**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 23-60170-CR-SCOLA**

**UNITED STATES OF AMERICA**

**v.**

**ALEXANDRA ACOSTA and**
**VILSAINT ST LOUIS,**

**Defendants.**
**_________________________________/**

## UNITED STATES MOTION IN LIMINE TO EXCLUDE EVIDENCE

### Introduction

The United States of America moves to preclude the following evidence and argument at trial:

1. Evidence and arguments of any attempt or successful repayment of the fraudulent funds to the SBA.
2. Evidence and arguments concerning any alleged negligence by the victim lender, their loan processors, or the United States Small Business Administration ("SBA");
3. Evidence and arguments concerning any profit by the above-referenced victims; and
4. Evidence and arguments relating to jury nullification, including evidence and argument about the nature of the prosecution, use of federal resources, and the United States's charging decisions.

Items 2–4 above are unopposed, but Defendant Alexandra Acosta reserves the right to challenge the investigative steps specific to the evidence in her case.

## Background

The United States incorporates by reference the facts set forth in its Motion in Limine to Admit Inextricably Intertwined Evidence, filed on May 11, 2024, ECF No. 38 at 2–4.

## Memorandum of Law

### I. The Defendant should be precluded from introducing evidence of any intent or attempt to pay back the PPP loan.

Acosta should be precluded from offering evidence of repayment or any attempt or intent to repay the PPP loan because it is irrelevant to the charges and otherwise would mislead and confuse the jury.

The charges against Acosta require an intent to defraud. *See* 15 U.S.C. § 645; 18 U.S.C. § 1343. To act with "intent to defraud" "means to act knowingly and with the specific intent to use false or fraudulent pretenses, representations, or promises to cause loss or injury." 11th Cir. Pattern Jury Instr. 051 (2022). The crime is complete once a defendant obtains money through knowingly false pretenses or representations, regardless of whether the defendant intended repayment. *Cf. United States v. Morales*, 978 F.2d 650, 653 (11th Cir. 1992) ("A reasonable expectation of making covering deposits after the event is not a defense which negates intent to defraud in a check kiting case."); *United States v. McKinney*, 822 F.2d 946, 949-50 (10th Cir. 1987) ("A charge under 18 U.S.C. § 656 is complete when the misapplication takes place, and the fact that the bank does not suffer a loss, or, if the bank does suffer a loss and the defendant later offers repayment, does not negate an earlier intent to defraud."). It also applies to violations of 18 U.S.C. § 1344 (bank fraud). *See United States v. Ross*, 206 F.3d 896, 899 (9th Cir. 2000); *United States v. Hollis*, 971 F.2d 1441, 1452 (10th Cir. 1992).

In *United States v. Fields*, 327 F. App'x 133 (11th Cir. 2009), the defendant was charged with stealing money from the United States in violation of 18 U.S.C. § 641, i.e., theft of government funds. *Fields*, 327 F. App'x at 134. The defendant had lied on an application to a housing authority that received federal funding. *Id.* Prior to being indicted for her conduct, the defendant agreed to a repayment plan and ultimately repaid the balance just before learning of the indictment. *Id.* At trial, the district court excluded evidence proffered by the defendant regarding her repayment plan and any related statements. *Id.* The defendant appealed arguing that the evidence should have been admitted because its relevance was not outweighed by the potential for confusion and it prevented her from presenting a "viable defense." *Id.*

In the unpublished opinion, the Eleventh Circuit discussed this Circuit's prior approach to similar issues and stated that "[a] defendant's intention to repay stolen money, and 'even actual repayment,' is not a defense to a charge under § 641." *Id.* at 135 (citing *United States v. Lanier*, 920 F.2d 887, 895 (11th Cir. 1991); *United States v. Suba*, 132 F.3d 662, 677 (11th Cir. 1998) ("Repayment in the face of litigation does not show a lack of fraudulent intent."). *United States v. Scott*, 701 F.2d 1340 (11th Cir. 1983) (repayment was irrelevant to the offense of intentionally providing false information to acquire loan accounts). And, after applying Rule 401, 402, and 403, the court held that "[b]ecause repayment was not relevant to [the defendant's] intent to deprive the government of its funds under § 641, the district court did not abuse its discretion in disallowing evidence of repayment." *Fields*, 327 F. App'x at 135. The court likewise excluded any purported statements made by the defendant to investigators about repayment on hearsay grounds. *Id.*

Here, as in *Fields*, the crime of defrauding the federal government was completed in June 2021, when the SBA issued its forgiveness payment to the lender. It is therefore irrelevant whether Acosta has repaid or attempted to repay any portion of the money that she fraudulently obtained from her PPP loan because failure to repay is not an element of the fraud and intent to repay is not a defense. *See United States v. Miller*, 953 F.3d 1095, 1103 ("Miller's primary defense—that he was not guilty of wire fraud because he intended to pay back the funds he deceptively obtained from [the victim company]—is not a defense at all."); *United States v. Masquelier*, 210 F.3d 756 (7th Cir. 2000) ("[The defendant's] ultimate intention to make good on the contract is irrelevant to his intent to obtain government money to which he was not entitled through deceptive means. . . . [T]o hold otherwise would require us to overturn a thousand years of criminal law."). Indeed, evidence of repayment or intent to repay now is solely designed for nullification and to play on sympathies of the jury, which will otherwise mislead them and confuse the issues in this case.

Accordingly, Acosta should be precluded from offering any evidence or argument that she has repaid, intends to repay, or has taken steps to repay the PPP loan.

**II. The Court should preclude evidence and arguments concerning any alleged negligence by the victim lenders, loan processors, and the SBA.**

The United States intends to call witness representatives from Cross River Bank, its servicers, and the SBA (which administered the PPP program and backed the loans, among other things). The United States respectfully askes the Court to preclude Defendant from introducing evidence and arguments concerning any alleged negligence by these victims.

A. Courts routinely find evidence of lender negligence inadmissible.

The Eleventh Circuit has held that evidence of a lender's alleged negligence is not relevant and is properly excluded at trial. *United States v. Powell*, 509 F. App'x 958, 967 (11th Cir. 2013) ("Whether the lenders in this case knew or should have known that the loan applications were fraudulent is of no consequence to this action. It has no bearing on the essential element of [defendant's] conduct, namely her intent to participate in the mortgage fraud scheme. Whether the lenders were motivated by profit or did, in fact, profit from [the defendant's] efforts is equally immaterial). "Likewise, whether the lenders negligently created an environment of lax lending standards is irrelevant. Contributory negligence is not a defense to the crime of fraud." *Id.* "[W]hatever role, if any, a victim's negligence plays as a bar to civil recovery, it makes little sense as a defense under a criminal statute that embraces '*any* scheme or artifice to defraud.' A perpetrator of fraud is no less guilty of fraud because his victim is also guilty of negligence." *United States v. Svete*, 556 F.3d 1157, 1165 (11th Cir. 2009) (citations omitted).

More recently, in *United States v. Rabuffo*, 716 F. App'x 888, 899 (11th Cir. 2017), the Eleventh Circuit declined the defendants' argument to overturn their convictions for bank and wire fraud in an extensive mortgage fraud scheme based on the district court's exclusion of certain evidence at trial. The defendants' "arguments rest[ed] on the contention that bad conduct by [the mortgage company] and its employees undercut the government's case, and was relevant to whether they (and their co-defendants) committed bank fraud." *Id.* The Eleventh Circuit, however, rejected defendants' argument, affirmed the convictions and sentences. *Id.* In affirming the district court's decision to exclude the evidence, the *Rabuffo* court noted that "the gravamen of § 1344 is the 'scheme,' rather than the 'completed fraud,' and . . . the offense therefore does not require 'damage' or 'reliance.'" *Id.* at 899 (quoting *Loughrin v. United States*, 573 U.S. 351, 372 (2014)); *see also id.* (quoting *United States v. Lindsey*, 850 F.3d 1009, 1014 (9th Cir. 2017) (the "lender's negligence, or even intentional disregard, cannot excuse another's criminal fraud.").

B. <u>Whether a victim is sophisticated is immaterial to the intent to defraud.</u>

In the Eleventh Circuit, as in other circuits, the government need not prove that a fraud scheme was calculated to deceive only persons of ordinary prudence and comprehension, as fraud statutes protect the naïve as well as the sophisticated. *Svete*, 556 F.3d at 1165 ("Proof that a defendant created a scheme to deceive reasonable people is sufficient evidence that the defendant intended to deceive, but a defendant who intends to deceive the ignorant or gullible by preying on their infirmities is no less guilty. Either way, the defendant has criminal intent."); *see also United States v. Hendrick,* 663 F. App'x 788, 790 (11th Cir. 2016) (holding that the wire fraud statute "prohibits '*any* scheme or artifice to defraud,' no matter how fanciful and without regard to whether a person of ordinary prudence and comprehension would rely upon the misrepresentation") (*citing Svete*, 556 F.3d at 1169); *United States v. Masino*, No. 18-15019, 2021 WL 3235301, at *9 (11th Cir. July 30, 2021) (affirming a wire fraud conviction and holding that "the government did not need to prove that the victims were actually tricked—or even that a person of ordinary prudence would have been tricked by defendants' scheme").

Accordingly, whether the institutional victims' internal controls or personnel were sufficient to detect and prevent fraud is irrelevant to the crimes charged in this case, and inadmissible as a defense.

C. <u>Victim negligence is irrelevant for assessing the materiality of a false statement.</u>

The federal mail fraud, wire fraud, and bank fraud statutes generally require a misrepresentation or concealment of *material* fact. *See Neder v. United States*, 527 U.S. 1, 22–25 (1999). In assessing whether a misrepresentation of fact was material, the Eleventh Circuit has time and time again rejected the argument, commonly made by defendants in fraud cases, that victim negligence is somehow relevant to materiality. The materiality requirement does not permit defendants to backdoor victim negligence into a case because materiality is an objective, rather than subjective, test. *See Svete,* 556 F.3d at 1165 (holding that "the focus of the mail fraud statute . . . is on the violator, [therefore] the purpose of the element of materiality is to ensure that a defendant actually intended to create a scheme to defraud . . . . [W]hatever role, if any, a victim's negligence plays as a bar to civil recovery, it makes little sense as a defense under a criminal statute that embraces 'any scheme or artifice to defraud.'"); *United States v. Scott,* 701 F.2d 1340, 1344–45 (11th Cir. 1983) (rejecting defendant's assertion that loan officers' testimony that they were not actually influenced by defendant's false statements was evidence that the defendant lacked the *intent* to influence).

The materiality requirement is not concerned with whether a decisionmaker relied on a false statement, but instead materiality focuses on whether a false statement "has a tendency to influence or is capable of influencing a decision." *United States v. Neder,* 197 F.3d 1122, 1128 (11th Cir. 1999); *see also United States v. Swearingen,* 858 F.2d 1555, 1558 (11th Cir. 1988) (holding that a bank's actual reliance on false statements is not determinative of materiality; materiality turns on "whether the false representations were capable of influencing the Bank's actions").

Along similar lines, the Eleventh Circuit has held that actual reliance is not a requirement for materiality. *See Powell,* 509 F. App'x at 967 ("Whether the lenders in this case knew or should have known that the loan applications were fraudulent is of no consequence to this action."); *see also Neder,* 197 F.3d at 1129 ("[T]he issue is whether a statement has a tendency to influence or is capable of influencing a decision, and not whether the statement exerted actual influence, a false statement can be material even if the decision maker did not actually rely on the statement.").

As noted above, the Eleventh Circuit in *Rabuffo* rejected the argument, commonly made by defendants in fraud cases, that victim negligence is somehow relevant to materiality. As the *Rabuffo* court observed, the materiality requirement does not allow defendants to backdoor victim negligence into a case because materiality is an objective, not subjective, test. *Rabuffo*, 716 F. App'x at 899–900 (holding that defendants' contention that they could not have committed bank fraud if the negligent or complicit mortgage processer knew that the statements were false "misse[d] the mark" because materiality focuses on the violator's intent); *see also Lindsey*, 850 F.3d at 1015 ("A false statement is material if it objectively had a tendency to influence, or was capable of influencing, a lender to approve a loan."). The materiality requirement is not concerned with a statement's subjective effect, but instead on a statement's objective reliability. *Svete*, 556 F.3d at 1165; *see also Neder,* 527 U.S. at 24–25 ("The common-law requirement[ ] of 'justifiable reliance' . . . ha[s] no place in the federal fraud statutes.").

D. The relevant inquiry is Acosta's intent, not the victim's negligence.

In the instant case, the relevant inquiry is whether: (i) Acosta submitted or caused to be submitted fraudulent PPP loan applications; (ii) whether Acosta had the requisite intent to defraud; and (iii) whether the information that Acosta caused to be submitted to the SBA victim lenders was material (as to Count 4 only), that is, had the capacity or natural tendency to influence a person's decision. Hindsight challenges to any of these institutional victims' internal controls are irrelevant, waste time, and create the risk of jury confusion. *See* Fed. R. Evid. 404(b).

Accordingly, this Court should prohibit Defendant from introducing evidence or making arguments concerning any supposed victim negligence, including any criticism of a PPP lender, loan processors, or SBA's internal controls, as well as the internal controls of banks and financial institutions whose accounts were used to receive or transfer fraudulent loan proceeds. *United States v. Biesiadecki*, 933 F.2d 539, 544 (7th Cir. 1991) (upholding exclusion of testimony that "would have improperly shifted the jury's attention away from the knowledge and intent of [defendant] and focused instead on the beliefs of the victim of the alleged scheme to defraud").

For similar reasons, the Court should exclude any evidence and arguments concerning the SBA's guarantees to PPP lenders as a defense to the alleged fraud. The government does not know on what basis Defendant would try to introduce evidence or make arguments concerning this guarantee, but any such evidence or argument should be excluded as irrelevant to the case, a waste time, and tending to confuse and mislead the jury. Even in civil cases, where a victim's negligence might be relevant to damages, evidence of financial compensation (insurance) is inadmissible to prove negligence or wrongdoing. Fed. R. Evid. 411. This is truer in the criminal context of the instant case, where victim negligence is irrelevant, and should therefore be excluded.

## III. The Court should preclude evidence and arguments concerning any profit by the above-referenced victims.

The Eleventh Circuit has held that "[w]hether the lenders were motivated by profit or did, in fact, profit from [defendant's] efforts is equally immaterial." *Powell*, 509 F. App'x at 967. "[T]he government can convict a person for mail or wire fraud even if his targeted victim never encountered the deception—or, if he encountered it, was not deceived.'" *Id.* (quoting *United States v. Svete*, 556 F.3d at 1166 ; *see also Rabuffo,* 716 F. App'x at 900 ("Our precedent thus establishes that whether [the victims] . . . would have or in fact did rely on the fraudulent statements contained in the mortgage applications does not undermine the fairness of the trial or the jury's findings."); *United States v. Gray,* 367 F.3d 1263, 1269–70 (11th Cir. 2004) (finding defendant guilty of mail fraud the moment the defendant mailed a letter with fraudulent misstatements, noting that even had victim not received the letter defendant would still be guilty of mail fraud). Therefore, the Court should exclude any evidence and arguments concerning any profits the victim lenders may have made as a result of the loans that are at issue in this scheme.

## IV. The Court should preclude evidence and argument relating to jury nullification, including evidence and/or argument about the nature of the prosecution, use of federal resources, and the United States's charging decisions.

Any statements or arguments from the defense regarding uncharged co-conspirators, or selective prosecution, are not relevant to the defendant's guilt, have no probative value, and should be precluded. *United States v. Armstrong*, 517 U.S. 456, 463 (1996) ("[a] selective-prosecution claim is not a defense on the merits to the criminal charge itself, but an independent assertion that the prosecutor has brought the charge for reasons forbidden by the Constitution"); *United States v. Shaygan*, 652 F.3d 1297, 1314 (11th Cir. 2011) ("[T]he Government retains 'broad discretion' as to whom to prosecute," and the "decision to prosecute is particularly ill-suited to judicial review.") (quoting *Wayte v. United States*, 470 U.S. 598, 607 (1985)). Any statements by defense counsel regarding the exercise of prosecutorial discretion in this case have no probative value and are only meant to prejudice the jury. Fed. R. Evid. 403.

Moreover, permitting such argument would be tantamount to a request for jury nullification. "Nullification is, by definition, a violation of a juror's oath to apply the law as instructed by the court – in the words of the standard oath administered to jurors in the federal courts, to 'render a true verdict according to the law and the evidence.'" *United States v. Thomas*, 116 F.3d 606, 614 (2d Cir. 1997) (citation omitted). The Eleventh Circuit has unequivocally disapproved of this practice and has issued clear instructions that "defense counsel may not argue jury nullification during closing argument." *United States* *v. Trujillo*, 714 F.2d 102, 106 (11th Cir. 1983); *see United States v. Funches*, 135 F.3d 1405, 1409 (11th Cir. 1998) (collecting cases in support of proposition that a defendant has no right to present evidence or make arguments geared towards nullification). Because "the potential for nullification is no basis for admitting otherwise irrelevant evidence," *Funches*, 135 F.3d at 1409, the United States moves to exclude evidence and to preclude argument designed to convince the jury to acquit not because the United States failed to prove the charged crimes, but because a guilty verdict would be contrary to a sense of justice, morality, or fairness. *Washington v. Watkins*, 655 F.2d 1346, 1374 n.54 (5th Cir. 1981) (noting that with respect to jury nullification, courts "have almost uniformly held that a criminal defendant is not entitled to an instruction that points up the existence of that practical power to his jury"); *United States v. Gorham*, 523 F.2d 1088, 1097–98 (D.C. Cir. 1975) (affirming trial court's refusal to admit evidence bearing no legal relation to the charges but which might encourage a "conscience verdict" of acquittal).

Improper arguments would include, for example, suggestions that the prosecution is unfair because the United States has prosecuted some individuals, but not others. Furthermore, the identity and quantity of individuals charged in connection with the scheme at issue, the reasons behind the United States's charging decisions, and the culpability of the United States as compared to other individuals are all examples of irrelevant and unfairly prejudicial evidence aimed at jury nullification. *See, e.g.*, *United States v. Thompson*, 253

F.3d 700 (5th Cir. 2001) (upholding grant of the government's motion in limine to prevent counsel from comparing defendant's conduct to that of other uncharged or immunized witnesses); *United States v. Re*, 401 F.3d 828, 833 (7th Cir. 2005) (finding that the government's exercise of prosecutorial discretion is not proper subject for cross-examination). Thus, Acosta should be precluded from making arguments or comments to the jury—and from eliciting statements on cross-examination—which are irrelevant to the record evidence and charges and that are, instead, designed to encourage a verdict without regard to the law.

**Certificate Pursuant to Local Rule 88.9**

Pursuant to Local Rule 88.9, undersigned counsel met and conferred in good faith with counsel of record for Defendant Alexandra Acosta, Attorney Brian Silber, via Microsoft Teams on May 1, 2024, and via telephone on May 6, 2024, in an attempt to resolve the issues raised in this Motion. The Parties agree as to the exclusion of evidence and arguments set forth in Sections II–IV, but the parties are unable agree as to the exclusion of evidence and arguments discussed in Section I.

**Conclusion**

For the foregoing reasons, the United States of America respectfully submits that this Court should exclude the following:

1. Evidence and arguments of any attempt or successful repayment of the fraudulent funds to the SBA.

2. Evidence and arguments concerning any alleged negligence by the victim lender, their loan processors, or the United States Small Business Administration ("SBA");

3. Evidence and arguments concerning any profit by the above-referenced victims; and

4. Evidence and arguments relating to jury nullification, including evidence and argument about the nature of the prosecution, use of federal resources, and the United States's charging decisions.

Respectfully submitted,

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