No. ______

In the Supreme Court of the United States

CARLOS MALDONADO-VARGAS, PETITIONER,

v.

UNITED STATES OF AMERICA, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

RACHEL BRILL
FRANCO L. PÉREZ-REDONDO
ALEJANDRA BIRD-LÓPEZ
Counsel for Petitioner
Federal Public Defender
District of Puerto Rico
241 F.D. Roosevelt Ave.
San Juan, PR 00918
(787) 281-4922
Alejandra_Bird@fd.org

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QUESTIONS PRESENTED

Whether harmless error review under Federal Rule of Criminal Procedure 52(a) requires the Government to show that erroneously admitted evidence did not substantially influence the jury's verdict, or whether an appeals court may affirm a conviction based on the sufficiency of untainted evidence alone.

Whether an appellate court errs when it labels "waived" a claim of prejudicial spillover from vacated counts, without inquiring whether the failure to raise that claim in the opening brief was an intentional relinquishment of a known right, where the predicate for the claim first materialized when the government conceded that the counts should be vacated less than two weeks before oral argument and almost two years after the opening brief was filed.

PARTIES TO THE PROCEEDINGS

Carlos Maldonado-Vargas, Petitioner, was the defendant-appellant below.

The United States of America, Respondent, was the plaintiff-appellee below.

LIST OF RELATED PROCEEDINGS

United States District Court for the District of Puerto Rico:

United States v. Carlos Maldonado-Vargas, No. 3:16-cr-00661-JAW (D.P.R.). Judgment entered September 19, 2022.

United States Court of Appeals for the First Circuit:

United States v. Maldonado-Vargas, No. 22-1735 (1st Cir.). Opinion affirming judgment entered November 14, 2025, reported at 159 F.4th 69; petition for rehearing denied March 10, 2026.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Carlos Maldonado-Vargas respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit (App. 1a-22a) is reported at *United States v. Maldonado-Vargas*, 159 F.4th 69 (1st Cir. 2025). The order denying rehearing (App. 23a) is unreported. The judgment of the United States District Court for the District of Puerto Rico (App. 24a-30a) is unreported.

JURISDICTION

The First Circuit entered judgment on November 14, 2025. App. 1a. A timely petition for rehearing was denied on March 10, 2026. App. 23a. This petition is timely filed within 90 days of that denial. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS

Federal Rule of Criminal Procedure 52 provides as follows:

> Rule 52. Harmless and Plain Error
>
> (a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.
>
> (b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

INTRODUCTION

For nearly a decade, the government insisted that Carlos Maldonado-Vargas (Mr. Maldonado) had committed bank fraud. It opposed his repeated efforts to dismiss those charges in the district court. It tried the case on them. It defended them in its brief on appeal. Then, less than two weeks before oral argument, it conceded that all 15 bank-fraud counts should be vacated, leaving only a lone securities-fraud count it had tried alongside them.

By then, the bank-fraud counts had done their work. They gave the government a vehicle to introduce evidence dating back to 2006 and argued to the jury that bank fraud and securities fraud were "the same scheme to defraud." The government also used them to anchor years of evidence relating to transactions that would otherwise have been time-barred and required gatekeeping under Rules 404(b) and 403.[1] This includes pages of summary exhibits that included information as far back as 2007 and additionally incorporated inadmissible hearsay and conclusions the government relied on to prove its theory of the case. The government obtained a conviction on all charges.

As soon as the government conceded that the bank-fraud charges should be vacated, Mr. Maldonado raised these issues to the First Circuit and requested that both parties be given the opportunity to file supplemental briefing on the spillover effect of the bank-fraud evidence on the securities-fraud conviction. The government opposed. The First Circuit denied the request and stated that the spillover argument was "waived" because it had not appeared in Mr. Maldonado's principal brief filed almost two years before the government's concession was made. Pet. App. 11a n.3.

Separately, the First Circuit acknowledged that the government's summary exhibits likely incorporated inadmissible material, but found any error was harmless —

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[1] A six-year statute of limitation on the securities fraud charge, 18 U.S.C. § 3301, means that incidents prior to October 20, 2010, were beyond the limitations cutoff period and the government would have had to justify admissibility on these under Federal Rules of Evidence 404(b) and 403. *See United States v. Anzalone*, 783 F.2d 10 (1st Cir. 1986). By contrast, the statute of limitations for bank fraud is 10 years, 18 U.S.C. § 3293, and the limitations period thus extended back to October 20, 2006.

not by asking whether the tainted evidence substantially influenced the verdict, as *Kotteakos v. United States*, 328 U.S. 750 (1946) requires, but by reviewing the evidence Maldonado had not challenged and concluding that his securities fraud conviction was "fully sustained 'by the properly admitted evidence'" and that "[t]he jury had ample evidence … to support its verdict." Pet. App. 12a and 14a.

The result is a framework that allowed the government to derive a benefit from pressing legally invalid counts, conceding them at the last moment, and then successfully arguing that any resulting prejudice was either harmless or forfeited. The precedents of this Court governing review on appeal do not permit that result.

This Court should grant this petition and reverse.

STATEMENT OF THE CASE

A. Background

In 2005, Mr. Maldonado incorporated Business Planning Resource International Corporation ("BPRIC") for the stated purpose of "help[ing] businesses or individuals to maximize their economic development." Pet. App. 8a. In the years that followed, BPRIC raised money to develop various businesses by borrowing money from individuals (denominated creditors) through contracts that promised to return the money after a specified period along with stipulated interest. Pet. App. 8a.

BPRIC made several payments to creditors, though payment was not made as stipulated. Pet. App. 8a. As time progressed, Mr. Maldonado communicated with creditors, acknowledging the delay and providing updates and expected future payments. A20-A25.[2] Ultimately, fulfilling these payments became impossible and BPRIC failed to fulfill its contractual obligations. Pet App. 8a.

B. The Indictment

In 2016, a grand jury indicted Mr. Maldonado on one count of securities fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff(a) (Count 1), and 15 counts of bank fraud, in violation of 18 U.S.C. § 1344(2) (Counts 2–16). A19-A29. The securities count identified eleven transactions that took place in 2011 involving 10 individuals. A24. The bank-fraud allegations included 10 individuals and fifteen different transactions that took place between 2007 and 2010. A28.

The indictment charged that Mr. Maldonado operated a Ponzi scheme through BPRIC, soliciting funds under the guise of investment contracts while recycling later investors' money to pay earlier investors rather than generating legitimate business returns. A19-A29. The indictment alleged that bank fraud had occurred because "each time the Defendant knowingly submitted a check payable to the BPRIC account, constituted a false representation to Banco Popular of Puerto Rico and other banks." A29.[3]

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[2] References cited as "A__" are to the Appendix filed with the court of appeals.

[3] During trial, the government added to this theory by presenting the testimony of a bank-records custodian who testified that, when Mr. Maldonado opened the BPRIC account with the bank in 2005, an account-opening form falsely identified BPRIC's "type of business" as "insurance sales company." A53. The defense objected that this

C. The Trial

A nine-day jury trial was conducted in December 2019. Pet App 9a. Mr. Maldonado's position has remained constant and was presented as the theory of defense at trial: BPRIC contracts were credit arrangements, not investment securities, and BPRIC was a legitimate venture that failed. Pet. App. 8a n.1; A3583-A3584. In other words, Mr. Maldonado lacked criminal intent and was not a con man, but rather a failed businessman.

The government called twenty-three witnesses. Pet. App. 9a. Fifteen of these were individuals who provided money to Mr. Maldonado under a BPRIC contract. Pet. App. 9a. Another government witness testified as an expert that the common "element" in Ponzi schemes is that returns to investors are actually recycled money from other investors because any legitimate income generating activity of the "business" does not produce enough money to make the disbursements. Pet. App. 9a, A182.

The government's central evidentiary vehicle was the testimony of FBI forensic financial analyst Mirelis Domínguez and a series of summary exhibits that Domínguez prepared by analyzing BPRIC and related entities' bank account records spanning from 2006-2012. Pet. App. 9a-10a, A3057-A3466. These included spreadsheets that assigned labels to each transaction based on Domínguez's own conclusions she drew from "the totality of the circumstances"

account-opening fraud theory appeared nowhere in the indictment's charging paragraphs, but the district court nevertheless allowed this testimony. A770-A772.

gathered in the investigation — meaning, evidence that was neither the purportedly summarized bank records nor trial evidence — about whether a transaction was to or from an "investor." A809-A845, Domínguez identified transactions corresponding to what she considered to be 149 "confirmed investors," plus 49 "potential investors." A3057-A3061.

Domínguez then used this hearsay-laden spreadsheet to generate numerous additional exhibits that purported to describe the total money flows to and from BPRIC and related accounts, and how many of these she attributed to payments to and from "investors." Pet. App. 12a, A3057-A3466. Mr. Maldonado objected to Domínguez's testimony on these matters and to sixteen of her exhibits as containing inadmissible material. A809-A845.

D. The Closing Argument & the Verdict

In its closing argument, the government explicitly told the jury that the bank-fraud scheme and the securities-fraud scheme were one and the same. A3556. It urged the jury to convict on the bank-fraud counts by reasoning that, if Mr. Maldonado had disclosed to the bank that he intended to run a Ponzi scheme, instead of an insurance business when it opened the account, the bank would never have permitted him to open or use the account. A3558.

This framing invited the jury to conflate the securities-fraud and bank-fraud counts reaching back from the opening of BPRIC's account in 2005 and forward through every transaction. Further, the government relied heavily on the Domínguez exhibits to demonstrate that the scheme was a Ponzi scheme, a theory that rested on proving money from "investors" was recycled to pay other "investors." A3528, A3529, A3542.

Reaching this conclusion depended entirely on who qualified as an "investor." The summary exhibits and testimony did not just support this theory—they unilaterally foreclosed any debate on the matter by pre-labeling 149 individuals as "confirmed investors." A3057-A3061. This made it easier to argue that an inflow from one investor was connected to an outflow to another investor and that the bulk of transactions in BPRIC's bank accounts involved essentially movements from one "investor" to another. A3057-A3061. This, in turn, artificially enlarged the apparent proportion of transactions categorized as recycling funds from later investors to earlier investors in a way that was not supported by admissible evidence. A3057-A3061, A3078-A3082, A3084-A3087, A3092, A3094-A3466.

In its closing, the government specifically relied on the pervasiveness of these transactions to make precisely this point. A3528-A3529, A3542. It argued that the definition of a Ponzi scheme was the recycling of money from recent investors to pay previous investors and made specific reference to the summary exhibits which contained Domínguez's inadmissible conclusions about which transactions were to and from investors. A3528-A3529, A3542.

The jury convicted Mr. Maldonado on all 16 counts.

E. The Appeal

Mr. Maldonado timely appealed and raised numerous issues including the validity of the government's theory of securities fraud, its theories of bank fraud and the prejudicial variance unveiled at trial, the admission of Domínguez's summary evidence, various aspects of the loss calculation and various aspects of the restitution order. Pet. App. 8a, 10a-11a. The government filed a responsive brief actively defending the bank-fraud convictions. Pet. App. 10a-11a.

Almost two years after Mr. Maldonado's brief was filed, and less than two weeks before oral argument was scheduled, the government filed a letter under Federal Rule of Appellate Procedure 28(j) advising the court of appeals that it agreed with Mr. Maldonado that all 15 bank-fraud counts should be vacated because the alleged fraud did not meet the federal definition of bank fraud. Pet. App. 10a-11a.

Two days later, Mr. Maldonado filed his own Rule 28(j) letter observing that the evidence relating to the invalid bank-fraud charge produced prejudicial spillover into the securities-fraud conviction and requested leave to file supplemental briefing to develop these arguments fully. Pet. App. 11a n.3. This position was again pressed at oral argument. The government opposed supplemental briefing, the court denied it and issued its opinion. Pet. App. 11a n.3.

F. The Court of Appeals' Decision

The First Circuit vacated the 15 bank-fraud convictions and affirmed the securities-fraud conviction.

On the spillover argument, the panel disposed of the issue in two sentences in a footnote indicating that Mr. Maldonado had waived the spillover argument by not raising it in his appellate brief. Pet. App. 11a n.3. The panel did not inquire whether Mr. Maldonado's failure to raise the spillover argument was an intentional relinquishment of a known right, nor did it apply to it the plain error standard of review.

On the evidentiary issue, the First Circuit acknowledged that Domínguez's exhibits likely contained inadmissible information. Pet. App. 12a. The panel did not address the government's failure, in its own brief, to offer any analysis of the actual impact of the tainted evidence. Rather than direct the government to carry its burden of demonstrating harmlessness, the court of appeals proceeded to evaluate the evidence that remained unchallenged. Pet. App. 12a-14a. It concluded that, even without the challenged exhibits, other evidence in the case supported the jury's verdict. Pet. App. 14a.

REASONS TO GRANT CERTIORARI

This case presents two important federal questions that the First Circuit decided in ways that conflict with relevant decisions of this Court. *See* S. Ct. R. 10(c).

The First Circuit's waiver ruling conflicts with *United States v. Olano*, 507 U.S. 725 (1993), and its definition of waiver as distinct from forfeiture. Its harmless-error analysis on the evidentiary issue, on the other hand, conflicts with *Kotteakos v. United States*, 328 U.S. 750 (1946), *United States v. Olano*, 507 U.S. 725 (1993), and *United States v. Davila*, 569 U.S. 597 (2013).

I. The First Circuit's waiver ruling conflicts with this Court's decision in O*lano* by labeling a contingent, unaccrued claim "waived" without asking whether counsel intentionally relinquished a known right.

Olano defines waiver as "the intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993) (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). The First Circuit never asked whether counsel's failure to raise the spillover claim in the opening brief satisfied that standard. It does not. A claim that is contingent on a predicate event that has not yet occurred is not a "known right" that can be intentionally abandoned.

Before the government filed its Rule 28(j) letter less than two weeks before oral argument, there was no vacatur, and therefore no spillover "right" to relinquish. It was, at most, a derivative and contingent claim dependent entirely on an outcome the government was actively litigating against. Once the government made its concession, however, this claim ripened, and Mr. Maldonado should have been allowed to litigate and argue it.

A. In order to find waiver, the First Circuit had to find the "intentional relinquishment or abandonment of a known right."

The Supreme Court has made clear that waiver and forfeiture are "distinct" concepts with different meanings and different consequences. "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Olano*, 507 U.S. at 733. The First Circuit applied "waiver" without performing the required inquiry. Calling a claim "available" is not the same as finding it constituted a "known right" that was "intentionally relinquished."

This Court's jurisprudence has consistently required affirmative evidence of conscious choice before finding waiver.

Morgan v. Sundance, Inc., 596 U.S. 411, 417 (2022); *Fairey v. Tucker*, 132 S. Ct. 2218, 2220, (2012); *Wood v. Milyard*, 566 U.S. 463, 474 (2012); *Kontrick v. Ryan*, 540 U.S. 443, 458 n.13 (2004); *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 682 (1999); *see also Glossip v. Oklahoma*, 604 U.S. 226, 280 n.5 (2025) (Thomas, J. dissenting); *Hemphill v. New York*, 595 U.S. 140, 156 (2022) (Alito, J. concurring); *Hamer v. Neighborhood Hous. Servs. of Chicago*, 583 U.S. 17, 20 n.1 (2017).

B. The spillover claim was not cognizable as a "right" capable of waiver or forfeiture because its predicate had not yet materialized.

A spillover claim is not a freestanding right. It is a derivative claim that arises only upon vacatur of the counts from which the prejudicial spillover flows.

"'Retroactive misjoinder' arises where joinder of multiple counts was proper initially, but later developments—such as a district court's dismissal of some counts for lack of evidence or an appellate court's reversal of less than all convictions—render the initial joinder improper." *United States v. Jones*, 16 F.3d 487, 493 (2d Cir. 1994); *see also United States v. Conde*, No. 23-6327, 2026 WL 1045500, at *3 (2d Cir. Apr. 17, 2026) (referencing same definition of retroactive misjoinder); *United States v. Abdelaziz*, 68 F.4th 1, 67 (1st Cir. 2023) (same) *United States v. Mink*, 9 F.4th 590, 605 (8th Cir. 2021) (same); *United States v. Jackson*, 918 F.3d 467, 481 (6th Cir. 2019) (same); *United States v. Bamdad*, 459 F. App'x 653, 656 (9th Cir. 2011) (same).

This scenario often arises where evidence is presented on multiple charges in a trial, and some of these are dismissed or vacated at the district court level. *See e.g.*, *United States v. Aldrich*, 169 F.3d 526 (8th Cir. 1999) (new trial granted on appeal because evidence related to felon-in-possession conviction was sufficiently prejudicial to warrant new trial on charge of possessing unregistered firearm and thus district court had erroneously denied a new trial thereon). In that scenario, a defendant is logically required to raise to the district court any claim that prejudicial 'spillover' of otherwise inadmissible evidence influenced the jury's decision on the remaining counts.

If the defendant fails to do so at the trial court level, he may nevertheless raise the claim at the appellate level, and have the claim reviewed there on plain-error review. *See e.g.*, *United States v. Jackson*, 918 F.3d 467, 481 (6th Cir. 2019) (claim of prejudicial spillover based on retroactive misjoinder of several charges dismissed by the government before case was submitted to the jury was reviewed for plain error as it was advanced for the first time on appeal).

In both scenarios, it is sensible to expect the defendant to raise the issue early, because the event that triggers the right has already occurred and is not contingent on "later developments." However, where no court has dismissed any charges or vacated any convictions, no right to claim spillover prejudice is yet ripe.[4]

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[4] Anticipatory briefing on a contingent claim is a litigation choice, not a legal obligation — and such a contingent argument does not assert a "right" in the sense that *Olano* contemplates. A right capable of forfeiture or waiver is one that exists, is

This is why the Second Circuit has repeatedly declared that, "[w]hen an appellate court reverses some but not all counts of a multicount conviction, *the court must determine* if prejudicial spillover from evidence introduced in support of the reversed count requires the remaining convictions to be upset." *United States v. Rooney*, 37 F.3d 847, 855 (2d Cir. 1994)[5] (reversing false statements convictions due to risk of prejudicial spillover from evidence that the government introduced on another count for which its theory of guilt was legally flawed) (emphasis added); *see also United States v. Aiello*, 118 F.4th 291, 305 (2d Cir. 2024).

Here, before the government's Rule 28(j) letter, the bank-fraud convictions were intact and being actively defended. There was no vacatur and no dismissal. No spillover claim was ripe. Counsel cannot intentionally relinquish or even forfeit a right that the law has not yet given rise to. And, if the right does not yet exist, it cannot be subject to forfeiture ("the failure to make the timely assertion of a right") or waiver ("intentional relinquishment or abandonment of a known right.") *See Olano*, 507 U.S. at 733.

This principle is embedded throughout federal law in a variety of contexts. A claim "is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Texas v. United States*, 523 U.S. 296, 300 (1998) (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 581 (1985)). Federal

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cognizable, and can presently be asserted. Speculation about possible prejudice if a contingency takes place is none of those things.

[5] *Rooney* itself conducted that analysis sua sponte — the defendant had not raised spillover in his briefs.

accrual doctrine likewise provides that “a cause of action does not become ‘complete and present’ for limitations purposes until the plaintiff can file suit and obtain relief.” *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 811 (2024). Congress recognized the same principle in the habeas context, expressly providing that a claim does not arise, and cannot be defaulted, until “the factual predicate of the claim … could have been discovered through the exercise of due diligence.” 28 U.S.C. § 2244(d)(1)(D). Each of these bodies of law reflects the same foundational principle: federal law does not treat as cognizable—or waivable—a right whose predicate facts have not yet occurred.

The government’s Rule 28(j) letter was the first moment that predicate became a concrete reality and Mr. Maldonado’s right to claim prejudicial spillover crystallized.

C. The complexity of this case (like many cases) and the demands of appellate briefing made anticipatory conditional briefing unreasonable.

The opening brief in the appeal below addressed fundamental errors going to the theory of liability on both charges, numerous trial errors, and multiple sentencing errors affecting both the term of imprisonment and restitution—all arising from a factually complex prosecution involving more than 300 documentary exhibits plus summary evidence purporting to distill years of bank records. Mr.

Maldonado made every effort to comply with appellate rules of concision.[6]

Against that backdrop, counsel cannot reasonably be expected to formulate every contingent claim derivative of every primary error. The spillover claim was not a primary, freestanding argument. It was contingent on a predicate—vacatur of the bank fraud counts—that had not occurred and that the government was actively opposing. In a case of this complexity, requiring counsel to brief every possible contingent permutation of every error would produce briefing that is labyrinthine and unmanageable—the antithesis of what the rules require and what effective advocacy demands.

Once the government conceded, counsel acted promptly, providing written notice of its claim of prejudicial spillover and requesting an opportunity for the parties to file supplemental briefing on the matter.

D. The First Circuit did not apply the plain-error rule either.

Even assuming that the right to make a spillover claim was capable of being forfeited, forfeiture does not extinguish the claim; it triggers plain error review under Rule 52(b). *Olano*, 507 U.S. at 733–34. But the First Circuit did not apply the plain-error rule either. As the following analysis shows, plain-error review sits uneasily on these facts — but even on its own terms, it would have compelled examination of the spillover claim rather than its dismissal.

[6] A considerable amount of space was dedicated to attacking the legality of the bank-fraud charges the government later conceded.

Plain-error review involves four steps: “First, there must be an error or defect—some sort of ‘[d]eviation from a legal rule’—that has not been intentionally relinquished or abandoned, *i.e.,* affirmatively waived, by the appellant.” *Puckett v. United States*, 556 U.S. 129, 135 (2009).

Immediately there is a difficulty, because retroactive misjoinder could not be an error on the part of the trial court until and unless the bank-fraud counts had been dismissed or vacated. The trial court’s error in this respect was sustaining the bank-fraud counts, an error which had unquestionably been raised on appeal. But the spillover error did not exist at trial. It crystallized at the appellate level when two things were simultaneously true: the government had conceded the bank-fraud counts, and the court was about to affirm the securities-fraud conviction without examining the relationship between the two. That is the moment the “deviation from a legal rule” — *Olano* and *Puckett*’s definition of error — occurred.

Recall that the contemporaneous objection rule and its plain-error corollary serve two related purposes: giving the trial court an opportunity to correct its own errors, and preventing “sandbagging” — a defendant’s deliberate silence about an objection, preserved as insurance against an unfavorable verdict. *Id.* at 134. Neither concern is implicated here.

There was nothing to sandbag. When the opening brief was filed, the bank-fraud counts were intact, and the government was actively defending them. No amount of strategic calculation could have led counsel to withhold a spillover argument as a hedge — because there was nothing to hedge against. The predicate for the claim did not exist. A defendant cannot "remain[] silent about his objection," *id.*, when the event giving rise to the objection has not yet occurred. Sandbagging requires a known card held in reserve. Counsel held no such card.

Moreover, the First Circuit — the court whose opportunity to address the error is the focus of the sandbagging concern — was not deprived of anything. If anything, it was the government's own late-breaking concession that disrupted the orderly progression of the appeal — and then the government reaped the benefit of the court's understandable but mistaken reluctance to engage with new arguments so close to oral argument, a reluctance that the government's own timing had created. The First Circuit had every opportunity to address the claim based on supplemental briefing. It chose instead to foreclose it. That is not sandbagging; it is the opposite.

The second prong of plain error requires that "the legal error must be clear or obvious, rather than subject to reasonable dispute." *Id.* at 135. In this case, the error of sustaining the bank-fraud counts was so clear and obvious that the government conceded the point rather than attempt to defend it at oral argument. There is no question that the retroactive misjoinder error contemplated in the First Circuit's own precedent arises: "joinder was proper initially … but … later developments … appear to render the initial joinder improper." *United States v. Abdelaziz*, 68 F.4th 1, 61 (2023). And the prejudicial spillover effect on the securities conviction is, at a minimum, colorable. But no court ever considered these last two questions. So it is nonsensical to speak of a standard of "review" at all.

The third prong of plain error is that "the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it 'affected the outcome of the district court proceedings.'" *Puckett*, 556 U.S. at 135. The effect on the outcome of the proceedings is already covered by the prejudice required to be demonstrated as part of the "prejudicial spillover" claim. *Abdelaziz*, 68 F.4th at 61 ("To win a new trial on the ground of retroactive misjoinder, a defendant 'must show compelling prejudice.") (cleaned up).

The last part of the plain-error test posits that, "[i]f the above three prongs are satisfied, the court of appeals has the *discretion* to remedy the error—discretion which ought to be exercised only if the error " 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.'" *Puckett,* 556 U.S. at 135. The First Circuit did not apply any part of the plain-error test, neither the first three prongs, nor the last prong which is meant to guide it in exercising its discretion to recognize a plain error.

That fourth inquiry has independent force. The plain-error rule traces to *United States v. Atkinson*, 297 U.S. 157, 160 (1936), where the Supreme Court recognized that appellate courts may, in the public interest, notice errors "of their own motion" when they "seriously affect the fairness, integrity, or public reputation of judicial proceedings." *Olano* reaffirmed that the fourth prong "is not limited to cases of actual innocence," 507 U.S. at 736—the rule protects the court's own institutional standing, not only the defendant. As the Eleventh Circuit has explained, the question is whether "a reasonable citizen would bear a rightly diminished view of the judicial process and its integrity if the court refused to correct the alleged error." *United States v. Hawkins*, 934 F.3d 1251, 1268 (11th Cir. 2019).

That standard is met here. The government itself conceded that 15 of the 16 counts of conviction should be vacated. The invalid counts did not merely sit alongside the securities fraud count in the indictment; they actively shaped how the trial was conducted and what the jury was invited to consider. The spillover operated through several reinforcing mechanisms.

The government introduced evidence that Mr. Maldonado had misrepresented BPRIC's purpose to Banco Popular in 2005 — an uncharged theory that appeared nowhere in the indictment's bank-fraud allegations. A19-A25. This evidence, which made Mr. Maldonado out to be a liar, was admitted only because the bank-fraud counts were before the jury; without them, the account-opening form would have had no anchor to the charged conduct.

As set out in the Introduction and Statement of the Case above, the bank-fraud counts anchored otherwise time-barred transaction evidence to the charged conduct, causing the trial to encompass years of transactions predating the six-year securities-fraud limitations period. Without the bank-fraud counts, evidence of those transactions would have had to satisfy the requirements of Federal Rules of Evidence 404(b) and 403. *See United States v. Anzalone*, 783 F.2d 10, 11–12 (1st Cir. 1986) (time-barred conduct must be subjected to Rules 404(b) and 403, not admitted automatically as part of a common scheme). That gatekeeping was never performed because the bank-fraud counts made the evidence appear directly charged.

The result was that the jury considered years of time-barred transaction history — going back ten years in some instances without the government ever having to demonstrate that the prejudicial effect of that volume of uncharged, time-barred conduct did not substantially outweigh its probative value. That omitted balancing is itself a concrete dimension of the spillover prejudice: had the bank-fraud counts been absent, the evidence picture presented to the jury would have been materially narrower.

The government told the jury explicitly that the bank-fraud scheme and the securities-fraud scheme were "the same scheme to defraud." A3556. It then layered the account-opening theory on top: "[e]ven though it's not necessary to prove that it has been shown that he made a material representations to the bank," the government had proved one anyway. A 3558. By telling the jury that the two schemes were one — and that the account-opening evidence confirmed the fraudulent intent reaching back to 2005 — the government ensured that the jury could not compartmentalize. A juror uncertain whether the BPRIC contracts were securities but persuaded by the bank-fraud evidence of pervasive fraudulent intent was invited to carry that finding directly into Count 1.

Nevertheless, without considering any of this or even allowing Mr. Maldonado to expand on this argument, the First Circuit affirmed the remaining conviction without examining whether the jury's securities-fraud verdict was infected by that pervasive evidence—because it disposed of the spillover claim on waiver grounds. Pet. App. 11a n.3.

Nothing on this record indicates the intentional relinquishment of a known right. There was only a failure to elaborate an argument on a theoretical claim whose predicate had not yet materialized. Treating that as waiver, and declining to consider the issue at all, even under plain-error analysis, produced precisely the kind of outcome that erodes public confidence in the integrity of judicial proceedings.

II. The First Circuit's harmless-error analysis conflicts with this Court's decisions in ***Kotteakos***, ***Olano***, and ***Davila***.

A. ***Kotteakos*** requires assessment of the tainted evidence's influence, not sufficiency of untainted evidence.

This Court established the standard for non-constitutional harmless error review in *Kotteakos v. United States*, 328 U.S. 750 (1946). The government had tried defendants on a single conspiracy charge but the evidence proved multiple separate conspiracies, and argued that the convictions should stand because each defendant's individual guilt was clear. This Court unanimously rejected that argument.

The question, the Court held, is not whether the record contains "enough to support the result, apart from the phase affected by the error," but "whether the error itself had substantial influence." *Id.* at 764–65. A reviewing court must examine "what effect the error had or reasonably may be taken to have had upon the jury's decision" — "the crucial thing is the impact of the thing done wrong on the minds of other men, not on one's own, in the total setting." *Id.* at 764. If "one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected." *Id.* at 764–65. Critically, the Court rejected the government's argument that harmlessness could be established by pointing to sufficient untainted evidence to sustain conviction. That "is neither our problem nor that of the Court of Appeals." *Id.* at 776.

The First Circuit's analysis in this case cannot be reconciled with *Kotteakos*. The court below did not ask whether the erroneously admitted categorization evidence had substantial influence on the jury's verdict. It asked instead whether the untainted evidence was sufficient to support the conviction — precisely the inquiry *Kotteakos* forbids. The distinction is not semantic. Sufficiency analysis asks whether a rational jury *could* have convicted on the untainted evidence. Harmless-error analysis asks whether this jury was substantially influenced by the tainted evidence. The two questions have different answers, and only the second is the right one.

The error matters here because the record does not permit confident answers to the right question. The challenged categorizations — the government witness's characterization of transactions as "investor" deposits — went to the core of the prosecution's theory and impermissibly amplified the scope of the alleged fraudulent scheme. The defense contested whether all of those individuals were in a contractual relationship with BPRIC and similarly situated to the 15 individuals who testified about their contractual relationship with BPRIC and Mr. Maldonado. The categorization evidence was not peripheral; it was the mechanism by which the government translated raw financial data into the narrative of fraud. Whether the jury would have reached the same verdict had it evaluated bank records summaries without the overlay and commentary that Domínguez provided is precisely the kind of question *Kotteakos* requires a reviewing court to confront — and the kind of question the First Circuit declined to ask.

B. The burden falls on the government, not the defendant.

This Court's decisions confirm that under Rule 52(a)'s harmless-error standard, the burden of demonstrating harmlessness rests on the government as the beneficiary of the trial court's mistake.

Under harmless error analysis governed by Rule 52(a), the government bears the "burden of showing the absence of prejudice." *Olano*, 507 U.S. at 741. This stands in contrast to plain-error review under Rule 52(b), under which the defendant bears the burden. *Id.* at 741. The asymmetry is fundamental: it reflects the different stakes of the two inquiries and the principle that the government should not benefit from errors of its own making without having to demonstrate the error was inconsequential.

In *United States v. Davila*, 569 U.S. 597 (2013), the Court reiterated that, "[w]hen Rule 52(a)'s harmless-error rule governs, the prosecution bears the burden of showing harmlessness." *Davila*, 569 U.S. at 607. And in *O'Neal v. McAninch*, 513 U.S. 432 (1995), the Court held that when a reviewing court is in "grave doubt" about whether an error had "substantial and injurious effect or influence in determining the jury's verdict," the error is not harmless and the defendant must prevail. *Id.* at 437.

The *O'Neal* Court grounded this conclusion in *Kotteakos* itself, describing that decision as "placing the risk of doubt" on the government. *Id.* at 438–39. Even the *O'Neal* dissenters acknowledged the fundamental principle: "once an error has been shown on direct appeal, the government must demonstrate that it was harmless if the conviction is to stand." *Id.* at 1003 (Thomas, J., dissenting).

The government's harmlessness showing below was not merely inadequate — it was effectively nonexistent. The government argued that any error was harmless because Domínguez testified that "the labels she used did not change her math or analysis."[7] This assertion did not engaged the actual question. The error was not that the arithmetic was wrong. It was that the categorizations — stamped with the authority of a government forensic accountant (who did not testify as an expert) and woven throughout the government's

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[7] The sum total of the government's harmlessness argument is collected here:

> [W]hile Maldonado contends otherwise, he is primarily challenging labels...[A]ny error would be harmless anyway, as Domínguez testified that the labels she used did not change her math or analysis.... But such labeling or categorizing by Domínguez was not the crux of her testimony; it was the mathematical figures of inflow and outflow to show that Maldonado could only have paid investors (and promoters and himself) with other investors' money. Domínguez herself testified that the mathematical figures of money going in and out of the accounts would not change regardless of whether she called a financial contributor an investor or a creditor. (DE 177 at 24–25). Or to follow Maldonado's analogy, regardless of what student buys what supply, it was clear that the supplies were paid for by classmates. (DE 177 at 14). So any error would be harmless.

Government's Br. 58-59, 62-63.

closing argument — supplied the jury with hearsay-based conclusions that, in addition to the testifying witnesses, there were scores of additional "confirmed investors" in a Ponzi scheme. Whether the math or the creditor/investor label was correct is not nearly as damaging as the fact that the conclusory categorization was not supported by admissible evidence but presented to the jury as an established fact.

Rather than hold the government to its burden, the First Circuit constructed its own harmlessness rationale. It announced it would examine "the evidence that Maldonado does not challenge" and ask whether that evidence "overwhelmingly" supported the government's theory. Pet App. 12a. That methodology — centering the analysis on what the defendant failed to challenge rather than what the government affirmatively demonstrated — is an inversion of the burden *Kotteakos*, *Olano*, *Davila* and *O'Neal* impose. The court then reviewed what it called "unchallenged evidence" and concluded it was "highly probable that the jury would have convicted Maldonado of securities fraud based on this unchallenged evidence," Pet. App. 14a. In fact, in fashioning a harmlessness rationale that the government never proposed and that the defense never had an opportunity to respond to, the First Circuit incorrectly identified a challenged exhibit as unchallenged.

The First Circuit never evaluated whether the tainted categorization evidence had substantial influence on the jury's verdict. That is the inquiry *Kotteakos* requires and the one the court declined to perform. The burden was the government's to carry. The First Circuit attempted to carry it for them — and did so under the wrong standard.

C. The First Circuit erred in finding the evidentiary error to be harmless when no proper showing of harmlessness was made.

The government's own closing argument makes this error stark. As set out in the Statement of the Case above, the prosecutor walked the jury through the summary exhibits and used them to argue that the volume and nature of "investor" cashflows in and out of the bank accounts proved a Ponzi scheme. The exhibits were not background context; they were the government's evidentiary answer to the most contested questions in the case. Yet, when the government turned to harmlessness, it offered only the irrelevant observation that Domínguez's math was consistent regardless of labels. Those two positions cannot coexist: an exhibit central enough to anchor the government's closing argument on the decisive questions cannot simultaneously be peripheral enough to be harmless when tainted.

The First Circuit's analysis also failed to hold the government to its burden. The government's harmlessness argument below consisted of a single sentence that did not address the central role that the summary exhibits and accompanying testimony was given by the government at the trial. Rather than find that the government's showing was insufficient, the court independently constructed a harmlessness rationale that the government had never offered. Pet. App. 13a-14a. Under *Olano* and *Davila*, the burden was the government's to carry, and the government failed to carry it.

The practical significance of the tainted exhibits was substantial and cannot be dismissed by pointing to unchallenged evidence. Domínguez's "investor" label answered the most contested question in the case: whether money running through BPRIC's bank accounts was predominantly from "investors." And the government never showed that the hearsay-based categorizations in the challenged columns played no role in the jury's resolution of the securities question.

The question whether Rule 52(a)'s harmless error standard requires affirmative assessment of a tainted evidence's likely influence on the verdict — rather than sufficiency review of untainted evidence — arises in a significant proportion of federal criminal appeals. The First Circuit's holding that it may discharge the harmless-error inquiry by cataloguing the untainted record, without the government ever having shown that the tainted evidence was inconsequential, conflicts with *Kotteakos*, *Olano*, and *Davila* and warrants this Court's review.

III. This petition raises issues that are recurring and important.

A. Harmless error methodology recurs in a majority of federal criminal appeals.

Evidentiary challenges to the government's evidence in criminal trials are commonplace. In every case where an evidentiary error is preserved and acknowledged, the court of appeals must determine whether that error was harmless under Rule 52(a). *Kotteakos v. United States*, 328 U.S. 750, 764 (1946), established nearly eighty years ago that the answer turns on whether the error "had substantial influence" on the verdict — not on whether untainted evidence sufficed to convict.

A court of appeals may not satisfy the government's harmlessness burden by evaluating the unchallenged evidence and declaring it sufficient without ever considering whether the tainted evidence itself infected the jury's deliberations. The First Circuit's opinion in this case is a published, citable example of exactly that methodology. Pet App. 12a-14a. If that approach is permitted to stand, the burden the government bears under *Olano* and *Davila* becomes a procedural formality — acknowledged in the abstract, never enforced in practice.

B. Questions of issue preservation, forfeiture and waiver arise in a large proportion of criminal and civil appeals.

Olano's distinction between waiver and forfeiture is the fulcrum of the Rule 52 framework. When a court labels an omission "waiver" rather than "forfeiture," it extinguishes all review — including plain-error review that Rule 52(b) would otherwise preserve. *Olano*, 507 U.S. at 733–34. Courts of appeals apply that label routinely, and they frequently do so, as the First Circuit did here, without asking whether the omission reflected the intentional relinquishment of a known right. When the mislabeled claim arises from a post-briefing development — as will inevitably occur whenever the government makes a last-minute concession, facts on the ground change in a significant way, or intervening authority shifts the legal landscape — the consequences fall hardest on the party who could not have known to preserve what did not yet exist.

Moreover, the question of whether *Olano*'s waiver inquiry or plain-error review can be applied to claims whose predicate materializes after briefing closes will recur in any multi-count federal criminal case that takes the procedural path this one did.

C. The government's conduct here creates a structural incentive that courts should not reward.

Under the First Circuit's framework, a government that presses legally invalid counts through trial and full appellate briefing, then concedes them at the last moment, keeps every trial advantage those counts produced while simultaneously benefiting from the defendant's inability to have briefed the resulting prejudice. If that framework stands, the government has every incentive to overcharge, try cases on legally questionable theories, and concede those counts on the eve of argument once the evidentiary benefit has been secured. This Court has never authorized that result, and the rules of harmless error and forfeiture should not be interpreted to allow it.

IV. This case is an ideal vehicle for resolving both questions.

A. The questions are cleanly presented on a fully developed record.

This is not a case where the evidentiary error was disputed or the record incomplete. The First Circuit acknowledged that "inadmissible hearsay may have played an improper role in the development of the summary exhibits." Pet. App. 12a. The government's harmlessness argument below was a single, demonstrably non-responsive sentence. The correct question under *Kotteakos* — whether the tainted evidence substantially influenced the verdict — was never asked by anyone. The methodological error is therefore starkly visible and uncontaminated by factual complexity.

B. The waiver ruling is equally clean.

The First Circuit's entire analysis of the spillover question fits in two sentences of a footnote. Pet. App. 11a n.3. It states only that the argument was "available" and that new arguments cannot be raised in a Rule 28(j) letter. It does not ask whether the omission was intentional. It does not address the timing of the government's concession. And it does not explain how a claim whose predicate — the vacatur of 15 counts — had not yet occurred could have been intentionally relinquished, or even forfeited. And it did not give any justification for rejecting the request for supplemental briefing beyond its waiver conclusion. The violation of the principles set out in *Olano* and *Puckett* is explicit and unambiguous on the face of the opinion. The First Circuit's ruling cannot be reconciled with these cases.

C. The First Circuit's harmless-error methodology conflicts with this Court's own decisions.

This is not a case where the courts of appeals have reached different conclusions on an open question. This Court has addressed these issues unambiguously in its own opinions on numerous occasions. When a circuit court's published opinion conflicts with settled holdings of this Court, certiorari is appropriate to restore uniformity. *See* S. Ct. R. 10(c)

D. The posture of the case eliminates any fact-finding dispute.

Because the government has already conceded that the bank-fraud counts should be vacated, there is no threshold question about the validity of those counts for this Court to resolve. The only questions are the two presented: whether the spillover claim was improperly barred and whether the harmless error analysis was conducted correctly. Both are pure legal questions on which no further fact-finding is required.

E. The record shows prejudicial spillover likely took place.

Though this Court does not have to make any determination on the prejudice question, the record indicates the prejudice likely flowed from a trial that included both securities fraud and the now vacated bank fraud counts.

The government's closing argument shows that it explicitly fused the bank fraud and the securities-fraud theories. There is no question that evidence was presented at trial that would either not have come in or would have been limited if the securities-fraud count alone had been tried. The First Circuit's own acknowledgment that the hearsay "may have played an improper role" in the summary exhibits removes any dispute about whether there was error to assess.

No further development of the record is necessary for this Court to determine that the First Circuit erroneously applied Supreme Court precedent relating to waiver and harmlessness. It should therefore grant certiorari, vacate the judgment below, and remand to the First Circuit to evaluate Mr. Maldonado's prejudicial spillover claim and apply proper harmlessness analysis.

CONCLUSION

For the reasons above, the petition for a writ of certiorari should be granted.

Respectfully submitted.

RACHEL BRILL
FRANCO L. PÉREZ-REDONDO

ALEJANDRA BIRD-LÓPEZ
Counsel for Petitioner
Federal Public Defender,
District of Puerto Rico
241 F.D. Roosevelt Ave.
San Juan, PR 00918

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