No. 18–5251

In the
Supreme Court of the United States

Sarjo Dambelly,

Petitioner,

v.

United States of America,

Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals
For the Second Circuit

REPLY TO THE BRIEF IN OPPOSITION

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ARGUMENT

I. The Second Circuit's entrenched position conflicts with *Global–Tech* and the holdings of other circuits.

The government contends that the Second Circuit's position since at least 2013—that willful blindness does not require "deliberate actions" or "active measures" to avoid learning the truth, *see* Pet. at 2 (collecting cases)—"does not conflict" with *Global–Tech Appliances, Inc. v. SEB S.A.*, 563 U.S. 754 (2011), or "the decision of any other court of appeals." Br. for the United States in Opp. ("BIO") at 6. This is simply not so.

First, the government does not and cannot deny what *Global–Tech* expressly held: willful blindness *does* require "deliberate actions to avoid learning of [the suspected fact]." 563 U.S. at 769; *see also id.* ("[A] willfully blind defendant is one who takes deliberate actions to avoid confirming a high probability of wrongdoing and who can almost be said to have actually known the critical facts."). "Deliberate indifference"—merely turning a blind eye to the truth, without "active efforts" to avoid knowledge—is not sufficient. *Id.* at 770.

Nor can the government dispute that the Second Circuit has repeatedly held—before and after *Global–Tech*, and contrary to other

circuits—that willful blindness does *not* require any "deliberate actions" or "active measures" to avoid acquiring actual knowledge. *See* Pet. at 14–18.

The government nevertheless attempts in vain to reconcile these opposing positions, in two ways:

First, the government suggests this Court did not mean what it said in *Global–Tech*. By "deliberate actions," the government posits, this Court meant to include taking *no* action—for example, by deciding not to question suspicious circumstances. *See* BIO at 9–13. But that was precisely the flaw this Court identified in the Federal Circuit's approach: "in demanding only 'deliberate indifference' to the risk [that the critical fact] existed, the Federal Circuit's test does not require *active efforts* ... to avoid knowing [that fact]." *Global–Tech*, 563 U.S. at 769 (emphasis added).

Second, the government likewise suggests that the Second Circuit does not mean what *it* says. That court has repeatedly held since at least 2013 that willful blindness under *Global–Tech* does not require "deliberate actions" to avoid knowledge. *See* Pet. at 15 (collecting cases). But the government insists that the court nevertheless requires "deliberate actions" because juries in the Second Circuit are generally told that they may consider whether the defendant "deliberately closed his eyes to what

otherwise would have been obvious to him" and "acted with a conscious purpose to avoid learning the truth." *See* BIO at 9–10.

The argument is sophistry. First, this Court should take the Second Circuit at its word: it holds, over and over again, that willful blindness after *Global–Tech* does not require that a defendant take "deliberate actions" to remain ignorant. *See* Pet. at 15 (collecting cases). The jury instructions cited by the government are not to the contrary. While those instructions state that willful blindness may be found if the defendant "deliberately closed his eyes to what would otherwise have been obvious to him" or "acted with a conscious purpose to avoid learning the truth," nothing in this language requires "deliberate *actions*" or "*active efforts*" within the meaning of *Global–Tech*, 563 U.S. at 768 n.8, 769, 770, 771 (emphasis added). Indeed, the Second Circuit itself recognizes as much: "'A finding that a defendant's ignorance of incriminating facts was a conscious choice on the defendant's part in no way requires a finding that the defendant took affirmative steps to avoid gaining the knowledge.'" Pet. App. 3a (quoting *United States v. Fofanah*, 765 F.3d 141, 150 (2d Cir. 2014) (per curiam) (Leval, J., concurring)). No juror, for example, would take the cited instructions literally to require proof that the defendant physically shut his or her eyelids to suspected wrongdoing. The reference to closing one's eyes is a metaphorical reference to the defendant's

conscious—but purely psychological—decision to disregard or fail to question highly suspicious circumstances. That is equivalent to the "deliberate indifference" standard this Court rejected in *Global–Tech*, because it is tantamount to recklessness, not willful blindness, which requires "active efforts" to avoid learning the truth. *See* Pet. at 24–27.

The government also claims that the Second Circuit's position aligns with that of other circuits, including the Seventh Circuit. BIO at 13–15. Again, this is not true. The Seventh Circuit rejects the notion that merely deciding not to question or investigate highly suspicious circumstances—what that court has called "psychological avoidance," as distinct from active or "physical avoidance," *see United States v. Macias*, 786 F.3d 1060, 1062 (7th Cir. 2015)—is sufficient to establish willful blindness under *Global–Tech*. That court holds that willful blindness requires more than internal "psychological efforts" consisting of "cutting off ... one's normal curiosity by an effort of will." *Id.* at 1063. The defendant instead "must take deliberate *actions* to avoid learning" the truth. *Id.* (emphasis in original).[1] Yet the Second Circuit holds that no such actions are necessary. That clear split demands resolution by this Court.

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[1] As the government notes (BIO at 14), *Macias*, in dictum, allowed for the possibility that the failure to ask questions in violation of a legal "duty" or affirmative "responsibility" to make inquiries could "perhaps" be so "unnatural" as to constitute "taking evasive action to avoid confirming

II. This case presents a suitable vehicle for granting review.

The government also says this case is no different from other willful-blindness cases in which this Court has denied certiorari. BIO 6–7. But a quick review of those cases reveals that this case is the first one since *Global–Tech* to warrant this Court's intervention.

Certiorari was denied in three of the four cases the government references—*Bourke v. United States*, 569 U.S. 917 (Apr. 15, 2013) (No. 12–531); *Jinwright v. United States*, 568 U.S. 1093 (Jan. 7, 2013) (No. 12–6350); and *Brooks v. United States*, 568 U.S. 1085 (Jan. 7, 2013) (No. 12–218)—in early 2013, less than two years after *Global–Tech* was decided, and before the circuit split over *Global–Tech*'s "deliberate actions" requirement crystallized. (The Seventh Circuit's decision in *Macias*, for example, was not issued until 2015.) When the petitions in those cases were denied, it made sense to await the views of additional circuits and see whether the emergent confusion over *Global–Tech*'s "deliberate actions" requirement would resolve itself. It hasn't.

Moreover, those cases presented poor certiorari vehicles. In *Jinwright*, the court of appeals found that the defendants, accused of a tax-evasion

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one's suspicions." 786 F.3d at 1063. That dictum is irrelevant here because there is no evidence—and the government has never argued—that petitioner, a low-level worker, had an affirmative legal duty to determine whether his employer was trafficking in stolen cars.

scheme, "undertook an active and deliberate effort" to avoid learning of their tax liability. *United States v. Jinwright*, 683 F.3d 471, 478 (4th Cir. 2012). For instance, the defendants claimed $1.6 million in deductions despite reporting about $1.8 million of taxable income. *Id.* at 479. Yet, they decided not to tell their personal accountant of the "substantial compensation ... that they specifically structured so as not to appear on their W–2s." *Id.* Accordingly, since the court of appeals determined that defendants took active measures to "'deliberately shield[]'" themselves from "'clear evidence of critical facts,'" *id.* at 478 (quoting *Global–Tech*, 563 U.S. at 766), their petition was a poor occasion for deciding whether such active measures are required by *Global–Tech*. And, unlike the Second Circuit here, the Fourth Circuit specifically held that the evidence showed "overwhelmingly" that the defendants' deliberate "conduct ... transcended recklessness and negligence." 683 F.3d at 480.

Bourke and *Brooks* are similarly distinguishable. Indeed, *Bourke* did not even present the same question raised by this petition: it asked instead whether juries must specifically be instructed that willful blindness applies only when "the defendant's conduct surpasses recklessness." *See* Pet. for Cert. at i, *Bourke*. And in *Brooks*, the petitioner conceded that the Fifth Circuit had ruled, consistently with *Global–Tech*,

that willful blindness requires "an active effort to avoid knowledge." Pet. for Cert. at 8–9, *Brooks*.

The remaining case cited by the government, *Salman v. United States*, 136 S. Ct. 899 (Jan. 19, 2016) (No. 15-628), which denied review of a willful-blindness question in early 2016, was also a poor vehicle. The Ninth Circuit there had held, contrary to the Second Circuit here, that willful blindness after *Global–Tech* requires "deliberate actions taken to avoid learning the truth." *United States v. Salman*, 618 F. App'x 886, 890 (9th Cir. 2015). Thus, as the government noted in its opposition to certiorari in that case, the court of appeals faithfully stated *Global–Tech*'s core holding. *See* Br. for the United States in Opp. at 16–17, *Salman*. Moreover, the district court in *Salman* specifically instructed the jury it could not find willful blindness if the defendant was "simply careless or reckless." *See id.* at 18 (quoting jury instructions). Here, in contrast, the district court, consistent with settled Second Circuit law, did *not* caution the jury that recklessness was insufficient. *See* Pet. App. 13a–14a; *United States v. Goffer*, 721 F.3d 113, 128 (2d Cir. 2013) (holding that *Global–Tech* does not require trial court to instruct jury that "reckless" behavior is insufficient to prove willful blindness).

Finally, the government argues that any error in allowing the jury to convict petitioner under a willful-blindness theory would be "harmless"

because, even though there was no proof that anyone ever told petitioner that the cars he transported were stolen, the circumstantial evidence of his criminal knowledge was "overwhelming[]." BIO at 17. This argument fails. First, the court of appeals did not rely on—or even mention—either the weight of the evidence or the government's "harmless error" argument in its decision. And the mere possibility that the court of appeals might ultimately decide on remand to affirm petitioner's conviction on a harmless-error theory is not a basis for denying review. This Court frequently considers cases that have been decided on one ground by a court of appeals, leaving other issues (including harmless-error issues) to be decided on remand, if necessary. *See, e.g.*, *McFadden v. United States*, 135 S. Ct. 2298, 2307 (2015); *Rosemond v. United States*, 572 U.S. 65, 83 (2014); *Neder v. United States*, 527 U.S. 1, 25 (1999); *Tuggle v. Netherland*, 516 U.S. 10, 14 (1995). As the government itself has repeatedly argued, uncertainty as to "the ultimate outcome" does not render a case an improper "vehicle for the Court to consider important questions," and "[t]he possibility that [respondent] might ultimately be able to [prevail on alternative grounds] ... would not prevent the Court from addressing the questions presented in the petition." Reply Brief for the Petitioners at 10, *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567

U.S. 209 (2012) (Nos. 11-246, 11-247); *accord* Reply Brief for the Petitioner at 8, *Astrue v. Capato*, 566 U.S. 541 (2012) (No. 11-159).[2]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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[2] In any event, the evidence of petitioner's actual knowledge was not nearly as strong as the government suggests. (If it were, the government would not have needed its willful-blindness theory at trial.) The government relies heavily on the questionable testimony of the sole cooperating witness (*see* BIO at 3–4, 17), but even the government conceded in summation that the witness "did not work directly with [petitioner]." Trial Transcript at 518. The government also ignores that petitioner's jury returned a mixed verdict, acquitting him of the charge that he knowingly submitted false or misleading export information about the cars he shipped.