wilson in which Wilson stated that he had a "good – very wealthy – friend [with] a daughter applying to Brown." Wilson described the friend as "willin[g] to pay a million, 2 million" to secure his daughter's admission, and said he would "connect" Singer and the friend by email.[32]

Because Wilson's own "state of mind ... is key" to the interdependence inquiry, the actions of his alleged coconspirators are of limited relevance. *Dellosantos*, 649 F.3d at 117; *see, e.g.*, *Glenn*, 828 F.2d at 859 (distinguishing between views of defendant and alleged coconspirators). Further, the referral by Wilson involving Brown University does not fall squarely within the conspiracy alleged by the indictment, which did not include Brown among the set of universities allegedly targeted by the parents.

Regardless, this one referral involving Wilson does not support an inference that Wilson viewed his activities as interdependent with Singer's work with other clients. Wilson's (or another parent's) referring a friend to Singer does not necessarily provide an "indication that [Wilson] thought that [his work with Singer to obtain admission for his own children] was 'necessary or advantageous to the success'" of Singer's work with other parents, or vice versa. *Monserrate-Valentín*, 729 F.3d at 44 (quoting *Dellosantos*, 649 F.3d at 117).

A jury could plainly infer that Wilson wanted Singer to work with the friend and that he hoped that that work would be successful. But to conclude based on this evidence that Wilson thought that Singer's work with other parents would be beneficial to his own success, even if he was likely to be a repeat player, would again require stacking inference upon inference.[33] For, as the defendants point out, *Kotteakos* itself contained evidence that both the defendant and other alleged coconspirators, many of whom were repeat players, had referred others to the "hub" figure, but held that such evidence did not suffice to show that either the defendant or the other alleged coconspirators who made referrals had thereby joined with the "hub" figure in an overarching conspiracy. *See* 328 U.S. at 754 ("Kotteakos ... sent Brown [(the hub figure)] applications on behalf of other persons.").

We conclude that there was insufficient evidence from which a rational jury could find interdependence with respect to these two defendants. This factor, too, points against the conclusion that the defendants agreed to join the broader conspiracy that was charged rather than merely the narrower ones to ensure admission for their own children.

4.

The defendants do not contest that the final factor, overlap among the participants, is satisfied by Singer's and his associates' interactions with the parents. *See Dellosantos*, 649 F.3d at 118. Rather, they assert, and we agree, that the "evidence of overlap ... was insufficient to outweigh the lack of interdependence" and common goal. *Id.* at 120.

In an abundance of caution before we turn to the issue of prejudice, we discuss the totality of the evidence. *See United States* v. *Canty*, 37 F.4th 775, 796 (1st Cir. 2022) (considering totality of circumstances in addition to common goal, interdependence, and overlap). The government does not cite any additional considerations beyond the three factors discussed above; the defendants offer one.

As the defendants point out, the dissimilarity in the conduct of the parents alleged to have conspired with Singer undercuts the reasonableness of finding a single conspiracy. *See Franco-Santiago*, 681 F.3d at 10. *Franco-Santiago* held that the evidence was insufficient to show that a defendant who had conspired to commit one robbery had agreed to join a broader conspiracy to commit a series of robberies in part because "the robbery in which [the defendant] did participate

[was] notably different from the other robberies encompassed by the ... overarching conspiracy." *Id.*; *see id.* at 11-12. In particular, the robbery in which the defendant had participated "was one of cash from a person, whereas the other four robberies were all robberies of places of business." *Id.* at 10. In this case, the evidence showed significant differences between the conduct of the defendants and that of their alleged coconspirators. The government introduced evidence that other parents who purportedly participated in the alleged overarching conspiracy knowingly made payments to university insiders' personal accounts and paid to alter standardized test scores or have third parties take online classes for their children. The evidence does not show, and the government does not argue, that Abdelaziz or Wilson engaged in those practices.

Evaluating the record as a whole, we conclude that there was insufficient evidence from which a rational jury could find beyond a reasonable doubt that the defendants joined the broader conspiracy charged in the indictment.

B.

Our conclusion that the proof varied from the indictment does not, on its own, "upset [the defendants'] conviction[s]." *Glenn*, 828 F.2d at 858. After all, "[a]s long as administrative convenience leads the government to prosecute many, or all, members of a large criminal enterprise at a single trial, variances between the scope of the conspiracy charged and that proved may, at least as to some defendants, be fairly common," *id.*, and "a defendant 'can hardly ... complain when the government's proof at trial establishes a scheme similar to but somewhat narrower in breadth and malignity than that charged in the indictment,'" *Monserrate-Valentín*, 729 F.3d at 49 (internal quotation marks omitted) (quoting *United States* v. *Mubayyid*, 658 F.3d 35, 48-49 [108 AFTR 2d 2011-6034] (1st Cir. 2011)).

To succeed on appeal, then, the defendants must also show that the variance "prejudiced [them – that] it 'affect[ed] [their] substantial rights.'" *Glenn*, 828 F.2d at 858 (second alteration in original) (internal quotation marks omitted) (quoting *Berger* v. *United States*, 295 U.S. 78, 82 (1935)); *accord*, *e.g.*, *Dellosantos*, 649 F.3d at 124. This circuit has "recognized at least three" possible forms of prejudice in this context, *Dellosantos*, 649 F.3d at 124:

> First, a defendant may receive inadequate notice of the charge against him and thus be taken by surprise at trial. Second, a defendant may be twice subject to prosecution for the same offense. Third, a defendant may be prejudiced by "evidentiary spillover": the "transference of guilt" to a defendant involved in one conspiracy from evidence incriminating defendants in another conspiracy in which the particular defendant was not involved.

Id. at 125 (quoting *Wihbey*, 75 F.3d at 774 (citations omitted)).

Abdelaziz and Wilson focus exclusively on the third form of prejudice – evidentiary spillover. They argue that because the government charged, but failed to prove, an overarching conspiracy, it "was able to admit mountains of inflammatory evidence about markedly different conduct by other parents," including evidence that other parents were aware that their payments would go to university officials personally, that other parents paid to alter standardized test answers and scores, and that other parents paid Singer's staff to take courses for their children. This evidence involved parental knowledge and conduct markedly different in kind from Abdelaziz's and Wilson's alleged activities and focused on parents with whom the defendants did not interact. Meanwhile, the government chose not to put Singer on the stand, where he would have been subject to cross-examination, despite the facts that Singer was the person with whom these two defendants did interact and that he had cooperated with the prosecution. The defendants argue that all of this "created an impermissibly high risk that the jury ... could not fairly evaluate [the defendants'] own knowledge or intent."

In response, the government emphasizes that "[t]o prevail on a claim of prejudicial spillover, a defendant must prove prejudice so pervasive that a miscarriage of justice looms." *Wihbey*, 75 F.3d at 776 (internal quotation marks omitted) (quoting *United States* v. *Levy-Cordero*, 67 F.3d 1002, 1008 (1st Cir. 1995)). The government contends that the defendants cannot meet that standard because, it asserts, (1) some evidence related to the other parents may have been admissible even to prove the narrower conspiracies involving the defendants, (2) the government compartmentalized its presentation of the evidence in a way that would prevent evidentiary spillover, (3) the trial court issued appropriate limiting instructions to the jury, and (4) the proof of the defendants' participation in those narrower conspiracies was overwhelming.

The record does not support the government's assertions. Rather, applying de novo review, *Dellosantos*, 649 F.3d at 124, we agree with the defendants: "The dangers for transference of guilt [in this case were] ... so great that no one really can say prejudice to substantial right has not taken place," *Kotteakos*, 328 U.S. at 774.

1.

The government does not dispute that to convict Abdelaziz and Wilson of conspiring to violate either § 666 or the mail and wire fraud statutes, it had to show that the defendants possessed the requisite mental state to commit the underlying offense. Violation of § 666 requires acting "corruptly ... with intent to influence or reward an agent of an organization." 18 U.S.C. § 666(a)(2). Violation of the mail and wire fraud statutes requires acting "with the specific intent to defraud." *United States* v. *Martínez*, 994 F.3d 1, 7 (1st Cir. 2021) (quoting *United States* v. *Woodward*, 149 F.3d 46, 54 (1st Cir. 1998)). Both conspiracy convictions thus required the government to prove that Abdelaziz and Wilson acted with some culpable state of mind. And at trial both defendants argued that they lacked this mental state and had instead acted in good faith, believing Singer's side door to be a path to admission of which the universities at least tacitly approved.

Notably, the government at trial acknowledged that Singer provided some "totally legitimate" services, including "assistance with college applications," and did not contend that, even when he was committing fraud with some parents, he was committing fraud with all parents who engaged him. Indeed, the evidence at trial showed that Abdelaziz paid Singer for work with his two older children in 2012 and 2013 – years before Abdelaziz allegedly began conspiring with Singer to facilitate his youngest daughter's admission, sometime in 2017. The government has not argued or cited any evidence that those earlier transactions were in any way improper.

Given this context, "there was a pervasive risk" that "the jury might have unfairly transferred to [Abdelaziz and Wilson] the guilt relating to" other parents who worked with Singer. *Dellosantos*, 649 F.3d at 125. Based on the overarching conspiracy charge, the government introduced powerful evidence of culpable intent on the part of other parents that presented a pervasive risk of prejudicing the jury's assessment of each defendant's own intent.

For example, in contrast with the government's acknowledgment that Singer told Abdelaziz and Wilson that their payments would go to the universities, the government's first witness, Isackson, testified that he "knew a good portion of [the money he paid Singer] was going into [Singer's] pockets and [to] the people who helped him." He further described his concerns about shielding the transactions from IRS scrutiny, again evincing a consciousness of guilt. In addition, a government auditor testified about payments from other parents through Singer to the personal accounts of university insiders at Georgetown, Yale, and UCLA, while a USC soccer coach testified to accepting bribes from Singer for facilitating the admission of other parents' children.

Further, through recordings of calls between Singer and other parents, as well as the testimony of Isackson and a Singer associate, the government introduced evidence of other parents' paying Singer to facilitate clearly fraudulent conduct that was both plainly wrongful and dissimilar in kind from Abdelaziz's and Wilson's actions. Isackson testified that he "paid to have one of [his] daughter's test scores altered." In a recorded call, parent Gordon Caplan, an alleged unindicted coconspirator,[34] discussed with Singer a scheme to have his daughter fake a learning disability in order to secure extra time on a standardized test and to bribe a proctor to correct her answers. A Singer employee testified to having taken online courses with the parents' knowledge for the children of Singer clients other than Abdelaziz and Wilson. The government thus "subjected the [d]efendants to voluminous testimony relating to unconnected crimes in which they took no part." *Id.*

The government, citing case law holding that the risk of "prejudice [is] minimized [where] ... transactions not directly involving [a defendant are] of the same character as the ones that did involve him," *United States* v. *Levine*, 569 F.2d 1175, 1177 (1st Cir. 1978), argues that at least some other parents engaged in the same kind of conduct as Abdelaziz and Wilson by "pay[ing] Singer to present [their] child[ren] as ... Division I athletic recruit[s] based on falsified credentials."

The defendants dispute the degree to which they were aware of any falsified credentials. But, even accepting that some other parents' conduct was similar in some respects to the defendants', much of the evidence introduced by means of charging the broader conspiracy nonetheless involved forms of conduct that were different in kind from Abdelaziz's and Wilson's. *Cf. Dellosantos*, 649 F.3d at 125 (noting risk of evidentiary spillover where government, based on overarching conspiracy charge, presented evidence of marijuana transactions against defendants who had participated only in cocaine distribution). All this other evidence threatened to influence the jury on the core issue of the defendants' state of mind.

Our precedent in *Martínez* supports our conclusion. There, a defendant and former public official, López, was charged with and convicted of receiving bribes from a codefendant, Hernández, in violation of § 666 and the mail and wire fraud statutes, and argued that her being tried jointly with Hernández created an unacceptable risk of evidentiary spillover. *See* 994 F.3d at 4-5, 11. López's "primary defense ... was that she merely accepted gifts from [Hernández] without any sort of quid pro quo." *Id.* at 15. Yet, because she was tried jointly with Hernández, who was also charged with a series of unrelated bribes involving other public officials, "[t]he jury before which López was tried was exposed to days of detailed evidence regarding Hernández's role in" those other bribery schemes, including "direct evidence of the corrupt intentions of those alleged to have been involved." *Id.* at 14. This court vacated López's conviction because "the evidence about how Hernández corruptly schemed with others ... to which her jury ... was exposed ... create[d] a grave risk of spillover prejudice." *Id.* at 15; *see id.* at 15-16. In particular, "that evidence risked leading the jury in considering her charges to impute the states of mind of [the individuals who had conspired with Hernández in the separate bribery schemes] ... to López." *Id.* at 15.

The same reasoning applies here. The overarching conspiracy charge enabled the government to introduce evidence of other parents' corrupt intent and actions in working with Singer, which we have described. Just as *Martínez* recognized a "grave risk" that the jury imputed to López the state of mind of Hernández's other collaborators, *id.*, we see an unacceptable risk that the jury in this case may have imputed other parents' culpable mental states to the defendants.

Finally, in addition to the specific evidence of other parents' intent and dissimilar conduct, the sheer number of alleged coconspirators and the breadth of the alleged overarching conspiracy further substantiates that there was prejudicial evidentiary spillover in this case. *Kotteakos* explained that the risk of prejudice increases with the number of defendants, the number of conspiracies proven, and the number of alleged coconspirators. *See* 328 U.S. at 766-67; *see also United States* v. *Kemp*, 500 F.3d 257, 292 (3d Cir. 2007). Although only Abdelaziz and Wilson went to trial, the operative indictment charged fifteen parents from twelve families in addition to alleged named coconspirators like Caplan, Huneeus, and Isackson who were not charged in the same indictment but who were treated as coconspirators for evidentiary purposes at trial. *Cf. Kotteakos*, 328 U.S. at 766 (noting that "only one conspiracy was charged, but eight separate ones were proved, involving at the outset thirty-two defendants"); *Dellosantos*, 649 F.3d at 110, 111 n.2, 125 (finding spillover prejudice where government charged eighteen individuals, of whom three went to trial, and evidence proved two distinct conspiracies).

For those reasons, we agree with the defendants that there was a significant risk that the evidentiary spillover in this case prejudiced them and affected their substantial rights. *See Monserrate-Valentín*, 729 F.3d at 49-50.

2.

The government's responses are unpersuasive. The government first contends that at least some of the evidence related to other parents may have been admissible against Abdelaziz or Wilson as proof of their participation in narrower conspiracies. But "[w]e ... cannot see how evidence of such depth and quality about the nature of the allegedly corrupt scheme[s]" in which Singer engaged with other parents "could have been admitted at a trial against" Abdelaziz or Wilson on narrower conspiracy charges, and "the admission of that evidence in a trial of [Abdelaziz or Wilson] still would have been limited by Federal Rule of Evidence ... 403."[35] *Martínez*, 994 F.3d at 14.

Next, the government argues that the record shows distinct treatment of evidence related to other parents sufficient to mitigate the risk of prejudice resulting from evidentiary spillover. We disagree. The prosecution did, at various times during its opening statement and closing argument, remind the jury that "[t]his trial is about [Abdelaziz and Wilson], what they knew, what they intended and what they agreed to do," and encourage jurors to "[l]ook at what the defendants did and what the defendants said." But at other times it invited the jury to use evidence related to other parents to prove the guilt of Abdelaziz and Wilson; for example, it chose to call as its first witness Isackson – a parent who confirmed that he had never met Abdelaziz and that, while he had met Wilson at school or charitable events, he had never had any "substantive conversation[s]" with him, and whose own scheme was obviously wrongful. It then built on Isackson's testimony and used it during its closing argument. Its description during closing argument of "the evidence of how the scheme worked" drew almost exclusively on Isackson's testimony and recordings of calls between Singer and other parents. Also in its closing, the government told jurors: "You know ... that these defendants joined in ... that conspiracy knowingly and intentionally[,] ... that the defendants knew what they were doing and ... intended to do it, and that they knew that what they were doing [was] wrong ... *because Bruce Isackson told you that he knew it* ...." (Emphasis added.) These statements by the government itself seriously undermine the government's contention that the jury would not have considered evidence regarding other parents in determining what the defendants had done.

The government also argues that the district court's instructions to the jury were sufficient to prevent the risk of spillover. The district court instructed the jury that it must base its verdict as to each defendant "upon evidence of his own words and actions" and "assess the evidence against each defendant individually." However, these limiting instructions "did not suffice to mitigate th[e] risk of spillover prejudice here." *Id.* at 15. *Mart í nez* explained that a similar limiting instruction was inadequate to address the risk of evidentiary spillover where trying a defendant jointly with her codefendants had "enabled the government to put forth direct evidence of the corrupt intent of [an alleged coconspirator's] collaborators in a distinct scheme, even though the government had only circumstantial evidence as to [the defendant's] state of mind and the trial ... implicated a number of players and ... complicated charges." *Id.* The same concerns apply here. "[W]e do not readily assume that a jury disregards clear directions," *Wihbey*, 75 F.3d at 775, but, given the pervasive risk of evidentiary spillover in this case, the limiting instructions cannot save the convictions.

The government lastly asserts that the convictions can stand because there was "overwhelming evidence that [Abdelaziz and Wilson] participated in smaller conspiracies that advanced their own side-door deals." *See, e.g., United States* v. *Morrow*, 39 F.3d 1228, 1235-36 (1st Cir. 1994) (finding no prejudice from evidentiary spillover where "[t]he *admissible* evidence against each appellant amply proved his complicity in [a] narrow[er] conspiracy"). We think the government's evidence of each defendant's smaller conspiracy with Singer (which the defendants admit was sufficient) was not so strong as to be overwhelming in relation to the significant risk of prejudice posed by the evidence regarding other parents. *Cf. Martínez*, 994 F.3d at 11, 15-17 (vacating conviction due to spillover prejudice where there was sufficient evidence to support conviction but government's case depended on circumstantial evidence from which competing inferences were possible).

We reject the government's leading argument relying on the transcripts of calls between Singer and Wilson in which Wilson verified that his daughters did not actually need to play the sports for which they would purportedly be recruited; agreed with Singer's statement that the girls were "athletic enough" for Singer to "sell" them without raising any "question" and without "Stanford['s] ... catch[ing] on"; and suggested that they could be nonplayers such as "scorekeeper[s]," "water girl[s]," "manager[s]," or "mascot[s]." The reference to Stanford's "catch[ing] on" was made by Singer, not Wilson, and record evidence supports the notion that Singer had for years prior to this conversation represented to Wilson that the side door was a longstanding path to admission, the proceeds of which went to the university itself. This statement, coming as late as it did, must be weighed against the impression Wilson had gained from years of conversations with Singer and from Wilson's experience arranging a side door for his son years earlier. The government's view also requires a further inference by the jury that Wilson did not believe that the university and upper-level administrators tacitly approved of side-door admission even if that policy was not known to everyone in the university, and that he did not think Singer was referring to such a dynamic when he spoke about "Stanford['s] ... catch[ing] on."

The references to other nonplayer roles for Wilson's daughters (for instance, as managers) at least equally support the defendants' argument that they understood side-door admission through athletics was a practice the universities had approved, at least tacitly. Indeed, testimonials on Singer's website described his assisting other clients in obtaining both college admission and positions as "managers" for college sports teams. Thus, to construe this evidence as showing Wilson's guilty intent, the jury would have to make at least one inference, even if a reasonable one: that Wilson made these statements knowing that the universities in question did not condone the practice, such that, even if he believed his payments to be part of a quid pro quo, he did not in good faith believe that such a quid pro quo was welcomed by the universities and so did not amount to bribery. And such an inference regarding Wilson's good or bad faith intent based on his understanding of Singer's scheme is precisely the sort that stands to be prejudiced by the evidence of the bad faith intent of other parents when committing similar conduct, as well as evidence of dissimilar conduct that could not plausibly be accompanied by good faith intent.

As to Abdelaziz, the government points chiefly to a phone call that took place between him and Singer after his daughter had already matriculated at USC, in which Singer told him that USC's Admissions Department was investigating why his daughter "did not show up for Women's Basketball in the fall," and that the USC administrator with whom Singer had negotiated the side door had told the Admissions Department that it was because Abdelaziz's daughter had suffered an injury. Singer then told Abdelaziz: "And I doubt that Admissions will call you regarding [your daughter], you know, getting in through the side door and ... not showing up for practice.... But they may ask you ... So I just wanted you to know in case they call ...." Abdelaziz responded by asking Singer whether the Admissions Department would ask his daughter and whether he should "prepare her." Singer said they would not ask her, but might call Abdelaziz, and Abdelaziz responded: "That's fine. I will answer the same [regarding the purported injury], uh, should they call me."

The government argues that this phone call is strong evidence that Abdelaziz understood that the side door was "at odds with the Admissions Department's expectations." But, while it certainly is relevant evidence on that score, the jury -- as with Wilson's phone call -- would have to make multiple inferences to arrive at such a conclusion, such as that this later conversation (which occurred after Abdelaziz's daughter had already matriculated at USC) was also reflective of his earlier intent, and that he did not believe that other actors and administrators at USC, including potentially higher-up administrators, tacitly approved of and welcomed these side doors even if other USC administrators were not aware of that.

We again point out that the more sweeping the charged conspiracy, the higher the bar for showing that the evidence was "overwhelming," and consequently for showing that an error was harmless. As *Kotteakos* itself explained, "it is one thing to hold harmless the admission of evidence [in a case] where only two conspiracies involving four persons all told were proved, and an entirely different thing to apply the same rule where, as here, only one conspiracy was charged, but eight separate ones were proved." 328 U.S. at 766; *see also Kemp*, 500 F.3d at 292. Indeed, the Court in *Kotteakos* itself commented that each defendant "was clearly shown to have shared in the fraudulent phase of the conspiracy in which he participated," but nonetheless reversed the lower court's finding that the error was harmless because it "d[id] not understand how it can be concluded, in the face of the instruction, that the jury considered and was influenced by nothing else." 328 U.S. at 771. And since that was the case in *Kotteakos*, where the Court found that the indictment alleged at least eight separate conspiracies, we do not see how that would not be the case here, where the indictment alleges at least fifteen.

For these reasons, we agree with the defendants that the risk of evidentiary spillover in this case rendered prejudicial the variance between the broader conspiracy charged in the indictment and the narrower ones shown at trial. We therefore vacate the conspiracy convictions (Counts One and Two of the operative indictment).[36]

C.

Because we have already vacated Wilson's conspiracy and substantive wire fraud convictions and address his tax conviction in the next section, we focus here on whether our holding vacating the conspiracy convictions due to a prejudicial variance requires us also to vacate his substantive convictions for federal programs bribery under § 666. Wilson's brief repeatedly asserts that the prejudicial variance requires a new trial on "all counts." Although the government's brief explicitly acknowledges Wilson's contention that the prejudicial variance requires us to vacate his substantive convictions, it does not develop any distinct counterargument against this claim, instead relying on its general argument that there was insufficient spillover prejudice to warrant vacating any of the defendants' convictions.[37]

Wilson's argument for vacating the § 666 convictions effectively amounts to a retroactive-misjoinder claim. *See, e.g.*, *Mubayyid*, 658 F.3d at 72-73, 72 n.39; *United States* v. *Hamilton*, 334 F.3d 170, 181-82 (2d Cir. 2003). "Retroactive misjoinder occurs where joinder was proper initially because of a conspiracy allegation, but where later developments, such as [a] ... court's decision ... to set aside a defendant's conspiracy conviction, appear to render the initial joinder improper." *Mubayyid*, 658 F.3d at 72 n.39 (quoting *United States* v. *Deitz*, 577 F.3d 672, 693 (6th Cir. 2009) (alterations and internal quotation marks omitted)); *accord Hamilton*, 334 F.3d at 181. To win "a new trial on the ground of retroactive misjoinder, a defendant 'must show compelling prejudice,'" which "may be found where there is '[p]rejudicial spillover from evidence used to obtain a conviction subsequently reversed on appeal.'" *Hamilton*, 334 F.3d at 181-82 (alteration in original) (first quoting *United States* v. *Vebeliunas*, 76 F.3d 1283, 1293 (2d Cir. 1996); and then quoting *United States* v. *Jones*, 16 F.3d 487, 493 (2d Cir. 1994)). As in the variance context, succeeding on a claim of spillover prejudice requires Wilson "to show prejudice so pervasive that a miscarriage of justice looms." *United States* v. *Correia*, 55 F.4th 12, 36-37 (1st Cir. 2022) (internal quotation marks omitted) (quoting *United States* v. *Simon*, 12 F.4th 1, 43-44 (1st Cir. 2021)).

For all the reasons just discussed in the variance analysis, we conclude that this case meets that standard. As with the conspiracy charges, Wilson's intent in his dealings with Singer was a key issue with respect to the substantive § 666 counts. *See* 18 U.S.C. § 666(a)(2) (covering only parties that act "corruptly ... with intent to influence or reward an agent of an organization"). And the government offers no reason – and we can think of none – why the risk of spillover from evidence of other parents' dealings with Singer would be less acute with respect to Wilson's substantive § 666 counts than with respect to the related conspiracy charges.

Nor is this "a case in which the results of the trial might be thought to undermine any claim of prejudice." *Martínez*, 994 F.3d at 16. We have observed that "a discriminating verdict," in which the jury convicts on some charges but not others, "is an indication that spillover prejudice did not infect the jury's decisional calculus." *Correia*, 55 F.4th at 38; *see id.* at 38-39. The jury in this case returned guilty verdicts on all counts, offering no reassurance that jurors were "[]able to compartmentalize the evidence of each offense." *Id.* at 39 (quoting *Mubayyid*, 658 F.3d at 74).

Case law from other circuits supports our conclusion. *See, e.g.*, *United States* v. *Tellier*, 83 F.3d 578, 581-82 (2d Cir. 1996) (finding retroactive misjoinder where a RICO count on which the court found there had been insufficient evidence to convict had allowed the government to introduce "enormous amount[s] of prejudicial spillover evidence" related to "criminal activities in which [the] defendant did not participate"); *Jones*, 16 F.3d at 492-93 (applying retroactive misjoinder where count on which court had vacated conviction had allowed government to introduce inflammatory evidence of defendant's criminal history); *United States* v. *Aldrich*, 169 F.3d 526, 528-29 (8th Cir. 1999) (similar).

The Second Circuit, for example, has developed a "three-part test" for assessing retroactive-misjoinder claims based on prejudicial spillover. *Hamilton*, 334 F.3d at 182. It examines:

> (1) whether the evidence introduced in support of the vacated count "was of such an inflammatory nature that it would have tended to incite or arouse the jury into convicting the defendant on the remaining counts," (2) whether the dismissed count and the remaining counts were similar, and (3) whether the government's evidence on the remaining counts was weak or strong.

Id. (quoting *Vebeliunas*, 76 F.3d at 1294 (internal quotation marks omitted)). This test is satisfied here. As to the first prong, the powerful evidence of other parents' obviously culpable conduct was potentially inflammatory – far more so than the evidence of Wilson's own acts. As to the second prong, the Second Circuit has explained that "prejudicial spillover is unlikely if the dismissed count and the remaining counts were either quite similar," such that the evidence relevant to the invalidated count would be independently admissible in connection with the other charges, "or quite dissimilar," such that a jury could readily compartmentalize the evidence. *Id.* at 182; *see id.* at 182-83. For the reasons described in the variance analysis, this case falls in the middle ground between these extremes, where a retroactive-misjoinder finding is appropriate. At least the vast majority of the evidence of other parents' activities would not have been properly admissible in a prosecution of Wilson alone. But the evidence was not so disconnected from Wilson's activities – bearing, as it did, on other parents' understanding of their work with Singer – as to limit the risk that the jury would impute those parents' mental states to Wilson. *Cf. Martínez*, 994 F.3d at 14. And, as to the third prong, we have already explained that the government's evidence related to Wilson himself was insufficiently strong to counteract the pervasive risk of prejudice.

We vacate Wilson's convictions on the substantive § 666 charges (Counts Eleven and Twelve of the operative indictment). This result makes it unnecessary to address – outside the context of Wilson's tax conviction – various evidentiary arguments raised by the defendants as grounds for vacating their convictions. Many of these rulings may well become moot on remand, and we express no view on the merits of the defendants' evidentiary arguments with respect to the conspiracy, mail and wire fraud, and § 666 charges. We note, however, that the government does not attempt to defend on appeal many of the bases on which the district court relied in excluding various exhibits.

V. Affirmance of Wilson's Conviction for Filing a False Tax Return Under 26 U.S.C. § 7206(1)

Finally, we turn to Wilson's conviction for filing a false tax return under 26 U.S.C. § 7206(1), which makes it a felony to "[w]illfully make[] and subscribe[] any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which [the individual] does not believe to be true and correct as to every material matter." We first lay out the relevant facts, then analyze and reject Wilson's challenges to his conviction.

A.

The tax count arises from Wilson's designation of payments he made in 2014 to secure his son's admission to USC as business expenses and charitable contributions on his 2014 income taxes.

At the time he worked with Singer to obtain his son's admission, Wilson was the sole shareholder of Hyannis Port Capital, an S corporation. An S corporation is a "pass-through entity" which does not separately pay federal taxes; instead, the corporation's "income, losses, deductions, and credits are attributed to individual shareholders," *Bufferd* v. *Comm'r*, 506 U.S. 523, 524-25 [71 AFTR 2d 93-573] (1993); *accord Benenson* v. *Comm'r*, 887 F.3d 511, 513 [121 AFTR 2d 2018-

1350] n.1 (1st Cir. 2018), such that Hyannis Port Capital's profits, losses, and deductions directly affected Wilson's personal tax liability.

On March 1, 2014, the day after Subco considered and approved his son's admission, Wilson sent Singer an email with the subject line "USC fees" that read: "Thanks again for making this happen! Pls give me the invoice. What are the options for the payment? Can we make it for consulting or whatever from the [K]ey [(Singer's business)] so that I can pay it from the corporate account ? [sic]" Singer replied: "Yes we can send you an invoice for business consulting fees and you may write off as an expense." He also requested "the name address etc you want the invoice to be made out to." Wilson responded: "Awesome!" He provided billing information for Hyannis Port Capital.

On March 29, 2014, Wilson emailed Hyannis Port Capital's office manager, Debbie Rogers, that "Monday we will get an invoice and wiring instructions for $250k. To be paid by hpc inc." When Rogers asked what account the invoice should be charged to, Wilson replied: "Business Consulting - the invoice will be for consulting - pls work with [Singer] to get invoice correct." The following day, Wilson emailed Rogers again, stating that "the amount is $200,000 not [$]250,000."

Two days later, Rogers told Wilson by email that she had consulted Singer and one of his business associates, and that they had said the payment structure would be "[$]100k ... to [Singer's] foundation, [$]100k an invoice from the Key [(Singer's business),] and [$]20k to Rick Singer." Rogers noted that this totaled $220,000, rather than the $200,000 Wilson had previously mentioned, and Wilson explained that he had "added $20 k for [Singer's] expenses." He also confirmed that the entire sum should be invoiced to Hyannis Port Capital.

Consistent with this plan, Hyannis Port Capital wired $100,000 to Singer's business, $100,000 to Singer's foundation, and $20,000 to Singer on April 7, 2014. Nine days later, Singer's business issued a $100,000 check made out to "USC Men's Water Polo" on behalf of the "Wilson family."

Singer's foundation sent Wilson a letter dated April 7, 2014, acknowledging his "contribution of $100,000" and stating that "no goods or services were exchanged" for the payment. Singer and his business also provided invoices, both dated April 1, to Hyannis Port Capital. The business's invoice purported to be for "Business Consulting," and Singer's referred to "Special Consulting ... Concept, design, and implementation of Professional Development program for Hyannis Port Capital associates." Wilson offered no evidence and does not argue on appeal that Singer or his business actually provided any consulting services to Hyannis Port Capital. In July, USC also sent Wilson and his wife a thank-you letter acknowledging a $100,000 gift, apparently in connection with the $100,000 check from Singer's business.

On his 2014 tax return, Wilson deducted the $120,000 Hyannis Port Capital paid to Singer and Singer's business as business expenses and the $100,000 payment to Singer's foundation as a charitable contribution.[38] Wilson does not dispute that the payment could not properly be deducted as a charitable contribution if he received goods or services in exchange for the payment.

An IRS agent testified that these deductions saved Wilson $88,546 in taxes. On cross-examination by Wilson's counsel, the same agent testified that treating the $120,000 in payments to Singer and his business as business expenses, rather than deducting the full $220,000 as charitable contributions, saved Wilson roughly $1,425. Wilson's tax preparer testified that the exact effect of deducting the payments as business expenses, rather than charitable contributions, would have been uncertain until all of Wilson's tax information was available at the end of the year.

The indictment charged Wilson with filing a false tax return based on allegations that both the $100,000 charitable contribution deduction and the $120,000 business expense deduction were improper. During closing argument, Wilson's counsel asserted with respect to the charitable deduction that Wilson was "not real attentive to his taxes" and may have made some unintentional errors, but "thought he made a donation" and "could get a deduction for it." He further argued that, given that belief, Wilson would have had little motive to willfully fraudulently deduct the payment as a business expense, since the deduction made only a small difference in his tax liability compared to deducting the entire sum as a charitable contribution.

The jury returned a general verdict of guilty on the tax count without specifying the theory on which it relied. Wilson's proposed verdict form had not requested a special verdict giving the basis for the jury's decision.

B.

Wilson challenges his tax conviction on three grounds. First, he contends that the conviction must be vacated pursuant to the Supreme Court's decision in *Yates* v. *United States*, 354 U.S. 298 (1957), and its progeny because the verdict may rest on an invalid legal theory. Second, he argues that spillover prejudice from the variance in the conspiracy counts also tainted this conviction. Third, he asserts that the district court prejudiced his defense through erroneous evidentiary rulings. We consider these arguments in turn.

1.

We first reject Wilson's argument that we must vacate his conviction under the Supreme Court's decision in *Yates*.

The defendants in *Yates* were charged with a single count of conspiring (1) "to advocate and teach the duty and necessity of overthrowing the Government of the United States by force and violence" and (2) "to organize, as the Communist Party of the United States, a society of persons who so advocate and teach." *Id.* at 300. The Court concluded that the conduct underlying the latter "organiz[ing]" object had occurred outside the relevant statute of limitations, such that the defendants could not lawfully have been convicted of conspiracy on that basis. *See id.* at 303-11. The Court then rejected the government's argument that the convictions could nonetheless stand based on the alternative "advoca[cy]" object, holding that "a verdict [must] be set aside in cases where the verdict is supportable on one ground, but not on another, and it is impossible to tell which ground the jury selected." *Id.* at 312; *see id.* at 311-12. In later cases, the Court has reaffirmed this rule while clarifying that it applies where "a particular theory of conviction submitted to [the jury] is contrary to law," and not where one of several alternative bases for conviction is legally sound but supported by insufficient evidence. *Griffin* v. *United States*, 502 U.S. 46, 59 (1991).

Here, the indictment did offer two types of allegedly false statements on which the jury could have convicted: Wilson's deductions for purported charitable contributions and business expenses. Wilson does not, however, develop an argument that either of those theories of conviction set forth in the indictment is legally unsound. He does not disagree with the government's assertion that the jury could convict based on a "find[ing] that Wilson willfully made a false statement as to a material matter on his tax return by falsely claiming the payments were business expenses and/or that he received no goods or services in exchange for them [as necessary to claim a payment as a charitable contribution]." On the contrary, he acknowledges that "perhaps a jury *could* [were it not for the alleged *Yates* and other trial errors] convict on the [business expense deduction] theory," and appears to concede that "a *quid pro quo* ... vitiates any charitable deduction even if the exchange was otherwise lawful." He also does not argue that the jury instructions on the tax count were improper.[39]

Instead, Wilson posits that the jury might have convicted him of tax fraud based on its conclusion that he committed bribery or property fraud, on a theory that unlawful or fraudulent payments are not deductible. And because, he argues, his bribery and property fraud convictions were based on legally flawed premises, the "[d]erivative" tax conviction cannot stand under *Yates*.

We reject this argument because the record does not support Wilson's claim that the jury could have convicted him on the tax count based on its verdicts on the bribery or property fraud charges.[40] He has not cited anything in the indictment or the jury instructions that would lead a juror to conclude that a guilty verdict on other charges would necessarily affect the outcome of the tax count.[41] *See Skilling*, 561 U.S. at 414 (characterizing *Yates* as holding that "constitutional error occurs when a jury *is instructed* on alternative theories of guilt and returns a general verdict that may rest on a legally invalid theory" (emphasis added)); *Griffin*, 502 U.S. at 59 (explaining that the *Yates* rule reflects the fact that "[j]urors are not generally equipped to determine whether a particular theory of conviction *submitted to them* is contrary to law" (emphasis added)). The jury instructions for the tax count, for example, did not cross-reference the other counts or otherwise suggest that the jury's findings on the bribery or property fraud charges were relevant to the tax count. *Cf. United States* v. *Foley*, 73 F.3d 484, 493-94 [77 AFTR 2d 96-389] (2d Cir. 1996) (vacating tax fraud conviction where jury had convicted defendant of bribery under legally invalid theory and was instructed that bribes were not deductible), *abrogated in part on other grounds by Salinas*, 522 U.S. 52. Certainly, a juror likely would – and should – have viewed some factual findings as relevant to multiple counts; for instance, whether Wilson understood himself to be entering a quid pro quo guaranteeing his son's admission in exchange for payment would bear both on the § 666 charge and on the legitimacy of his charitable deductions. But Wilson offers no support for the assertion that a juror would have viewed the legal status of his payments as bribes as controlling the legitimacy of his deducting those payments.

Wilson's strongest argument is that the instruction to the jury that, "[f]or purposes of the mail and wire fraud statutes, admission[s] slots are ... property" – which we have already held was erroneous based on the theory presented by the government at trial and on appeal, *see supra* Section III.B – may have influenced the verdict on the tax count. He contends that, having been told that an admissions slot is property as a matter of law, the jury might have concluded that Wilson's payment could not constitute a valid charitable contribution, since it would have been made in exchange for goods or services. Taken in context, however, this erroneous instruction on different counts does not undermine the jury's verdict. The property instruction was specifically limited to "the mail and wire fraud statutes," and Wilson cites nothing else in the instructions that would indicate to a juror that the verdict on the fraud count should influence the tax count.[42] "[We] presum[e] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instructions in a criminal case and strive to understand, make sense of, and follow the instructions given them." *United States* v. *Olano*, 507 U.S. 725, 740 (1993) (alterations in original) (quoting *Francis* v. *Franklin*, 471 U.S. 307, 324 n.9 (1985)). And, although Wilson did move below to sever the tax count from the other counts due in part to the confusion that might be caused by the theory that admissions slots are property, he does not now style his argument as an objection to the district court's denial of any motion to sever, nor to a failure by the district court to issue a clarifying instruction on the tax count to dispel that potential confusion. In the absence of any such argument, the alleged confusion caused by the district court's instructions on a separate count cannot by itself provide a basis for vacating his conviction on this count.

Wilson also argues that post-trial statements by the government and district court show that the jury may have convicted him on the tax count based on its conclusions about the other charges, but neither statement provides a basis for vacating the conviction. First, he highlights that the government, in a memorandum opposing Wilson's post-trial motion for a new trial on *Yates* grounds, stated that "the jury could convict [either on the theory that] Wilson deducted an illegal bribe as business and charitable deductions, or because he deducted payments ... that were not in fact charitable contributions or business expenses." Although this statement appears to accept Wilson's premise that the jury could have convicted on this basis, neither Wilson's motion nor the government's response cited any material presented to the jury that would have led jurors to believe that the verdict on the bribery and fraud counts should control the verdict on the tax count. We decline to vacate the jury's verdict based on a single sentence in a post-trial filing. *Cf. United States* v. *McGregor*, 650 F.3d 813, 824 n.4 (1st Cir. 2011) (explaining that concession by government in district court does not bind this court).

Second, Wilson relies on a ruling by the district court during sentencing that, for purposes of the tax loss amount applicable during sentencing, Wilson could not claim any of the $220,000 payment as a legitimate charitable contribution "because the entire payment was fraudulent." Wilson cites no authority for the proposition that a statement by the court during sentencing is relevant to determining the basis for a jury's verdict. This statement also does not require vacating Wilson's conviction.

Without some clearer grounding in the record, Wilson's broad argument that the jury might, on its own initiative, have based its resolution of the tax count on the bribery or property fraud charges does not create a *Yates* problem.

2.

We turn to Wilson's argument that the same spillover prejudice that led us to vacate his conspiracy and substantive § 666 convictions also requires us to vacate his tax conviction, which we understand to be a retroactive-misjoinder argument, even though Wilson has not characterized it as such. *See United States* v. *Cadden*, 965 F.3d 1, 21 n.7 (1st Cir. 2020) ("'[R]etroactive misjoinder' arises where joinder of multiple counts was proper initially, but later developments ... render the initial joinder improper." (quoting *Jones*, 16 F.3d at 493)). In discussing this alleged evidentiary spillover, Wilson does not draw a distinction between the charitable and business expense deductions. We conclude that Wilson has not met his burden to "prove prejudice so pervasive that a miscarriage of justice looms." *Wihbey*, 75 F.3d at 776 (quoting *Levy-Cordero*, 67 F.3d at 1008). Our analysis applies to both the business expense and charitable contribution theories.

The government's case on the tax count relied largely on Wilson's own emails discussing how to structure the payments related to his son's admission, limiting the risk that Wilson was convicted based on other parents' conduct. *See id.* at 775-76 (noting that distinctness of evidence related to charged coconspirators' conduct reduced danger of evidentiary spillover or jury confusion); *United States* v. *Moran*, 984 F.2d 1299, 1304 (1st Cir. 1993) (similar). The distinctness of this evidence from evidence related to other parents also increases the probability that the jury was able to comply with the district court's instruction to determine Wilson's "guilt or innocence ... on an individual basis." *See Wihbey*, 75 F.3d at 775 (observing that similar instruction limited risk of spillover prejudice).

Further, the evidence against Wilson on the tax count, based on his own words and conduct, was very strong. *See Morrow*, 39 F.3d at 1235-36 (concluding variance did not warrant vacating convictions where evidence properly admissible against defendants "amply proved" their guilt). Importantly, Wilson does not develop on appeal any argument that, as a matter of substantive tax law, the statements on his return were true – that is, that the payments were properly deductible as business expenses or charitable contributions. He does not meaningfully dispute the government's theory that the payments did not qualify as business expenses (because of their personal nature) or as charitable contributions (because they were his side of a quid pro quo to secure his son's admission).[43] His argument as to spillover prejudice, and as to the alleged evidentiary errors discussed below, focuses instead on the required mental state: that the false return be "ma[de] and subscribe[d]" "*[w]illfully*." 26 U.S.C. § 7206(1) (emphasis added). We thus have no cause to reexamine the conviction on the basis of substantive tax law, and instead focus on the evidence of Wilson's intent.

That evidence, with respect to both the business and charitable deductions, was powerful. After having already discussed the cost of the side door with Singer, Wilson, apparently on his own initiative, asked Singer if the payment could be designated "for consulting or whatever from [Singer's business] so that [Wilson] c[ould] pay it from the corporate account." When Singer responded that he could send an invoice for consulting that Wilson could "write off as an expense," Wilson responded, "Awesome!" Wilson then directed his office manager to charge the invoice to "Business Consulting" and to expect invoices from Singer. Wilson offered no evidence and does not argue on appeal that any such consulting actually took place. Indeed, any notion that Wilson deducted these expenses because he believed that Singer's college counseling services qualified as "Business Consulting" is severely undermined by the fact that Wilson deducted the $20,000 that went to Singer personally on the basis that it was for the "[c]oncept, design, and implementation of [a] [p]rofessional [d]evelopment program for Hyannis Port Capital associates," a service completely unrelated to college counseling, and one that Singer clearly never performed.

Wilson does not argue that he could plausibly have relied in good faith on Singer's representation that the payment could legitimately be "writ[ten] off as an expense" so long as it was falsely described as for business consulting services, nor would such an argument be tenable. Instead, Wilson's enthusiastic response to Singer's statement linking payment from Wilson's corporate account with a "write off" provides evidence that Wilson was aware of the tax benefits of falsely characterizing the payments as business expenses and acted willfully to obtain those benefits.

As for Wilson's deducting the $100,000 payment to Singer's nonprofit foundation as a charitable contribution, it is first worth noting that, although Wilson paid $100,000 to Singer's foundation, it was Singer's for-profit business that then paid $100,000 to USC. Without some link between the two payments, the payment to Singer's nonprofit would clearly be in exchange for goods and services – the same services that Wilson was simultaneously attempting to deduct as a business expense.

However, even assuming that Wilson deducted the $100,000 payment to Singer's foundation intending that it reflect a charitable contribution that would in turn be made to USC, the government offered strong evidence that Wilson understood this payment to be part of an explicit quid pro quo to secure his son's admission, rather than a gift that might also curry some intangible amount of favor with the university. Singer told Wilson that the USC men's water polo coach was "giving [him] 1 boys slot" on a "first come first [sic]" basis. Later, Wilson asked Singer: "When is [the USC men's water polo coach] going to be able to give us decision [sic] on USC? And when do I pay u [sic]?" Singer responded: "No payment of money till [sic] [the USC men's water polo coach] gets a verbal and written [sic] from admissions ...." The day after Subco considered and approved his son's admission, Wilson thanked Singer "for making this happen" and asked for an "invoice" with no differentiation between payment for Singer's services and any contribution to USC, further suggesting that he viewed the payment as his side of an exchange to secure his family a concrete benefit, rather than as a gift.

That the deductions ultimately saved Wilson tens of thousands of dollars on his taxes would give the jury further reason to conclude that Wilson acted willfully.

Wilson's brief on appeal downplays this evidence, arguing that Wilson was living overseas at the time of filing; could not have foreseen "whether or how" classifying the payments as business expenses, rather than charitable donations, would affect his tax liability; and ultimately saved only $1,425, relative to his liability had he deducted the entire $220,000 as a charitable contribution.[44] This argument rests on an assumption that Wilson believed he could legitimately deduct the entire sum as a charitable contribution, but the government produced strong evidence to the contrary. Further, even if this assumption were correct, the argument offers no plausible good faith explanation of why Wilson himself sought to classify the payments as consulting fees, and the unpredictability of the resulting tax benefits cuts both ways – Wilson may have hoped to gain more through the maneuver.

We conclude that Wilson has not shown a risk of evidentiary spillover that warrants vacating his tax conviction.

3.

Finally, Wilson contends that allegedly erroneous evidentiary rulings by the district court require us to vacate the tax conviction. The excluded material he cites falls into three categories: (1) statements by Singer, (2) statements by Wilson, and (3) evidence related to USC's practices in acknowledging donations.[45] We conclude that, even assuming the district court erred in excluding this evidence – a question we need not and do not decide – those errors were harmless with respect to the tax conviction.[46]

"An error will be treated as harmless only if it is highly probable that the error did not contribute to the verdict." *United States* v. *Kilmartin*, 944 F.3d 315, 338 (1st Cir. 2019) (internal quotation marks omitted) (quoting *United States* v. *Fulmer*, 108 F.3d 1486, 1498 (1st Cir. 1997)). "To sustain the verdict, the reviewing court must be able to say with a fair degree of assurance that the erroneous ruling did not substantially sway the jury." *Id.* (quoting *Ruiz-Troche* v. *Pepsi Cola of P.R. Bottling Co.*, 161 F.3d 77, 87 (1st Cir. 1998)); *see also id.* (requiring "a panoramic, case-specific inquiry" (quoting *United States* v. *Piper* , 298 F.3d 47, 57 (1st Cir. 2002))).

The first category of excluded evidence cited by Wilson encompasses a variety of statements by Singer to listeners other than Wilson, including public presentations and communications with other parents. In these statements, Singer generally depicted himself as well connected in the realm of college admissions and experienced in using the side door to help clients' children gain admission. For example, in a corporate presentation, Singer stated that he "read applications at two schools every year," including some of "the ... most prominent universities in America," and had "d[one] 761 side doors into the best schools in America." He asserted to one parent that the "side door is not improper" but is part of "how all schools fund their special programs or needs," and told another that he would soon be meeting with "the President[s] of Harvard and Tufts for lunch."[47]

Wilson does not contend that he was aware of these statements during his dealings with Singer. Instead, he argues that "[a] jury could have reasonably inferred that Singer pitched the side-door to Wilson in the same way he pitched his advice to other parents," and that such a pitch would tend to show that Wilson plausibly could have believed that Singer's business was legitimate. For several reasons, we conclude that any error in excluding this evidence was harmless with respect to the tax count.

First, there was other evidence before the jury regarding Singer's pitch. *See, e.g.*, *United States* v. *Veloz*, 948 F.3d 418, 434 (1st Cir. 2020) (finding erroneous exclusion of evidence harmless where record contained other evidence "to the same effect"); *United States* v. *Wilkerson*, 251 F.3d 273, 280 (1st Cir. 2001) (similar). An IRS agent who assisted the FBI's investigation of Singer and his clients testified at trial that "Singer's general pitch was that [side-door payments were] donation[s] to ... program[s]"; that "Singer did not use the word 'bribe' when he was discussing the side door"; and that even after he began cooperating with the government, Singer "at times ... would go back to his whole pitch and go back to the old cover story as part of his just being used to saying 'donation' when we asked him to say payment." The agent even acknowledged that Singer's framing of the side door as a donation "does not sound bad." The jury evidently found this similar evidence unpersuasive.

The probative value of the excluded material with respect to the tax count was also quite low. *See, e.g.*, *United States* v. *Brown*, 805 F.3d 13, 17 (1st Cir. 2015) (finding evidentiary error harmless where jury likely gave little weight to improperly admitted material). Singer's statements have little apparent relevance to the business deduction theory of tax fraud, as a belief on Wilson's part in Singer's legitimacy would not provide a basis for classifying the payments as business expenses, and Wilson does not offer any explanation for how that could be otherwise. With respect to the charitable deduction, Wilson's understanding of Singer's legitimacy would at most be tangentially relevant to his understanding of whether the payment was pursuant to a quid pro quo, which Wilson does not dispute would "vitiate[] any charitable deduction." And in order to rely on the evidence at all, the jury would need to infer that Singer made similar statements to Wilson himself and that Wilson relied on those statements – a possible, but hardly inevitable, conclusion.

Most importantly, as discussed above, the government's evidence on the tax count was powerful with respect to both the charitable and business expense deductions. *See, e.g.*, *Kilmartin*, 944 F.3d at 338-39 (noting that "the strength or weakness of the government's evidence of guilt is normally the most important integer in the harmlessness equation"). Considering the totality of the circumstances, we conclude that any error in the exclusion of Singer's statements was harmless.

The second category of excluded evidence consists of statements by Wilson himself. Wilson's brief identifies six excluded exhibits of this type. The first three are email threads referring other parents to Singer. In one thread, for example, Wilson told another parent: "There is a company and [a] CEO I know well who was a great help to us [with Wilson's son] that might be very helpful for you too. I would be happy to connect you and pay for it ... if you and your daughter would find it useful." Wilson asserts that a jury might infer "that Wilson would refer Singer's services to [other parents] only if he believed those services were legitimate."

The other three excluded statements appear in emails from Wilson to Singer about his son's admission and enrollment at USC. In one, sent at the beginning of his son's senior year of high school, Wilson asked whether it was important for his son to retake the ACT and SAT, saying that it "[s]eem[ed] like a lot [to do] in the fall." The other two, sent during the summer before his son's enrollment at USC, inquired about the start date for his son's water polo practices. [48] Wilson argues that these emails might lead a jury to conclude that Wilson believed that "Singer was legitimate, that his son needed to do well on his tests, and that his son was going to play water-polo."

We conclude, for similar reasons as with Singer's statements, that, even assuming the exclusion of this evidence was erroneous, it was harmless with respect to the tax count.

Again, evidence similar to the excluded material was before the jury. *See Veloz*, 948 F.3d at 434; *Wilkerson*, 251 F.3d at 280. In a recorded call introduced into evidence by the government, Wilson told Singer that he planned to refer a friend to him – apparently the same friend who received one of the three excluded referrals.[49] Another government exhibit included emails from Wilson to Singer in which Wilson asked whether "it w[ould] be known that [his son was] a bench warming candidate," noted that "[o]bviously his skill level m[ight] be below the other freshmen," inquired whether his son would "be so weak as to be a clear misfit at practice," and stated that he "want[ed] to be sure [his son would] not [be] a lepper [sic]." And, although neither party mentions as much in its briefing, one of Wilson's water polo inquiries appears to have been admitted as part of a government exhibit; indeed, when introducing the exhibit, the government had a witness read Wilson's email aloud to the jury.

The probative value of the excluded material with respect to the tax count was also low. *See, e.g.*, *Brown*, 805 F.3d at 17. For the same reasons as with Singer's statements, whether Wilson believed that Singer's services were legitimate has limited relevance to his state of mind for purposes of the tax count. And, in any event, the excluded statements provide only weak evidence about Wilson's understanding of Singer's legitimacy. Wilson does not dispute that Singer provided at least some legitimate services in addition to admission through the side door, and the referral emails – which do not mention the side door by name – could be for those services, shedding little light on Wilson's perception of the legitimacy of the services Singer provided to him. Further, the email regarding exam scores is, as the government argues, "consistent with questioning whether [Wilson's son] had to worry more about test scores at all given the side-door arrangement in place," and the emails about water polo would be consistent with Wilson's believing that, even if his son was not a legitimate athlete, he needed to at least pretend to be a team member for the side-door scheme to work. *Cf. United States* v. *Sabean* , 885 F.3d 27, 42 [121 AFTR 2d 2018-1127] (1st Cir. 2018) (finding any error harmless where excluded "statements had as much of a tendency to inculpate the defendant as to exonerate him," because "the net impact of the evidence was likely a wash").

Given the government's strong evidence on the tax count, we conclude it is highly probable the exclusion of these exhibits did not taint Wilson's conviction. *See Kilmartin*, 944 F.3d at 338-39.

Finally, Wilson argues that the district court erroneously excluded evidence related to USC's practices in acknowledging donations for tax purposes. Federal tax law generally requires a charitable organization that receives a payment made "partly as a contribution and partly in consideration for goods or services" to (1) inform the donor that only the excess value of the payment beyond the value of those goods or services is deductible for federal tax purposes, and (2) provide an estimate of the value of the goods or services for the donor to use in preparing her taxes. 26 U.S.C. § 6115(b); *see id.* § 6115(a). Wilson sought to introduce evidence that USC did not advise other donors that they were required to offset the value of their charitable deductions by the value of any admissions benefits received in exchange for their donations. In particular, in response to a subpoena, USC offered "to provide a declaration explaining that ... it ha[d] no responsive documents reflecting that USC instructed a donor to reduce his or her tax deductability

[sic] in connection with an admission decision because USC does not offer admission to any applicant in exchange for *quid pro quo* payments." Wilson argues that this evidence, which the district court excluded on relevance grounds, "would have supported the good-faith legitimacy of Wilson's deductions" by showing that he "reasonably believed that no offset was required." The government does not develop any argument that this evidence was properly excluded; it instead contends that the exclusion was harmless. We agree.

The evidence's probative value was limited. *See, e.g.*, *Brown*, 805 F.3d at 17. It had no bearing on the legitimacy of Wilson's deductions for business expenses. And it would provide only indirect support for Wilson's claim that he believed the charitable deductions to be legitimate. Wilson did not contend below that he was aware of USC's donation acknowledgement practices at the time he filed his tax return; indeed, the district court excluded the evidence because Wilson did not show such awareness. Instead, we understand Wilson's brief to argue that evidence that USC did not instruct other donors to offset charitable deductions by the value of any admissions boost received would have made Wilson's belief that such an offset was not required appear more reasonable and, as a result, more likely to be sincere. *See United States* v. *Lachman*, 521 F.3d 12, 19 (1st Cir. 2008). But to the extent Wilson asserts that this evidence confirms the reasonableness of his belief in the deduction's legitimacy because it shows that USC shared that belief, the language of USC's proposed declaration undercuts his argument. The university claims not to have instructed donors to offset the value of their contributions only because it "does not offer admission to any applicant in exchange for *quid pro quo* payments." But we have already shown why the evidence is very strong that Wilson could not have believed in good faith that he was not engaging in a quid pro quo. And to the extent Wilson argues that he was not aware that the benefit he received in that quid pro quo was the kind of valuable benefit that would preclude his payment from being deductible, nothing in the disputed document bears on that question, since the document at most establishes the ordinary point that a donation not given pursuant to a quid pro quo is fully deductible. In truth, then, the proposed declaration does not support Wilson's position, meaning that the exclusion of that declaration was not prejudicial.

Given this context, the government's strong evidence on both theories of the tax count again enables us to "say with a fair degree of assurance that the [exclusion of this evidence] did not substantially sway the jury," rendering any error harmless. *Kilmartin*, 944 F.3d at 338 (quoting *Ruiz-Troche*, 161 F.3d at 87).

We affirm Wilson's tax conviction.

VI. Conclusion

For the foregoing reasons, we *affirm* Wilson's conviction for filing a false tax return in violation of 26 U.S.C. § 7206(1) (Count Thirteen of the operative indictment). We *vacate* Abdelaziz's and

Wilson's other convictions, and *remand* for proceedings consistent with this opinion.

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1 Singer pleaded guilty to conspiracy to commit racketeering, *see* 18 U.S.C. § 1962(d); conspiracy to commit money laundering, *see id.* § 1956(h); obstruction of justice, *see id.* § 1512(c)(2); and conspiracy to defraud the United States, *see id.* § 371.

2 Singer contrasted this side door with the "front door" (admission on merit) and the "back door" (admission through large "institutional advancement" donations).

3 We acknowledge and thank the amici curiae for their submissions in this case. Eleven former U.S. Attorneys, five criminal law professors, and the National Association of Criminal Defense Lawyers and the American Board of Criminal Lawyers filed briefs in support of Wilson.

4 Singer ran both a for-profit business, The Key, and a nonprofit foundation, The Key Worldwide Foundation.

5 Singer and Wilson covered similar ground in a call a few days later, in early November. Singer told Wilson: "[W]e got the Stanford spot. They wanna know if you want it because I have to pay the coach, um, right away." He reiterated that the coach "d[id]n't care if it's a sailor or not." He added that he was "working" on Harvard, but it would "not happen for several months." Wilson again asked for more time to figure out which schools his daughters wanted to attend. He also agreed with Singer that his daughters "weren't going to get into either" Harvard or Stanford without the side door.

6 All fifteen defendants were also charged with conspiracy to commit money laundering. *See* 18 U.S.C. § 1956(h). The district court dismissed this charge as to Abdelaziz and Wilson before trial on the government's motion.

7 The district court later incorporated this conclusion into its instructions to the jury on the mail and wire fraud counts, which stated: "For purposes of the mail and wire fraud statutes, admission[s] slots are the property of the [u]niversities."

8 Section 666 applies only if the "organization" in question "receives, in any one year period, benefits in excess of $10,000 under a Federal program involving a grant, contract, subsidy, loan, guarantee, insurance, or other form of Federal assistance." 18 U.S.C. § 666(b); *see id.* § 666(a). On appeal, the defendants do not dispute that the universities satisfy this condition.

9 Similarly, in their briefing, the defendants stated that bribes could be directed to the agent's "political campaign, or ... his favorite charity."

10 The language of § 666 tracks the language of the revised version of § 215. The defendants make no argument that, notwithstanding the revisions to the text of § 215, "any person" in that provision excludes the financial institution.

11 The section's caption does use the term "bribery," 18 U.S.C. § 666, but "[t]he caption of a statute ... 'cannot undo or limit that which the [statute's] text makes plain,'" *Intel Corp.* v. *Advanced Micro Devices, Inc.*, 542 U.S. 241, 256 (2004) (second alteration in original) (quoting *Bhd. of R.R. Trainmen* v. *Balt. & Ohio R.R. Co.*, 331 U.S. 519, 529 (1947)).

12 Because, as we will explain, we vacate the § 666 convictions on other grounds, we leave it to the district court to address the import of the meaning of "corruptly," if necessary, on remand after full briefing.

13 The defendants also argue that they are entitled to a new trial due to alleged error in the jury instructions. Because we vacate the convictions under § 666 on other grounds, as discussed below, we do not address this argument.

14 The defendants do not dispute that if either theory is legally viable and the jury instructions were proper, the evidence was sufficient. *See United States* v. *Celestin*, 612 F.3d 14, 24 (1st Cir. 2010) ("[W]hen the government has advanced several alternate theories of guilt and the trial court has submitted the case to the jury on that basis, an ensuing conviction may stand as long as the evidence suffices to support any one of the submitted theories." (quoting *United States* v. *Gobbi*, 471 F.3d 302, 309 (1st Cir. 2006))). They argue separately that, even if the government's theory and the jury instructions were legally sound, they are nonetheless entitled to a new trial because of trial error; we address those contentions in Section IV below.

15 The mail fraud statute applies to schemes involving use of the mails, 18 U.S.C. § 1341, while the wire fraud statute applies to those involving use of the wires, *id.* § 1343. Apart from these elements, the Supreme Court has construed the statutes coextensively, *see, e.g.*, *Pasquantino* v. *United States*, 544 U.S. 349, 355 [96 AFTR 2d 2005-5392] n.2 (2005), and so we discuss them interchangeably.

16 The defendants argue that the lack of pre-*McNally* precedent "is dispositive" and requires acquittal. We need not reach so far; even assuming that the lack of pre-*McNally* precedent is only a relevant but not a dispositive factor in our analysis, we reach the same result.

17 The jury instructions that the government requested, and those that were ultimately given at trial, for example, did not require the jury to find that the alleged bribes satisfied either of those requirements in order to convict under an honest services theory.

18 *Skilling* explained that construing § 1346 to overlap to some degree with specialized anticorruption statutes does not render *§ 1346* superfluous because it applies to a broader range of contexts. *See* 561 U.S. at 413 n.45. It is a different question whether reading § 1346 to cover everything that § 666 covers, as well as other conduct, would render *§ 666* superfluous.

19 The government does not develop any argument on appeal that the universities were defrauded of money or property, such as instructional resources, associated with the defendants' children's enrollment.

20 It may be that underlying the government's argument is an assumption that a contractual interest necessarily creates a property interest. But this circuit has never so held, and *Carpenter* expressly rejected that argument as to honest services fraud. *See* 484 U.S. at 25 (citing *McNally*, 483 U.S. at 355, 359 n.8, 360) (explaining that a "contractual right to [an employee's] honest and faithful service" is not a cognizable property interest in this context).

21 A test looking only at whether the purported property interest has economic value would also sweep too broadly for all the same reasons as a test requiring both economic value and exclusivity, discussed below.

22 The defendants argue that the government's test also conflicts with *Cleveland*, which held that unissued gaming licenses possessed by the State of Louisiana did not qualify as property for mail fraud purposes despite the State's exclusive control over the licenses, 531 U.S. at 23-24, and the fact that they could potentially generate revenue (in the form of application processing fees) even while in the State's possession, *id.* at 22. But the Court reached that result because, in administering the licensing scheme, the State acted as a regulator, rather than as a property holder. *See id.* at 20-25. That reasoning would not apply to entities, like the universities, without regulatory authority. Were *Cleveland* the only obstacle, then, the government could have proposed the same test but restricted its application to private parties. There is no such easy fix for the test's incompatibility with *McNally*.

23 The defendants are supported in this view by an amicus brief from eleven former U.S. Attorneys.

24 For convenience, we will refer to the two charged conspiracies as "the charged conspiracy" because the defendants contend that there was a variance because each charged conspiracy was broader than what they contend the evidence at most suffices to show – their respective agreements to each join a conspiracy to gain admission for their own child or children.

25 The government conceded in *Kotteakos* that the evidence did not support a finding of a single conspiracy. *See* 328 U.S. at 754-56, 768-69. The Court endorsed that conclusion in both *Kotteakos* and *Blumenthal* v. *United States*, 332 U.S. 539 (1947), and its reasoning in doing so informs our analysis. *See Kotteakos*, 328 U.S. at 754-56, 768-69; *Blumenthal*, 332

U.S. at 558; *cf., e.g.*, *Brito* v. *Garland*, 22 F.4th 240, 248 (1st Cir. 2021) (noting that this court is "bound to follow 'considered dicta' of the Supreme Court" (quoting *United Nurses & Allied Pros.* v. *NLRB*, 975 F.3d 34, 40 (1st Cir. 2020))).

26 We have already vacated the defendants' mail and wire fraud conspiracy convictions in Section III. This variance analysis provides an alternative ground for that holding, in addition to providing the sole ground for vacating the convictions for conspiracy to commit federal programs bribery under § 666. Because we have already vacated the mail and wire fraud conspiracy convictions, we do not address Abdelaziz's argument that his conviction for conspiracy to commit mail and wire fraud must be vacated because of alleged error in the jury instructions' description of the scope of the charged conspiracy.

27 Isackson was named alongside Abdelaziz and Wilson in the government's original criminal complaint. He entered a plea agreement with the government pursuant to a criminal information, waiving the right to indictment, and so was not indicted with the defendants.

28 Isackson testified that he had never met or spoken with Abdelaziz and that he had met Wilson at school or charitable events but had never had any "substantive conversation[s]" with him.

29 Like Isackson, Huneeus was named in the government's original criminal complaint alongside Abdelaziz and Wilson, but pleaded guilty pursuant to a criminal information before Abdelaziz and Wilson were indicted.

30 Abdelaziz argues that he "did not know that the 'side door' was broader than USC," but the government presented evidence that "a stock part of Singer's pitch" was the "wide[] variety of school options" that he was able to offer parents, which could allow a jury to conclude that Abdelaziz learned the same from Singer.

31 One of the friends was later admitted to USC with Singer's assistance; his family made a $100,000 contribution for "USC baseball" through Singer's foundation. The friend's parents do not appear to have been charged in this case, and the government's brief does not describe them as codefendants.

32 Wilson's friend was not indicted in the operative indictment for his interactions with Singer.

33 At oral argument, the government contended that the record shows more than "bare referrals" and that parents effectively vetted potential new participants in the scheme to ensure they would benefit Singer's network. The only evidence to this effect is Palatella's statement to Singer, not made by Wilson or even his wife.

34 Like Huneeus and Isackson, Caplan was named in the government's original criminal complaint alongside Abdelaziz and Wilson, but pleaded guilty pursuant to a criminal information before Abdelaziz and Wilson were indicted.

35 Rule 403 provides that "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

36 We do not reach Abdelaziz's argument that the variance was prejudicial because there was not venue in the District of Massachusetts for the smaller conspiracy. Abdelaziz has not argued that we must conduct a venue analysis even where we conclude that a variance is prejudicial on alternative grounds. Nor did he seek distinct relief based on his venue argument in his opening brief, which sought only vacatur of his conviction. To the extent Abdelaziz claims an entitlement to different relief in his reply brief, that argument has been waived. *See, e.g., Green Earth Energy Photovoltaic Corp.* v. *KeyBank Nat'l Ass'n*, 51 F.4th 383, 391 n.15 (1st Cir. 2022).

We do not address any Double Jeopardy Clause issues as they are not before us, and we express no opinion on the matter.

37 In particular, the government has not argued that Wilson failed to preserve his claim that the prejudicial variance requires vacating his substantive convictions, and so we need not decide whether plain error review would apply, had the government argued for it. *See United States* v. *Encarnación-Ruiz*, 787 F.3d 581, 586 (1st Cir. 2015) ("When the government fails to request plain error review, we, and many of our sister circuits, review the claim under the standard of review that is applied when the issue is properly preserved below.").

38 Wilson originally filed a 2014 return in December 2015. He later filed two amended returns, neither of which made any changes to his claimed business expenses or charitable contributions.

39 The district court instructed the jury that this count required the government to prove that (1) "Wilson made or caused to be made a [2014] federal income tax return ... that he verified to be true," (2) the "return was false as to a material matter," (2) "Wilson signed the return willfully and knowingly – knowing that it was false," and (4) the "return contained a written declaration that it was made under the penalty of perjury."

40 We have also partially rejected Wilson's premise that all of the bribery and property fraud charges are legally unsupportable. *See supra* Sections II-III.

41 As we discuss below, to the extent Wilson argues that, even if the jury did not treat its verdict on the other counts as dictating the outcome of the tax count, the presence of such inflammatory charges might have influenced its verdict on the tax count, we note that Wilson has not challenged on appeal the district court's denial of his motion to sever the tax count from the other charges before trial, and the argument that we must vacate his tax conviction due to retroactive misjoinder lacks merit.

42 The specific limiting language in the property instruction and the distinctness of the instructions relevant to the different counts undermines Wilson's reliance on *United States* v. *Lindberg*, 39 F.4th 151 (4th Cir. 2022). *Lindberg* vacated a defendant's conviction under § 666 because it concluded that a jury instruction incorrectly defining the term "official act" for purposes of a separate bribery charge had "infected" the jury's consideration of the § 666 count. *Id.* at 164; *see id.* at 164-65. Although § 666 does not contain an "official act" requirement (it refers instead to payments intended to influence an agent in connection with "any business, transaction, or series of transactions" of an organization), the court recognized that the district court had nonetheless "provided instructions on both counts at the same time using the term 'official act.'" *Id.* at 164. Wilson does not cite any such overlapping instructions in this case.

43 In particular, with respect to the business deduction, Wilson does not argue on appeal that the fact that his business was a pass-through S corporation is relevant to the payments' deductibility, thereby waiving any such argument. *See United States* v. *Zannino*, 895 F.2d 1, 17 (1st Cir. 1990). With respect to the charitable deduction, as discussed below, Wilson argues that the district court improperly excluded evidence related to USC's practices in acknowledging donations for tax purposes. He asserts that this evidence would have shown that "back-door and non-Singer side-door donations were ... fully deductible." But Wilson styles this argument as involving an "evidentiary error[]" bearing on his mental state, and, in his opening brief, does not cite any legal authority explaining why this USC practice would bear on the deductibility of his payments. We thus deem any challenge to the legal deductibility of the payments waived. *See id.*; *United States* v. *Diggins*, 36 F.4th 302, 320 (1st Cir.) (explaining that arguments not developed in an appellant's opening brief are waived), *cert. denied*, 143 S. Ct. 383 (2022).

44 Notably, this argument echoes the position Wilson's counsel unsuccessfully presented to the jury during closing argument.

45 Wilson also argues that the district court's exclusion of various evidence related to USC's admissions practices prejudiced his tax count defense by "hobbl[ing] the defense to the bribery and fraud counts." This claim repackages Wilson's *Yates* argument, and we reject it for the same reasons. In addition, Wilson asserts elsewhere in his brief that the district court erred in declining to suppress certain call recordings the government captured beginning in September 2018. He does not reference this issue in discussing the tax count, and so we do not consider it here.

46 We emphasize that our holding that any error in the exclusion of this evidence was harmless is limited to Wilson's tax conviction. We express no view as to whether the exclusion may have been harmful with respect to any other count.

47 The district court excluded these statements on a combination of relevance, hearsay, and Rule 403 grounds.

48 As with the Singer statements, the district court excluded these exhibits on a combination of relevance, hearsay, and Rule 403 grounds.

49 During the call, Wilson identified the friend by name, identified his employer, and said the friend had a daughter who "want[ed] to go to Brown." One of the excluded referrals was addressed to a parent with the same name whose email address corresponded to the friend's employer, and noted that the parent's daughter "ha[d] a strong interest in Brown."

END OF DOCUMENT -

American Federal Tax Reports

BOYKIN v. U.S., Cite as 131 AFTR 2d 2023 -XXXX, (DC NC), 05/15/2023

REBECCA L. BOYKIN, Plaintiff, v. UNITED STATES OF AMERICA, Defendants.

Case Information:

Code Sec(s):	
Court Name:	IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA,
Docket No.:	CIVIL ACTION NO. 5:21-CV-00103-KDB-DCK,
Date Decided:	05/15/**2023**.
Disposition:	

HEADNOTE

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Reference(s):

OPINION

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NORTH CAROLINA STATESVILLE DIVISION,

ORDER

Judge: Kenneth D. Bell United States District Judge

THIS MATTER is before the Court on Plaintiff's Motion for Summary Judgment and the United States' Motion for Partial Summary Judgment. (Doc. Nos. 40, 42). In this action, Plaintiff Rebecca L. Boykin seeks a declaration that the Nominee Liens asserted by the United States against her home are invalid. *See* Doc. No. 1. The United States counterclaims, arguing that the liens are valid and that Plaintiff's husband, James Balvich, fraudulently transferred money and 50% of his interest in KB Management Services LLC to Plaintiff. *See* Doc. No. 5. Plaintiff has now moved for summary judgment on all counterclaims asserted by the United States. In turn, the United States has moved for summary judgment on its second counterclaim alleging the fraudulent transfer of the 50% interest in KB Management Services LLC. *See* Doc. No. 40, 42.

The Court has reviewed the motions, the parties' briefs and exhibits, and the argument of counsel at the May 10, **2023**, hearing. For the reasons discussed below, the Court will deny the Plaintiff's Motion for Summary Judgment and grant the United States' Motion for Partial Summary Judgment.

I. FACTUAL BACKGROUND

From 1999 through 2006 James Balvich, an emergency room physician, did not pay income tax. *See* Doc. No. 41-10, 42-3. As a result, statutory penalties and interest were assessed against him on top of the tax he owed. *Id.*; Doc. No. 41-12. The IRS also imposed civil fraud penalties under 26 U.S.C. § 6663 against Balvich because he omitted income that he received from KB Management from his original 2003 through 2006 tax returns. *Id.* To resolve these tax related debts, Balvich entered into four Partial Payment Installment Agreements with the IRS beginning in 2009. *See* Doc. No. 47-1. A "Partial Payment Installment Agreement" is used when the IRS has determined the taxpayer's current ability to pay is insufficient for the taxpayer to fully pay his delinquent tax liability before the expiration of the period of limitations on collection. *Id.* Balvich has subsequently defaulted on every agreement. *Id.*

In early 2010, Balvich began a romantic relationship with Plaintiff. *See* Doc. No 42-3, ¶ 14. Later in 2010, Balvich realized that he needed help with administrative and personal tasks due to working overnight shifts. *Id.* ¶ 15. Balvich asked Plaintiff if she would be interested in serving as his assistant, and she agreed. *Id.* Plaintiff was initially paid $1,000 per month. *Id.* ¶ 16. However, as she took over additional duties and responsibilities, her pay increased. *Id.* Though described as a "personal assistant," over time Plaintiff became more of an executive assistant or office manager. *Id.*

Upon their marriage in June 2015, Balvich transferred a 50% ownership of KB Management Services, LLC to Plaintiff. Doc. No. 42-3. KB Management is a limited liability company through which emergency rooms paid Balvich for his work. Doc. No. 41-3. Balvich contends that he felt this was appropriate because his ex-wife had owned 50% of his business during their marriage and was awarded half of its value upon their divorce. *Id.* Plaintiff admits that she did not provide any monetary consideration in exchange for this transfer. *See* Doc. No. 41-16. In June 2015, KB Management had no tangible assets, but had a regular source of income from Balvich's work as an emergency room physician. *Id.* From 2015 through 2019 Plaintiff received $340,625 in guaranteed payments or cash distributions from KB Management because of her 50% ownership interest in the entity. *See* Doc. Nos. 41-4, 41-5, 41-6, 41-7. Plaintiff is also the owner of real property located at 176 Sweet Autumn Lane in Boone, North Carolina. *See* Doc. No. 42-4. After buying the lot in early 2014, Plaintiff built a house on the property and has lived there since June 2015. *Id.*

The United States filed an action in the United States District Court for the Western District of North Carolina on August 1, 2019, to reduce to judgment Balvich's tax liabilities. *See* Doc. No. 41-10. On August 6, 2020, this Court entered an order that Balvich is indebted to the United States for the taxable years 1999 through 2006 in the amount of $4,473,711.27 as of July 31, 2019, plus statutory interest after that date. *See* Doc. No. 41-11. As of January 23, **2023**, James Balvich owes $4,940,940.38 for the 1999 through 2006 taxable years. *See* Doc. No. 41-14, ¶ 4.

The Plaintiff filed her Complaint on July 12, 2021, seeking a declaration that the nominee tax liens asserted against her residence are invalid. (Doc. No. 1). The United States answered and asserted counterclaims on September 10, 2021. (Doc. No. 5). The counterclaims allege that the Plaintiff received fraudulent transfers from her husband in the form of (i) excessive compensation and (ii) transfer of 50% ownership of his interest in KB Management Services, LLC without adequate consideration. *Id.* The counterclaims also seek enforcement of the United States' nominee liens. *Id.*

II. LEGAL STANDARD

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *United States v. 8.929 Acres of Land in Arlington Cnty., Virginia*, 36 F.4th 240, 252 (4th Cir. 2022) (quoting Fed. R. Civ. P. 56(a)); *see United States, f/u/b Mod. Mosaic, LTD v. Turner Construction Co., et al.*, 946 F.3d 201, 206 (4th Cir. 2019). A factual dispute is considered genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *8.929 Acres of Land*, 36 F.4th at 252. "A fact is material if it might affect the outcome of the suit under the governing law." *Id.*, (quoting *Libertarian Party of Va. v. Judd*, 718 F.3d 308, 313 (4th Cir. 2013)).

The party seeking summary judgment bears the initial burden of demonstrating the absence of a genuine issue of material fact through citations to the pleadings, depositions, answers to interrogatories, admissions, or affidavits in the record. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986) (when the nonmoving party "has failed to make a sufficient showing on an essential element of [his] claim with respect to which [he] has the burden of proof," summary judgment is warranted); *United States ex rel. Gugenheim v. Meridian Senior Living, LLC*, 36 F.4th 173, 178 (4th Cir. 2022). If the movant satisfies his initial burden to demonstrate "an absence of evidence to support the nonmoving party's case," the burden shifts to the nonmovant to "present specific facts showing that there is a genuine issue for trial." *8.929 Acres of Land*, 36 F.4th at 252, quoting *Humphreys & Partners Architects, L.P. v. Lessard Design, Inc.*, 790 F.3d 532, 540 (4th Cir. 2015). "The mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. *Hixson v. Moran*, 1 F.4th 297, 302 (4th Cir. 2021). Rather, the nonmoving party must establish that a material fact is genuinely disputed by, *inter alia*, "citing to particular parts of the materials of record" and cannot rely only on "conclusory allegations, mere speculation, the building of one inference upon another, or the mere existence of a scintilla of evidence." Fed. R. Civ. P. 56(c)(1)(A); *8.929 Acres of Land*, 36 F.4th at 252, quoting *Dash v. Mayweather*, 731 F.3d 303, 311 (4th Cir. 2013).

Still, summary judgment is not intended to be a substitute for a trial of the facts. *Anderson*, 477 U.S. at 249. In determining whether summary judgment is appropriate, "courts must view the evidence in the light most favorable to the nonmoving party and refrain from weigh[ing] the evidence or mak[ing] credibility determinations." *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 659 (4th Cir. 2018) (internal quotation marks omitted) (quoting *Lee v. Town of Seaboard*, 863 F.3d 323, 327 (4th Cir. 2017). "Summary judgment cannot be granted merely because the court believes that the movant will prevail if the action is tried on the merits." *Jacobs v. N.C. Admin. Office of the Courts*, 780 F.3d 562, 568-69 (4th Cir. 2015) (quoting 10A Charles Alan Wright & Arthur R. Miller et al., Federal Practice & Procedure § 2728 (3d ed.1998)). In the end, the relevant inquiry on summary judgment is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251–52. "When faced with cross-motions for summary judgment, the court must review each motion separately on its own merits to determine whether either of the parties deserves judgment as a matter of law." *Rossignol v. Voorhaar*, 316 F.3d 516, 523 (4th Cir. 2003) (internal quotation and citation omitted).

III. DISCUSSION

Generally, the parties do not dispute the legal principles governing the United States' counterclaims. Both parties seek summary judgment under N.C. Gen. Stat. § 39-23.4(a), the North Carolina statute that determines when a transfer made by a debtor is fraudulent as to a creditor. *See* Doc. Nos. 40, 42. The United States also seeks summary judgment under N.C. Gen. Stat. §

39-23.5, which addresses the specific circumstance of a claimed fraudulent transfer after a creditor's claim has been established. In response, Plaintiff argues that the United States did not properly plead a N.C. Gen. Stat. § 39-23.5 claim and therefore may not seek summary judgment on that basis. The Court will address each argument in turn.

a. N.C. Gen. Stat. § 39-23.4(a)

The North Carolina Uniform Voidable Transactions Act provides that a transfer made by a debtor is fraudulent as to a creditor — whether the creditor's claim arose before or after the transfer was made or the obligation was incurred — if the debtor made the transfer or incurred the obligation: (1) with intent to hinder, delay, or defraud any creditor of the debtor; or (2) without receiving a reasonably equivalent value in exchange for the transfer and the debtor (a) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction or (b) intended to incur, or believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due. *See* N.C. Gen. Stat. § 39-23.4(a). A party need satisfy only one of the two enumerated tests to succeed on its claim.

Significantly, both tests under Section 39.23.4(a) require a determination of Balvich's intent. *See* N.C. Gen. Stat. § 39-23.4(a)(1), (a)(2)(b).[1] In the United States' telling, Balvich transferred a 50% ownership interest in KB Management to Plaintiff in exchange for nothing and to avoid collection of his outstanding tax liability. *See* Doc. Nos. 40-1; 41-3, 33:15 – 33:20. Predictably, Plaintiff's version of events is different. She contends that her husband legitimately transferred the 50% ownership interest in KB Management to recognize her work as his administrative assistant and the life-long commitment they made through marriage. *See* Doc. Nos. 42-1, 42-3. Further, the parties offer conflicting evidence and testimony about Balvich's intent in making the transfer and his belief in his ability to pay his tax assessment — through a monthly installment plan or otherwise. These varying accounts of Balvich's intent are the essence of a material factual dispute. *See Reetz v. Lowe's Companies, Inc.*, No. 518CV00075KDBDCK, 2021 WL 535160, at *1–2 (W.D.N.C. Feb. 12, 2021). Thus, the Court finds that neither party has proven an entitlement to a summary disposition under N.C. Gen. Stat. § 39-23.4(a), and the Court will deny the cross motions for summary judgment as to this ground.

b. N.C. Gen. Stat. § 39-23.5.

The North Carolina Uniform Voidable Transactions Act also provides that a transfer made by a debtor is fraudulent as to a present creditor — whose claim arose before the transfer was made— if: (i) the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transfer or obligation; and (2) the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer. *See* N.C. Gen. Stat. § 39-23.5(a).

Before reaching the merits of the United States' argument under N.C. Gen. Stat. § 39-23.5, the Court must address whether the United States properly pled that claim. In general, the Federal Rules of Civil Procedure do not require a party to plead all its specific legal theories. At the same time, even "notice pleading" is designed to provide parties with fair notice of the claims against them and the grounds upon which those claims rest. *See Conley v. Gibson*, 355 U.S. 41, 47, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957), *abrogated on other grounds by Bell Atlantic Corp. V. Twombly*, 550 U.S. 544, 127 S.Ct. 1955, 167 L.Ed.2d 929 (2007); *see also Dove Air, Inc. v. Fla. Aircraft Sales, LLC*, 2011 U.S. Dist. LEXIS 88611, *12 (W.D.N.C. Aug. 9, 2011). Therefore, the well-established "liberal" pleading rules outlined by the **Supreme Court** cannot be construed so liberally as to deprive a party of notice. *See Barclay White Skanska, Inc. v. Battelle Mem'l Inst.*, 262 Fed.Appx. 556, 563 (4th Cir. 2008) (unpublished). Put another way, the Court will not allow a party to raise a new argument at the summary judgment stage if the basis was not evident from the complaint. *See Duke Energy Fla., Inc. v. Westinghouse Elec. Co. LLC*, No. 3:14-cv-00141-MOC-DSC, 2016 U.S. Dist. LEXIS 134453, at *12 (W.D.N.C. Sep. 29, 2016). Plaintiff argues that the United States never asserted a claim under N.C. Gen. Stat. § 39-23.5 and therefore should be precluded from seeking summary judgment on that basis. The United States responds that its second counterclaim was pled under all sections of the North Carolina Voidable Transaction Act. *See* Doc. No. 5.

On its face, the United States' counterclaim chiefly seeks liability under Section 39-23.4. Paragraphs 43 and 44 of the counterclaims specifically cite Section 39-23.4 as the basis of liability. *Id.* ¶¶ 43, 44. In contrast, the counterclaim does not explicitly mention Section 39-23.5. Still, the claim was pled under the heading of "N.C. Gen. Stat. § 39-23.1, *et seq.*" The counterclaim also contains all the required factual allegations for a Section 39-23.5 claim. Paragraphs 37 and 38 state that Balvich transferred his 50 % interest in KB Management after he incurred his federal tax liabilities and that he did not receive reasonably equivalent value for the transfer. *Id.* ¶¶ 37, 38. While the counterclaim does not explicitly state that Balvich was insolvent at the time, there can be no mistake that insolvency was alleged. The countercomplaint details Balvich's delinquent tax liabilities and the comparatively small amount of income he generates. *Id.* ¶¶ 9, 22. It also asserts that he transferred the 50 % interest in KB Management even though he would incur debts beyond his ability to pay. *Id.* ¶ 39. In short, keeping in mind the well-established liberal pleading standard, the Court finds that the countercomplaint sufficiently put Plaintiff on notice of a possible Section 39-23.5 theory of liability.

Turning to the merits, the Court finds that the United States is entitled to judgment as a matter of law under N.C. Gen. Stat. § 39-23.5(a).[2] First, it is undisputed that the United States' claim arose before Balvich transferred a 50% ownership of KB Management to Plaintiff.[3] The IRS made federal income tax assessments against Balvich for the 1999 to 2006 tax years on or before August 30, 2010, *see* Doc. Nos. 41-10, 41-12, 41-13 and Balvich did not transfer the 50%

ownership in KB Management to Plaintiff until June 2015. *See* Doc. Nos. 5, 22, 41-3, 41-15, 41-16. Thus, the first element of § 39-23.5(a) has been easily met.

Second, Balvich did not receive a reasonably equivalent value in exchange for the transfer. Plaintiff argues that a factual dispute exists as to whether Balvich received reasonably equivalent value for the compensation paid to Plaintiff because the company "had no assets" at the time of the transfer. *See* Doc. No. 45. Yet, this argument is unconvincing. Regardless of its balance sheet, KB Management had (and was expected to have) significant income at the time of the ownership transfer because of Balvich's ongoing 36-year career as a physician. *See* Doc. Nos. 41-3, 42-3. Indeed, Plaintiff received significant value, $340,625, due to her 50% ownership in KB Management. *See* Doc. Nos. 41-4, 41-5, 41-6, 41-7. As for her reciprocal contribution, Plaintiff admits that she "did not provide any monetary consideration in connection with [the transfer of the 50% interest in KB Management] but has provided Balvich with love, affection, and companionship for the entirety of their marriage." *See* Doc. No. 41-16. Yet, "love, affection, and companionship" is not valid consideration here. *See DWC3, Inc. v. Kissel*, 246 N.C. App. 361, 2016 WL 1006133, *5 (2016) (holding that transfer motivated by love and affection does not constitute reasonably equivalent value under North Carolina's fraudulent transfer statute).[4] Therefore, it is undisputed that Balvich did not receive a reasonably equivalent value in exchange for the transfer.

And lastly, Balvich was insolvent at the time of the transfer. A debtor is insolvent if, at a fair valuation, the sum of the debtor's debts is greater than the sum of the debtor's assets. *See* N.C. Gen. Stat. § 39-23.2 (a). A debtor that is generally not paying the debtor's debts as they become due ... is presumed to be insolvent." N.C. Gen. Stat. § 39-23.2(b). In 2015, Balvich could not pay his debts as they came due. At the time of the transfer, Balvich was enrolled in a Partial Payment Installment Agreement (which he defaulted on). Indeed, the installment agreement itself presupposes that he did not have the ability to fully pay his tax liability. *See* Doc. No. 47-1. Moreover, the tax assessments against Balvich totaled over $1.769 million. *See* Doc. No. 41-14. The joint 2015 income tax return filed by Plaintiff and Balvich showed adjusted gross income totaling $502,328. *See* Doc. No. 41-17. There is no evidence before the Court that Balvich had any other assets that might have rendered him solvent. Accordingly, no reasonable jury could find that Balvich was not insolvent.[5]

In sum, the United States has proven an entitlement to summary judgment under Section 39-23.5 because Balvich was insolvent when he transferred a 50% ownership in KB Management, after the United States' claim arose, in exchange for nothing.

c. The Appropriate Forms of Relief

Finally, the parties dispute the relief which may be awarded to the United States. Rule 54 (c) provides that, except in cases of judgment by default, "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." The Fourth Circuit has held that district courts have a "duty to grant whatever relief is appropriate in the case on the basis of the facts proved" even if the party has not demanded that relief in its pleadings, and "[t]he pleadings serve only as a rough guide to the nature of the case." *Robinson v. Lorillard Corp.*, 444 F.2d 791, 803 (4th Cir. 1971); *see Gilbane Bldg. Co. v. Fed. Rsrv. Bank of Richmond*, 80 F.3d 895, 901 (4th Cir. 1996) ("Rule 54(c) ... commands that the trial court shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." (internal quotation marks omitted)). However, a party "will not be given relief not specified in its complaint where the failure to ask for particular relief so prejudiced the opposing party that it would be unjust to grant such relief." *Atl. Purchasers, Inc. v. Aircraft Sales, Inc.* , 705 F.2d 712, 716 (4th Cir. 1983).

The United States seeks to recover a money judgment against Plaintiff even though its countercomplaint specifically seeks foreclosure on Plaintiff's property, not a money judgment. *See* Doc. Nos. 5, 40-1. If a transaction is voidable under the North Carolina Uniform Voidable Transactions Act, a remedy for the creditor is a judgment against the transferee for the value of the asset transferred, or the amount necessary to satisfy the creditor's claim, whichever is less. *See* N.C. Gen. Stat. § 39-23.8(b); N.C. Gen. Stat. § 39-23.7 (listing remedies); *Cherry Cmty. Org. v. Sellars*, 381 N.C. 239, 247 (N.C. 2022) ("creditor who is successful on a [North Carolina Uniform Voidable Transactions Act] claim may obtain avoidance of the transfer ... to the extent necessary to satisfy the creditor's claim and may recover judgment for the value of the asset transferred against" the receiver of the transfer). Therefore, the governing statute plainly permits the United States to recover a money judgment.

Accordingly, the Court will permit the United States to recover a money judgment. Plaintiff points out that the Court denied the United States' Motion for Leave to Amend its Counterclaims finding that Plaintiff would be prejudiced by going from "potentially losing her residence to potentially losing her residence and having a money judgment of more than $ 300,000 entered against her." *See* Doc. No. 39. However, the analysis at this stage differs significantly. In denying the United States' Motion to Amend the Court largely relied on the United States' lack of diligence in seeking an amendment. *Id.* Here, there is no lack of diligence on the part of the United States.6 The United States' original countercomplaint sought liability under a statute that explicitly authorizes the recovery of a money judgment. *See* Doc. No. 5. The United States' countercomplaint also requests "[s]uch other and further relief as the Court deems just and proper." *See* Doc. No. 5. Plaintiff therefore was on notice — or should have been — of her potential exposure to a money judgment. As a result, Plaintiff will not be unduly prejudiced by the award of a money judgment7 on claims already pled. [6]

IT IS THEREFORE ORDERED THAT:

(1.) Plaintiff's Motion for Summary Judgment, (Doc. No. 42), is DENIED;

(2.) The United States' Motion for Partial Summary Judgment, (Doc. No. 40), is GRANTED;

(3.) The United States is awarded a money judgment in the amount of $340,625.00.

(4.) This case shall proceed to trial on the merits in the absence of a voluntary resolution of the dispute among the parties.

SO ORDERED.

Signed: May 15, **2023**

Kenneth D. Bell

United States District Judge

---

1 Neither party contends that N.C. Gen. Stat. § 39-23.4(a)(2)(a) is applicable here. *See* Doc. Nos. 40, 42.

2 The United States also seeks summary judgment under N.C. Gen. Stat. § 39-23.5(b). This section only applies when "the transfer was made to an insider for an antecedent debt." *Id.* Plaintiff has never argued that the transfer was made for an antecedent debt and therefore this section is inapplicable.

3 At oral argument, Plaintiff's counsel conceded that this element has been met.

4 Notably, Plaintiff does not argue that her continued administrative assistance constitutes reasonably equivalent value.

5 At oral argument, Plaintiff's counsel admitted that no reasonable jury could find that Balvich was not insolvent at the time of the transfer.

6 While the Court remains convinced that the United States acted without the required diligence in seeking an amendment (which alone was sufficient to deny the motion), the Court may have been off target with its prejudice analysis. Plaintiff's counsel candidly admitted that he could not identify any way in which the discovery process would have differed if the countercomplaint specifically stated that the United States sought a money judgment. Accordingly, the Court's previous prejudice analysis is withdrawn and not controlling here in light of Plaintiff's counsel admission. 7 The value of Boykin's 50% ownership in KB Management in easily discernable. From 2015 through 2019 Plaintiff received $340,625 in guaranteed payments or cash distributions from KB Management because of her 50% ownership interest in the entity. *See* Doc. Nos. 41-4, 41-5, 41-6, 41-7. Therefore, the value of the asset transferred is $340,625.

END OF DOCUMENT -

American Federal Tax Reports

U.S. v. EVERSON, Cite as 131 AFTR 2d 2023 -XXXX, (DC OH), 05/16/2023

United States of America, Plaintiff, v. John M. Everson, Defendant.

Case Information:

Code Sec(s):	
Court Name:	UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO,
Docket No.:	Case No. 3:18-cr-727,
Date Decided:	05/16/**2023**.
Disposition:	

HEADNOTE

.

Reference(s):

OPINION

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO WESTERN DIVISION,

MEMORANDUM OPINION AND ORDER

Judge: Jeffrey J. Helmick United States District Judge

I. INTRODUCTION AND BACKGROUND

On December 12, 2018, Defendant John M. Everson was charged by indictment with four counts of tax evasion, in violation of 26 U.S.C. § 7201. (Doc. No. 1). Everson proceeded to trial before a jury and was found not guilty on Count 1, a charge related to the 2012 tax year, and found guilty on Counts 2 through 4, charges related to the 2013 through 2015 tax years. (*See* Doc. No. 103).

At various points in this case, including at trial, Everson was represented by counsel. Following the jury's verdict, Everson discharged his attorney and filed a motion for judgment of acquittal and a motion to vacate his conviction and to grant a new trial.[1] (Doc. Nos. 107 and 108). The government filed a brief in opposition to Everson's motions. (Doc. No. 109). I denied the motion on January 10, **2023**, and the Clerk's office mailed a copy of my decision on the same date. (Doc. No. 110); (non-document entry dated January 10, **2023**).

A few months later, around the beginning of March **2023**, Everson notified my chambers that he did not receive a copy of the government's opposition brief and, therefore, did not realize his deadline to file a reply brief had been triggered. (*See* non-document order dated March 3, **2023**). The government confirmed it mistakenly had failed to serve a copy of its brief on Everson. I then granted Everson a 45-day extension to file a reply brief in support of his motions. Everson subsequently filed a motion to vacate my decision due to the government's failure of service, (Doc. No. 118), and later filed his reply brief as permitted by my order. (Doc. No. 119).

For the reasons stated below, I deny Everson's motion to vacate, reject his arguments as stated in his reply brief, and affirm my earlier decision denying his motion for acquittal and his motion to vacate the jury's verdict and for a new trial.

II. STANDARD

As I previously stated, (Doc. No. 110 at 2), a defendant may move for "a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. Fed. R. Crim. P. 29(a). *See also* Fed. R. Crim. P. 29(c) (permitting defendant to renew a Rule 29 motion within 14 days after a guilty verdict). Rule 29 "requires the court to view the evidence in a light most favorable to the prosecution," and "asks whether '*any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.'" *United States v. Mallory*, 902 F.3d 584, 596 (6th Cir. 2018) (quoting *Jackson v. Virginia*, 443 U.S. 307, 317 (1979)) (further citation omitted) (emphasis in *Jackson*).

Rule 33 permits a defendant to move a court to vacate a judgment and "grant a new trial if the interest of justice so requires." Fed. R. Crim. P. 33(a). A Rule 33 "motion calls on the trial judge to take on the role of a thirteenth juror, weighing evidence[,] and making credibility determinations firsthand to ensure there is not a miscarriage of justice." *Mallory*, 902 F.3d at 596. A district court "should exercise [its] discretion [to grant a Rule 33 motion] only in the extraordinary circumstances where the evidence preponderates heavily against the verdict." *United States v. Ashworth*, 836 F.2d 260, 266 (6th Cir. 1988) (quoting *United States v. Turner*, 490 F. Supp. 583, 593 (E.D. Mich. 1979)).

III. ANALYSIS

A. MOTION TO VACATE

Everson first moves to vacate my January 10, **2023** Memorandum Opinion and Order, arguing it was issued in violation of his procedural due process rights. (Doc. No. 118). While the government has conceded it erred by not serving Everson with a copy of its opposition, Everson has not shown this error led to a violation of his rights. To start, Everson had "notice and an opportunity to be heard" on those issues before me, as he was the first to raise those issues in his Rule 29 and Rule 33 motions. (Doc. No. 118 at 1). He has not cited to any case in which a court has held a party has a constitutional right to file a reply brief in support of the party's own motion. And, notwithstanding the absence of a constitutional right to file a reply brief, I provided Everson with a significant opportunity by granting him 45 days in which to file his reply brief after he notified my chambers of the failure of service, rather than the 14 days customarily provided for such filings.

I conclude Everson fails to show his procedural due process rights have been violated. Further, as discussed below, I conclude he fails to establish he is entitled to relief under Rule 29 or Rule 33. Therefore, I deny his motion to vacate and reaffirm my earlier ruling.

B. RULE 29 AND 33 MOTIONS

For the sake of completeness, I restate the Analysis section of my January 10, **2023** Memorandum Opinion and Order:

> Everson argues the government did not present sufficient evidence to sustain a conviction because: (1) the government did not present the jury with the specific section of the Internal Revenue Code which imposed an income tax on him; (2) the evidence showed "the IRS's acquiescence to [the] non-existence of a legal duty" to pay taxes; (3) the government could not show he owed tax which he did not pay without first identifying the specific section of the Internal Revenue Code imposed a tax on him; (4) the government did not prove he was a "person" as defined by federal law; and (5) the government could not prove he undertook an

affirmative act to avoid pay tax he owed without first disproving his assertion that he is exempt from taxation. (Doc. No. 107 at 4-5, 6, 8, 9).

He also argues the judgment of conviction must be vacated because (1) his due process rights were violated when the government failed to identify the specific section of the Internal Revenue Code which subjected him to a tax; (2) he was denied due process and his right to trial by jury because the jury was not required to find he is a "person" subject to federal income tax; (3) he was denied due process when I ruled he could not present his interpretations of federal case law to the jury. (Doc. No. 108 at 2-6, 6-9).

I already have concluded Everson's arguments lack any legal basis. Federal law imposes an income tax on "'every element of gross income.'" (Doc. No. 71 at 1) (quoting *HCSC-Laundry v. United States*, 450 U.S. 1, 5 [47 AFTR 2d 81-797] (1981)). Everson is a "person" within the meaning of federal tax law. (Doc. No. 62 at 3). The IRS's refusal to provide Everson with a signed affidavit disputing his legal theories does not estop the government from assessing income tax or from prosecuting Everson for tax evasion. (Doc. No. 71 at 4). Everson was not entitled to present his "'views about the validity of the tax statutes'" to the jury. (*Id.* at 3 (quoting *Cheek v. United States*, 498 U.S. 192, 206 [67 AFTR 2d 91-344] (1991)).

Further, Everson has not cited to any case in which a court accepted his theories as a basis to overturn a jury's verdict of guilt. Therefore, I once again reject Everson's arguments.

Moreover, Everson's implication that I denied him the right to present his good- faith-belief defense is flatly untrue. (*See* Doc. No. 108 at 1-2). While I did not permit Everson to present his legal interpretation of federal case law, I gave the jury a lengthy instruction on the defense of good faith misunderstanding or belief, at his request and over the government's objection. (*See* Doc. No. 101 at 17-19). I emphasized the jury had to make their "decision based upon what the evidence establishe[d] the defendant actually believed and not upon what [they] (or someone else) believe or think the defendant ought to believe." (*Id.* at 18).

I conclude Everson fails to show no reasonable juror could have found the essential elements of the offenses for which he was convicted beyond a reasonable doubt based upon the evidence presented at trial. Further, I conclude Everson fails to establish that the interest of justice requires that I vacate the jury's verdict.

(Doc. No. 110 at 2-4).

Everson's reply brief reads, in many ways, like a motion for reconsideration. This is understandable, given the unusual circumstances. Generally, I consider Everson's arguments in light of the standard set forth in Rules 29 and 33; I do not apply the higher standard or error applicable to motions for reconsideration. But I do not find Everson's arguments persuasive and I reaffirm my denial of his Rule 29 and Rule 33 motions.

In his reply brief, Everson argues the judgment against him is "void *ab initio*," (Doc. No. 119 at 1), because (1) the government failed to establish he had a duty to pay federal income tax; (2) the indictment did not properly identify the precise statute subjecting him to federal income tax and therefore was deficient; (3) this court lacks jurisdiction to hear the charges against him; (4) his rights were violated when I ruled he could not provide the jury with his interpretation of certain holdings of the United States **Supreme Court**; and, (5) he is not a "person" who may be charged with violating § 7201. (*Id.* at 2-3, 5-6, and 18).

Yet, once again "Everson has not cited to any case in which a court accepted his theories as a basis to overturn a jury's verdict of guilt." (Doc. No. 110 at 3). Everson's disagreement with my legal rulings and the jury's decision does not entitle him to relief under either Rule 29 or Rule 33.

There is one category of arguments Everson makes in his reply brief that I do not consider at all. Everson devotes a substantial amount of his reply brief arguing that the appointed attorney who represented him at trial was incompetent.[2] (*See, e.g.*, Doc. No. 119 at 7-9, 16-17). But it is well-established that a party may not raise new claims or arguments, including claims for ineffective assistance of counsel, for the first time in a reply brief. *United States v. Anderson*, No. 1:16-CR-123, 2020 WL 1531275, at *3 (N.D. Ohio Mar. 31, 2020) (citing cases for the holding that defendant waives ineffective assistance of counsel claim by raising it for the first time in reply brief). *See also United States v. Adams*, 598 F. App'x 425, 429 (6th Cir. 2015) ("'We have held that the appellant cannot raise new issues in a reply brief; he can only respond to arguments raised for the first time in appellee's brief.'") (quoting *United States v. Campbell*, 279 F.3d 392, 401 (6th Cir. 2002)) (further citation and internal quotation marks omitted); *Selby v. Schroeder*, 522 F. Supp. 3d 388, 402 n.8 (M.D. Tenn. 2021) ("Generally speaking, arguments raised for the first time in reply briefs are waived.") (citations and internal quotation marks omitted). I conclude Everson has waived these new arguments as a basis for his Rule 29 and Rule 33 motions by failing to include them in his initial motions and raising them for the first time in his reply brief.

IV. CONCLUSION

For the reasons set forth above, I deny Everson's Rule 29 and Rule 33 motions. (Doc. Nos. 107 and 108).

So Ordered.

s/ Jeffrey J. Helmick

United States District Judge

1 I previously granted a brief extension of the filing deadline for both motions, (*see* Doc. No. 106), and, therefore, both motions were timely filed.

2 Everson also offers the new argument that "certain individuals in the executive branch and ... certain individuals in the judicial branch" have committed "institutional fraud" and "the offense of treason" by refusing to accept Everson's arguments regarding jurisdiction and the "unconstitutional exaction of the wealth of People of these several States" and allowing Everson to stand trial. (Doc. No. 119 at 17).

END OF DOCUMENT -

American Federal Tax Reports

U.S. v. STATE OF DELAWARE DEPT. OF INSURANCE, Cite as 131 AFTR 2d 2023 -1466, Code Sec(s) 7602, (CA3), 04/21/2023

UNITED STATES OF AMERICA, APPELLEE v. STATE OF DELAWARE DEPARTMENT OF INSURANCE, APPELLANT.

Case Information:

[pg. **2023** -1466]

Code Sec(s):	7602
Court Name:	U.S. Court of Appeals, **Third Circuit**,
Docket No.:	No. 21-3008,
Date Decided:	04/21/**2023**.
Prior History:	District Court, (2021, DC DE) 128 AFTR 2d 2021-6117, adopting (2021, DC DE) 128 AFTR 2d 2021-5225, affirmed. Earlier proceeding at (2022, DC DE) 130 AFTR 2d 2022-5585.
Disposition:	Decision for Govt.

HEADNOTE

1. Summons enforcement—ins. information; micro-captive ins. cos.; state law and preemption. District court decision enforcing summons that IRS issued on state ins. dept., seeking information about "captive insurance program" incident to investigation of stated entities' micro-captive transactions and potential tax shelter promotion penalties, was affirmed. While dept. argued that under McCarran-Ferguson Act's reverse preemption provision regarding "business of ins.," state law, which forbade dissemination of stated ins. information absent certain conditions, overrode IRS's authority to summons same, court correctly found that conduct being challenged here wasn't business of ins. in 1st place, so Act's reverse preemption provision didn't apply. Dept.'s alternate contentions, including that this threshold inquiry was itself not good law, were rejected.

Reference(s): ¶ 76,025.02(12) Code Sec. 7602

OPINION

James J. Black, III [ARGUED] Mark W. Drasnin Jeffrey B. Miceli Black & Gerngross 1617 John F. Kennedy Blvd. Suite 1575 Philadelphia, PA 19103

Patricia A. Davis Office of Attorney General of Delaware Delaware Department of Justice 102 West Water Street–3rd Floor Dover, DE 19904

Kathleen P. Makowski Office of Attorney General of Delaware Department of Justice [pg. **2023** -1467] 820 N. French Street–Suite 1010 Wilmington, DE 19801 Counsel for Appellants

Travis S. Hunter Richards Layton & Finger 920 N. King Street One Rodney Square Wilmington, DE 19801 Counsel for Amicus Appellants

Ward W. Benson Kyle L. Bishop United States Department of Justice Tax Division P.O. Box 227 Ben Franklin Station Washington, DC 20044

Michael J. Haungs Lauren E. Hume Francesca Ugolini [ARGUED] United States Department of Justice Tax Division 950 Pennsylvania Avenue P.O. Box 502 Washington, DC 20044 Counsel for Appellee

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT,

On Appeal from the United States District Court For the District of Delaware (D.C. No. 1-20-cv-0829) District Judge: Honorable Maryellen Noreika

Before: JORDAN, SCIRICA, and RENDELL, Circuit Judges

OPINION OF THE COURT

Judge: JORDAN, Circuit Judge.

PRECEDENTIAL

This case pits Delaware's authority to protect corporate privacy against the power of the IRS to enforce the tax laws of the United States. The dispute arises from the refusal of the Delaware Department of Insurance (the "Department") to comply with an IRS summons. The Department relies on Title 18, Section 6920 of the Delaware Code, which generally prohibits the Department from disclosing certain information about captive insurance companies to anyone, including the federal government, absent the companies' consent.[1] But § 6920 does allow disclosure to the federal government if it agrees in writing to keep the disclosed information confidential. The government did not and instead petitioned the District Court to enforce its summons. The Court granted that petition. The Department argues that, under the McCarran-Ferguson Act ("MFA"), 15 U.S.C. § 1011 et seq., Delaware law as embodied in § 6920 overrides the IRS's statutory authority to issue and enforce summonses, so the District Court's order should be reversed.

While the MFA does protect state insurance laws from intrusive federal action when certain requirements are met, the District Court concluded that, before any such reverse-preemption occurs, our precedent requires that the conduct at issue–in this case, the refusal to produce summonsed documents–must constitute the "business of insurance" within the meaning of the MFA. [J.A. at 008, 012-17, 024-33.] The District Court held that this threshold requirement was not met here, and we agree. We will therefore affirm.

I. BACKGROUND

A. Origin of the McCarran-Ferguson Act and Its Relevant Text

The MFA was Congress's response to the Supreme Court's decision in *United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533 (1944). Before that decision, "it had been assumed that `[i]ssuing a policy of insurance [wa]s not a transaction of commerce,' subject to federal regulation." *U.S. Dep't of Treasury v. Fabe*, 508 U.S. 491, 499 (1993) (quoting *Paul v. Virginia* , 75 U.S. (8 Wall.) 168, 183 (1869)). That changed when *South-Eastern Underwriters* held that "insurance transactions were subject to federal regulation under the Commerce Clause, and that the antitrust laws in particular[] were applicable to them." *SEC v. Nat'l Sec., Inc.*, 393 U.S. 453, 458 (1969).

Fearing that *South-Eastern Underwriters* would "undermine state efforts to regulate insurance," Congress enacted the MFA. *Humana Inc. v. Forsyth*, 525 U.S. 299, 306 (1999). Relevant to our inquiry today are the provisions of the statute codified at §§ 1011 and 1012 of Title 15 of the United States Code.[2] The first, denominated "Declaration of policy," states:

> Congress hereby declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation or taxation of such business by the several States.

15 U.S.C. § 1011. Then, § 1012 provides:

(a) State regulation

The business of insurance, and every person engaged therein, shall be subject to the laws of the several States which relate to the regulation or taxation of such business.

(b) Federal regulation

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: [pg. **2023** -1468]*Provided* , That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

15 U.S.C. § 1012.

The Supreme Court later, in *Prudential Insurance Co. v. Benjamin*, 328 U.S. 408 [34 AFTR 1258] (1946), "explained the legislative intent behind the statute's preclusionary approach to federal intrusion on state insurance laws." *Sabo v. Metro. Life Ins. Co.*, 137 F.3d 185, 189 (3d Cir. 1998). It said, among other things, that Congress's "purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co.*, 328 U.S. at 429. Those closing words—"the business of insurance"—have high salience in this dispute over captive insurance companies.

B. Overview of Captive Insurance

A "captive" insurance company is one that is wholly owned and controlled by its insureds. *Avrahami v. Comm'r of Internal Revenue* , 149 T.C. 144, 176 (T.C. 2017). This type of entity protects the owner-insured while simultaneously allowing the benefit of reaping the captive company's underwriting revenues. Businesses that are experienced in establishing and managing captive insurance companies are called "captive managers." (J.A. at 241 at ¶ 14.) Captive managers facilitate the creation and management of captive insurers in jurisdictions that have passed captive insurance enabling legislation, as has Delaware.

Captive insurance is effectively a kind of self-insurance, but one with an added tax benefit: "Amounts paid for insurance are deductible under [26 U.S.C. §§ 162(a)] as ordinary and necessary expenses paid or incurred in connection with a trade or business[,]" as opposed to "amounts set aside in a loss reserve as a form of self-insurance," which are not deductible. *Avrahami*, 149 T.C. at 174. The upshot is that a company that wishes to hold money aside in case of loss can reduce its taxable income by paying such money as premiums to its captive insurer and then deducting the premiums.

Title 18 of the Delaware Code (the "Delaware Insurance Code") governs insurers and insurance professionals licensed under Delaware law. Chapter 69 of the Delaware Insurance Code is the part of the state's statutory scheme governing the formation, licensing, and regulation of captive insurers. Under Chapter 69, corporations and various alternative entities can apply for certificates of authority from the Insurance Commissioner of the State of Delaware to operate as captive insurance companies. [3] If a certificate is granted, the resulting Delaware captive insurance company is generally subject to triennial examinations in which the Department "thoroughly inspect[s] and examine[s] [the company's] affairs to ascertain its financial condition, its ability to fulfill its obligations and its compliance with the provisions of [Chapter 69]." 18 Del. Code Ann. § 6908.

Section 6920 of the Delaware Insurance Code, which is central to the present controversy, relates to the confidential treatment of materials and information that captive insurers are required to submit to the Department. It provides, in pertinent part:

> All portions of license applications reasonably designated confidential by...an applicant captive insurance company, ...and all examination reports, ...recorded information, [and] other documents, ...produced or obtained by or submitted or disclosed to the Commissioner that are related to an examination pursuant to this chapter must, unless the prior written consent...of the captive insurance company...has been obtained, be given confidential treatment..., and may not be...disclosed to any other person at any time except:
>
> ....
>
> To a law-enforcement official or agency of...the United States of America so long as such official or agency agrees in writing to hold it confidential and in a manner consistent with this section.

§ 6920.

In short, § 6920 prohibits the Department from disclosing covered information to anyone, including the federal government, unless the captive insurance company consents, or, as relevant here, the federal government agrees in writing to treat the information as confidential.

C. Overview of "Micro-Captive" Insurance and Tax Concerns

As mentioned above, captive insurance can be used to obtain a tax benefit for the insureds [pg. **2023** -1469] by permitting them to claim deductions for the premiums they pay. But that does not prevent the IRS from taxing the captive insurers. "While the [Internal Revenue] Code permits the deduction of insurance premiums *paid*, it also taxes insurance premiums *received*." *Avrahami*, 149 T.C. at 174 (emphasis in original); *see also id.* at 175 ("Insurance companies–other than life-insurance companies...–are generally taxed on their income in the same manner as other corporations.").

There is, however, an exception of particular relevance here: insurance companies whose annual net written premiums do not exceed a specified maximum and meet certain other requirements may elect tax treatment under 26 U.S.C. §§ 831(b).[4] *See id.* at 176, 178-79 & n.46. That election allows a captive insurance company to pay *no* taxes on the premiums it receives. *IRS Notice of Transaction of Interest–Section 831(b) Micro-Captive Transactions* ("2016 IRS Notice"), [sic, Notice 2016-66] 2016-47 I.R.B. 745 (2016). Instead, it only pays tax on any eligible investment income it may have. *Id.*; *see also Avrahami*, 149 T.C. at 176 (explaining that such an entity is "subject to tax only on its taxable investment income"). In that circumstance, then, the insured can deduct premiums from its taxable income without its captive insurer being taxed on those same premiums.

Insurance companies that are both "captive insurers" and taxed under 26 U.S.C. §§ 831(b) are known as "micro-captives." The term "micro-captive" does not appear anywhere in the Delaware Captive Law or the Internal Revenue Code. It is simply an apt description used by the IRS and the Tax Court, among others, to designate a captive insurance company whose annual net written premiums do not exceed the maximum allowed for it to elect the special tax treatment available under § 831(b). *See Avrahami*, 149 T.C. at 176, 178-79 (discussing such companies and transactions, their tax consequences, and their potential for abuse).

While the IRS has explicitly "recognize[d] that related parties may use captive insurance companies that make elections under § 831(b) for risk management purposes that do not involve tax avoidance," it has identified "micro-captive" transactions as having "a potential for tax avoidance or evasion." 2016 IRS Notice, [sic, Notice 2016-66] 2016-47 I.R.B. 745. For example, "[u]nscrupulous promoters" may "persuade closely held entities to...create captive insurance companies onshore or offshore, drafting organizational documents and preparing initial filings to state insurance authorities and the IRS." IRS News Release IR-2015-19 (Feb. 3, 2015), https://www.irs.gov/pub/irs-news/IR-15-019.pdf. Too often, these micro-captives are not providing bona fide insurance. "Underwriting and actuarial substantiation for the insurance premiums paid are either missing or insufficient." *Id.* Instead, their purpose is to serve as a conduit for inflated premiums that their insureds can deduct as business expenses, while the faux insurer, by keeping the premiums below the threshold for § 831(b), is taxed only on the investment income it may have. *Id.* The promoters help paper over the charade and may "assist[] with creating and `selling' to the entities often times poorly drafted `insurance' binders and policies to cover ordinary business risks or esoteric, implausible risks for exorbitant `premiums[.]'" *Id.* All the while, the insured may retain actual commercial insurance coverage from traditional insurers. *Id.*

Accordingly, "the IRS has applied increased scrutiny to these transactions, adding them to [its] `dirty dozen' list of tax scams in 2015 and declaring them `transactions of interest' in 2016." *Avrahami*, 149 T.C. at 173. A 2016 IRS Notice declared micro-captive transactions satisfying certain criteria as "transactions of interest" that must be reported to the IRS. IRS Notice, [sic, Notice 2016-66] 2016-47 I.R.B. 745.

D. Factual Background

The summons enforcement action now on appeal arises from the IRS's investigation of Artex Risk Solutions, Inc. ("Artex"), and Tribeca Strategic Advisors, LLC ("Tribeca"), the latter entity being wholly owned by Artex. The investigation seeks to determine whether Artex and Tribeca are liable for penalties under 26 U.S.C. §§ 6700 for promoting abusive tax shelters.[5] The federal government successfully enforced two summonses issued to Artex, leading to a production of documents in 2014. Those documents included two email chains between Artex and the Delaware Department of Insurance that piqued the interest of the IRS [pg. **2023** -1470] and led to the summons at issue here. The first email chain related to the issuance by the Department of certificates of authority in December 2012 to an Artex client. The second involved the Department's Director of Captive and Financial Insurance Products, who declined a dinner invitation from Artex but scheduled a breakfast meeting the following day with six Department employees and Artex.

On October 30, 2017, the IRS issued an administrative summons to the Department for testimony and certain records relating to filings by and communications with Artex, Tribeca, or others working with those companies. Of main concern is what the parties and District Court refer to as "Request 1" of the summons. Request 1 seeks "all electronic mail between [the Department] and Artex and/or Tribeca related to the Captive Insurance Program." (J.A. at 065.) The "Captive Insurance Program" is broadly defined in the summons as "any arrangement managed by Artex or Tribeca wherein captive insurance companies, defined by [Chapter 69 of the Delaware Insurance Code], provide either insurance and/or reinsurance." (J.A. at 063.) At the time of the summons, it seems the IRS believed that the Department had issued 191 certificates of authority to insurance companies created by Artex and Tribeca.[6] It directed the Department to appear before a revenue agent to give testimony and produce requested documents by November 29, 2017.

The Department responded with objections to the summons, including confidentiality objections pursuant to § 6920 of the Delaware Insurance Code. The IRS declined the Department's request to agree in writing to abide by the confidentiality requirements of § 6920. The Department has thus continued to refuse to produce any emails or other documents responsive to Request 1 that relate to specific captive insurers created by Artex and Tribeca, absent the affirmative consent of the relevant captive insurers, and no representative of the Department has ever appeared to provide testimony. Any limited compliance with the summons was tailored to avoid violating § 6920 and does not bear on the issues before us.

E. Procedural Background

Given the Department's refusal to comply with the summons, the federal government filed in the District Court a petition to enforce it, supported by a declaration from IRS Revenue Agent Bradley Keltner. Specifically, the government sought an order directing the Department to comply with Request 1 of the summons and the demand for testimony. A Magistrate Judge, the Honorable Christopher J. Burke, issued an order to show cause why the Department should not be compelled to comply with the summons. The Department opposed the petition for enforcement and moved to quash the summons. Of importance here, the Department argued that, under the MFA, § 6920 reverse-preempts the IRS's summons authority.[7]

The Magistrate Judge issued a thorough Report and Recommendation concluding that the petition to enforce the summons should be granted. He recommended against any holding of reverse-preemption under the MFA, after analyzing the question at length. First, he explained how MFA reverse-preemption is "an exception to the general rule" that a "state statute yields under the doctrine of preemption" in the face of a conflicting federal statute. (J.A. at 025.) Specifically, he explained that, unlike the normal situation, the MFA "permits state laws to trump federal laws in certain circumstances (or to `reverse preempt' those laws)." (J.A. at 025.) Further, he described how the MFA's reverse-preemption provision, codified in § 1012(b), contains two clauses, with the first addressing "federal laws in general," and the second addressing "application of federal antitrust laws." (J.A. at 025 (quoting *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160, 167 n.1 (3d Cir. 2001)).)

The Magistrate Judge then said that in a non-antitrust matter, such as this case, the first clause of § 1012(b) asks three questions (the "first clause requirements") that must be answered in the affirmative before reverse-preemption is appropriate under the MFA. Those questions are: "(1) whether the state law is enacted `for the purpose of regulating the business of insurance'; (2) whether the federal law does not `specifically relat[e] to the business of insurance'; and (3) whether the federal law would `invalidate, impair, or supersede' the State's law." (J.A. at 026 (citing *Humana*, 525 U.S. at 307).) [pg. **2023** -1471]

Argued by the federal government, the Magistrate Judge went on to say "that before the Court applies the above-referenced three-factor test drawn from [§ 1012(b)], it must first assess whether an additional, threshold element...has been met: `whether the activity complained of constitutes the "business of insurance."'" (J.A. at 026 (emphasis removed) (quoting *Highmark*, 276 F.3d at 166 (quoting *Sabo*, 137 F.3d at 191)).) He observed that our precedent has "clearly and repeatedly instructed that...[courts] must first assess whether the movant has satisfied the threshold element, before applying [§ 1012(b)]'s three-part test." (J.A. at 028.) Further, he rejected the argument that, based on the Supreme Court's decisions in *U.S. Department of Treasury v. Fabe*, 508 U.S. 491 (1993), and *Humana Inc. v. Forsyth*, 525 U.S. 299 (1999), our threshold "business of insurance" inquiry is no longer good law.

With that said, the Magistrate Judge recommended the conclusion that, under our threshold inquiry, the challenged conduct did not constitute the "business of insurance" and so was not subject to the reverse-preemption provision of the MFA. He suggested that, in determining whether the reverse-preemption provision in § 1012(b) applies, courts should look at the discrete conduct in question (here, resisting an IRS summons, as dictated by § 6920), rather than examining how the ostensibly reverse-preempting provision of state law fits into the State's overarching regulatory scheme. He agreed with the federal government that the conduct at issue in this case is "fairly characterized as `[r]ecord maintenance' or `the dissemination and maintenance of information, documents, and communications [maintained by the state.]'" (J.A. at 029 (quoting D.I. 23 at 12-23).) Parsing the language of § 6920, he determined that the "entire focus is on the type of access that [the Department] may or may not provide to third parties (including federal law enforcement officers) regarding a captive insurer's confidential information." (J.A. at 029.) He thus recommended concluding such conduct does not constitute the "business of insurance."

In sum, the recommended holding was that the MFA does not apply to the particular conduct of the Department now at issue and, accordingly, that the petition to enforce the IRS summons should be granted and the motion to quash should be denied. The Department filed timely objections to the Magistrate Judge's Report and Recommendation, and the District Court overruled them, adopting the Report and Recommendation, granting the petition to enforce the summons, and denying the motion to quash. This timely appeal followed.

II. DISCUSSION[8]

The Department argues, first, that our threshold inquiry is no longer good law and, second, that even if it remains good law, the District Court erred in saying it was not satisfied here. Both of those arguments proceed from a fundamental misreading of our precedent. Accordingly, before turning to either argument, we review our holding in *Sabo v. Metropolitan Life Insurance Co.*, 137

F.3d 185 (3d Cir. 1998), and our reaffirmance of *Sabo* in *Highmark, Inc. v. UPMC Health Plan, Inc.*, 276 F.3d 160 (3d Cir. 2001).

A. Our Threshold Inquiry Precedent

1. Origin and General Principles

In *Sabo*, we interpreted subsections 1012(a) and 1012(b), as well as the import of the Supreme Court's discussion of the MFA in *SEC v. Nat'l Sec., Inc.* ("*National Securities*"), 393 U.S. 453 (1969). We concluded that there is a "threshold question in determining whether the antipreemption mandate of...§ 1012(b) applies," and that the inquiry is "whether the challenged conduct broadly constitutes the `business of insurance' in the first place." *Sabo*, 137 F.3d at 189-91. Only when that question is answered in the affirmative do the "three distinct requirements" from the first clause of § 1012(b) come into play. *Id.* at 189. For reverse-preemption to be appropriate, all three of those "first clause" requirements must be met: "(1) the federal law at issue does not specifically relate to the business of insurance; (2) the state law regulating the activity was enacted for the purpose of regulating the business of insurance; and (3) applying federal law would invalidate, impair, or supersede the state law."[9] *Id.*

In *Sabo*, we were at pains to demonstrate that the threshold inquiry–again, whether the challenged conduct constitutes the "business of insurance"–had a firm foundation in § 1012(a). The issue presented in *Sabo* was [pg. **2023** -1472] whether reverse-preemption under the MFA barred an insurance salesman from suing his former employer under the Racketeer Influenced and Corrupt Organization Act, 18 U.S.C. §§ 1961-68, when the "challenged predicate acts ar[o]se [out] of the defendant's insurance business." *Sabo*, 137 F.3d at 187. The parties' disagreement focused on "the scope of the `insurance business' covered by [the MFA], and whether it applied to" the conduct at issue in the dispute. *Id.* at 187-88. That conduct was a churning scheme involving the fraudulent trading of insurance policies, the fraudulent advertising of insurance policies as a retirement savings plan, and the coercing of employees to engage in those acts. *Id.*

We decided that those activities constituted the "business of insurance," after analyzing the proper role and basis for the threshold inquiry. *Id.* at 188-92. We stated that "Section [1012(a)] by its terms, affirmatively subjects the business of insurance to state regulation." *Id.* at 189. We then explained that the MFA took the "further step of proscribing unintended federal interference of state insurance laws by a general mandate," quoting the requirements of the first clause of § 1012(b). *Id.* We noted that our preemption analysis would focus on "the first clause of section 1012(b)," rather than the second clause because the complaint was not "grounded in federal antitrust law." *Id.* at 189 n.1.

We then analyzed the interplay between § 1012(a) and § 1012(b), saying, "[i]f it is determined that the alleged conduct at issue broadly constitutes the `business of insurance,' and is therefore subject to state regulation under section 1012(a), the next issue is whether the anti-preemption mandate of section 1012(b) precludes a federal cause of action." *Id.* at 189. We did not engraft an atextual limitation onto the requirements of the first clause of § 1012(b). Rather, citing *National Securities*, we made it clear that we were relying on the text of § 1012(a) for the threshold inquiry:

> The threshold question in determining whether the antipreemption mandate of 15 U.S.C. § 1012(b) applies is whether the challenged conduct broadly constitutes the "business of insurance" in the first place. 15 U.S.C. § 1012(a). If the contested activities are wholly unrelated to the insurance business, then the [MFA] has no place in analyzing federal regulation because only when "[insurance companies] are engaged in the `business of insurance' does the act apply."

Id. at 190 (quoting *National Securities*, 393 U.S. at 459–60). We concluded by observing again that, "[i]f the defendant's conduct does not constitute `the business of insurance,' then the Act simply does not apply and there is no need to confront preclusion issues under § 1012(b)." *Id.*

Re-emphasizing the point, and, relying on another Supreme Court opinion, *U.S. Department of Treasury v. Fabe*, we noted that reverse-preemption applies when "the activity in question constitutes the business of insurance and...the specific state law was enacted with the `end, intention, or aim' of adjusting, managing, or controlling the business of insurance." *Sabo*, 137 F.3d at 191 (quoting *Fabe*, 508 U.S. at 505).[10]

After *Sabo*, we reaffirmed the threshold inquiry in *Highmark*. "If the activity does not constitute the `business of insurance,' then the [MFA] does not apply," we said.[11] 276 F.3d at 166 (citing *Sabo*, 137 F.3d at 190-91). If, however, the threshold inquiry is satisfied, "we then look to whether § 1012(b)" reverse-preempts the federal law in question. *Id.*

2. The Breadth of the Phrase "Business of Insurance"

The Supreme Court has provided further guidance on the meaning of the phrase "business of insurance," as used in the MFA. The phrase is undefined in the statute, so the Court has looked to "the ordinary understanding of that phrase, illumined by any light to be found in the structure of the Act and its legislative history." *Grp. Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 211 (1979). We do likewise, looking to how the Supreme Court employed that phrase in *National Securities*.

In its opinion there, the Court noted that Congressional debates surrounding the MFA were "mainly concerned with the relationship between insurance ratemaking and the antitrust laws, and with the power of the States to tax insurance companies," none of which was then at issue in the case before it. *National Securi[pg.* ***2023*** *-1473] ties*, 393 U.S. at 458-59. Accordingly, the Court analyzed the phrase "business of insurance" in the broader context of Congress's reaction to *South-Eastern*

Underwriters, and, in so doing, found "it [was] relatively clear what problems Congress was dealing with." *Id.* at 459. "Congress was concerned" with preserving for state regulation that which had been understood as beyond the Commerce Clause before *South-Eastern Underwriters*, specifically, "the type of state regulation that centers around the contract of insurance." *Id.* at 460.

Having thus set the stage, the Supreme Court identified the "core of the `business of insurance'" as "[t]he relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement[.]" *Id.* In addition, *National Securities* provided several examples of that "core": "the fixing of [insurance] rates"; "the selling and advertising of [insurance] policies"; and the "licensing of companies and their agents." *Id. National Securities*, however, made clear that the sweep of the "business of insurance" goes beyond the core to reach "other activities of insurance companies [that] relate so closely to their status as reliable insurers that they too must be placed in the same class." *Id.* "[W]hatever the exact scope of the statutory term," the touchstone remains the impact on the "relationship between the insurance company and the policyholder." *Id.*

The Court later admonished that not everything that "indirect[ly] [a]ffects" policyholders or "redounds to the[ir] benefit" in some way falls within the "business of insurance." *Fabe*, 508 U.S. at 508-09 (citing *Royal Drug*, 440 U.S. at 216-17). After all, the "statute d[oes] not purport to make the States supreme in regulating all the activities of insurance companies[.]" *National Securities*, 393 U.S. at 459. Thus, "terms such as `reliability' and `status as a reliable insurer'" cannot "be interpreted" so "broad[ly]" that "almost every business decision of an insurance company could be included in the `business of insurance.'" *Royal Drug*, 440 U.S. at 217.

B. Sabo and Highmark Remain Good Law

In this appeal, the Delaware Department of Insurance argues that our decisions in *Sabo* and *Highmark* are no longer good law, citing three reasons. First, the Department argues that *Sabo* conflicts with the Supreme Court's earlier decision in *Fabe*, 508 U.S. 491. Second, it argues that *Sabo* was implicitly overruled by a later Supreme Court decision, *Humana Inc. v. Forsyth*, 525 U.S. 299. And third, it argues that our own decisions after *Sabo* and *Highmark* conflict with those two cases. More specifically, the Department says that the lack of any mention of the threshold inquiry in *Suter v. Munich Reinsurance Co.*, 223 F.3d 150 (3d Cir. 2000), represents the true post-*Humana* precedent of our Court, replacing *Sabo* and *Highmark.* None of those arguments holds water, and, contrary to each of them, the threshold inquiry prescribed in *Sabo* and reiterated in *Highmark* remains the law of this Circuit.

The Department's arguments contain two foundational flaws. First, they misread the origins of the threshold inquiry. The contention that the threshold inquiry does not derive from § 1012(a) is plainly wrong, as demonstrated by the description we have just given of *Sabo. See supra* Section II.A.1.[12] As already noted, *Sabo* expressly cites § 1012(a) when stating that "[t]he threshold question in determining whether the antipreemption mandate of 15 U.S.C. § 1012(b) applies is whether the challenged conduct broadly constitutes the `business of insurance' in the first place." *Sabo*, 137 F.3d at 190; *see also id.* at 189 ("If it is determined that the alleged conduct at issue broadly constitutes the `business of insurance,' and is therefore subject to state regulation *under section 1012(a)*, the next issue is whether the anti-preemption mandate of section 1012(b) precludes a federal cause of action." (emphasis added)). The quoted language from *Sabo* speaks for itself.

Second, as we proceed to discuss now, the Department perceives jurisprudential conflict where there is none. Those supposed conflicts are instances where we or the Supreme Court analyzed MFA reverse-preemption under the first clause of § 1012(b), focusing on what was at issue in those cases. Whether reverse-preemption is warranted under the first clause of § 1012(b) when it is implicated is a separate question from whether reverse-preemption is implicated in the first place under § 1012(a). [pg. **2023** -1474]

1. Sabo does not conflict with Fabe

By way of example, the Department wrongly asserts that *Fabe* conflicts with *Sabo*. *Fabe* stands for the unremarkable proposition that the first clause of § 1012(b) has three requirements, but it does not foreclose a threshold inquiry derived from § 1012(a). In *Fabe*, the liquidator of an insurance company brought a declaratory judgment action in federal court "seeking to establish that [a] federal priority statute [did] not preempt [an] Ohio law designating the priority of creditors' claims in insurance-liquidation proceedings." 508 U.S. at 495. The federal statute "accord[ed] first priority to the United States with respect to a bankrupt debtor's obligations[,]" while the Ohio statute "confer[red] only fifth priority upon claims of the United States in proceedings to liquidate an insolvent insurance company[.]" *Id.* at 493.

Fabe quoted the first clause of § 1012(b) and gave passing acknowledgment to uncontested points. *Fabe*, 508 U.S. at 500-01. After that, "[a]ll that [was] left" for analysis, under the first clause, was "whether the Ohio priority statute [was] a law enacted `for the purpose of regulating the business of insurance.'" *Id.*

The Supreme Court's treatment of that contested point included analysis akin to our threshold inquiry. The Court first clearly stated that "the Ohio statute" was "a law `enacted for the purpose of regulating the business of insurance,' within the meaning of the first clause of § [1012(b)]." *Id.* at 505. It then backtracked, refusing to fully reverse-preempt the federal law with respect to creditors who were not policyholders, holding that the state law was "not a law enacted for the purpose of regulating the business of insurance" to the extent it benefited such creditors. *Id.* at 508 & n.8. Additionally, it refused to hold that the portion of the state law providing for administrative costs for creditors other than policyholders reverse-preempted federal law. *Id.* at 509. It reasoned that the provision's "connection to the ultimate aim of insurance [wa]s too tenuous." *Id.* Although pressed by the dissent to justify such a "compromise holding," *id.* at 518 (Kennedy, J., dissenting), the majority provided no textual hook for its holding. *See id.* at 508-09 & n.8 (arguing that the dissent had conceded that the statute need not "stand or fall in its entirety" and observing that the dissent had cited nothing preventing the majority from finding certain parts of the statute had effected a reverse-preemption and others had not). Of more importance for present purposes, it never foreclosed § 1012(a) from playing the role we have concluded it plays.

Simply put, while *Fabe* focuses on § 1012(b), it is not irreconcilable with our threshold inquiry or the conclusion that § 1012(a) is the source of it.

2. Sabo does not conflict with Humana

Nor does *Humana* conflict with *Sabo* or overrule it. In *Humana*, insurance policy beneficiaries alleged that an insurance company engaged in a scheme to hide discounts that the company had received from a hospital, and that it did so to prevent the beneficiaries from sharing in the savings. 525 U.S. at 303-04. The plaintiffs contended that this violated both the Nevada law regulating insurance fraud and RICO. *Id.* at 302. Although the state and federal laws represented "differ[ing]" "remedial regimes," the Supreme Court concluded that "RICO can be applied in this case in harmony with the State's regulation," and, therefore, "the [MFA] does not bar the federal action." *Id.* at 303.

Humana touched only on the first clause of § 1012(b), without suggesting a rejection of a threshold inquiry under § 1012(a). The first sentence of the opinion introduced the case as one "concern[ing] the regulation of insurance by the states, as secured by the [MFA], 59 Stat. 33, as amended, 15 U.S.C. § 1011 et seq." *Id.* at 302. But that same paragraph made it apparent that the Court was going to limit its discussion solely to the one requirement of the first clause of § 1012(b) then in dispute[13] —whether RICO "`invalidate[d], impair[ed], or supersede[d]' the State's regulation." *Id.* at 302-03. Although *Humana* states that § 1012(b) is "the centerpiece of this case," *id.* at 306, it discusses only two of the three "first clause" requirements, and one of those only in passing, with the remaining one being assumed to be satisfied. *Id.* at 307 ("RICO is not a law that `specifically relates to the business of insurance.' This case therefore turns on the question: Would RICO's application to the employee beneficiaries' claims at issue `invalidate, impair, or supersede' Nevada's laws regulating insurance?").

That *Humana* proceeded to examine whether RICO conflicted with state law without tarrying along the way does not mean that *Humana* addressed the existence of a threshold inquiry derived from § 1012(a). It did not, and thus does not foreclose it. The Department's suggestion [pg. **2023** -1475] that *Humana* sets out the first clause of § 1012(b) as the exclusive "test for the [MFA]" preemption ignores what *Humana* makes plain in context–that the Court was quickly getting to the heart of the issue without purporting to write a treatise on every aspect of the MFA.[14] *Cf. United States v. Sineneng-Smith* , 140 S. Ct. 1575, 1579 (2020) ("[Courts] wait for cases to come to them, and when [cases arise, courts] normally decide only questions presented by the parties.") (discussing the "principle of party presentation"); *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 775 (1968) ("[T]his Court does not decide important questions of law by cursory dicta inserted in unrelated cases."); *Roebuck v. Drexel Univ.*, 852 F.2d 715, 738 n.41 (3d Cir. 1988) (declining appellee's "invitation to transform what is in essence stray language and at best no more than dicta into a binding holding").

3. Sabo does not conflict with Suter

Also contrary to the Department's assertion, our own decision in *Suter v. Munich Reinsurance Co.* does not suggest there is a conflict between *Humana* and *Sabo*, or that *Humana* implicitly overrules *Sabo.* Indeed, *Suter* mentions neither case. *Suter* involved a suit brought in state court by the liquidator of an insurance company against a German reinsurance company over an alleged breach of "certain reinsurance treaties." 223 F.3d at 152. The reinsurance treaties "include[d] arbitration clauses governed by the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards." *Id.* Congress enacted a removal provision, 9 U.S.C. § 205, as a part of an act to enforce that convention (the "Convention Act"). *Id.* at 154-55. Relying on those procedural tools, the defendant first removed the case to district court under 9 U.S.C. § 205, and then tried to both compel arbitration and stay the district court proceedings pending arbitration. *Id.* at 152. The plaintiffs argued for remand on three grounds, two of which are relevant here: first, that a provision in the reinsurance treaty waived the defendant's right to remove and, second, that the Convention Act and Federal Arbitration Act (the "FAA") were reverse-preempted by the MFA. *Id.* The district court remanded the case to state court on the first ground without reaching the plaintiffs' other arguments or ruling on the defendant's motion. *Id.* After reversing the district court on the only ground that it examined, we declined to affirm on the basis of MFA reverse-preemption. We examined only one of the three requirements of the first clause of § 1012(b) and found it was not satisfied. *Id.* at 162. To begin, we noted that "there is no contention that either the Convention Act or the FAA `specifically relate to the business of insurance.'" *Id.* at 160. We briefly identified the remaining requirements of the first clause of § 1012(b) and assumed one of them away without discussion. *See id.* at 160-61 ("Thus the only issues are whether these statutes as applied in the instant case invalidate, impair or super[s]ede a New Jersey statute that was enacted for the purpose of regulating the business of insurance."); *id.* at 161 ("For purposes of this decision, we will assume that [the statutory] provisions were enacted for the purpose of regulating the business of insurance[.]"). We then briefly explained why "application of the Convention Act to th[e] suit does not impair the New Jersey Liquidation Act." *Id.* at 162. Nothing in that analysis overrides *Sabo*, even if the approach looked at § 1012(b) without pausing at § 1012(a). Given *Sabo*'s status as pre-existing precedent, *Suter* could not have overruled *Sabo*, *see* **Third Circuit** I.O.P. 9.1, and there is no indication that it intended to.

4. The Department's remaining arguments

The Department makes two additional points that warrant brief mention. First, it notes that we are alone in holding that there is a threshold inquiry derived from § 1012(a). Second, it contends that each of the other circuits that previously used a four-factor test have abandoned it. Neither point would, of course, overrule *Sabo* or *Highmark*, but they might provide a basis for en banc review if they were persuasive. *Cf. In re Krebs*, 527 F.3d 82, 86 (3d Cir. 2008) (a panel may neither overrule a prior precedential opinion "because we are no longer persuaded by its reasoning" nor because "[s]everal of our sister courts of appeals have decided the...issue" contrary to that precedent). They are not. The Department identifies no post-*Humana* precedential opinion of our sister circuits that engages in legal analysis grappling with (let [pg. **2023** -1476] alone dispensing with) something akin to *Sabo* 's threshold inquiry under § 1012(a).

The one pre-*Humana* case that explicitly parts ways with *Sabo* is *Autry v. Nw. Premium Servs., Inc.*, 144 F.3d 1037 (7th Cir. 1998), and it misreads *Sabo.* Without explanation or analysis, *Autry* lumps *Sabo* in with opinions applying a four-factor test derived from § 1012(b). *Autry* , 144 F.3d at 1041. Hence, the reasons articulated in *Autry* for rejecting a four-factor test derived from § 1012(b) are errantly applied to *Sabo* because, as we have explained, *Sabo*'s threshold inquiry derives from § 1012(a).[15]

C. The Threshold Inquiry is Not Satisfied

We now turn to the task of applying the threshold inquiry. That involves identifying the conduct being challenged by the party asserting federal supremacy and then asking if that conduct constitutes the "business of insurance."

1. The Challenged Conduct is Non-Disclosure of Records Maintained by the State Absent a Confidentiality Agreement

To recap, the federal government brought this summons enforcement action to force the Department to provide information related to certain micro-captives. The Department has steadfastly refused to provide that information without the federal government first signing a confidentiality agreement. The Department's refusal, and that alone, is the challenged conduct. More specifically, the challenged conduct is the Department's insistence that it need not provide documents and related testimony that are responsive to Request 1 of the summons. The Magistrate Judge's Report and Recommendation, adopted by the District Court, characterized the conduct in fundamentally the same way, while noting that the conduct tracks the pertinent exception to the general disclosure proscription in § 6920 of the Delaware Insurance Code.

The Department proposes that, to define the challenged conduct for purposes of the threshold inquiry, we should examine the purpose of § 6920 and how it fits into the State's overall regulatory scheme. But that proposal is tantamount to asking us to skip the threshold inquiry. The Department wants us to characterize the challenged conduct by asking, effectively, whether § 6920 was "enacted...for the purpose of regulating the business of insurance." Transforming the threshold inquiry into that post-threshold requirement from the first clause of § 1012(b) cannot be reconciled with *Sabo*'s admonition that those are separate questions. *Sabo* , 137 F.3d at 191.

Furthermore, the Department's proposal is not faithful to how we went about characterizing the conduct at issue in *Sabo* and *Highmark* for purposes of the threshold inquiry. In *Sabo*, we defined the challenged conduct as a "churning scheme" involving fraudulently trading insurance policies, fraudulently advertising an insurance policy as a retirement savings plan, and coercing employees to engage in those activities. *Sabo*, 137 F.3d at 187, 191. Although such conduct, if it occurred, would violate state law, no reference was made to state law in characterizing that conduct. *Id.* at 191-92. In *Highmark* , the plaintiff alleged that a rival's advertisements included misleading statements about the plaintiff's insurance, ostensibly running afoul of the Pennsylvania Unfair Insurance Practices Act. *Highmark*, 276 F.3d at 163-64. We characterized "the action complained of" as "the advertising" or the "advertising practices of the parties," with no mention of the state law. *Id.* at 166. Thus, in keeping with *Sabo* and *Highmark*, we reject the contention that defining the challenged conduct for purposes of the threshold inquiry entails examining the purpose of § 6920 and how it fits into Delaware's overall regulatory scheme.

2. The Challenged Conduct Does Not Constitute the Business of Insurance

The Department's refusal to provide documents and testimony responsive to Request 1 of the summons is not the "business of insurance."[16] As an initial matter, it is plainly not the "core of the `business of insurance.'" *See National Securities*, 393 U.S. at 460 ("The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement–these [are] the [pg. **2023** -1477] core of the `business of insurance.'"). It also cannot reasonably be understood as "[an]other activit[y] of insurance companies [that] relate[s] so closely to [their] status as reliable insurers that [it] must be placed in the same class." *Id.* It stands, rather, somewhat removed from the "relationship between the insurance company and the policyholder." *Id.*

The Department nevertheless presses the argument that, even if the challenged conduct is its adherence to the strictures of § 6920 in the face of an action to enforce Request 1 of the summons, such conduct constitutes the "business of insurance." That conclusion follows, the Department says, because the confidentiality provision at issue deals with materials submitted in connection with the licensure of would-be captive insurers and examinations of already-approved captive insurers "for the purpose of determining the solvency and safety of insurers, and for the protection of its policyholders." (Answering Br. at 38.) If § 6920 does not reverse-preempt the IRS's summons authority, the Department claims, then applicants and already-approved captive insurers will be less forthcoming with the Department. The Department therefore contends that affirming the

District Court will indirectly endanger those who are insured. By that route, the Department reasons that its adherence to § 6920 should be placed in the category of the "business of insurance."

For that argument to hold water, however, we must accept that affirming the District Court would lead to a change in behavior by captive insurers (or their managers) that would reduce the reliability of captive insurers. That is a contention that cannot survive scrutiny. As an initial matter, the substantive requirements for licensure and continued permission to operate under certificates of authority issued by the Department is not altered by our affirmance of the District Court's ruling. The Department has the authority to obtain documents it requires for licensure and subsequent examinations and can impose consequences on companies that will not provide them. *See, e.g.*, 18 Del. Code Ann. §§ 6903, 6908, 6909.[17] Simply put, the Department will be no less entitled to the information it currently receives to license captive insurance companies than it has previously been. The same is true of the Department's entitlement to information to determine whether already-licensed captive insurance companies should be allowed to continue to operate.

Moreover, according to the Department and Amici, the information sought here is as legally obtainable by a direct summons or subpoena to the captive insurance companies (or, perhaps, to their managers) as a summons directed to the Department. Accepting those arguments on their own terms, insurance companies will have no plausible reason to withhold information from the Department that turns on the outcome of this case. That is, we are being asked to accept that, but for the potential availability of the novel argument that § 6920 reverse-preempts the IRS's summons authority, a prospective or existing captive insurer will intentionally withhold required information from the Department.

But if a captive insurer is so well informed about the IRS's enforcement powers and defenses against them that it thinks of MFA reverse-preemption in this context, such a company is almost certainly aware of the obvious threat of a direct IRS summons or subpoena. And it must also be aware that being less than forthcoming with the Department risks foregoing or losing a certificate of authority to operate as an insurer. In short, it is hard to see the causal connection the Department is trying to draw. If enforcement of the summons is not the but-for cause of a company's changing its transparency (or lack thereof) with the Department, then the Department is in the same position regardless of how we decide the present dispute. And if that is so, then affirming the District Court will neither undermine the insurer-insured relationship nor the insurer's reliability as an insurer. Accordingly, we reject the Department's argument that its adherence to § 6920 constitutes the "business of insurance."

III. CONCLUSION

For the forgoing reasons, the District Court's order will be affirmed.

1 A captive insurance company is an insurance company that is wholly owned and controlled by its insureds. *Avrahami v. Comm'r of Internal Revenue*, 149 T.C. 144, 176 (T.C. 2017).

2 All references herein to the MFA are to its provisions as codified.

3 A would-be captive insurance company may apply for a "certificate of authority" from the Commissioner, as provided in 18 Del. Code Ann. § 6903 ("License application; certificate of authority"). Once issued a "certificate of authority," a captive insurance company is "authoriz[ed]...to do insurance business in th[e] State." *Id.* § 6903(f). The terms "Commissioner" and "the Department" will be used herein interchangeably, as there is no issue in this case relating to delegation of the Commissioner's authority.

4 That section generally provides that instead of paying taxes computed using their taxable income, insurance companies that have elected this treatment have their "tax computed by multiplying" their "taxable investment income" "by the rates provided in [26 U.S.C.] section 11(b)." 26 U.S.C. §§ 831(b)(1) (setting the general tax consequence for certain small insurance companies). The 2015 amendments to 26 U.S.C. §§ 831(b) set the threshold at $2.2 million and provided that this will periodically be "increased for inflation." *Avrahami* , 149 T.C. at 176 n.46. The federal government represents that as of the time it filed its Answering Brief, the maximum still stands at $2.2 million. The 2015 amendments to 26 U.S.C. §§ 831(b) "added new diversification requirements that an insurance company must meet in order to receive the favorable tax treatment of subsection (b)." *Id.*

5 The origins of that investigation are immaterial to the issues before us now.

6 The Department has represented that it actually issued 225 certificates of authority to companies created by Artex and Tribeca.

7 To make out a prima facie case for the validity of a summons, the federal government must show each of the following: (1) "that the investigation will be conducted pursuant to a legitimate purpose"; (2) "that the inquiry may be relevant to the purpose"; (3) "that the information sought is not already within the [IRS's] possession"; and (4) "that the administrative steps required by the [United States Tax] Code have been followed." *United States v. Rockwell Int'l*, 897 F.2d 1255, 1262 [65 AFTR 2d 90-833] (3d Cir. 1990) (quoting *United States v. Powell*, 379 U.S. 48, 57-58 [14 AFTR 2d 5942] (1964)) (internal quotation marks omitted). Before Judge Burke, the Department argued the third prerequisite had not been shown. He decided that the federal government had met its burden on the challenged *Powell* factor and that the Department had not rebutted it. The Department did not object to that finding, which also underpins the District Court's decision based on the Report and Recommendation of Judge Burke. Likewise, the Department has not raised that point on appeal and thus it is forfeited. *See Geness v. Cox*, 902 F.3d 344, 355 (3d Cir. 2018) (explaining that an appellant forfeits an argument in support of reversal if it is not raised in the opening brief).

8 The District Court had jurisdiction under 26 U.S.C., §§ 7604(a), 7402(b), and 28 U.S.C. §§ 1340, 1345. We have jurisdiction pursuant to 28 U.S.C. § 1291. We review for clear error whether the factual prerequisites for enforcement of an IRS summons have been met, and we review questions of law de novo. *United States v. Ins. Consultants of Knox, Inc.*, 187 F.3d 755, 759 [84 AFTR 2d 99-5722] (7th Cir. 1999). The issue of reverse-preemption under the MFA is one of law. *Weiss v. First Unum Life Ins. Co.*, 482 F.3d 254, 263 (3d Cir. 2007).

9 This is the test applicable in all but antitrust cases. In antitrust cases, the second clause, or "antitrust clause," of § 1012(b) provides a statutory exemption from antitrust liability "for activities that (1) constitute the `business of insurance,' [and] (2) are regulated pursuant to state law," so long as they "(3) do not constitute acts of `boycott, coercion or intimidation,'" under § 1013(b). *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129, 1133 (3d Cir. 1993). Antitrust issues are not in play here, but the distinction between antitrust and non-antitrust cases under the MFA is noteworthy because of the different treatment the two categories receive under § 1012(b).

10 The phrase "the specific state law was enacted with the `end, intention, or aim' of adjusting, managing, or controlling the business of insurance" derives from the Supreme Court's construction of the phrase: "for the purpose of regulating the business of insurance." *See Fabe*, 508 U.S. at 505 ("The broad category of laws enacted `for the purpose of regulating the business of insurance' consists of laws that possess the `end, intention, or aim' of adjusting, managing, or controlling the business of insurance.") (citing Black's Law Dictionary 1236, 1286 (6th ed. 1990)).

11 In *Highmark* an insurance company sued a rival seeking injunctive relief and damages for advertisements that allegedly included misleading statements about the plaintiff's insurance, in violation of the Lanham Act, 15 U.S.C. § 1125(a)(1)(B). 276 F.3d at 163-64. The defendant moved to dismiss on two bases: first, that the advertisement did not substantially affect interstate commerce and, therefore, the Lanham Act did not apply, and, second, that the Lanham Act claims were reverse-preempted by the Pennsylvania Unfair Insurance Practices Act. *Id.* at 164. The district court denied the motion to dismiss and entered a preliminary injunction. *Id.* We affirmed. *Id.*

12 The Department misunderstands footnote two of *Sabo*. We said there "that federal courts have seemingly disagreed as to the proper analytic inquiry into [MFA] preclusion[,]" and, therefore, we thought it important "to discuss our analysis in detail." *Id.* at 189 n.2. That footnote observed that some courts had adopted a three-part test "that does not require a specific conclusion that the defendant's conduct constitutes the business of insurance," but others had adopted a four-part test that did require such a specific conclusion. *Id.* Our holding that there is a threshold inquiry deriving from § 1012(a) relied on none of those cases. Indeed, it would have been difficult to do otherwise, as none of them relies on § 1012(a) for a threshold inquiry, and no one here suggests they do. In that context, our statement that "it is important to discuss our analysis in detail" is more naturally read as divergence from—not a subscription to—the position stated in those other cases.

13 Recall that the three requirements for application of MFA reverse-preemption, as set forth in the first clause of § 1012(b), are as follows: "(1) the federal law at issue does not specifically relate to the business of insurance; (2) the state law regulating the activity was enacted for the purpose of regulating the business of insurance; and (3) applying federal law would invalidate, impair, or supersede the state law." *Highmark*, 276 F.3d at 166.

14 While we refer to the inquiry derived from Section 1012(a) as a "threshold" one, it need not be addressed in every case. Sound advocacy may well lead parties to concede or assume the threshold inquiry has been met, thus allowing them to address other requirements for MFA reverse-preemption that may be more readily dispositive. Judicial economy may likewise prompt a court to resolve an MFA reverse preemption question in a similar way. Courts often assume satisfaction of some analytical steps, where appropriate, to get to the heart of a matter. *See, e.g.*, *Pearson v. Callahan*, 555 U.S. 223, 234-43 (2009) (loosening the rigidly ordered two-step analysis of the qualified immunity inquiry and allowing courts to begin with either step to prevent the misuse of "substantial expenditure[s] of scarce judicial resources... [on matters that] have no effect on the outcome of the case"); *United States v. Leon*, 468 U.S. 897, 924 (1984) ("There is no need for courts to adopt the inflexible practice of always deciding whether the officers' conduct manifested objective good faith before turning to the question whether the Fourth Amendment has been violated."); *Strickland v. Washington*, 466 U.S. 668, 697 (1984) ("[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one.").

15 *Autry* declined to find that its own four-part precedent was no longer good law. In a footnote, the opinion acknowledges the three-factor test that it recited does not square with *American Deposit Corp. v. Schacht*, 84 F.3d 834, 838 (7th Cir. 1996). But *Autry* suggests that it might be appropriate to apply the fourth factor later in the MFA analysis:

> In *Schacht* we first addressed whether the state statute was "enacted...for the purpose of regulating the business of insurance." After answering that question in the affirmative, we asked whether the particular activity at issue in the case was part of the "business of insurance." No doubt we took this second step because *Fabe* counsels that a statute

"need not be treated as a package which stands or falls in its entirety," *Fabe*, 508 U.S. at 509 n.8, and instead that a state statute should only displace federal law "to the extent that it regulates policyholders," *id.* at 508. Because we find that the Illinois statute regulating premium financing agreements is not one "enacted...for the purpose of regulating the business of insurance," we need go no further.

Autry, 144 F.3d at 1042 n.3.

16 The Report and Recommendation indicated the parties were generally in agreement that, if the petition were granted, the IRS would get both the documents and the testimony. The Magistrate Judge noted that the Department made a passing argument that the federal government forfeited its ability to get testimony. But he rejected that argument as being without legal support and that rejection was adopted by the District Court in its overall endorsement of the Report and Recommendation. The Department does not mention the forfeiture argument before us and, thus, we do not address it. *See Geness*, 902 F.3d at 355 (supra at note 10).

17 Although no case has been cited to us construing any of these provisions of the Delaware Insurance Code, it seems clear on their face that they endow the Department with such powers. For example, one provision provides in part: "Before receiving a certificate of authority, an applicant captive insurance company shall file with the Commissioner a certified copy of its organizational documents, a statement under oath of its president or other authorized person showing its financial condition, and any other statements or documents required by the Commissioner." 18 Del. Code Ann. § 6903(c)(1). It, further, indicates that the Department has the authority not to approve the certificate in the first instance if its filings do not comply with Delaware Captive Law. *See id.* § 6903(f) ("If the Commissioner is satisfied that the documents and statements that such captive insurance company has filed comply with the provisions of this chapter, the Commissioner may grant a certificate of authority authorizing it to do insurance business in this State...."). As previously mentioned, captive insurance companies are generally examined triennially to determine, among other things, their "ability to fulfill [their] obligations and [their] compliance with the provisions of this chapter." 18 Del. Code Ann. § 6908. The Department may "suspend or revoke" a captive insurance company's certificate of authority, if, "upon examination, hearing or other evidence," the Department finds that the company has "refus[ed] or fail[ed] to submit...any...report or statement required by law or by lawful order of the Commissioner" or "fail[ed] otherwise to comply with the laws of" Delaware. 18 Del. Code Ann. § 6909.

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American Federal Tax Reports

U.S. v. ZIMMERMAN, Cite as 131 AFTR 2d 2023 -1383, Code Sec(s) 7403, (CA3), 04/11/2023

UNITED STATES OF AMERICA, APPELLEE v. Edwin H. ZIMMERMAN, in his personal capacity and as Trustee of the Sunny Side Family Trust, the Wemer Trust, and the Hinkleville Holdings Trust; Esther Zimmerman, in her personal capacity and as Trustee of the Sunny Side Family Trust, the Wemer Trust, and the Hinkleville Holdings Trust; Wemer Family Trust; Hinkleville Holdings Trust; Sunny Side Family Trust; Keystone Concrete Products, Inc.; Phillip Wollman; Doug McConkey; Harold Miller; Erla Seibel; Wilmer N. Zimmerman; Ruth Ann Burkholder; Edwin N. Zimmerman, Jr.; Pennsylvania Department of Revenue; Linda King; Thomas J. Reeve, Edwin H. Zimmerman; Wilmer N. Zimmerman, APPELLANTS.

Case Information:

[pg. **2023** -1383]

Code Sec(s):	7403
Court Name:	U.S. Court of Appeals, **Third Circuit**,
Docket No.:	Nos. 22-1730 & 22-2192,
Date Decided:	04/11/**2023**.
Prior History:	District Court, (2022, DC PA) 129 AFTR 2d 2022-576, affirmed per curiam.

Tax Year(s):	Years 2002, 2003, 2004, 2005.
Disposition:	Decision against Taxpayers.

HEADNOTE

1. Collection actions—assessments reduced to judgment—lien foreclosure; sale—waiver—summary judgment. District court properly granted govt. summary judgment on its claims to reduce assessments to judgment for married taxpayers' and their family trust's outstanding liabilities, and to foreclose liens for same on stated property for years for which they didn't file returns or pay any tax. Their argument about authorization for suit failed in that govt. affidavits were sufficient to show authorization. Alternative arguments challenging "whipsaw" assessments were waived via earlier stipulation; their arguments that court improperly appointed IRS property appraisal and liquidation specialists to sell property and/or set sale conditions were meritless; and any arguments that IRS's interference with property constituted unreasonable seizure and due process violation were forfeited.

Reference(s): ¶ 74,035.01(25) Code Sec. 7403

OPINION

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT,

On Appeal from the United States District Court for the Eastern District of Pennsylvania (D.C. Civil Action No. 5-18-cv-04875) District Judge: Honorable John M. Gallagher

Before: KRAUSE, SCIRICA, and AMBRO, Circuit Judges

[pg. **2023** -1384]

OPINION*

Judge: PER CURIAM

NOT PRECEDENTIAL

Pro se appellants Edwin and Wilmer Zimmerman ("Appellants") appeal from orders of the United States District Court for the Eastern District of Pennsylvania granting summary judgment in favor of Appellee the United States of America and ordering the sale of real property. For the following reasons, we will affirm the orders of the District Court.

I.

In 2018, the United States brought an action to collect unpaid taxes against Edwin Zimmerman, his wife Esther (who is now deceased), and the WEMER Family Trust. Other defendants included Wilmer Zimmerman and other persons and entities that might claim interests in the real property that would be used to satisfy the debt. After obtaining counsel, Edwin and Esther Zimmerman and the WEMER Family Trust stipulated that they did not file tax returns or pay federal income taxes from 2002 to 2005 despite earning income throughout that period. *See* ECF No. 90 at 1. They also, in the same stipulated order entered by the District Court, waived "any and all defenses" to the complaint, except, among other things, that the subject tax assessments were procedurally invalid. *Id.* at 4.

The Government thereafter moved for summary judgment against Edwin and Esther Zimmerman, the WEMER Family Trust, and Wilmer Zimmerman. Its motion was tailored to the stipulation order and addressed the issues that had not been waived. The District Court granted the motion and subsequently entered an order of sale foreclosing on the Government's tax liens and authorizing the sale of real property to satisfy the tax debt. Appellants filed appeals of the order granting summary judgment and the order of sale, which have been consolidated.[1]

II.

We have jurisdiction pursuant to 28 U.S.C. § 1291.[2] We exercise plenary review over the District Court's grant of summary judgment. *See Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 265 (3d Cir. 2014).

III.

First, Appellants contend that the District Court lacked jurisdiction over the action because the Government did not produce proof of compliance with 26 U.S.C. §§ 7401, which bars any action for the collection or recovery of taxes unless "the Secretary authorizes or sanctions the proceedings and the Attorney General or his delegate directs that the action be commenced." The District Court ruled that Appellants had waived the issue of authorization by not preserving it in the stipulation, and noted that it appeared that the suit was authorized. Appellants contend that the District Court erred because jurisdictional requirements cannot be waived.

Assuming without deciding that § 7401 is jurisdictional, we reject Appellants' contention that the action was not authorized because the Government produced sworn affidavits by counsel stating that it was properly authorized. *See* ECF No. 98. In arguing to the contrary, Appellants have pointed only to a lack of an "authorization document." It is unclear to what Appellants are referring, but in any event, the affidavits produced by the Government are, under the circumstances of this case, sufficient to show authorization. *See Palmer v. IRS*, 116 F.3d 1309, 1311 [80 AFTR 2d 97-5100] (9th Cir. 1997).[3]

Appellants also contend that the District Court's judgment improperly imposed liability on Edwin and Esther Zimmerman and the WEMER Family Trust for a single tax debt. Appellants essentially challenge the Government's issuance of "whipsaw" assessments, which are assessments of a tax against more than one taxpayer to protect the Government when taxpayers disclaim liability. *See Gerardo v. Comm'r*, 552 F.2d 549, 555 [39 AFTR 2d 77-1176] (3d Cir. 1977). Such assessments are generally permissible because the tax will be collected only once. *See id.* at 556.

This claim, which appears to pertain to Edwin and not Wilmer Zimmerman, has been waived. "Waiver is the intentional abandonment of an argument." *Simko v. U.S. Steel Corp*, 992 F.3d 198, 205 (3d Cir. 2021). Here, Edwin and Esther Zimmerman and the Trust stipulated that the assessments were substantively accurate and that "any income attributable to WEMER Family Trust, Esther Zimmer[pg. **2023** -1385] man, or Edwin Zimmerman is properly attributable as income to all three." ECF No. 90 at 2. They also stipulated that the net proceeds of the sale of the real property would be paid to the United States "until the unpaid balance of the judgments arising from the 2002-2005 federal income tax assessments against Esther Zimmerman, Edwin Zimmerman, and WEMER Family Trust are fully satisfied (*recognizing that the United States cannot collect federal income tax assessed on the same income more than once...*)." *Id.* at 5 (emphasis added). Edwin Zimmerman accordingly waived this argument by intentionally assenting to the accuracy of the assessments and the manner of their collection in the stipulated order. *See Wegbreit v. Comm'r*, 21 F.4th 959, 963-64 [128 AFTR 2d 2021-7044] (7th Cir. 2021) (stating that issues stipulated to in collection action were waived).[4]

Next, Appellants contend that the District Court's appointment of the Property Appraisal and Liquidation Specialists ("PALS") of the IRS to conduct the sale of the property was improper under Federal Rule of Civil Procedure 53. Rule 53, which governs the district courts' ability to appoint a master, is inapplicable here. Rather, pursuant to 26 U.S.C. §§ 7403, a district court adjudicating the merits of tax liens on a property "may decree a sale of such property, by the proper officer of the court." *See* § 7403(c). The Government states that PALS is routinely used to conduct judicial sales, *see, e.g., United States v. Davis*, 815 F.3d 253, 255 [117 AFTR 2d 2016-959] (6th Cir. 2016), and Appellants do not argue that the order of sale does not comply with § 7403(c). This contention is accordingly without merit.

Appellants also contend that the order of sale improperly granted injunctive relief by directing Edwin Zimmerman to maintain the property so as to not commit waste and directing all persons to vacate the property within 90 days of its entry. As noted, the District Court had authority pursuant to 26 U.S.C. §§ 7403 to decree a sale of the property, and along with that authority, had the discretion to set the terms and conditions of the sale. *See United States v. Branch Coal Corp.*, 390 F.2d 7, 10 (3d Cir. 1968); *see also United States v. Rodgers*, 461 U.S. 677, 708-709 [52 AFTR 2d 83-5042] (1983). Because conditions of a sale can include the timeline for vacating the property and the maintenance of the property pending the sale, the District Court acted within its authorized discretion in including such provisions in its order of sale.

Finally, by failing to raise them in court, Appellants forfeited their arguments that the interference with the property constituted an unreasonable seizure and a violation of due process, and they have not identified any "exceptional circumstances" warranting our review. *See Barna v. Bd. of Sch. Dirs. of the Panther Valley Sch. Distr.*, 877 F.3d 136, 145 (3d Cir. 2017) (citation omitted).

We will accordingly affirm the District Court's judgments.[5]

---

* This disposition is not an opinion of the full Court and pursuant to I.O.P. 5.7 does not constitute binding precedent.

1 The District Court also entered default or other judgments against the other defendants; those rulings are not at issue.

2 Although Appellants' notice of appeal of the order granting summary judgment was premature, it ripened after the District Court issued the order of sale, which was a final order for purposes of § 1291. *See Cape May Greene, Inc. v. Warren*, 698 F.2d 179, 185 (3d Cir. 1983).

3 Given that the parties agreed to narrow the scope of litigation to the issues in the stipulation, and this issue was raised for the first time in response to the Government's motion for summary judgment, the District Court did not err in allowing the Government to submit evidence of authorization as part of its reply to Appellants' opposition to summary judgment.

4 Even if this issue is not waived, it is without merit in light of the Government's stipulation that it cannot collect federal income tax assessed on the same income more than once. *See Gerardo*, 552 F.2d at 556.

5 We take no action upon Doug McConkey's letter filed in this Court, as a request to modify the order of sale must be filed in the District Court.

END OF DOCUMENT -

American Federal Tax Reports

SKOLNICK v. COMM., Cite as 131 AFTR 2d 2023 -968, Code Sec(s) 183; 172; 6651; 7491, (CA3), 03/08/2023

Mitchel SKOLNICK; Leslie SKOLNICK, APPELLANTS IN NO. 22-1501 v. COMMISSIONER of Internal Revenue, Mitchel SKOLNICK; Brianna SKOLNICK, APPELLANTS IN NO. 22-1502 v. COMMISSIONER of Internal Revenue, Eric Freeman, APPELLANT IN NO. 22-1503 v. COMMISSIONER of Internal Revenue, APPELLEE.

Case Information:

[pg. **2023** -968]

Code Sec(s):	183; 172, 6651; 7491
Court Name:	U.S. Court of Appeals, **Third Circuit**,
Docket No.:	Nos. 22-1501, 22-1502, and 22-1503,
Date Decided:	03/08/**2023**.
Prior History:	Tax Court, (2021) TC Memo 2021-139 [2021 RIA TC Memo ¶2021-139], (opinion by Lauber, *J.*), affirmed. Earlier proceeding at (2019) TC Memo 2019-64 [2019 RIA TC Memo ¶2019-064], (opinion by Lauber, *J.*)
Tax Year(s):	Years 2010, 2011, 2012, 2013.

Disposition:	Decision against Taxpayers.

HEADNOTE

1. Activities not for profit—horse-related activities—partners and partnerships—net operating losses—proof. Tax Court decision that horse-related activity which retired taxpayers/partnership co-founders/former consulting firm owner and ins. professional conducted through their partnership didn't qualify as activity engaged in for profit for Code Sec. 183 pur[pg. **2023** -969] poses was affirmed. Factors showing lack of profit objective included that activity had substantial loss history; that taxpayers kept inaccurate records, had no business plan for years at issue and that partnership paid for personal expenses; and that taxpayers had significant income from other sources. Taxpayers' arguments regarding adverse market conditions' effect on profits and their responses to changes in breeder's award requirements were unavailing. Also, any profits, real or expected, were minimal compared to losses, even characterizing horse breeding as speculative; taxpayers derived personal pleasure from activity; and while they had experience in horse breeding industry and consulted experts, such didn't advance profit motive. Their claim for NOL carryfowards from prior years also failed due to lack of substantiation.

Reference(s): ¶ 1835.01(38) Code Sec. 183;Code Sec. 172

2. Failure to timely file returns penalties—burden of proof and production—reasonable cause—reliance on professional. Tax Court properly upheld failure to timely file returns penalty against married taxpayers for year for which they filed late: any arguments that they were entitled to relief were forfeited and/or unsupported.

Reference(s): ¶ 66,515.14(5);¶ 74,915.03(15) Code Sec. 6651;Code Sec. 7491

3. Accuracy-related penalties—burden of proof and production—written approval of assessment—reasonable cause; good faith—reliance on professional. These issues weren't discussed on appeal.

Reference(s): ¶ 66,625.01(45) Code Sec. 6662;Code Sec. 7491;Code Sec. 6751

OPINION

Bryan E. Bloom Kevin H. DeMaio Faegre Drinker Biddle & Reath 600 Campus Drive Florham Park, NJ 07932

B. Paul Husband Law Offices of B. Paul Husband 101 South First Street Suite 202 Burbank, CA 91502

Richard W. Craigo 10724 Wilshire Boulevard Suite 406 Los Angeles, CA 90024 Counsel for Appellants

David A. Hubbert Janet A. Bradley Joan I. Oppenheimer United States Department of Justice Tax Division Room 4738 950 Pennsylvania Avenue, N.W. P.O. Box 502 Washington, DC 20044 Counsel for Appellee

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT,

On Appeal from the United States Tax Court (IRS Nos. 16-24649, 16-24650, 16-24980) Tax Court Judge: Honorable Albert G. Lauber

Before: HARDIMAN, KRAUSE, and MATEY, Circuit Judges.

OPINION OF THE COURT

Judge: HARDIMAN, Circuit Judge.

PRECEDENTIAL

Mitchel Skolnick, Leslie Skolnick, Brianna Skolnick, and Eric Freeman (collectively, Taxpayers), appeal an order of the United States Tax Court. They argue the Court clearly erred when it held their horse activity—undertaken through Bluestone Farms, LLC (the Company)—was "not engaged in for profit" under § 183 of the Internal Revenue Code. Taxpayers also claim the Court erred when it held they could not carry forward net operating losses (NOLs) allegedly arising from their horse activity in prior years. After scrutinizing the Tax Court's comprehensive opinion, the record, and the briefs, we perceive no reversible error. We will affirm.

I

A

During the tax years at issue, 2010–2013, Mitchel Skolnick and Eric Freeman owned the Company, a horse farm in New Jersey. They bought, sold, bred, and raced Standardbred horses. Mitchel's first wife, Leslie, and his second wife, Brianna, are parties to the case only because they filed tax returns jointly with Mitchel. So we focus on the activities of Mitchel and Eric.

Mitchel received an undergraduate degree from Emory University in 1976 and an MBA from Adelphi University in 1986. He remained in Atlanta after college and worked briefly as an engineer in training. In 1978, he joined Solgar Co., Inc., a successful vitamin company his father Allen Skolnick operated. That same year, Allen took an interest in Standardbred horses, which led him and his wife to found Southwind Farms to start a breeding operation. In 1986, Mitchel started his own consulting firm and became involved in the Standardbred industry when Allen asked him to manage three horses. By 1996, Mitchel had retired from his consulting business and was working full-time at Southwind with Allen.

Eric graduated from Cornell in 1966 and earned an MBA from the University of Virginia two years later. His career focused mainly on insurance. Eric's clients included Southwind and Allen's other ventures. Allen introduced Eric to Standardbred horse breeding.

Around 1993, Eric asked Allen if he could get involved in the horse breeding industry. Allen invited Eric to join him, along with [pg. **2023** -970] Mitchel, in the Chancery Equine Group, a syndicate that enabled investors to purchase Standardbred horses. When Allen invited Eric to invest, he cautioned Eric that though he might lose all his money, he would at least meet people he would never meet otherwise. Eric called the predictions "prophetic."

Following disputes with his father, Mitchel left Southwind and the Chancery Group in 1998. Mitchel had discussed with Eric starting their own horse farm and they had created a business plan and a budget for the Company. They planned to buy and breed a stallion and to board other horses. To that end, they acquired 61 acres in Hopewell, New Jersey, not far from Southwind. They paid $559,000 for the property and called it Bluestone Farms.

By 2000, Mitchel did not have the money to pay for the Company's expenses, so Eric paid most of the bills while Mitchel returned to his consulting firm. That year, Mitchel and Eric crafted a second business plan, hoping to supplement the Company's income by winning horse races and breeder's awards. In 2001, the Company received $325,000 from a passive investor, Frank Russo, in exchange for a 15 percent interest. In 2002, the Company bought a 30-acre property, Wert Farm, for $850,000.

In 2003, the Company sold a conservation easement at Bluestone for $869,640. The same year, Mitchel retired from the consulting business again, and he and Eric developed a third business plan. They wrote a fourth (and final) business plan in 2004. Soon after, Mitchel began receiving millions of dollars from an irrevocable trust his parents created. In 2007, the Company purchased 200 acres near Bluestone (the Rosenthal Farm) for $4 million. Mitchel and Eric planned to expand operations with more broodmares at Rosenthal Farm, but that effort was halted after New Jersey ceased using Atlantic City casino funds to subsidize racetracks. The Company was audited in 2008, but the Commissioner of Internal Revenue took no adverse action. By 2009, Mitchel had received about $10 million from his parents' trust.

B

During the tax years at issue (2010–2013) between 15 and 25 horses lived at Bluestone, Wert, and Rosenthal Farms at any given time. Other horses were boarded at out-of-state farms. The

Company employed between seven and ten employees who assisted with the horses and organized the Company records. None of the employees had a budget. Taxpayers do not contest that they lost more than $3.5 million during the years at issue and more than $11.4 million between 1998 and 2013. *See Skolnick v. Comm'r*, 2021 WL 5936986 [2021 RIA TC Memo ¶2021-139], at *20 (T.C. Dec. 16, 2021).

Mitchel handled daily operations for the Company, including paying bills and monitoring the horse breeding process. Eric split his time between Florida and New Jersey, and handled the Company's insurance needs, but had little involvement in its day-to-day operations. Eric did, however, accompany horses to races and attended "pretty lavish parties." App. 972. Taxpayers contributed capital and made loans to the Company without differentiating between the two.

Over the years, Taxpayers increasingly focused on winning studs. The Company owned a 35% interest in a successful stallion, Always A Virgin, stabled in Indiana. In 2013, the Company bought for about $50,000 a 35 percent interest (later increased to 55 percent) in a horse sired by Always A Virgin called Always B Miki. Always B Miki earned purses totaling $2.7 million from racing through his retirement in 2016 and generated substantial stud fees. In 2016, the Company sold interests in Always B Miki for nearly $1.2 million, enabling it to report a modest overall profit in that year.

During the tax years at issue, the Company responded to changes in the horse market. New Jersey stopped subsidies to racetracks and decreased the purse structures for breeder's awards. Meanwhile, Pennsylvania had tightened its requirements for awards by requiring breeders to locate mares in Pennsylvania for 180 days to maintain eligibility for state-sponsored races. So the Company continued its previous partnership with a Kentucky operation, Cane Run Farm, to board horses outside Kentucky, including in Pennsylvania, to capitalize on breeder's awards.

The Wert and Rosenthal Farms were never expanded to include additional mares, as originally planned. Mitchel and Eric tried to sell those properties in 2012 to a publicly traded home builder, Toll Brothers, but negotiations failed. When Mitchel and Eric were approached in 2013 about a purchase of the building rights on Wert and Rosenthal Farms, they declined the offer.

The Company also paid for many of Mitchel's personal expenses. Mitchel moved to Bluestone in 2008 after he separated from Leslie. Brianna began staying with him around 2009. Beginning in 2010, and for the rest of the years at issue, Mitchel and Brianna lived together rent-free in a renovated farmhouse at Bluestone. The Company paid to tear down and rebuild the farmhouse. By 2011, Brianna had a [pg. **2023** -971] Company credit card that she sometimes used for personal expenses. The Company also paid for Brianna to keep her horses at Bluestone. In 2013, Mitchel divorced Leslie and married Brianna. Mitchel admitted at trial that Company funds "definitely" paid for wedding expenses, including extensive landscaping. App. 790.

C

Mitchel filed joint tax returns with Leslie for 2010–2012, and with Brianna for 2013, claiming Company losses substantial enough to eliminate any income tax liability for those years. Eric also claimed losses and reported owing little or no taxes for the years at issue.

In 2016, the Internal Revenue Service sent notices of income tax deficiencies and penalties to Mitchel and Leslie for 2010–2012, Mitchel and Brianna for 2013, and Eric for 2010–2013. Taxpayers timely filed amended petitions in the United States Tax Court for a redetermination of the deficiencies and penalties.

After a five-day trial, the Tax Court sustained the deficiency determinations, holding that Taxpayers could not deduct Company losses because their horse breeding activity was not engaged in for profit under § 183 of the Internal Revenue Code. *Skolnick*, 2021 WL 5936986 [2021 RIA TC Memo ¶2021-139], at *22. The Court also held that Taxpayers failed to substantiate net operating loss carryforwards that allegedly arose from Company activity. *Id.* at *23. The Court further held that Mitchel and Leslie were liable for the late-filing penalty, but Taxpayers were not liable for the accuracy-related penalties. *Id.*

Under the final orders, the Skolnicks were liable for tax deficiencies for 2010–2013 of $282,036, $230,141, $189,077, and $174,664, respectively. Eric Freeman was liable for tax deficiencies of $52,421, $38,514, $39,478, and $21,385 for those years. Mitchel and Leslie were also ordered to pay $67,026 for filing late in 2010. Taxpayers filed timely appeals and we consolidated the cases.

II

The Tax Court had jurisdiction under 26 U.S.C. and §§ 6214 and 7442. We have jurisdiction under 26 U.S.C. §§ 7482(a)(1). Venue was proper because, at the time they filed their petitions, Mitchel and Brianna resided in New Jersey, and Leslie resided in Pennsylvania. Eric resided in Florida, but the parties stipulated to venue in the **Third Circuit** for his appeal.

III

The key issue on appeal is whether Taxpayers' horse activity was not engaged in for profit under § 183 of the Internal Revenue Code during 2010–2013. We review that factual determination for clear error. *Keating v. Comm'r*, 544 F.3d 900, 903 [102 AFTR 2d 2008-6638] (8th Cir. 2008); *Comm'r v. Duberstein*, 363 U.S. 278, 291 & n.13 [5 AFTR 2d 1626] (1960). "[W]e affirm the court's finding so long as it is 'plausible'; we reverse only when 'left with the definite and firm conviction that a mistake has been committed.'" *Cooper v. Harris*, 581 U.S. 285, 309 (2017) (citation omitted).

Section 183(a) of the Internal Revenue Code provides that "[i]n the case of an activity engaged in by an individual or an S corporation, if such activity is not engaged in for profit, no deduction attributable to such activity shall be allowed...." 26 U.S.C. §§ 183(a). Treasury Regulation 1.183–2(b) lists nine non-exclusive factors to consider in determining whether an activity is engaged in for profit. They are: (1) the manner in which the taxpayer carries on the activity; (2) the expertise of the taxpayer or his advisors; (3) the time and effort expended by the taxpayer in carrying on the activity; (4) the expectation that assets used in the activity may appreciate in value; (5) the success of the taxpayer in carrying on other similar or dissimilar activities; (6) the taxpayer's history of income or losses with respect to the activity; (7) the amount of occasional profits, if any; (8) the financial status of the taxpayer; and (9) elements of personal pleasure or recreation. 26 C.F.R. § 1.183–2(b). The inquiry is fact-driven and we give greater weight to objective facts than to intent. 26 C.F.R. §§ 1.183?2(a), (b). No one factor is determinative and the analysis does not depend on a preponderance of the nine factors. 26 C.F.R. § 1.183–2(b).

The Tax Court considered these factors and determined that Taxpayers did not conduct the Company's horse activity during 2010–2013 with a genuine intent to make a profit. *Skolnick*, 2021 WL 5936986 [2021 RIA TC Memo ¶2021-139], at *12–22. Section 183 thus disallowed as deductions the losses that the Company passed through to them. In its analysis, the Court found that five factors—1, 6, 7, 8, and 9—favored the Commissioner. Three factors—3, 4, and 5—were neutral. And only factor 2 favored Taxpayers. We review these three groups in turn. Taxpayers dispute the Tax Court's analysis of every factor.

A. Factors Favoring the Commissioner

1

Because the history of income and losses (factor 6) was "by far" the most important to the Tax Court's analysis, we begin with that factor before discussing the other four that fa[pg. **2023** -972] vored the Commissioner. *Skolnick*, 2021 WL 5936986 [2021 RIA TC Memo ¶2021-139], at *20. And it weighed heavily against Taxpayers. *Id.* Between 1998 and 2013, the Company lost more than $11.4 million. The Tax Court has held the start-up phase for horse activity is five to ten years. *Engdahl v. Comm'r*, 72 T.C. 659, 669 (1979). But the Company's losses continued essentially unabated after that timeframe. By 2010 the Company had been in operation for twelve years. Yet from 2010 through 2013, the Company lost more than $3.5 million.

Taxpayers point to profits the Company earned after the years at issue, emphasizing the success of Always A Virgin. But as the Tax Court noted, those profits occurred after the IRS selected Mitchel and Leslie's tax return for examination. So Taxpayers were motivated to generate a profit. *Skolnick*, 2021 WL 5936986 [2021 RIA TC Memo ¶2021-139], at *20. Taxpayers' arguments about their gross receipts also fall flat because they failed to measure them against their expenditures. *See Faulconer v. Comm'r*, 748 F.2d 890, 901 [55 AFTR 2d 85-302] (4th Cir. 1984).

Taxpayers try to excuse the Company's lack of profit by citing adverse events beyond their control. The Tax Court acknowledged that the economic environment for Standardbred horses had declined and that a financial crisis occurred in 2008. *Skolnick*, 2021 WL 5936986 [2021 RIA TC Memo ¶2021-139], at *20. But the elimination of the New Jersey subsidy to the horse industry in 2012 "d[id] not explain the magnitude of [the Company's] loss in 2012 ($993,066) or the magnitude of its losses in earlier years when the subsidy existed." *Id.* Likewise, the Company's losses during the severe downturn in the economy from 2008–2010 ($3,063,893) were barely greater than its losses in 2011–2013 ($2,993,873), when the economy was recovering. *Id.* So the Tax Court did not clearly err when it found that adverse market conditions did not explain the Company's sustained unprofitability. The substantial history of losses strongly weighed against Taxpayers.

2

The Tax Court found that the way Taxpayers conducted their horse activity (factor 1) also strongly favored the Commissioner. *Skolnick*, 2021 WL 5936986 [2021 RIA TC Memo ¶2021-139], at *12–15. Taxpayers challenge this finding by citing their voluminous business records. The Tax Court acknowledged the records but identified significant inaccuracies and gaps in them. *Id.* at *12. For example, although the Company was founded in 1998, the initial operating agreement between Mitchel and Eric was dated 2001. At trial, Mitchel could not recall how much he or Eric had initially contributed to the Company or if their contributions were equal. Mitchel also testified that he and Eric did not distinguish between capital contributions and loans. In the same vein, important changes in the ownership interests of the Company were not memorialized until after the IRS began its examination.

Taxpayers claim the Court erroneously found that the regulation "requires" a plausible business plan. Taxpayers Br. 26 n.11. But the Court said no such thing. *Skolnick*, 2021 WL 5936986 [2021 RIA TC Memo ¶2021-139], at *12. The lack of a business plan after 2004, plus the lack of employee budgets, supported a finding that the horse activity was not conducted in a businesslike manner. Mitchel did not help his case either when he testified that cost-saving options suggested by staff were not a priority because he approached the Company "not so much in income and expenses." App. 910.

If that were not enough, the Company paid for personal expenses, including the Bluestone farmhouse reconstruction and landscaping for Mitchel's wedding. Brianna used a Company credit card for her personal expenses. Mitchel set aside the bills for the cost of boarding Brianna's horses and Company staff widened the walking path for her. At trial, when asked about some of these costs, Brianna called them her "bar tab," but she could not say how much she owed. App. 1514–1515. Mitchel likewise testified: "it sounds like a lot of money, but...[Brianna is] my wife," although he was still married to Leslie when many expenses were incurred. App. 803, 806–811. The Tax Court did not err when it said that piling these costs onto Bluestone "sits uneasily" with claims that the Company operated with a profit motive. *Skolnick*, 2021 WL 5936986 [2021 RIA TC Memo ¶2021-139], at *14.

Taxpayers argue persuasively that the Court should not have substituted its own business judgment in evaluating how Mitchel and Eric responded to losses. *See Skolnick*, 2021 WL 5936986 [2021 RIA TC Memo ¶2021-139], at *15. Under the regulation, changing operating methods to respond to losses is evidence of a profit motive. 26 C.F.R. § 1.183–2(b)(1). Taxpayers responded to changes in breeder's award requirements, including by partnering with Cane Run and boarding their horses in other states. Even so, those actions were minor cost-saving measures that are not quite the "abandonment of unprofitable methods" contemplated by this part of the regulation. 26 C.F.R. §[pg. **2023** -973] 1.183–2(b)(1). Despite the Tax Court's slight misstep, there remained sufficient evidence that the Company was not run in a businesslike manner. So the Court did not clearly err in weighing this factor in favor of the Commissioner.

Mitchel's and Eric's financial status (factor 8) also weighed strongly in the Commissioner's favor. *Skolnick*, 2021 WL 5936986 [2021 RIA TC Memo ¶2021-139], at *21. The Tax Court correctly considered Taxpayers' substantial income from sources other than the Company as evidence that their horse breeding activity was not engaged in for profit. Both the Skolnicks' and Eric's returns during the years in question reported six-figure gross income from sources other than the Company.

Mitchel insists he did not invest in the Company for tax benefits, but the record suggests otherwise. The Company produced substantial tax benefits. Mitchel's income totaled $3.5 million, some $1.5 million of which was taxable. Mitchel argues that if he had been motivated by tax savings, "surely" he would have been "savvy enough" to switch his tax-exempt bonds to another investment. Taxpayers Br. 51. But the substantial annual Company losses for 2010–2013 reduced Taxpayers' income tax liabilities for those years to zero or close to it.

Taxpayers argue that any tax benefits were not dispositive. That's true, but the Tax Court did not rely on this factor alone. The tax benefits were real, they were significant, and the Court did not err in finding that factor 8 favored the Commissioner.

3

The last two factors that favored the Commissioner are the amount of occasional profits (factor 7) and the elements of personal pleasure or recreation (factor 9). Though we perceive some weaknesses in the Court's analyses of these factors, it placed little weight or emphasis on either one.

Taxpayers raise some persuasive challenges to the Tax Court's analysis of factor 7—the amount of occasional profits. There is some evidence the Court did not acknowledge. For example, Frank

Russo's purchase of a 15 percent interest in the Company for $325,000 in 2001, although not generating an overall profit, was significant. Though Russo's investment did not put the Company in the black that year, the Court could have cited the sale as evidence that the Company was a business. There was also the 2003 sale of a conservation easement for $869,640, which offset a $652,453 loss. Finally, there were profits in 2016 from the sale of the interest in Always B Miki. But even had the Court noted this income, it would not have tipped the balance in favor of Taxpayers. The income was appreciably less than the Company's consistent losses, which often exceeded $1 million a year. As the regulation states: "[a]n occasional small profit from an activity generating large losses...would not generally be determinative that the activity is engaged in for profit." 26 C.F.R. § 1.183–2(b)(7). And the profit generated from Always B Miki is tempered by the fact that it occurred after the tax years at issue and after Taxpayers received the notices of deficiency.

Factor 7 also accommodates speculative investments. The Tax Court acknowledged that it had "previously found certain horse activities—especially racing activities—to be highly speculative ventures, even likening them to wildcat oil drilling ventures." *Skolnick*, 2021 WL 5936986 [2021 RIA TC Memo ¶2021-139], at *20 (citing *Annuzzi v. Comm'r*, 2014 WL 5904717 [2014 RIA TC Memo ¶2014-233], at *12 (T.C. Nov. 13, 2014)). The Court then emphasized that the Company's efforts are in breeding, not racing. *Id.* Yet the Court ignored the possibility that breeding might be a speculative industry. At Southwind, for example, one horse drove farm profits. Mitchel also testified that "you raise several horses in the expectation that one of them will go on to be what Always B Miki is." App. 620. Still, the Court did not err in ultimately finding no hope of a big payout. The net profit from the sale of Always B Miki in 2016, for example, was $281,450, far below what was needed to offset the millions of dollars lost in prior years.

Taxpayers make another good point when they claim the Tax Court applied the wrong legal standard to factor 7. 26 C.F.R. § 1.183–2(b)(7). The Court did not think Taxpayers "entertained a reasonable belief, during 2010–2013, that the outsized success of a few horses would make Bluestone profitable overall." *Skolnick* , 2021 WL 5936986 [2021 RIA TC Memo ¶2021-139], at *21. But a "reasonable expectation of profit is not required." 26 C.F.R. § 1.183–2(a). The applicable standard is not whether Taxpayers had "a bona fide expectation" of profit, but whether they engaged in the activity with the "objective" of making a profit. *See Dreicer v. Comm'r*, 665 F.2d 1292, 1299–1300 [48 AFTR 2d 81-5884] (D.C. Cir. 1981) (quoting 26 C.F.R. § 1.183–2(a)). The statute bars deductibility of losses emanating from "'activities not engaged in for profit,' not activities lacking an expectation of profit." *Id.* (quoting 26 U.S.C. §§ 183). Despite this misstatement, the Tax Court did not clearly err in [pg. **2023** -974] finding that factor 7 favored the Commissioner. As explained above, any profits, real or expected, were minimal compared to losses, even characterizing horse breeding as speculative. Although Taxpayers valiantly mined the record to show that the Court could have weighed the evidence differently, their evidence does not convince us that the District Court clearly erred.

Factor 9—elements of personal pleasure or recreation—favored the Commissioner. As the Tax Court has previously recognized, "[s]uccess in business is largely obtained by pleasurable interest therein." *Jackson v. Comm'r*, 59 T.C. 312, 317 (1972) (citation omitted). Still, "if the chance for profit is small relative to the potential for gratification, the latter may emerge as the primary motivation." *Annuzzi* , 2014 WL 5904717 [2014 RIA TC Memo ¶2014-233], at *13. Here, Taxpayers do not meaningfully resist the Court's analysis about Eric. But as to Mitchel, they insist there is no evidence he enjoyed the horse activity because he never rode horses or had parties at Bluestone. The Commissioner argues that the Court based its finding on the *opportunity* to socialize. We agree with Mitchel on this point. The record does not support that the *prospect* of social opportunities mattered to Mitchel, notwithstanding his wedding party at Bluestone. We also agree with Mitchel that his enjoyment of the analytical approach to breeding supported the Company's profit motive.

We are unpersuaded, however, by Mitchel's argument that any benefits of his residence at Bluestone somehow discount his pleasure in living on the property. The record supports the Court's finding that the personal pleasure Mitchel derived from living at Bluestone outweighed the benefits that accrued to the Company. Mitchel moved to the farm in 2008 after he separated from Leslie. By 2010, he and Brianna were living together rent-free in the renovated farmhouse. Mitchel allowed Brianna to use the property to ride her horses and to use a Company credit card for personal expenses. He also arranged for substantial improvements to Bluestone before their wedding and derived pleasure from residing on the 61-acre estate. These personal motives suggest that Mitchel's operation of the Company was not for profit. On balance, we agree with the Court's finding that factor 9 favored the Commissioner.

B. Neutral Factors

The Court deemed factors 3, 4, and 5 neutral. The Court and the parties spent more time evaluating factor 4—the expectation that the assets used in the activity may appreciate in value—so we focus on that factor first.

The Court found that the horse breeding operation and real estate holdings at Bluestone were interrelated. *Skolnick*, 2021 WL 5936986 [2021 RIA TC Memo ¶2021-139], at *18. It follows that Taxpayers' expectation that the original property would appreciate supported their profit motive. The same is not true, however, of the Wert and Rosenthal Farms. There was little horse activity on those farms. They were almost sold to Toll Brothers for housing development, but whatever appreciation might have occurred in that respect could not have supported the notion that the Company bred horses for profit.

As for the horses, the Court did not err when it found there was no plausible basis to find the Company's herd would meaningfully appreciate in value. *Skolnick*, 2021 WL 5936986 [2021 RIA

TC Memo ¶2021-139], at *19. Even accepting Taxpayers' belief that Always B Miki would succeed, the Company lost more than $11 million on horse ownership between 1998–2013. Weighing the evidence of Mitchel's testimony against that of the IRS experts and the actual losses, we hold that the Court did not clearly err in discounting any expectation of the horses appreciating in value.

We agree with the Tax Court that this factor was neutral because that expectation does not support a finding that the horse activity as a whole was conducted with a genuine intent to make a profit.

We address factors 3 and 5 only briefly. Factor 3—the time and effort expended—was not meaningfully disputed by Eric, presumably because his involvement in the Company was minimal. Not so for Mitchel, who worked eight to nine hours a day, five to six days a week. Taxpayers rightly note that considerable hours spent on an activity might reflect a profit motive. But hours alone are not necessarily enough to find that this factor must favor a taxpayer. *See, e.g., Betts v. Comm'r,* 2010 WL 2990300 [2010 RIA TC Memo ¶2010-164], at *9 (T.C. Jul. 27, 2010) (although Betts spent a "significant amount of time on her horse activity," the "many personal and recreational aspects" made the factor neutral). Here the Tax Court acknowledged Mitchel's time, but also credited the testimony of Company employees that he was not much of a hands-on manager. *Skolnick* , 2021 WL 5936986 [2021 RIA TC Memo ¶2021-139], at *16. The evidence here is equivocal, so the Court did not clearly err.

Taxpayers rightly note that "withdrawal from another occupation to devote most of his [pg. **2023** -975] energies to the activity" may suggest that the activity is engaged in for profit. 26 C.F.R. § 1.183–2(b)(3). Mitchel and Eric stopped working at their other jobs before working for the Company. And even after Mitchel went back to work at his consulting firm to help pay the Company's bills, his second retirement coincided with his anticipated receipt of millions of dollars of trust funds. The Court did not clearly err in finding factor 3 to be neutral either.

As for factor 5—success in similar activities—Taxpayers showed no meaningful synergy between their past business activities and their horse breeding operation. The Court did not err in finding this factor neutral.

C. Factor Favoring Taxpayers

Factor 2—the expertise of Taxpayers and their advisors—was the only one that favored Taxpayers. *Skolnick,* 2021 WL 5936986 [2021 RIA TC Memo ¶2021-139], at *16. Both Mitchel and Eric had experience in the horse breeding industry dating back to their work with Southwind and the Chancery Equine Group. The Tax Court credited that experience. *Skolnick* , 2021 WL 5936986 [2021 RIA TC Memo ¶2021-139], at *16. Taxpayers argue that their experience should have been given more weight. But the case they cite did not give this factor significant weight. *See Den Besten v. Comm'r,* 2019 WL 6312955 [2019 RIA TC Memo ¶2019-154], at *9 (T.C. Nov. 25, 2019).

Mitchel and Eric also consulted experts in the industry. But for § 183 purposes, that counts only if the expert advice advances the profit motive. *See Whatley v. Comm'r*, 2021 WL 289333 [2021 RIA TC Memo ¶2021-011], at *7 (T.C. Jan. 28, 2021). Taxpayers did not reveal what type of advice they sought from their advisors. So the Court did not err in giving little weight to the consultation of experts. As the Court noted, hobbyists "often seek expert advice" about their interests. *Skolnick*, 2021 WL 5936986 [2021 RIA TC Memo ¶2021-139], at *16. And even if this factor were afforded more weight, it would have done little to alter the balance of all the other factors.

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In sum, the Tax Court did not clearly err in finding that Taxpayers' horse activity during 2010–2013 was "not engaged in for profit" under § 183.

IV

Taxpayers also sought to carry forward net operating losses generated by the Company in the years prior to 2010 to shelter future investment income, including the deficiencies at issue. *See* 26 U.S.C. §§ 172(b)(1)(A). Contrary to Taxpayers' unsupported claim that the NOL determination is a legal question, we consider it a matter of fact and agree with our sister courts that we review the sufficiency of evidence submitted for tax deductions for clear error. *See, e.g.*, *Buelow v. Comm'r*, 970 F.2d 412, 415 [70 AFTR 2d 92-5521] (7th Cir. 1992) ("The tax court's determination that a taxpayer has failed to come forward with sufficient evidence to support a deduction is a factual finding"); *Thompson v. Comm'r* , 631 F.2d 642, 646 [46 AFTR 2d 80-6107] (9th Cir. 1980), *cert. denied*, 452 U.S. 961 (1981).

The first two pieces of evidence submitted—the income tax returns—are insufficient because Taxpayers cannot rely solely on their own returns to establish losses. *Roberts v. Comm'r*, 62 T.C. 834, 837 (1974).

Taxpayers insist that their third piece of evidence—the IRS's No Change letter submitted in 2010 after the audit of their 2008 tax returns—makes this case unique. We disagree. The audit and letter did not address whether Taxpayers operated the Company intending to make a profit. The letter simply says the Internal Revenue Agent proposed no changes to their 2008 tax return. App. 5633. Again, tax returns cannot establish losses on their own. And the claimed NOLs were from more years than just the audit year (2008), and each tax year stands on its own. *United States v. Skelly Oil Co.*, 394 U.S. 678, 684 [23 AFTR 2d 69-1186] (1969).

Taxpayers also failed to submit ledgers from the years prior to 2010 in which the asserted NOLs occurred. The last piece of evidence Taxpayers submitted were the general ledgers from the years 2010–2013. Recognizing their error in not submitting more evidence, Taxpayers moved to add evidence five months after the record was closed. The Tax Court denied that motion as untimely and Taxpayers have not challenged that order.

For the reasons stated, the Tax Court did not clearly err in denying the NOL carryforward deductions.

V

Mitchel and Leslie claim that any finding in their favor on the prior two issues will eliminate their late-filing penalty for 2010 under 26 U.S.C. §§ 6651(a)(1). They forfeited this argument by only raising it in a footnote. *See United States v. Centeno*, 793 F.3d 378, 388 n.9 (3d Cir. 2015). They also cited no law to support their legal claim. So Mitchel and Leslie remain liable for the penalty. [pg. **2023** -976]

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The Tax Court adeptly conducted the five-day trial and issued a comprehensive opinion. At most, Taxpayers have shown that the Tax Court could have weighed the evidence differently. Because more is necessary to show clear error, we will affirm the decision.

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American Federal Tax Reports

U.S. v. ALICEA, Cite as 131 AFTR 2d 2023 -392 (58 F.4th 155), Code Sec(s) 5000A, (CA4), 01/19/2023

UNITED STATES OF AMERICA, CREDITOR-APPELLANT v. Fabio ALICEA; Sarah J. Zabek, DEBTORS-APPELLEES.

Case Information:

[pg. **2023** -392]

Code Sec(s):	5000A
Court Name:	U.S. Court of Appeals, **Fourth Circuit**,
Docket No.:	No. 21-2220,
Date Decided:	01/19/**2023**.
Prior History:	District Court, affirming Bankruptcy Court, reversed and remanded.
Tax Year(s):	Year 2018.
Disposition:	Decision for Govt.
Cites:	58 F.4th 155, **2023** -1 USTC P 50,118.

HEADNOTE

1. Tax claims in bankruptcy—priority claims—health care rules and shared responsibility payment—tax vs. penalty. 4th Cir. determined that IRS's claim for taxpayer's pre-2019 Code Sec. 5000A payment obligation, for failing to maintain health care ins., was entitled to priority under 11 USC 507(a)(8)(A) as tax "measured by income." Payment's nature for bankruptcy purposes as tax, rather than penalty, was clear when considering it was imposed under Congress's taxing power; collected by IRS as part of regular income tax filing process; and served public purpose, in terms of raising some revenue and encouraging individuals to maintain health ins. And amount of payment owed was clearly measured by income within meaning of 11 USC 507(a)(8)(A) . This conclusion wasn't changed by facts that some groups of individuals weren't required to pay any Code Sec. 5000A obligation or that others paid only flat rate.

Reference(s): ¶ 68,726.54;¶ 50,00A5.01(5) Code Sec. 5000A

OPINION

ARGUED: Pooja Ashok Boisture, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Appellant. William Earl Brewer, Jr., Raleigh, North Carolina, for Appellees.

ON BRIEF: David A. Hubbert, Deputy Assistant Attorney General, Ellen Page DelSole, Tax Division, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C.; Michael F. Easley, Jr., United States Attorney, OFFICE OF THE UNITED STATES ATTORNEY, Raleigh, North Carolina, for Appellant. Travis Sasser, SASSER LAW FIRM, Cary, North Carolina, for Appellees.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT,

Appeal from the United States District Court for the Eastern District of North Carolina, at Wilmington. Louise W. Flanagan, District Judge. (7:20-cv-00169-FL)

Before WILKINSON and NIEMEYER, Circuit Judges, and TRAXLER, Senior Circuit Judge.

Judge: TRAXLER, Senior Circuit Judge:

PUBLISHED

Amended: January 19, **2023**

When first enacted, the Affordable Care Act ("ACA") included a mandate (now repealed) requiring most individuals to maintain health insurance meeting certain minimum requirements. Individuals covered by the ACA who did not maintain the minimum level of insurance were required to pay a "shared responsibility payment" ("SRP") to the Internal Revenue Service through their annual income tax returns. *See* 26 U.S.C. §§ 5000A. The ACA [pg. **2023** -393] identifies the SRP as a penalty rather than a tax. *See* 26 U.S.C. §§ 5000A(b)(1) ("If a taxpayer [required to maintain insurance] fails to meet the requirement...for 1 or more months, then, except as provided in subsection (e), there is hereby imposed on the taxpayer a penalty with respect to such failures in the amount determined under subsection (c).").

In *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 [109 AFTR 2d 2012-2563] (2012) (*NFIB*), the Supreme Court upheld the constitutionality of the individual mandate. Although the Court determined that the SRP was a penalty, not a tax, for purposes of the Anti-Injunction Act, *see id.* at 546, it concluded that, as a constitutional matter, the SRP could fairly be read as a tax on the uninsured, which the Court found was within Congress's power to impose, *see id.* at 574. The question in this case is whether the SRP qualifies as a tax measured by income or as an excise tax entitled to priority in bankruptcy proceedings. *See* 11 U.S.C. §§ 507(a)(8)(A), 507(a)(8)(E). As we will explain, we conclude that the SRP qualifies as a tax measured by income, and we therefore reverse the judgment of the district court and remand for further proceedings.

I.

In 2018, when the ACA's mandate and SRP were still in effect, Fabio Alicea and his wife Sarah Zabek ("Taxpayers") did not maintain the minimum insurance coverage required by the ACA. The taxpayers did not include their $2409 SRP when they filed their 2018 federal tax return. In December 2019, the Taxpayers filed for Chapter 13 bankruptcy protection in the Eastern District of North Carolina.

The IRS filed a proof of claim for the unpaid SRP and asserted that its claim was entitled to priority as an income or excise tax under § 507 of the Bankruptcy Code. The Taxpayers objected to the government's claim of priority. The bankruptcy court granted the objection, concluding that, for purposes of the Bankruptcy Code, the SRP is a penalty, not a tax, and therefore is not entitled to priority under § 507(a)(8). The government appealed to the district court, which affirmed the bankruptcy court's decision. The district court held that even if the SRP was generally a tax, it did not qualify as a tax measured by income or an excise tax and thus was not entitled to priority. The government thereafter appealed to this court. Whether the SRP is entitled to priority under 11 U.S.C. § 507(a)(8) as either a tax measured by income or an excise tax on a transaction is a purely legal question that we review *de novo. See Ford Motor Credit Co. v. Dobbins*, 35 F.3d 860, 865 (4th Cir. 1994).

II.

The Bankruptcy Code gives priority to certain classes of unsecured claims, which must be paid in full before other unsecured claims may be paid. Section 507(a)(8)(A) gives priority to unsecured claims for "a tax on or measured by income or gross receipts for a taxable year ending on or before the date of the filing of the petition." Section 507(a)(8)(E) gives priority status to "an excise tax on...a transaction" occurring within a designated time period. The Bankruptcy Code does not define "tax" or "excise tax."

Because "[t]he presumption in bankruptcy cases is that the debtor's limited resources will be equally distributed among the creditors...., statutory priorities must be narrowly construed." *Ford Motor Credit*, 35 F.3d at 865; *see also New Neighborhoods, Inc. v. W. Virginia Workers' Comp. Fund*, 886 F.2d 714, 719 (4th Cir. 1989) (explaining that "there is a need carefully to limit priority claims in bankruptcy," given that "[e]very priority claim lessens the dividend, if any, of a general creditor in the event of bankruptcy"). When applying § 507(a), courts distinguish between *taxes* and *penalties.* Taxes are entitled to priority if they qualify as taxes measured by income or as excise taxes, but penalties are not entitled to priority and must "be dealt with as an ordinary, unsecured claim." *United States v. Reorganized CF & I Fabricators of Utah, Inc.*, 518 U.S. 213, 226 [77 AFTR 2d 96-2562] (1996).

Broadly speaking, "a tax is an enforced contribution to provide for the support of government; a penalty...is an exaction imposed by statute as punishment for an unlawful act." *Id.* at 224 (cleaned up); *see also New Neighborhoods*, 886 F.2d at 718 ("[A] payment may be classified as a tax if the state has compelled the payment and if the payment serves a public purpose."). When determining whether a particular exaction qualifies as a tax or as a penalty for purposes of priority in bankruptcy, "the label placed on the exaction" is not controlling. *CF&I Fabricators*, 518 U.S. at 220. Instead, we apply a functional analysis looking to "the operation of the provision using the term in question." *Id.*; *see United States v. Sotelo*, 436 U.S. 268, 275 [42 AFTR 2d 78-5001] (1978) ("That the funds due are referred to as a `penalty'...does not alter their essential character as taxes.").

III.

At issue in this appeal is whether, for purposes of priority treatment in bankruptcy pro[pg. **2023** -394] ceedings, the SRP qualifies as a tax or a penalty. If we conclude that the SRP is a tax rather than a penalty, we must then determine whether it qualifies as a tax measured by income or as an excise tax.

The government argues that the Supreme Court's decision in *NFIB* upholding the individual mandate largely resolves these questions, because the Court found the SRP to be a tax by engaging in the same functional analysis required in the bankruptcy context. The Taxpayers, however, argue that the *NFIB* Court's analysis of the tax question is not binding on this court, because the constitutional question of whether the SRP was within Congress's taxing power is governed by different principles than the statutory question of whether the SRP constitutes a tax within the meaning of the Bankruptcy Code. Relying instead on the *NFIB* Court's analysis of the

SRP under the Anti-Injunction Act, the Taxpayers contend that because Congress deliberately labeled the SRP as a penalty, Congress did not intend to treat the SRP as a tax.

A.

Given the centrality of the Supreme Court's decision in *NFIB* to the parties' arguments, we begin there.

As is relevant to this case, *NFIB* involved constitutional challenges to the ACA that focused on the individual mandate and the SRP. The challengers contended that the mandate and SRP exceeded Congress' powers under the Commerce Clause because the Act sought to regulate *inaction*—the failure to maintain adequate insurance. Before addressing the merits of the constitutional question, however, the Court first had to determine whether the Anti-Injunction Act, 26 U.S.C. §§ 7421, barred the challenge.

The Anti-Injunction Act prohibits lawsuits seeking to "restrain[] the assessment or collection of any tax." § 7421(a). Instead, the tax must first be paid, and the taxpayer may then go to court to challenge the tax and seek a refund. The Supreme Court held that the SRP was not a tax for purposes of the Anti-Injunction Act. The Court noted that the ACA labels the SRP a penalty, but labels other exactions taxes. The Court concluded that the different statutory treatment demonstrated that Congress did not intend the SRP to be treated as a tax within the meaning of the Anti-Injunction Act:

> Congress's decision to label this exaction a "penalty" rather than a "tax" is significant because the Affordable Care Act describes many other exactions it creates as "taxes." Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.
>
> ....
>
> The Anti–Injunction Act and the Affordable Care Act...are creatures of Congress's own creation. How they relate to each other is up to Congress, and the best evidence of Congress's intent is the statutory text. We have thus applied the Anti–Injunction Act to statutorily described "taxes" even where that label was inaccurate....
>
> Congress can, of course, describe something as a penalty but direct that it nonetheless be treated as a tax for purposes of the Anti–Injunction Act.
>
> ....
>
> The Affordable Care Act[, however,] does not require that the penalty for failing to comply with the individual mandate be treated as a tax for purposes of the Anti–Injunction Act.

567 U.S. at 544, 546.

On the merits of the constitutional challenges, the Supreme Court concluded that the individual mandate exceeded the scope of Congress's power under the Commerce Clause. The Court explained that "[t]he Constitution grants Congress the power to `*regulate* Commerce.' The power to *regulate* commerce presupposes the existence of commercial activity to be regulated. If the power to `regulate' something included the power to create it, many of the provisions in the Constitution would be superfluous." *Id.* at 550 (citation omitted).

The Court then considered the government's alternative argument that the mandate may be read "not as ordering individuals to buy insurance, but rather as imposing a tax on those who do not buy that product," *id.* at 562, and thus a proper exercise of the government's powers to lay and collect taxes. Although the Court believed "[t]he most straightforward reading of the mandate is that it commands individuals to purchase insurance," *id.*, the Court recognized that "[t]he text of a statute can sometimes have more than one possible meaning." *Id.*

> The question is not whether [the government's view that the mandate imposes a tax on those without insurance] is the most natural interpretation of the mandate, but only whether it is a fairly possible one. As we have explained, every reasonable construction must be resorted to, in order to save a statute from unconstitutionality. The Government asks us to interpret the mandate as imposing a tax, if it would otherwise violate the [pg. **2023** -395] Constitution. Granting the Act the full measure of deference owed to federal statutes, it can be so read....

Id. at 563 (cleaned up).

When explaining why the mandate can reasonably be read as imposing a tax on the uninsured, the Court engaged in a functional analysis of the SRP. The Court noted that the SRP

> looks like a tax in many respects. The [SRP] is paid into the Treasury by taxpayers when they file their tax returns. It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status. The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which...must assess and collect it in the same manner as taxes. This process yields the essential feature of any tax: It produces at least some revenue for the Government.

NFIB, 567 U.S. 563–64 (cleaned up).

While the statutory labelling of the SRP as a penalty was determinative of the Anti-Injunction Act question, the Court explained that the penalty label

> does not determine whether the payment may be viewed as an exercise of Congress's taxing power. It is up to Congress whether to apply the Anti–Injunction Act to any particular statute, so it makes sense to be guided by Congress's choice of label on that question. That choice does not, however, control whether an exaction is within Congress's constitutional power to tax.

Id. at 564. In the Court's view, "[t]he Affordable Care Act's requirement that certain individuals pay a financial penalty for not obtaining health insurance may reasonably be characterized as a tax. Because the Constitution permits such a tax, it is not our role to forbid it, or to pass upon its wisdom or fairness." *Id.* at 574.

B.

As noted above, both sides of this case rely on *NFIB* to support their positions. The government contends that the Court's determination that the SRP was a tax for purposes of the constitutional inquiry requires us to conclude that the SRP is a tax for bankruptcy purposes, while the Taxpayers contend that the *NFIB* Court's determination that the SRP was a penalty for purposes of the Anti-Injunction Act requires us to conclude that the SRP is a penalty for bankruptcy purposes. The dissent agrees with the Taxpayers and argues that, under *NFIB*, the statutory label given a governmental exaction always controls any question of statutory interpretation. *See Dissenting Op.* at 23 ("[W]hen Congress labels the shared responsibility payment a penalty, not a tax, the payment should be treated as a penalty in other congressional enactments, including the Bankruptcy Code. This holding is required by [*NFIB*].").

1.

We disagree with the Taxpayers and the dissent that *NFIB* requires us to treat the SRP as a penalty. While the *NFIB* Court did rely primarily on the statutory label when deciding that the SRP was not a tax for purposes of the Anti-Injunction Act, the court did not hold that the statutory label always controls all statutory questions. Instead, the court indicated that its analysis only governed questions under the Anti-Injunction Act. *See NFIB*, 567 U.S. at 564 ("It is up to Congress *whether to apply the Anti–Injunction Act to any particular statute*, so it makes sense to be guided by Congress's choice of label on that question.") (emphasis added).

Accepting the Taxpayers' argument would mean that the *NFIB* Court silently upended bankruptcy practice and overruled a long line of cases. As discussed above, when determining whether a governmental exaction is a tax or penalty for bankruptcy purposes, Supreme Court precedent *requires* us to apply a functional analysis that ignores the label given to the exaction and instead considers whether the exaction operates as a tax or a penalty:

> On a number of occasions, this Court considered whether a particular exaction, whether or not called a "tax" in the statute creating it, was a tax for purposes of [priority in bankruptcy proceedings], and *in every one of those cases the Court looked behind the label placed on the exaction and rested its answer directly on the operation of the provision using the term in question.*

CF & I Fabricators, 518 U.S. at 220 (1996); *see City of Huntington* , 999 F.2d at 73 ("The proper analysis to arrive at the real nature of the [exaction] is to examine all the facts and circumstances and assess them on the basis of economic realities.").

If the dissent is right that the *NFIB* Court held that the statutory label given a governmental exaction always controls any question of statutory construction, that would mean that the Court used a non-bankruptcy case to overrule *CF&I* and to reject its long-standing approach to bankruptcy cases. The *NFIB* Court, however, never indicated that its analysis of the Anti-Injunction Act issue was breaking new ground or [pg. **2023** -396] required the overruling of any cases. If the Court's analysis of the Anti-Injunction Act issue had worked such a fundamental change in unrelated areas of the law, it seems likely that the Court would have been aware of the change and would have acknowledged the consequences of its decision.

Moreover, the *NFIB* Court relied on two bankruptcy functional-approach cases—*CF&I* and *Sotelo* —when concluding that the SRP operates as a tax for constitutional purposes. *See NFIB*, 567 U.S. at 565-67 & n.7. If the Court intended to overrule those cases and hold the statutory label controls all statutory questions, it seems unlikely that the Court would rely, without comment, on cases that it had just silently overruled.

The dissent does not address these difficulties in its approach or even acknowledge the long-established line of cases requiring a functional approach when considering claims of priority under the Bankruptcy Code. *CF&I* and *City of Huntington* are binding precedent that require us to apply a functional approach when determining whether a governmental exaction qualifies as a tax or a penalty for purposes of claim priority under the Bankruptcy Code. Because the Supreme Court in *NFIB* did not purport to overrule any of its Anti-Injunction Act cases, much less any of its bankruptcy cases, "it is not our role to say it did." *United States v. Moses*, 23 F.4th 347, 357 (4th Cir. 2022) ("[I]t is noteworthy that *Kisor* did not purport to overrule *Stinson*, and it is not our role to say it did."), *cert. denied*, No. 22-163 (U.S. Jan. 9, **2023**). Unless and until the *Supreme Court* overrules *CF&I*, we are obliged to follow it. *See Payne v. Taslimi* , 998 F.3d 648, 654 (4th Cir. 2021) (It is "the Supreme Court's prerogative alone to overrule one of its precedents. *It is beyond our power to disregard a Supreme Court decision*, even if we are sure the Supreme Court is soon to overrule it." (cleaned up), *cert. denied*, 211 L. Ed. 2d 403 (Dec. 13, 2021). Under *CF&I* and *City of Huntington*, the "penalty" label assigned to the SRP is not dispositive of the priority question before us, and we must instead look to the nature and function of the SRP to determine whether it qualifies as a tax entitled to priority under 11 U.S.C. § 507(a)(8).

2.

We turn now to the government's claim that we are bound by the *NFIB* Court's application of the functional approach to conclude the SRP can be viewed as a tax. The Taxpayers correctly observe that conflicting presumptions are involved in this case and in *NFIB*. In *NFIB*, the determination that the SRP could reasonably be viewed as a tax was a product of long-standing principles of statutory interpretation that required the Supreme Court to find the mandate constitutional if fairly possible. This case, however, presents a question of statutory meaning rather than congressional power. The question is whether the SRP is a tax within the meaning of the Bankruptcy Code, under a statute that we must construe narrowly.

The Third Circuit recently considered the issue before us and concluded that, in light of the differing presumptions involved, *NFIB* was not directly controlling of the bankruptcy priority question. *See In re Szczyporski*, 34 F.4th 179, 186 [129 AFTR 2d 2022-1784] (3d Cir. 2022) ("These conflicting presumptions suggest that an exaction could function as a tax for the broader purpose of constitutional validity, but not within the narrower confines of bankruptcy priority."). We generally agree with the Third Circuit that, because of the differing presumptions, a hypothetical exaction could be a tax for constitutional purposes and a penalty for purposes of priority in bankruptcy proceedings. The *NFIB* Court, however, stated that the SRP qualified as a tax even under the narrowest view of the taxing power. *See NFIB*, 567 U.S. at 573 ("We have already explained that the shared responsibility payment's practical characteristics pass muster as a tax under our narrowest interpretations of the taxing power."). Accordingly, we are not so sure that the broader presumption at play in *NFIB* makes the decision less applicable to the question before us.

Moreover, as noted above, the Court concluded that the SRP could reasonably be viewed as a tax by relying on cases that applied the functional approach to the question of tax versus penalty in the bankruptcy context. If applying the identical functional analysis that we apply in the bankruptcy context led the Supreme Court to conclude that the SRP functions as a tax, it would seem difficult for an intermediate court to reach a different conclusion.

In any event, as we will explain, we agree that a functional analysis of the SRP shows that it operates as a tax, not a penalty. We therefore do not need to decide whether we are technically bound by the Supreme Court's functional analysis of the SRP.

IV.

We turn now to the meat of the issue on appeal—whether the government's claim for the unpaid SRP is entitled to priority under 11 U.S.C. § 507(a)(8). [pg. **2023** -397]

A.

When determining whether a governmental exaction is a tax, "[t]he proper analysis to arrive at the real nature of the [exaction] is to examine all the facts and circumstances and assess them on the basis of economic realities." *United States v. City of Huntington* , 999 F.2d 71, 73 (4th Cir. 1993) (cleaned up). "For the purpose of determining claim priority in the context of bankruptcy," an exaction is a tax if it is

> (a) An involuntary pecuniary burden, regardless of name, laid upon individuals or property; (b) Imposed by, or under authority of the legislature; (c) for public purposes, including the purpose of defraying expenses of government of undertakings authorized by it; and (d) Under the police or taxing power of the state.

Id. at 73 n.4. Applying this functional standard, we conclude that the SRP qualifies as a tax.*

The SRP is imposed by the government under its taxing power on a large, identifiable class of people (uninsured, nonexempt taxpayers), and the SRP is collected by the IRS as part of the regular income tax filing process. The SRP serves public purposes, as it raises some amount of revenue for the government and encourages individuals to maintain health insurance, which in turn reduces the expenses of providing medical care to the uninsured borne by governments and medical providers. *See In re Szczyporski* , 34 F.4th at 186 ("The Supreme Court's *[NFIB]* analysis is not dispositive in the bankruptcy context, but we find it persuasive. Based on the functional examination of the shared responsibility payment's actual effects and operation, we conclude that the payment is a tax for bankruptcy purposes.").

The Taxpayers contend that the SRP cannot be viewed as a tax because the primary purpose of the individual mandate and the SRP was to encourage the purchase of health insurance, not to raise revenue. We disagree. As the Supreme Court has explained, the "essential feature of any tax" is that "[i]t produces at least some revenue for the Government." *NFIB*, 567 U.S. at 564.

> Although the [SRP] will raise considerable revenue, it is plainly designed to expand health insurance coverage. But taxes that seek to influence conduct are nothing new....That § 5000A seeks to shape decisions about whether to buy health insurance does not mean that it cannot be a valid exercise of the taxing power.

Id. at 567. Accordingly, we conclude that the SRP operates as a tax, not a penalty.

B.

Although we conclude that the SRP is properly viewed as a tax, the government's claim is entitled to priority only if the SRP further qualifies as either "a tax on or measured by income or gross receipts," 11 U.S.C. § 507(a)(8)(A), or an "excise tax on...a transaction," § 507(a)(8)(E). Because we conclude that the SRP qualifies as a tax measured by income, it is unnecessary for us to consider whether the SRP also amounts to an excise tax.

The statute setting out the method for calculating the SRP, 26 U.S.C. §§ 5000A(c), contains formulas keyed to individual and household income. The amount of the SRP is calculated "as a percentage of household income, subject to a floor based on a specified dollar amount and a ceiling based on the average annual premium the individual would have to pay for qualifying private health insurance." *NFIB* , 567 U.S. at 539. Because household income provides the starting point for all SRP calculations, we have no difficulty concluding that the SRP is "measured by income."

According to the Taxpayers, however, the SRP is not a tax measured by income because "[t]he threshold question of whether the [SRP] is triggered is not answered by reference to how much income an individual earned, but by reference to whether an individual had health insurance." Brief of Respondent at 12. The Supreme Court appears to have already rejected this argument, as the Court in *NFIB* explained that the SRP obligation "is triggered by specific circumstances—earning a certain amount of income but not obtaining health insurance." 567 U.S. at 571.

Moreover, the bankruptcy statute gives priority to claims for taxes *measured* by income, not to claims for taxes *triggered by* a particular income level. Even if income has nothing to do with triggering *liability* for the SRP, the *amount owed* for the SRP is measured by income. *See In re Szczyporski*, 34 F.4th at 188 [pg. **2023** -398] (The SRP "is not a traditional tax `on' income earned or received. Section 507(a)(8)(A)'s plain language, however, grants priority not only to traditional income taxes, but also to taxes, like the shared responsibility payment, whose amounts are calculated based on the taxpayer's income.").

The Taxpayers also suggest that the SRP is not measured by income because some groups—like members of Indian tribes and those who cannot afford the SRP—are not required to pay it at all, and others pay only a flat rate. Again, we disagree.

As the government points out, the flat rate applies only if it is greater than the amount calculated based on the taxpayer's income. *See* 26 U.S.C. §§ 5000A(c)(2). Because the flat rate cannot be calculated without first calculating the amount due based on income, the existence of the flat rate does not mean that the SRP is not measured by income. *See In re Szczyporski*, 34 F.4th at 189 ("Because the amount due under each of these scenarios is based on the taxpayer's household income, the shared responsibility payment is an obligation `measured by income,' even when the payment is a flat fee rather than a percentage of income."). And while certain groups are entirely exempt from the SRP, that again does not mean that the SRP is not measured by income. There are many exemptions from the obligation to pay federal income taxes, yet there is no dispute that federal income taxes are entitled to priority as taxes measured by income. That some taxpayers are not required to pay the SRP does not change the fact that when the SRP must be paid, the amount to be paid is measured by the taxpayer's income. *See In re Juntoff*, 636 B.R. 868, 885 [129 AFTR 2d 2022-1126] (B.A.P. 6th Cir. 2022) ("[W]hile a taxpayer may be obligated to pay a flat amount rather than a percentage of their income, making that determination requires a taxpayer to input their income into a calculation. Stated differently, it is impossible to discern a nonexempt taxpayer's liability for the SRP without factoring their income into the analysis, making the SRP a tax `measured by' the taxpayer's income.").

V.

To summarize, we conclude that the SRP qualifies as a tax under the functional approach that has consistently been applied in bankruptcy cases and that nothing in the Supreme Court's decision in *NFIB* requires us to abandon that functional approach. Because the SRP is a tax that is measured by income, the government's claim is entitled to priority under 11 U.S.C. § 507(a)(8)(A). Accordingly, we reverse the judgment of the district court and remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED

Judge: WILKINSON, Circuit Judge, concurring:

I concur in full in Judge Traxler's fine majority opinion in this case. Plaintiff's suit strikes me as a not-too-subtle rearguard action against the Affordable Care Act and the decision to uphold it, *NFIB v. Sebelius*, 567 U.S. 519 [109 AFTR 2d 2012-2563] (2012). That decision is the law, however, and circumventing it would be as impermissible as overruling it.

The SRP has now been effectively slain, *see* Tax Cuts and Jobs Act of 2017, Pub. L. No. 115–97, § 11081, 131 Stat. 2092 (reducing payments to zero), and I should have thought the matter, so very controversial at the time, had been well settled. The smoke of battle lingers still, however, in our fine bankruptcy courts of all places. During its brief lifetime, the SRP behaved and functioned as one would expect a tax to do. Not just in one particular but in many. *See NFIB*, 567 U.S. at 563–64; Maj. Op. at 11–13. This functionality trumps labeling, as the Supreme Court and this court have repeatedly held.

It is time now to give the SRP a decent burial, with all the accoutrements of priority the Bankruptcy Code affords.

This fight is over. R.I.P.

Judge: NIEMEYER, Circuit Judge, dissenting:

The issue in this case is straightforward—whether the "shared responsibility payment" imposed by the Patient Protection and Affordable Care Act of 2010 ("Affordable Care Act" or "ACA") is a "tax" or a "penalty" when considered in the context of the Bankruptcy Code, which gives the IRS priority for tax claims but not for penalty claims. *See* 11 U.S.C. § 507(a)(8); *see also United States v. Reorganized CF&I Fabricators of Utah, Inc.*, 518 U.S. 213, 226 [77 AFTR 2d 96-2562] (1996). Like the majority, I conclude that the answer to this question is provided by the Supreme Court's decision in *National Federation of Independent Business v. Sebelius* (*NFIB*), 567 U.S. 519 [109 AFTR 2d 2012-2563] (2012), which specifically addressed the nature of the payment. But I differ with the majority in that I conclude that *NFIB* requires that the payment be treated as a penalty in the context of the Bankruptcy Code. By concluding instead that the payment is a tax in that context, the majority fails to recognize that *NFIB* applied two distinct analyses, one when construing the ACA's statutory text and another when deter[pg. **2023** -399] mining the scope of Congress's constitutional authority for enacting the ACA. While the *NFIB* Court chose to apply a functional standard when determining the scope of Congress's constitutional authority, it applied the standard rules of statutory construction when determining, for purposes of how the ACA interacted with another statute, whether the shared responsibility payment was a tax or a penalty, concluding that the payment was a penalty.

Specifically, the *NFIB* Court held that for purposes of the Anti-Injunction Act—which prohibits actions to restrain the assessment or collection "of any tax"—the ACA's shared responsibility payment is a "penalty," as so labeled, and not a "tax." 567 U.S. at 543. The Court explained, "Congress's decision to label this exaction a `penalty' rather than a `tax' is significant because the Affordable Care Act describes many other exactions it creates as `taxes.' Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally." *Id.* at 544 (citation omitted). But the Court noted that while Congress chose to label the shared responsibility payment a penalty, its label does not control when the Court must determine *the scope of Congress's authority under the Constitution*—more particularly, when it must determine the scope of Congress's taxing power. *See* U.S. Const. art. I, § 8, cl. 1 ("The Congress shall have Power To lay and collect Taxes"). The Court said that the " *constitutional question* was not controlled by Congress's choice of label," *NFIB*, 567 U.S. at 564 (emphasis added), and thus the shared responsibility payment "may *for constitutional purposes* be considered a tax, not a penalty," *id.* at 566 (emphasis added). The distinction the Court drew between following Congress's labels when construing its legislation and looking behind them when determining the scope of Congress's power under the Constitution is central to the disposition of this case.

The majority fails to accept the Supreme Court's distinct analyses, applying the functional analysis that the Court employed only for constitutional interpretation to its statutory interpretation of the ACA. And even then, the majority is noncommittal as to whether it is "technically bound by the Supreme Court's functional analysis of the [shared responsibility payment]." *Ante* at 13. Moreover, to avoid the Court's statutory analysis, which *rejected* a functional analysis in construing the term "penalty," *see NFIB*, 567 U.S. at 544 (rejecting the argument that the shared responsibility payment, although labeled a penalty, "functions like a tax"), the majority states simply that "the [*NFIB*] [C]ourt did not hold that the statutory label always controls all statutory questions." *Ante* at 9. In short, the majority simply refuses to apply the analysis specified by the Court that

> Congress's decision to label this exaction a "penalty" rather than a "tax" is significant because the Affordable Care Act describes many other exactions it creates as "taxes." Where Congress uses certain language in one part of a statute and different language in another, it is generally presumed that Congress acts intentionally.

NFIB, 567 U.S. at 544 (citation omitted). And the majority does so to be able to hold that the "penalty" is not actually a penalty but a "tax," even though it was not considered a tax by Congress. That reasoning is unsustainable.

I

The Affordable Care Act mandates that "applicable individual[s]" maintain "minimum essential [health insurance] coverage," 26 U.S.C. §§ 5000A(a), and, for persons who fail to do so, it imposes a "penalty," *id.* § 5000A(b)(1). The Act also provides that the "penalty" must be paid to the IRS with the taxpayer's tax return and "shall be assessed and collected in the same manner *as an assessable penalty* under [26 U.S.C. §§ 6671–6725]." *Id.* § 5000A(g)(1) (emphasis added). In short, the ACA labels the shared responsibility payment a "penalty" that is imposed for failure to maintain mandated health insurance, which stands in contrast to the Act's labeling of other exactions as "taxes." *See NFIB* , 567 U.S. at 544.

The taxpayers before us filed a voluntary Chapter 13 bankruptcy petition in December 2019, and the IRS filed a proof of claim of roughly $30,000 as an unsecured *priority* claim, which included $2,409 owed for an unpaid shared responsibility payment under the ACA. The taxpayers objected to the claim, contending that the portion consisting of the shared responsibility payment was not entitled to priority because it was not a tax, but a penalty, and therefore should be classified as an "unsecured *general* claim," not an "unsecured *priority* claim."

The Bankruptcy Code distinguishes between how claims for unpaid taxes and claims for unpaid penalties are to be treated. Under § 507(a)(8), it gives the IRS priority for certain unpaid *taxes. See* 11 U.S.C. § 507(a)(8); *see also Neighborhoods, Inc. v. W. Va. Workers' Comp. Fund*, 886 F.2d 714, 719 (4th Cir. 1989) (noting that § 507(a) "extends priority to vari[pg. **2023** -400] ous types of taxes"). But if the debt is an unpaid *penalty*, the claim is not given priority.

The bankruptcy court sustained the taxpayers' objection and concluded that the shared responsibility payment was a penalty and not a tax, relying on *NFIB.* The district court affirmed, explaining in particular how its holding was governed by *NFIB*:

> The [*NFIB*] court observed that "Congress cannot change whether an exaction is a tax or a penalty for *constitutional* purposes simply by describing it as one or the other." But, the manner in which the Anti-Injunction Act and the Affordable Care Act "relate to each other is up to Congress, and the best evidence of Congress's intent is the statutory text."

(Quoting *NFIB*, 567 U.S. at 544). I would affirm.

II

The issue in this case is one of *statutory* interpretation—whether the shared responsibility payment is a penalty as so labeled by Congress in the ACA. Given the plain meaning of the text, I conclude that Congress's labeling it a penalty is controlling for purposes of other congressional enactments, and therefore it should be treated as a penalty in the Bankruptcy Code, which distinguishes penalties from taxes. As the Supreme Court instructs, Congress's labels must be honored when engaging in statutory interpretation, "even where [the] label was inaccurate." *NFIB*, 567 U.S. at 544. And in responding to the argument that the ACA treats the shared responsibility payment as a tax, despite being labeled a penalty, for purposes of applying the Anti-Injunction Act, 26 U.S.C. §§ 7421(a), the Court stated that "[t]he text of the pertinent statutes suggests otherwise." *NFIB*, 567 U.S. at 543. It explained that Congress "chose to describe the `[s]hared responsibility payment' imposed on those who forgo health insurance not as a `tax,' but as a `penalty,'" and that because the pertinent statutes are "creatures of Congress's own creation[,] [h]ow they relate to each other is up to Congress," even if Congress's labels are thought to be inaccurate. *Id.* at 543–44. Indeed, the Court specifically rejected the argument that, for its statutory construction, it should apply a functional analysis. *Id.* at 544.

Similarly here, the pertinent statutes are the ACA and the Bankruptcy Code, both of which are "creatures of Congress's own creation." Accordingly, when Congress labels the shared responsibility payment a penalty, not a tax, the payment should be treated as a penalty in other congressional enactments, including the Bankruptcy Code. This holding is required by *NFIB*. In *NFIB*, the Court noted that "*Amicus* argues that even though Congress did not label the shared responsibility payment a tax, we should treat it as such under the Anti-Injunction Act *because it functions like a tax.* " 567 U.S. at 544 (emphasis added). Yet, the Court rejected that argument in favor of honoring Congress's deliberate decision to label it a penalty. *Id.* The Court recognized that, while the Anti-Injunction Act applied to "any tax," the shared responsibility payment in the ACA was not a tax as a matter of statutory construction because Congress "chose to describe [the payment] not as a `tax,' but as a `penalty.' There is no immediate reason to think that a statute applying to `any tax' would apply to a `penalty.'" *Id.* at 543 (citations omitted). Nonetheless, the majority concludes that the penalty should be treated as a tax to give the government a priority in bankruptcy, employing the same functional analysis rejected by the *NFIB* Court.

Although in *NFIB* the ACA's penalty label was applied to the Anti-Injunction Act and the other statute involved here is the Bankruptcy Code, the language of the ACA that labels the payment a "penalty," 26 U.S.C. §§ 5000A(b), is not textually restricted, such that the payment is a "penalty" in one statutory context but a "tax" in another. And the Supreme Court so observed. *See NFIB*, 567 U.S. at 544–45, 564. All three statutes are of Congress's creation.

To be sure, when determining whether Congress has the *constitutional power* to impose the shared responsibility payment, the question in *NFIB* became one of constitutional interpretation. And in discharging that responsibility, the Court conducted a functional analysis of the shared responsibility payment, concluding that the shared responsibility payment functions in large part like a tax such that Congress could constitutionally require the payment. As the Court stated:

> It is of course true that the Act describes the payment as a "penalty," not a "tax." But while that label is fatal to the application of the Anti-Injunction Act, it does not determine whether the payment may be viewed as an exercise of Congress's taxing power. It is up to Congress whether to apply the Anti-Injunction Act to any particular statute, so it makes sense to be guided by Congress's choice of label on that question. That choice does not, however, control whether an exaction is within Congress's constitutional power to tax.

NFIB, 567 U.S. at 564 (citation omitted). [pg. **2023** -401]

In this case, there is no question presented about the scope of Congress's constitutional authority. Rather, the question presented involves the statutory interpretation of the ACA, a congressional enactment, in which Congress distinguished a "penalty" from a "tax." While Congress described numerous exactions in the Act as "taxes," it described the shared responsibility payment as a "penalty." Thus, when determining how the shared responsibility payment must be treated under the Bankruptcy Code, we must yield to Congress's determination that it is a penalty. As *NFIB* observes, in the context of two congressional enactments, we must honor the congressional texts *as written*.

***

At bottom, in the Affordable Care Act, Congress deliberately labeled the shared responsibility payment a penalty—as distinct from other payments required under the Act that are labeled as taxes—and therefore, when addressing the payment in the Bankruptcy Code, it must be treated as a penalty. This is what *NFIB* requires; this is what the district court held; and this is what I would conclude. I respectfully dissent.

* This question has been considered by several courts. The Third Circuit has concluded that the SRP qualifies as a tax measured by income. *See In re Szczyporski*, 34 F.4th 179, 190 [129 AFTR 2d 2022-1784] (3d Cir. 2022) ("[W]e hold that the shared responsibility payment is a tax `measured by income.' As such, it is entitled to priority under Section 507(a)(8)(A).") (cleaned up). The Fifth Circuit in a non-precedential opinion has concluded that the SRP does not qualify as an excise tax, but the court declined to consider the untimely raised question of whether it qualified as a tax measured by income. *See In re Chesteen*, 799 F. App'x 236, 239-40 [125 AFTR 2d 2020-969] (5th Cir. 2020) ("In this appeal, the Government...contends the owed SRP satisfies one of two subsections: 11 U.S.C. § 507(a)(8)(E)(i), `an excise tax on a transaction'; and 11 U.S.C. § 507(a)(8)(A), `a tax on or measured by income.' As explained infra, the former fails, and the latter is not properly before our court.") (cleaned up). District courts and bankruptcy courts have reached conflicting conclusions. *See In re Szczyporski*, 34 F.4th at 184-85 nn.1-3 (collecting cases).

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American Federal Tax Reports

PEJOUHESH v. COMM., Cite as 131 AFTR 2d 2023 -XXXX, (CA5), 05/09/2023

HASSAN ALI PEJOUHESH, Petitioner—Appellant, v. COMMISSIONER OF INTERNAL REVENUE, Respondent—Appellee.

Case Information:

Code Sec(s):	
Court Name:	United States Court of Appeals for the **Fifth Circuit**,
Docket No.:	No. 22-60469,
Date Decided:	05/09/**2023**.
Disposition:	

HEADNOTE

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Reference(s):

OPINION

United States Court of Appeals for the Fifth Circuit,

Appeal from a Decision of the United States the Tax Court Agency No. 34748-21

Before CLEMENT, GRAVES, and HIGGINSON, Circuit Judges.

Judge: JAMES E. GRAVES, JR., Circuit Judge:

Hassan Ali Pejouhesh, a federal prisoner proceeding *pro se*, moves for leave to proceed *in forma pauperis* and a change of venue for his tax appeal to the United States Court of Appeals for the District of Columbia Circuit. However, for the reasons stated below, we dismiss this appeal for lack of jurisdiction.

In November 2021, Pejouhesh petitioned the Tax Court alleging that he had not received economic impact payments ("EIPs") under the CARES Act despite being eligible. *See* 26 U.S.C. § 6428 *et seq.* The Commissioner of Internal Revenue ("CIR") moved to dismiss the claim, arguing that no notice of deficiency, as authorized by 26 U.S.C. § 6212(a), and required by 26 U.S.C. § 6213(a), had been sent to Pejouhesh.

On February 14, 2022, the Tax Court directed Pejouhesh to submit an objection to the motion to dismiss. Following the request and subsequent approval of two extensions to file an objection, Pejouhesh moved once more for an extension of time. On July 29, 2022, the Tax Court denied the motion for an extension of time, granted the CIR's motion to dismiss, and ordered that the case be dismissed after finding that Pejouhesh failed to establish jurisdiction.

However, after the court entered its Order, Pejouhesh filed a pleading entitled "Motion Petitioner Objection to Respondent Motion to Dismiss for Lack of Jurisdiction."[1] In it, he asserts that he attached a valid notice of deficiency to his petition. In addition, he argues that he submitted a Form 3531, titled "Request for Signature or Missing Information to Complete Return," which details how his tax return for the 2020 tax year was incomplete because it lacked a valid original signature.

A few weeks later, Pejouhesh filed a notice of appeal in this court from the Order where, *inter alia*, he challenges the failure of the Tax Court to consider his newest pleading. To date, the Tax Court has not issued a ruling on Pejouhesh's "Motion Petitioner Objection to Respondent Motion to Dismiss for Lack of Jurisdiction."

The United States Courts of Appeals have exclusive jurisdiction to review decisions of the Tax Court. 26 U.S.C. § 7482(a)(1). For a Tax Court's decision to be reviewable, it must be final. *Nixon v. Comm'r*, 167 F.3d 920, 920 [83 AFTR 2d 99-930] (5th Cir. 1999); *see also* 28 U.S.C. § 1291 ("The courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States ... ."). A "final decision" typically is one that puts an end to the litigation on the merits and "leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 467 (1978). "This finality rule is designed to avoid piecemeal trial and appellate litigation and the delays and costs of multiple appeals upon both parties and courts, as well as to provide a clear test so that needless precautionary appeals need not be taken lest substantive rights be lost." *Newpark Shipbuilding & Repair, Inc., v. Roundtree*, 723 F.2d 399, 401 (5th Cir. 1984).

As such, absent certification under 28 U.S.C. § 1292(b) or a separate Rule 54(b) type order, an order disposing of fewer than all parties or claims in an action is unappealable, subject to exceptions not applicable here. *Nixon*, 167 F.3d at 920 [83 AFTR 2d 99-930]. That is what we have here. Since no certification under § 1292(b) or a separate Rule 54(b) type order exists, and Pejouhesh's pleading is still pending before the Tax Court, we lack jurisdiction over this appeal.

It is therefore ORDERED that this appeal is dismissed *sua sponte* for lack of jurisdiction without prejudice. All pending motions are DENIED as moot.

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1 Generally, this court construes *pro se* filings liberally. *See Yohey v. Collins* , 985 F.2d 222, 225 (5th Cir. 1993). Read broadly, this motion will be construed as a Motion to Vacate or Revise as the substance of Pejouhesh's pleading directly challenges the basis of the Tax Court's Order. *See* TAX CT. RULE 162.

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American Federal Tax Reports

TON v. TON, Cite as 131 AFTR 2d 2023 -1236, (CA5), 03/29/2023

Lynda Ronquillo TON, APPELLANT v. Hendrikus TON, APPELLEE; In the Matter of Hendrikus TON, Debtor.

Case Information:

[pg. **2023** -1236]

Code Sec(s):	
Court Name:	U.S. Court of Appeals, **Fifth Circuit**,
Docket No.:	No. 22-30378,
Date Decided:	03/29/**2023**.
Prior History:	District Court, affirming Bankruptcy Court, affirmed. Earlier proceedings at (2020, DC LA) 126 AFTR 2d 2020-5063, vacating and remanding Bankruptcy Court.
Disposition:	Decision against Appellant.

HEADNOTE

1. Appeals in bankruptcy—partition judgments—community property. 6th Cir. affirmed partition judgment which was entered in ex-husband/business co-owner/convicted tax evader's bankruptcy case, partitioning his and ex-wife/business co-owner's community property. In so holding, 6th Cir. determined what constituted community property and community obligations, including loans/line of credit ex-husband refinanced to satisfy pre-divorce tax obligations.

Reference(s): ¶ 68,726.52(60)

OPINION

United States Court of Appeals for the Fifth Circuit,

Appeal from the United States District Court for the Eastern District of Louisiana USDC No. 2:21-CV-1029

Before WIENER, STEWART, and ENGELHARDT, Circuit Judges.

Judge: PER CURIAM:*

This appeal arises from Lynda Ton's ("Lynda") challenge to the district court's order affirming the bankruptcy court's partition judgment. Because the district court properly determined that Lynda did not establish that the bankruptcy court erred in assessing administrative expenses against her portion of the former community property, we AFFIRM.

I. BACKGROUND

Hendrikus Ton ("Hank") and Lynda were married in 1987. *In re Ton*, No. 21-514, 2022 WL 832572, at *1 (E.D. La. March 21, 2022). During the marriage, the Tons owned and operated several businesses, including Abe's Boat Rentals Inc. ("Abe's"). *Id.*

On October 5, 2012, Hank pleaded guilty to conspiracy to defraud the United States by failing to file employment taxes in violation of 18 U.S.C. § 371 and 25 U.S.C. § 7202. *Id.* at 2. Hank admitted that he underreported withheld taxes for Abe's employees between the years 2006 and 2009 and agreed to repay the amount of $3,582,451 in restitution to the IRS (the "tax liability" or "liability"). *Id.*

Lynda then filed for divorce in Louisiana on November 14, 2012 and received a judgment which terminated the community property regime retroactive to the date of that filing. *Id.* On November 21, 2013, a year and a week later, Lynda filed a petition to partition community property in state court, but a trial was never held.

On May 29, 2013, Hank refinanced an existing line of credit to satisfy the tax liability. *Id.* He personally guaranteed a $3,222,451 loan and used the proceeds to pay the restitution owed to the IRS. He also liquidated a community life insurance policy and invested the proceeds in Abe's to cover its operating costs. He then refinanced his debt through a total of five loans to Abe's from Whitney bank between August 2011 and January 2015. *Id.* at 2–3.

In 2018, Hank filed a voluntary bankruptcy petition under Chapter 11 in the Eastern District of Louisiana. *Id.* at 2. The bankruptcy court ordered a reorganization plan which incorporated Hank's personal assets and assets of the marriage's community property to satisfy the debt, including the series of loans he took out in connection with his tax liability. Several months later, Lynda removed the community property partition petition to the bankruptcy court. *Id.*

On August 14, 2019, the bankruptcy court entered an order partitioning the Tons' former community property. *Id.* The Tons each appealed that ruling, and the district court for the Eastern District of Louisiana vacated and remanded, holding that the bankruptcy court had erred in several respects in its partition. *Id.* at 3.

By early 2021, a confirmation hearing was held in the bankruptcy court during which Hank presented evidence that the proposed plan of reorganization ("the Plan") satisfied the requirements for a nonconsensual Chapter 11 "cramdown" under 11 U.S.C. § 1129.[1] *Id.* On February 21, 2021, the bankruptcy court entered an order (the "Confirmation Order") confirming the Plan. *Id.* Lynda appealed the Confirmation Order to the district court which [pg. **2023** -1237] determined that her arguments lacked merit and affirmed the Order. *Id.*

On May 12, 2021, the bankruptcy court entered a final judgment partitioning the Tons' community property, taking into consideration the bankruptcy court's Original Partition Judgment, the district court's holding on appeal, and the bankruptcy court's holding on remand. Lynda then appealed the bankruptcy court's judgment to the district court. The district court determined that Lynda did not meet her burden to establish that the bankruptcy court erred. This appeal followed.

II. STANDARD OF REVIEW

"We review the decision of a district court, sitting as an appellate court, by applying the same standards of review to the bankruptcy court's findings of fact and conclusions of law as applied by the district court." *In re Goodrich Petroleum Corp.*, 894 F.3d 192, 196 (5th Cir. 2018), *as revised* (June 29, 2018) (quoting *In re Entringer Bakeries, Inc.* , 548 F.3d 344, 348 (5th Cir. 2008) (internal quotation marks omitted)). "Thus, we review the bankruptcy court's findings of fact for clear error and its legal conclusions de novo." *Id.* (citing *In re Gerhardt*, 348 F.3d 89, 91 (5th Cir. 2003)).

III. DISCUSSION

On appeal, Lynda makes the following three arguments: 1. the bankruptcy and district courts erred in holding that creditor claim No. 8 was based on loans that were not a community obligation at the time they were incurred; 2. the bankruptcy and district courts erred in holding that she lost her vested economic interest in certain property deemed part of the bankruptcy estate; and 3. the bankruptcy and district courts erred in not treating Parcel No. 900648-C as community property. We address each argument in turn.

A. Community Obligation

Lynda argues that she should not be forced to forfeit her undivided one-half of the former community to satisfy Whitney Bank's creditor claim—which consisted of assets valued at $7,692,303 at the time of the community's termination—because the valuation was based on 2014 and 2015 loans made to Abe's after the community had terminated on the Tons' divorce in 2012. She avers that she did not file for bankruptcy, that she was not responsible for the debt, and that the debt was incurred by her ex-husband six years after the divorce in 2012. She asserts that she did not guarantee Abe's debts and had opposed the loans being made. She provides an analysis on each of the five loans dating back to the first, which was originally guaranteed by Hank on August 16, 2011. She further asserts that each subsequent loan paid off the former loan in full until the January 5, 2015 loan (the "January loan"). $412,072.77 of the January loan was used to pay off the remaining balance of Loan 4. $2,010,082.17 of the January loan was used to pay off the remaining balance of Loan 1. And $3,682,855.85 of the January loan was used to purchase a vessel for Abe's operations.

Before considering her arguments, we must first determine what is community property in this case. Community property is any property acquired during the existence of the legal regime, i.e., the marriage, through the effort, skill, or industry of either spouse. La. Civ. Code Ann. art. 2338 (**2023**). We have explained that "community property," as used to define property of the bankruptcy estate in § 541(a)(2), includes community property and former community property that has not been partitioned as of the petition date. *See In re Robertson*, 203 F.3d 855, 861 (5th Cir. 2000). Community property does not include former community property which has been divided and reclassified as separate property by state law before the petition date. *Id.* at 861. The legal regime of community property is terminated by a judgment of divorce. art. 2356 (**2023**). After the termination of the community property, La. Civ. Code. Ann. arts. 2369.2–2369.8 (**2023**) apply until a partition of the former community property is finalized.

In *Robertson*, we explained that "[a]n obligation incurred by a spouse before or during the community property regime may be satisfied after termination of the regime from the property of the former community and from the separate property of the spouse who incurred the obligation." 203 F.3d at 861. This means that a creditor's claim under state law is not affected by the partition. *Id.* Further, the Bankruptcy Code article that controls community property, 11 U.S.C. § 541(a)(2), states that "[a]ll interests of the debtor and the debtor's spouse in community property" become part of the bankruptcy estate, including property that is under "equal, or joint management and control of the debtor."

Lynda filed for divorce in November 2012, roughly a month *after* Hank pleaded guilty to tax fraud and agreed to repay the tax liability in the amount of $3,582,451. Thus, at the time the tax liability was imposed, the Tons were still married, so the tax liability became a liability of the community. Further, the tax fraud was connected to Abe's, a business jointly owned and operated by the Tons during their marriage. When Abe's filed for Chapter 11 bankruptcy [pg. **2023** -1238] relief in 2018, that case was converted to Chapter 7. With the conversion of its bankruptcy case, Abe's ceased operations and was liquidated by a bankruptcy Trustee. The Trustee sold Abe's assets, but the bankruptcy court determined that the obligation was not satisfied and resorted to a reorganization plan to satisfy Hank's debt, which included Lynda's assets and vested economic interests.

In *Robertson*, we explained that obligations incurred by the spouses during the marriage are community obligations unless and until the challenging party demonstrates either that such an obligation was not incurred for the common interest of the spouses or that the interest of one spouse did not benefit the other spouse. *In re Robertson*, 203 F.3d at 861. Because Lynda did not rebut this presumption or show that the bankruptcy court otherwise erred in calculating the community obligations, the district court correctly held that the additional loans taken out after the divorce—pertinent here, the 2013 and 2015 loans—were "merely refinanced community obligations, such as the [t]ax [l]iability[.]" *In re Ton*, No. 21-1029, 2022 WL 1642042, at *3 (E.D. La. May 24, 2022). We hold that the district court properly affirmed the bankruptcy court's determination.

B. Economic Interest in Co-owned Former Community Property

Lynda also argues that the bankruptcy and district courts erred in holding that she, as the non-filing spouse, lost her vested economic interest in the co-owned former community property as a result of Hank's filing for bankruptcy in 2018. She contends that, under Louisiana law, former spouses become co-owners of the former community property and that her portion of the co-owned former community may only be assessed for liability that incurred prior to its termination. The district court reasoned that the bankruptcy code preempts state law when the two conflict. Consequently, "a bankruptcy estate acquires both spouses' interests in the community property and is therefore the sole owner (even where one spouse does not file bankruptcy)." *In re Ton*, No. 21-1029, 2022 WL 1642042, at *3 (E.D. La. May 24, 2022) (quoting *In re Wiggains*, 535 B.R. 700, 719–20 (Bankr. N.D. Tex. 2015), *aff'd sub nom. Matter of Wiggains*, 848 F.3d 655 (5th Cir. 2017)). We agree, and —since we have already determined that Lynda's property interest was properly incorporated into the bankruptcy estate because the liability was incurred not only *before* the partitioning of the former community property, but also *before* she filed for divorce—it is unnecessary to further examine the bankruptcy court's economic–interest calculations. For these reasons, we hold that the district court did not err when it affirmed the bankruptcy court's order. *See Goodrich Petroleum Corp.*, 894 F.3d at 196.

C. Parcel No. 900648-C

Lastly, Lynda contends that the plan did not treat Parcel No. 900648-C as community property for the purposes of satisfying the liability. However, the district court determined that the record established that the partition judgment incorporated the $320,000 value of Parcel No. 900648-C. Lynda never challenged the bankruptcy court's valuations during her appeal of the original partition, so she has failed to establish clear error in the bankruptcy court's calculations. *See Gerhardt*, 348 F.3d at 91.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM.

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* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

1 The "cramdown" provision in 11 U.S.C. § 1129(b) requires valuation of collateral in the context of plan confirmation when the debtor retains possession of the collateral. "Under th[e] [cramdown] provision, a bankruptcy court may confirm a plan over a creditor's objection subject to certain conditions, so long as the plan `does not discriminate unfairly, and is fair and equitable, with respect to each class of claims or interests that is impaired under, and has not accepted, the plan.'" *Matter of Hous. Reg. Sports Net., L.P.*, 886 F.3d 523, 528 (5th Cir. 2018) (quoting 11 U.S.C. § 1129(b)).

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American Federal Tax Reports

GILLIAM v. U.S., Cite as 131 AFTR 2d 2023 -1130, Code Sec(s) 7433, (CA5), 03/23/2023

William Jeffrey GILLIAM, PLAINTIFF—APPELLANT v. UNITED STATES OF AMERICA, DEFENDANT—APPELLEE.

Case Information:

[pg. **2023** -1130]

Code Sec(s):	7433
Court Name:	U.S Court of Appeals, **Fifth Circuit**,
Docket No.:	No. 22-10993,
Date Decided:	03/23/**2023**.
Prior History:	District Court, (2022, DC TX) 130 AFTR 2d 2022-5071, adopting (2022, DC TX) 130 AFTR 2d 2022-5068, affirmed with modification per curiam. Earlier proceedings at (2021, DC TX) 128 AFTR 2d 2021-5896, adopting (2021, DC TX) 128 AFTR 2d 2021-5892.
Tax Year(s):	Years 1993, 1995.
Disposition:	Decision against Taxpayer.

HEADNOTE

1. Actions against U.S.—wrongful collection—exhaustion of administrative remedies. District court decision, dismissing taxpayer's amended complaint alleging unlawful levy on his SS benefits and fraud on court, was affirmed but with modification. To extent taxpayer was suing under Code Sec. 7433 , claim failed because he didn't meet statute's administrative remedies exhaustion prerequisite. Taxpayer's argument that exhaustion wasn't required because govt. waived sovereign immunity under 11 USC 106 by filing proofs of claim in his bankruptcy proceedings was unavailing in that those proceedings were concluded 10 years before alleged unlawful levy. He also failed to identify any document addressed to appropriate official setting forth injuries he sustained and dollar amount of claim. And his multiple allegations of fraud on court committed by judge, IRS, bankruptcy trustees, and Justice Dept. attorney failed to make out sufficiently plausible claim for relief. But, his Code Sec. 7433 claim should have been dismissed without prejudice given above.

Reference(s): ¶ 74,335.01(5) Code Sec. 7433

OPINION

United States Court of Appeals for the Fifth Circuit,

Appeal from the United States District Court for the Northern District of Texas USDC No. 3:20-CV-2366

Before DAVIS, SMITH, and DOUGLAS, Circuit Judges.

Judge: PER CURIAM:[*]

Summary Calendar

Plaintiff-Appellant, William Jeffrey Gilliam, proceeding pro se, appeals the district court's judgment dismissing his claims against the Government for lack of jurisdiction based on failure to exhaust administrative remedies and for failure to state a claim. For the reasons set forth below, we AFFIRM AS MODIFIED.

I. BACKGROUND

Beginning in 1995 and spanning two decades, Gilliam became involved in a series of lawsuits in multiple courts within the Fourth and Ninth Circuits. The lawsuits involved Gilliam's tax liability and bankruptcy. The litiga[pg. **2023** -1131] tion ended with a judgment against Gilliam for millions of dollars in tax liability.[1]

In August 2020, Gilliam filed the instant action against the Government. Gilliam asserted he was entitled to (1) damages under 26 U.S.C. §§ 7433 of the Internal Revenue Code for unlawful tax collection practices, specifically a tax levy on his social security retirement benefits; (2) damages under 26 U.S.C. §§ 7432 for wrongfully reinstating Government liens after they were released; (3) relief from any and all orders and judgments obtained through alleged fraud on multiple courts; and (4) tax mitigation relief under 26 U.S.C. §§ 1311-1314. In response, the Government filed a motion to dismiss, arguing that Gilliam's complaint was barred by res judicata. The Government alternatively argued that Gilliam's § 7433 claim for unlawful tax collection should be dismissed for failure to exhaust administrative remedies and his claim of alleged fraud on the court should be dismissed for failure to state a claim.

The magistrate judge determined that two of Gilliam's claims—his claim of wrongful reinstatement of Government liens and his tax mitigation claim—were barred by res judicata and recommended dismissal with prejudice. As to Gilliam's § 7433 claim for unlawful tax collection of his social security retirement benefits, the magistrate judge found that Gilliam had failed to exhaust his administrative remedies. And, as to Gilliam's claim of alleged fraud on the court, the magistrate judge determined that Gilliam had failed to state a claim. She recommended that those claims be dismissed without prejudice and that Gilliam be allowed to amend his complaint to demonstrate exhaustion of administrative remedies and to state a claim for alleged fraud on the court. Over Gilliam's objections, the district court adopted the magistrate judge's report and recommendation.

Gilliam thereafter filed an amended complaint, which the Government again moved to dismiss. The magistrate judge determined that Gilliam's amended complaint showed that he did not fulfill the mandatory exhaustion requirement with respect to his § 7433 claim for unauthorized tax collection and that the court consequently lacked jurisdiction over that claim. The magistrate judge further determined that Gilliam failed to state a claim for fraud on the court. The magistrate judge recommended dismissal of both claims with prejudice. Over Gilliam's objections, the district court adopted the magistrate judge's report and recommendation and issued a judgment dismissing Gilliam's claims with prejudice. Gilliam moved for relief from the judgment under Federal Rules of Civil Procedure 59(e) and 60(b)(3). The district court denied the motion, and Gilliam filed a timely notice of appeal.

II. DISCUSSION

We review de novo the district court's judgment dismissing Gilliam's claims for lack of jurisdiction based on failure to exhaust administrative remedies and for failure to state a claim.[2]

A.

Gilliam first argues that the district court erred in determining that his claim for damages for unlawful tax collection practices should be dismissed because he failed to exhaust administrative remedies.

Under 26 U.S.C. §§ 7433, entitled "civil damages for certain unauthorized collection actions," a taxpayer may bring a civil action for damages against the Government "[i]f, in connection with any collection of Federal tax...any officer or employee of the [Internal Revenue Service (IRS)] recklessly or intentionally, or by reason of negligence, disregards any provision of [the Internal Revenue Code], or any regulation promulgated under [it]." [3] The statute requires that administrative remedies be exhausted. Specifically, it provides that "[a] judgment for damages shall not be awarded...unless the court determines that the plaintiff has exhausted the administrative remedies available to such plaintiff within the [IRS]." [4]

Gilliam argues that he was not required to exhaust administrative remedies because the Government waived its sovereign immunity under 11 U.S.C. § 106 of the Bankruptcy Code when it filed proofs of claim for 1993 and 1995 taxes in Gilliam's 1996 bankruptcy proceeding. Under § 106, when a governmental unit "has filed a proof of claim" in a bankruptcy pro[pg. **2023** -1132] ceeding, it "is deemed to have waived sovereign immunity with respect to a claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which the claim of such governmental unit arose." [5] Gilliam calls our attention to a district court opinion which held that the plaintiffs (taxpayers) did not have to exhaust administrative remedies to assert a claim for damages under § 7433 because the IRS had filed a proof of claim in the plaintiffs' bankruptcy proceeding. [6]

We find that case inapposite for several reasons. First, as the Government points out, the instant action is not part of a bankruptcy proceeding. The bankruptcy proceedings involving Gilliam and his company, wherein the Government filed proofs of claim, were concluded in 2009. Furthermore, the claim for § 7433 damages that Gilliam has asserted is based on actions allegedly taken by the IRS in 2019 and 2020. Specifically, Gilliam asserts that the IRS wrongfully levied 100 percent of his social security retirement income from May 2019 through April 2020. Considering that Gilliam alleges the unlawful actions occurred in 2019 and 2020, the Government could not have waived its sovereign immunity for any claim based on those actions by filing proofs of claim in bankruptcy proceedings that were concluded ten years before. For these reasons, Gilliam's argument that the Government waived its sovereign immunity under § 106 of the Bankruptcy Code has no merit.

Gilliam also argues that he, in fact, exhausted his administrative remedies. The specific steps a taxpayer must follow when filing an administrative claim (prior to filing a § 7433 action for unauthorized tax collection in district court) are set forth in 26 C.F.R. § 301.7433-1(e). [7] As the magistrate judge determined, the documents upon which Gilliam relies do not show that he complied with the requirements of § 301.7433-1(e). Specifically, Gilliam has identified no document addressed to the appropriate official setting forth the injuries he sustained from the alleged wrongful levy of his social security retirement income and the dollar amount of his claimed damages.

Although we agree with the district court that Gilliam's § 7433 claim should be dismissed for lack of jurisdiction based on failure to exhaust administrative remedies, the dismissal should have been without prejudice.[8] Consequently, we AFFIRM the judgment AS MODIFIED to reflect that the dismissal of Gilliam's § 7433 action for wrongful levying of his social security retirement income is without prejudice.

B.

Gilliam next argues that the district court erred in determining that he failed to state a claim under Rule 12(b)(6) for fraud on the court.

Under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to `state a claim to relief that is plausible on its face.'"[9] "To establish fraud on the court, it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision."[10] "Generally speaking, only the most egregious misconduct, such as bribery of a judge or member of a jury, or the fabrication of evidence by a party in which an attorney is implicated, will constitute fraud on the court."[11] "Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court."[12]

Gilliam argues that the district court did not consider certain documents he submitted in support of his opposition to the Government's motion to dismiss. He contends that had the district court done so, it would have determined he stated a claim for fraud on the court. These documents include his declaration in support of his opposition to the Government's motion to dismiss, the numerous documents submitted with his opposition, and his motion requesting the district court to take judicial notice of his requests for assistance and/or investigation sent to various federal agencies.

In these documents, which contain the same allegations as his amended complaint, Gilliam alleges that a bankruptcy trustee committed fraud on the court by not adhering to 26 U.S.C. §§ 1398(j)(2), relating to the treatment of "carrybacks"; that the IRS issued letters containing [pg. **2023** -1133] "false" information; that a bankruptcy judge assisted the IRS and the Department of Justice in misconduct; and that attorneys made false statements or presented false evidence in the proceedings before bankruptcy courts, district courts, and courts of appeals.

Although in conducting a de novo review of a Rule 12(b)(6) dismissal, we "accept[] all well-pled facts as true, drawing all reasonable inferences in favor of the nonmoving party," we do not "presume true...legal conclusions; mere labels; threadbare recitals of the elements of a cause of action; conclusory statements; and naked assertions devoid of further factual enhancement."[13] As the Government rightly contends, when Gilliam labels a statement as "false" or "fraudulent," he is describing his disagreement with the legal merit of various arguments and positions taken by the Government and other parties in the multitude of proceedings that have occurred since his tax troubles began. Gilliam lists as the "facts constituting fraud on the court": (1) the failure of the IRS to amend its proof of claim and the bankruptcy trustee's failure to object to the accuracy of the IRS's 1993 tax claims; (2) the bankruptcy trustee's filing of an "ultra vires" tax return and the IRS's acceptance of the return; and (3) a bankruptcy judge's intentional disregard of one of its prior orders and misstatement on the record that the IRS had previously addressed many of Gilliam's claims and defenses. These allegations do not plausibly set forth "an unconscionable plan or scheme which is designed to improperly influence the court in its decision."[14]

Gilliam attempts to set forth allegations showing "the fabrication of evidence by a party in which an attorney is implicated."[15] He describes the actions of a Government attorney during a bankruptcy hearing in August 2015. He alleges that the attorney lied when she stated that certain tax liens were still in effect when the IRS had released the liens. Gilliam further asserts that the attorney, along with a bankruptcy trustee, made "false statements/arguments" to the bankruptcy court, district court, and court of appeals. Finally, Gilliam alleges that a bankruptcy trustee's final accounting was "false and fraudulent." Here again, Gilliam is simply labeling as "false" and "fraudulent" legal positions advanced by the Government and other parties on various issues. We agree with the district court that Gilliam has failed to state a claim for fraud on the court.

III. CONCLUSION

Based on the foregoing, we AFFIRM AS MODIFIED the district court's judgment dismissing Gilliam's claims.

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* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

1 The litigation history is detailed in the district court's opinion in *United States v. Gilliam*, No. 2:154064-MBS, 2017 WL 2417923 [119 AFTR 2d 2017-1799] (D.S.C. May 5, 2017), *aff'd*, 737 F. App'x 660 [121 AFTR 2d 2018-2211] (4th Cir. 2018) (per curiam) (unpublished).

2 *Ernst v. Methodist Hosp. Sys.*, 1 F.4th 333, 337 (5th Cir. 2021) (applying de novo review to dismissal for failure to exhaust administrative remedies); *Armstrong v. Ashley*, 60 F.4th 262, 269 (5th Cir. **2023**) (applying de novo review to dismissal under Rule 12(b)(6) for failure to state a claim). Gilliam has not briefed the issue whether res judicata barred his claims for wrongful reinstatement of Government liens and tax mitigation. He therefore has forfeited any challenge to the district court's dismissal of those claims. *Stevens v. St. Tammany Par. Gov't.*, 17 F.4th 563, 574 (5th Cir. 2021) (appellant forfeits challenge to district court's holding on an issue when appellant does not raise and argue the issue on appeal). Gilliam does argue that res judicata is not a defense to his claim of fraud on the court, but for the reasons described below, he has failed to state such a claim.

3 § 7433(a). Except as provided in 26 U.S.C. §§ 7432, entitled "civil damages for failure to release lien," the civil action allowed by § 7433 is "the exclusive remedy for recovering damages resulting from such actions." *Id.*

4 § 7433(d)(1).

5 § 106(b).

6 *See Cunningham v. United States*, 165 B.R. 599, 604 [73 AFTR 2d 94-734] (N.D. Tex. 1993).

7 Specifically, an administrative claim must be "sent in writing to the Area Director, Attn: Compliance Technical Support Manager of the area in which the taxpayer currently resides" and must include, *inter alia*, "the grounds for the claim," "description of the injuries," and "[t]he dollar amount of the claim." § 301.7433-1(e)(1)-(2).

8 *See Wright v. Hollingsworth*, 260 F.3d 357, 359 (5th Cir. 2001) (modifying judgment to reflect that a dismissal for failure to exhaust administrative remedies should be without prejudice).

9 *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

10 *First Nat'l. Bank of Louisville v. Lustig*, 96 F.3d 1554, 1573 (5th Cir. 1996) (internal quotation marks and citations omitted).

11 *Id.* (internal quotation marks and citations omitted).

12 *Id.* (internal quotation marks and citations omitted).

13 *Armstrong*, 60 F.4th at 269 (internal quotation marks and citations omitted).

14 *First Nat'l. Bank of Louisville*, 96 F.3d at 1573 (internal quotation marks and citations omitted).

15 *Id.* (internal quotation marks and citations omitted).

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American Federal Tax Reports

GROSS v. U.S., Cite as 131 AFTR 2d 2023 -976, Code Sec(s) 1341; 162, (CA5), 03/08/2023

Robert GROSS, PLAINTIFF-APPELLANT v. UNITED STATES OF AMERICA, DEFENDANT-APPELLEE.

Case Information:

[pg. **2023** -976]

Code Sec(s):	1341; 162
Court Name:	U.S. Court of Appeals, **Fifth Circuit**,
Docket No.:	No. 22-40230,
Date Decided:	03/08/**2023**.
Prior History:	District Court, (2022, DC TX) 129 AFTR 2d 2022-711, affirmed per curiam.
Tax Year(s):	Year 2016.
Disposition:	Decision against Taxpayer.

HEADNOTE

1. Claim of right rules—repayment of funds illegally received; deductions; criminal fines or penalties. District court properly dismissed psychiatrist's Code Sec. 1341 complaint to recover funds which he previously included in income from fraudulent ins. billing, but then later repaid pursuant to criminal judgment. Taxpayer couldn't meet Code Sec. 1341 's deduction prong in that, although he claimed he was entitled to deduction under Code Sec. 162(a) , Code Sec. 162(f) disqualified him from same.

Reference(s): ¶ 13,415.01(65);¶ 13,415.01(55) Code Sec. 1341;Code Sec. 162

OPINION

United States Court of Appeals for the Fifth Circuit,

Appeal from the United States District Court for the Southern District of Texas USDC No. 2:20-CV-192

BEFORE WIENER, STEWART, AND ENGELHARDT, Circuit Judges.

Judge: PER CURIAM:*

Robert Gross appeals the district court's dismissal of his claim for a tax refund under Internal Revenue Code ("I.R.C.") § 1341. Because he fails to demonstrate that the district court erred in holding that he is not entitled to a refund under another provision of the tax code, we AFFIRM.

I. BACKGROUND

Gross was a psychiatrist in Texas between 2007 and 2014. In October 2014, he was indicted on fifty-two counts of health care fraud for submitting false claims for reimbursement to Medicare and Medicaid in violation of 18 U.S.C. § 1347. His indictment alleged that he sought reimbursement for procedures he never performed and services rendered after patients had died. In 2015, Gross entered into a plea agreement with the Government in which he admitted to knowingly submitting a fraudulent Medicare claim for services provided to a then-deceased patient.

Gross's plea agreement included the following stipulations: (1) that restitution could be included as part of his sentence and would account for all of his actions, not simply the one count he was convicted of; (2) he would pay restitution totaling $1,832,869.21—representing the amount of overpayments he received—to the Government for the victims of his fraud; (3) he would sign any documents necessary to facilitate his restitution payments; (4) the approximately $2 million that the Government seized from his various bank accounts would be applied toward any restitution he was ordered to pay; and (5) he would not contest the forfeiture of any funds to the United States.

Ultimately, the district court sentenced Gross to 71 months in prison and ordered him to pay criminal monetary payments, including $1.8 million in restitution.[1]

Gross later filed his 2016 tax return and sought a refund of $838,077.40 under § 1341. He based this amount on the $2.1 million he repaid to Medicare and other private insurance companies as part of his plea agreement. The IRS, however, did not consider the merits of his refund request, so Gross filed suit.

In his suit, Gross claimed that he was entitled to a tax refund under § 1341 because he paid taxes on income "which he reasonably thought he had an unrestricted right" to, and he was later required to pay the Government in accordance with his guilty plea agreement, "even though he was not guilty." The Government moved to dismiss his complaint, first arguing that Gross did not and could not allege facts that would entitle him to relief under § 1341. It also asserted that he failed to allege that there was a separate basis for the deduction he claimed, which was required for relief under § 1341. In response to the Government's latter contention, Gross averred that he had sufficiently alleged that he qualified for a deduction under I.R.C. § 162(a).

The district court agreed with the Government and dismissed Gross's case. It reasoned that: (1) Gross could not have believed that he had an unrestricted right to funds that he ille[pg. **2023** -977] gally obtained in a health care fraud scheme; and (2) restitution does not qualify for deduction of "ordinary and necessary expenses" under § 162(a) when paid pursuant to a criminal guilty plea. Gross timely appealed.

II. STANDARD OF REVIEW

"To survive a motion to dismiss, a complaint must contain sufficient factual matter...to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotations and citation omitted). We accept a plaintiff's "well-pleaded facts as true, viewing them in the light most favorable to the plaintiff." *Allen v. Walmart Stores, LLC*, 907 F.3d 170, 177 (5th Cir. 2018).

Whether a taxpayer is entitled to relief under § 1341 is a question of statutory interpretation that we review *de novo. See Carder v. Cont'l Airlines, Inc.*, 636 F.3d 172, 174 (5th Cir. 2011) (explaining that questions of statutory interpretation are subject to *de novo* review).

III. DISCUSSION

Gross argues that he was entitled to a refund on his 2016 tax return because: (1) he subjectively believed that he had an "unrestricted right" to the income he earned in 2007-2014; and (2) his restitution payment was eligible for deduction under § 162(a). We disagree and deny him relief.

Section 1341 "allows an income tax deduction to a taxpayer who previously received taxable income under a claim of right, but who must later repay some or all of that income." *Estate of Smith v. Comm'r*, 198 F.3d 515, 526 [84 AFTR 2d 99-7393] (5th Cir. 1999) (emphasis omitted). While § 1341 has numerous requirements, only two are pertinent to the instant appeal. First, under § 1341(a)(1), an item must be "included in gross income for a prior taxable year (or years) because it appeared that the taxpayer had an unrestricted right to such item[.]" Second, as we explained in *Wood v. United States*, § 1341 "only applies where the taxpayer is entitled to a deduction under another provision of the tax code." 863 F.2d 417, 420 [63 AFTR 2d 89-709] (5th Cir. 1989) (citing *United States v. Skelley Oil Co.*, 394 U.S. 678, 683 [23 AFTR 2d 69-1186] (1969)). Regarding § 1341(a)(1)'s "unrestricted right" prong, we have expressly recognized that when the item at issue is "embezzled funds[,] it is clear that it could not appear to the taxpayer that he had any right to the funds, much less an unrestricted right to them." *McKinney v. United States*, 574 F.2d 1240, 1243 [42 AFTR 2d 78-5227] (5th Cir. 1978) (internal quotations omitted).

Preliminarily, we examine our decision in *McKinney. See* 574 F.2d at 1240 [42 AFTR 2d 78-5227]. There, a taxpayer sought a refund after reporting and paying taxes on funds he obtained by embezzling money from his employer, the Texas Employment Commission. *Id.* at 1241. He relied on § 1341 as the basis for his entitlement to a refund for the taxes he paid. *Id.* A panel of this court reasoned that because § 1341 was enacted before embezzled funds could be legally counted as reportable income, Congress could not have intended to "give the benefits of [§ 1341] to holders of embezzled funds." *Id.* at 1243. We have upheld that logic in subsequent cases. *See, e.g.*, *Wood*, 863 F.2d at 420 (explaining that the "unrestricted right" prong cannot be satisfied where funds were fraudulently obtained). Under this backdrop, we proceed to Gross's claims.

Gross contends that the district court's reliance on *McKinney* is misplaced because this case does not involve embezzled funds, and he paid taxes on the income he earned. He also argues that his subjective belief that he had an unrestricted right to the income he earned through 2007 and 2014 satisfies § 1341's first prong. To evince his subjective belief, he highlights that from 2007 through 2014, he: (1) maintained an active Medicare license; (2) treated and billed patients; and (3) reasonably believed that he was entitled to the funds he received.

Our case law does not foreclose Gross's argument that we should look to his subjective belief that he had an unrestricted right to the funds he made from 2007 to 2014. In *Wood*, this court expressed its "reluctan[ce] to hold that a wholly subjective test of a claim of right to ill-gotten gains governs § 1341(a)(1)." 863 F.2d at 420. Instead, the panel recognized that even if the plaintiff "prevailed on his theory that *McKinney* is distinguishable or must be overruled, he must then furnish another statutory source for a deduction" in accordance with § 1341's second prong. *Id.* Ultimately, the panel concluded that the plaintiff failed to provide another statutory source, as the second prong required. So, rather than address whether *McKinney* remained good law or if prong one warranted a subjective inquiry, the panel decided the case on § 1341's second prong. Like in *Wood*, Gross fails § 1341's second prong, so we need not weigh his arguments on the first prong.

Section 162(a) permits a taxpayer to deduct "all the ordinary and necessary expenses paid or incurred during the taxable year in carrying on any trade or business." *See id.* (1975). In turn, C.F.R. § 1.162-21(b)(1)(i) provides that a "[pg. **2023** -978] fine or similar penalty" includes amounts "[p]aid pursuant to...a plea of guilty...for a crime (felony or misdemeanor) in a criminal proceeding[.]" According to Gross, the Government conceded that his business expenses between 2007 and 2014 were ordinary and necessary to his practice, so he is entitled to a deduction under § 162(a). In response, the Government points to § 162(f), which prohibits deductions "for any fine or similar penalty paid to a government for the violation of any law." *See id.* (2012). It asserts that because Gross has not pleaded an alternate deduction to which he would be entitled, his claim fails. We agree.

Here, Gross is not entitled to a tax refund because § 162(f) disqualifies him from a deduction under § 162(a). The district court ordered Gross to forfeit his property and use it for restitution payments. *See* 18 U.S.C. § 982(a)(7) (providing that a district court, "in imposing sentence on a person convicted of a Federal health care offense, shall order the person to forfeit property, ...that constitutes or is derived...from gross proceeds traceable to the commission of the offense"). Its order stemmed from his guilty plea, where he expressly agreed to pay restitution for his fraudulent behavior. His restitution order squarely falls within the legal definition of a "fine or similar penalty." *See* C.F.R. § 1.162-21(b)(1)(i). Consequently, § 162(f) disqualifies him from a deduction under § 162(a). Because Gross is not "entitled to a deduction under another provision of the tax code," he fails § 1341's second prong and has not stated a plausible claim for his requested tax refund. *Wood* , 863 F.2d at 420; *Iqbal*, 556 U.S. at 678.

IV. CONCLUSION

For the foregoing reasons, we AFFIRM the district court's dismissal of Gross's claim for a tax refund.

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* This opinion is not designated for publication. See 5th Cir. R. 47.5.

1 Gross was also ordered to pay a fine of $100,000 and to forfeit any interest accrued in the funds that the Government seized.

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American Federal Tax Reports

U.S. v. ASKER, Cite as 131 AFTR 2d 2023 -XXXX, (CA6), 05/11/2023

UNITED STATES OF AMERICA, Plaintiff-Appellee v. HAPPY ASKER, Defendant-Appellant.

Case Information:

Code Sec(s):	
Court Name:	UNITED STATES COURT OF APPEALS FOR THE **SIXTH CIRCUIT**,
Docket No.:	No. 21-1643,
Date Decided:	05/11/**2023**.
Prior History:	
Disposition:	

HEADNOTE

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Reference(s):

OPINION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF MICHIGAN

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT,

Before: SILER, KETHLEDGE, and WHITE, Circuit Judges.

OPINION

Judge: KETHLEDGE, Circuit Judge.

NOT RECOMMENDED FOR PUBLICATION

By means of a criminal judgment entered in 2015, the district court adjudicated Happy Asker guilty of tax fraud, sentenced him to 50 months in prison, and ordered him to pay $2.5 million in restitution. Some three years later, Asker moved to reduce his restitution amount to about $1.1 million. The district court denied the motion. We affirm.

I.

Happy Asker founded Happy's Pizza, a restaurant chain based in eastern Michigan. From 2004 to 2011, he orchestrated a scheme to underreport the income and payroll of various Happy's Pizza stores. A federal jury later convicted him of one count of conspiracy to defraud the United States, three counts of filing a false tax return, 28 counts of aiding and assisting in the filing of a false tax return, and one count of obstructing the administration of the internal revenue laws.

At sentencing, the parties initially disputed the tax loss caused by Asker's scheme. That loss would dictate Asker's base offense level under the guidelines, U.S.S.G. § 2T1.1, and the restitution required under the Mandatory Victims Restitution Act, 18 U.S.C. § 3663A. Asker argued that the tax loss was $1.4 million; the probation office calculated a loss of $5.8 million; and the government said the loss was $7.2 million. After a day's testimony in an evidentiary hearing, the parties told the district court that they were "prepared to stipulate to a loss amount" of $2.5 million. The district court accepted the stipulation.

During sentencing, however, the court asked what would happen if Asker's amended returns later showed that he owed more than $2.5 million in taxes:

Court:	You don't anticipate that what is owed will be more than 2.5?

Government: It is hard to say at this point. It is going to depend—
Court: What if it is? Do you anticipate that 2.5 precludes your client
from paying back the rest?

Asker's Counsel: I wouldn't think that if it comes out—I would not think that this Court's restitution award would be conclusive on the IRS. In fact, if there was some civil basis to seek additional penalties or interests, the IRS could do that.
I suppose if it turns out the number is less, we may probably come back and apply to the Court for some relief from the restitution amount.

Government: That is correct, Your Honor.
Court: I just—my concern is that if it turns out to be more, I think that is owed.

Asker's Counsel: Yes, Ma'am. We don't disagree with that.

Court: Okay.

The district court thereafter entered its criminal judgment, which specified a restitution amount of $2.5 million. Asker appealed his convictions; we affirmed. *United States v. Asker*, 676 F. App'x 447 [119 AFTR 2d 2017-484] (6th Cir. 2017).

Asker moved in 2018 to reduce his restitution amount, asserting that—based on his amended tax returns—he had actually owed only about $1.1 million in taxes, an amount that he said the IRS did not contest. The government acknowledged that the IRS had chosen not to audit Asker's amended returns, but said that decision reflected the IRS's allocation of its enforcement resources, not any agreement with Asker's numbers. More to the point, the government argued that the district court lacked authority to amend Asker's criminal judgment.

For the next three years, Asker's motion remained unadjudicated in the district court. Finally, in October 2021—after Asker formally moved for a decision on his motion—the district court agreed with the government's argument and denied the motion to reduce Asker's restitution amount. This appeal followed.

II.

We review de novo the district court's conclusion that it lacked authority to amend Asker's restitution amount. *United States v. Curry*, 606 F.3d 323, 327 (6th Cir. 2010).

All litigation must eventually come to an end; a court may revisit a criminal judgment that has become final only when the court has some lawful authority to do so. Here, Asker cites two sources that he thinks authorized the district court to amend his criminal judgment three years after its entry. The first is Criminal Rule 36, which provides in full as follows:

> After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment, order, or other part of the record, or correct an error in the record arising from oversight or omission.

Fed. R. Crim. P. 36.

Asker's argument as to Rule 36, specifically, is that, during his sentencing hearing, the district court expressed an intention to lower Asker's restitution amount if his amended tax returns showed that he owed less than $2.5 million. That intention undisputedly appears nowhere in Asker's written judgment; his $2.5 million restitution amount, as stated therein, is unconditional. Asker says that omission was an "error" in the record arising from oversight or omission, which the court may correct "at any time[.]" Fed. Crim. R. Proc. 36.

Clerical errors, however, are a matter of keystrokes or transposition, "of the sort that a clerk or [court reporter] might commit, mechanical in nature." *United States v. Robinson*, 368 F.3d 653, 656 (6th Cir. 2004) (cleaned up). Errors arising from oversight or omission include discrepancies between the oral sentence and the written judgment. *United States v. Cofield*, 233 F.3d 405, 407 (6th Cir. 2000). They do not include the omission of a district court's " *unexpressed* sentencing intention." *Robinson*, 368 F.3d at 657. Here, one might infer from the hearing transcript that the district court intended to consider redetermining the restitution amount based on any amended returns to be filed. But that aim was neither clearly articulated nor fully developed. *See United States v. Werber*, 51 F.3d 342, 347 (2d Cir. 1995). Thus, its omission from the written judgment was not a "clerical error" or oversight, and Rule 36 does not authorize the amendment Asker seeks.

Asker also argues that Mandatory Victims Restitution Act (the "Act") afforded the district court authority to reduce his restitution amount. Specifically, he says that 18 U.S.C. §§ 3663A(b)(1) and 3664(d)(5), read together, allow the relief he seeks. But § 3663A(b)(1) outlines how restitution is calculated in the first place; it says nothing about changing that amount later. And § 3664(d)(5) allows only victims to seek an increase in restitution. Hence these sections provide no authority for a court to reduce the amount of restitution already ordered.

Nor, contrary to Asker's assertions, do our decisions in *United States v. Vandeberg*, 201 F.3d 805, 814 (6th Cir. 2000) or *United States v. Phillips*, 9 F.4th 382 (6th Cir. 2021) authorize such a reduction. Asker quotes *Vandeberg* out of context, to the effect that the Act "permits amendments to restitution orders to reflect changed circumstances[.]" 201 F.3d at 814. But that dictum hardly authorizes courts to amend restitution awards as they see fit. Read in context, rather, that dictum describes only the Act's operation within the terms of § 3664(d)(5), the provision addressing victims. Nor has Asker explained how *Phillips* has any application here.

Finally, Asker argues (for the first time on appeal) that the district court's $2.5 million restitution order violates the Eighth Amendment's prohibition on excessive fines. We set to one side the question whether the Excessive Fines Clause applies to restitution orders. The guidelines range for a fine for Asker's many offenses far exceeded the $2.5 million Asker must pay; suffice it to say that his restitution amount was not "grossly disproportional to the gravity of" his offenses here. *United States v. Bajakajian*, 524 U.S. 321, 334 (1998).

***

The district court's order is affirmed.

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