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Through the Looking Glass: Conceptualizing Control and Analyzing Criminal Liability For Unlicensed Money Transmitting Businesses Under Section 1960

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Foreword

Section 1960 of Title 18 United States Code, the federal money transmitting statute, makes it a crime to conduct a money transmitting business without an appropriate state or federal license. This statute obtained notoriety soon after 9/11, as federal prosecutors used it to prosecute those suspected of engaging in terrorist financing. The statute became an even more powerful tool when Congress, in passing the PATRIOT Act, amended it to omit the specific intent element, and to apply to defendants who did not have knowledge that the business in which they were engaged even required a license.

Evidencing the breadth of Section 1960, the U.S. Department of Justice has also relied on it over the last decade in its prosecutions of those allegedly engaged in the transmission of digital assets. The authors of this paper are among the leading lawyers and advocates for the digital asset industry, and they demonstrate how a careful study of Section 1960 calls into question the merits of recent prosecutions in that space.

The paper illustrates both the breadth of Section 1960 and its complexity. As they study the statute element-by-element, the authors explore in treatise-like fashion the many interpretive issues that have occupied courts in their analysis of Section 1960. This comprehensive review of Section 1960 is certain to be of great value to practitioners and courts, both within the digital asset space and beyond.

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I. Introduction[1]

The Bank Secrecy Act of 1970 ("BSA") began as a measured framework to help law enforcement detect and prosecute illicit activity, but it has grown over the last fifty years into a massive complex of financial surveillance. Law enforcement has increasingly relied on financial intermediaries — including traditional institutions and a broadly defined group of "money services businesses" — to report information about allegedly suspicious financial activity. The cost to individuals' privacy rights grew in line with the rise of the BSA's labyrinthine reporting regime; it became nearly impossible for any American to conduct a non-cash transaction without being caught in the BSA's dragnet.

In the last decade, the seemingly unstoppable force of financial surveillance has collided with the immovable object of the decentralized public blockchain. Unlike the legacy financial system, blockchain technology enables permissionless, peer-to-peer transactions with no intermediaries who are required, or technically able, to monitor and report user transactions.

The government has responded to the tension between this new technology and decades-old law by attempting to apply the BSA and related laws and regulations to non-intermediary participants in blockchain ecosystems. One such related law is 18 U.S.C. §1960, a statute criminalizing the operation of an unlicensed money transmitting business and subjecting violators to extraordinarily harsh penalties: up to $250,000 in fines and up to five years in prison. Within the last year, the U.S. Department of Justice ("DOJ") began using Section 1960 to prosecute software developers in the blockchain industry in two known cases: *United States v. Storm* and *United States v. Rodriguez*.[2] The broad sweep of the DOJ's allegations suggests that many others in the industry could be targeted or are already under investigation on the same theory.

Given these high stakes, we undertook an analysis of the key elements of a Section 1960 charge to explain in detail the burden of proof that the government must meet to sustain a conviction for operating an "unlicensed money transmitting business." Courts have described Section 1960 as a "complex"[3] statute that sets forth "somewhat peculiar terms"[4] creating "glaring problems" of interpretation.[5] We hope this paper helps guide parties and courts on crafting motions, jury instructions, and orders. Also, we hope to assist Congress in the important task of amending this vague and ambiguous statute to clarify whom exactly it should expose to criminal liability.

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1 Thank you to the following people for their review and thoughtful feedback: Miller Whitehouse-Levine, the brilliant Arktouros lawyers, and Zach Langley.

2 *United States v. Storm*, No. 1:23-cr-00430 (KPF) (S.D.N.Y. Sep. 26, 2024); *United States v. Rodriguez*, No. 1:23-cr-00082 (RMB) (S.D.N.Y. Feb. 14, 2024).

3 *United States v. Budovsky*, 2015 WL 5602853, at *6 (S.D.N.Y. Sept. 23, 2015).

4 *United States v. Bah*, 2007 WL 1032260, at *1 (S.D.N.Y. Mar. 30, 2007).

5 *United States v. Ali*, 2008 WL 4773422, at *12 (E.D.N.Y. Oct. 27, 2008).

The central premise of this paper is that an entity falls within the scope of Section 1960 only if it operates a business that engages in "money transmitting," defined as "transferring funds on behalf of the public," which requires that the entity has control over the funds at issue. The paper proceeds in four sections. *First*, we provide the text and background of Section 1960, which criminalizes knowingly operating an "unlicensed money transmitting business" and specifies three types of money transmitting businesses that are "unlicensed." *Second*, we analyze the definition of "money transmitting," the threshold activity that a business must conduct as a prerequisite for Section 1960 to apply, regardless of whether the business is "unlicensed." *Third*, we analyze what it means to operate a "business" subject to the statute. *Fourth*, we analyze the *mens rea* required for a finding of legal culpability.

On the definition of "money transmitting," we conclude that a party transmits funds for purposes of Section 1960(b)(1) when it both *obtains* control of funds and *relinquishes* control of those funds. We support our conclusion by analyzing the definition of "money transmitting" set forth in Section 1960(b)(2), and all federal circuit court cases that substantively interpret the language of the statute, including a discussion of key Second Circuit precedent from *United States v. Bah* and *United States v. Velastegui*. We also explain the interplay between Section 1960 and the definition of "money transmitting business," also found in the BSA, 31 U.S.C. § 5330. We conclude that although Section 1960 does not adopt the BSA definition, Section 5330's definition is substantively similar and confirms that the plain language of "money transmitting" means the act of both obtaining control and relinquishing control of funds.

On the definition of "business," we conclude that a "business" within the scope of Section 1960 is characterized by three elements: operation of a commercial enterprise established specifically for money transmission; completion of multiple transmissions of money; and receipt of a fee paid by a customer specifically for the service of money transmission. We further detail why and how the statute distinguishes between the types of money transmitting businesses that Congress intended to be covered by its scope, compared to others that engage in money transmission only infrequently, incidentally, or gratuitously.

On the requirement of *mens rea*, we explain that Section 1960 only covers defendants who "knowingly" operate an unlicensed money transmitting business. Courts have held that this requirement is satisfied when a defendant has knowledge of the facts that add up to the offense, including that the business was engaged in "money transmitting," and that it did not have a license or registration. But courts have found that Section 1960 does not require proof that a defendant knew a license or registration was required by law. We analyze recent Supreme Court cases related to the longstanding common law presumption of *mens rea* and conclude that courts have erred in this respect, and arguing that the government must prove that a defendant knew of the applicable obligations with which his business failed to comply in order to sustain a conviction under Section 1960(b)(1)(B).

Throughout the paper, we contextualize our analysis by applying the law to the alleged facts and pre-trial motions practice in *Storm*. In that case, the government charged the developers of a blockchain-based software protocol called Tornado Cash with violating Section 1960, among other criminal code provisions. Tornado Cash is a smart contract protocol that allows users to conduct peer-to-peer transactions on a public blockchain while preserving their privacy. Defendant Roman Storm was indicted on August 21, 2023,[6] and filed a motion to dismiss the Indictment on March 29, 2024,[7] which the court denied in an oral ruling from the bench on September 26, 2024.[8] As of this writing, a jury trial is set for April 14, 2025.

As we explain, the threshold question in a Section 1960 prosecution is if the defendant operated a "money transmitting business," and the *sine qua non* of "money transmitting" is obtaining control and relinquishing control of funds. If a business does not engage in this prerequisite activity, then Section 1960 does not apply, even if the business is otherwise "unlicensed." For years, the blockchain industry has developed and deployed non-custodial smart contract protocols consistent with this view of the law. Although the vagueness and ambiguity of the statute has caused significant confusion, our analysis validates the industry's approach to anti-money laundering compliance and rebuts the interpretation put forward by the government and adopted by the court in *Storm*.

II. Background on Section 1960

Title 18 U.S. Code Section 1960 is a federal statute that makes it a felony to operate an "unlicensed money transmitting business." The statute in its entirety is as follows:

> (a) Whoever knowingly conducts, controls, manages, supervises, directs, or owns all or part of an unlicensed money transmitting business, shall be fined in accordance with this title or imprisoned not more than 5 years, or both.
>
> (b) As used in this section—
>
> (1) the term "unlicensed money transmitting business" means a money transmitting business which affects interstate or foreign commerce in any manner or degree and—
>
> (A) is operated without an appropriate money transmitting license in a State where such operation is punishable as a misdemeanor or

6 *United States v. Storm*, No. 1:23-cr-00430 (KPF), ECF No. 1 (S.D.N.Y. Aug. 21, 2023) (hereinafter, "Indictment"). The Indictment was superseded on November 15, 2024, with the DOJ removing the detailed factual allegations in the original indictment in light of the coming trial. *See id.* ECF No. 105.

7 *United States v. Storm*, No. 1:23-cr-00430 (KPF), ECF No. 30 (S.D.N.Y. March 29, 2024) (Memorandum of Law in Support of Roman Storm's Motion to Dismiss, hereinafter, "Storm MTD").

8 Transcript of Oral Ruling on Storm's MTD from *United States v. Storm*, No. 1:23-cr-00430 (KPF) (S.D.N.Y. Sep. 26, 2024) (hereinafter, "Storm MTD Order").

> a felony under State law, whether or not the defendant knew that the operation was required to be licensed or that the operation was so punishable;
>
> (B) fails to comply with the money transmitting business registration requirements under section 5330 of title 31, United States Code, or regulations prescribed under such section; or
>
> (C) otherwise involves the transportation or transmission of funds that are known to the defendant to have been derived from a criminal offense or are intended to be used to promote or support unlawful activity;
>
> (2) the term "money transmitting" includes transferring funds on behalf of the public by any and all means including but not limited to transfers within this country or to locations abroad by wire, check, draft, facsimile, or courier; and
>
> (3) the term "State" means any State of the United States, the District of Columbia, the Northern Mariana Islands, and any commonwealth, territory, or possession of the United States.

Notably, Section 1960 has mutated significantly since it was first enacted in 1992. Initially, Section 1960 only punished those who operated a business while "knowing the business is an illegal money transmitting business," and defined "illegal money transmitting business" as one that was "knowingly operated" without the "appropriate . . . State license."[9] In 1994, Congress amended the BSA through the Money Laundering Suppression Act, which added Section 5330 and defined a new category of financial institution, a "money transmitting business," along with registration requirements for such businesses.[10] At the same time, Congress added subsection (b)(1)(B) to Section 1960, including businesses that failed to comply with Section 5330 as a second category of "illegal money transmitting business" and clarifying that Section 1960 was the criminal enforcement mechanism for Section 5330.[11] Section 1960 evolved again seven years later when Congress enacted the USA PATRIOT Act of 2001.[12] The PATRIOT Act included

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9 *See* Annunzio-Wylie Anti-Money Laundering Act (Oct. 28, 1992), Pub. L. 102–550, 106 Stat. 4057, *available at* https://tinyurl.com/3xabf6un. A more user-friendly version of the text as it appeared in 1992 is available in the Amendments section to 18 U.S.C. § 1960 at https://tinyurl.com/mt3yz25x.

10 *See* Money Laundering Suppression Act, H.R. 3235, 103d Cong. (Mar. 23, 1994), *available at* https://tinyurl.com/4vckf6kb; *see also* History of Anti-Money Laundering Laws, FinCEN, https://tinyurl.com/ytknrzze (last visited Nov. 23, 2024).

11 *See generally* Money Laundering Suppression Act, H.R. 3235, at 27:8-24 (titling the section "CRIMINAL PENALTY FOR FAILURE TO COMPLY WITH REGISTRATION REQUIREMENTS—Section 1960(b)(1) of title 18, United States Code, is amended to read as follows" and adding subsection "(B) fails to comply with the money transmitting business registration requirements under section 5329 of title 31, United States Code, or regulations prescribed under such section").

12 *See* Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT Act) Act of 2001, Pub. L. No. 107-56, § 361, 115 Stat. 272, 329 (2001), *available at* https://tinyurl.com/y6hdvsfv.

several key changes to Section 1960: it changed the term "illegal money transmitting businesses" to "unlicensed money transmitting businesses," removed the "intentionally operated" language from subsection 1960(b)(1)(A), and added subsection 1960(b)(1)(C), which defined a third category of "unlicensed money transmitting businesses" that applied irrespective of whether the business was licensed or registered.[13] The result was the statute as it appears now.

In its current form, Section 1960 contains an "operational subsection" in (a), and a "definitional subsection" in (b).[14] In its operational subsection, Section 1960(a) makes it a crime to knowingly operate an "unlicensed money transmitting business." Therefore, "[t]he key phrase in § 1960 . . . is 'unlicensed money transmitting business.'"[15] In its definitional subsection, Section 1960(b) defines an "unlicensed money transmitting business" as, (1) a "money transmitting business" that is, (2) "unlicensed."

As to "money transmitting business," the statute does not explicitly define what that term means.[16] But "[b]reaking that phrase down into its component parts,"[17] "money transmitting" and "business," Section 1960(b)(2) states that the term "money transmitting" "includes transferring funds on behalf of the public by any and all means including but not limited to transfers within this country or to locations abroad by wire, check, draft, facsimile, or courier." The statute "does not provide a particularized definition of 'business.'"[18]

As to "unlicensed," Section 1960(b)(1) "lists three ways in which a 'money transmitting business' can be deemed 'unlicensed'":[19] (A) in violation of a state money transmitting license; (B) in violation of federal registration requirements under Section 5330 and regulations thereunder; and (C) if transporting or transmitting funds that are known to derive from or support unlawful activity.

The plain text supports, and courts have repeatedly confirmed, that "[i]n order to be guilty of a violation of Section 1960 . . . an entity must first, as a prerequisite, be a business that engages in 'money transmitting' as so defined in Section 1960(b)(2)."[20]

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13 *See id*. Sec. 373, 115 Stat. 339 (amending 18 U.S.C. §1960). We note the oddity of subsection 1960(b)(1)(C) defining a money transmitting business as "unlicensed" without any reference to a licensing requirement, and the seeming contradiction of its covering businesses that are in fact licensed as required by state and federal law. Subsection 1960(b)(1)(C) thus appears duplicative of the general money laundering statute, 18 U.S.C. § 1956, by failing to criminalize any conduct that was not already covered by Section 1956 as enacted in the Money Laundering Control Act of 1986. See Pub L. No. 99-570, § 1352(a), 100 Stat. 3207-18 (1986), *available at* https://tinyurl.com/2etpabku.

14 *United States v. Petix*, 2016 WL 7017919, at *3 (W.D.N.Y. Dec. 1, 2016).

15 *United States v. Murgio*, 209 F. Supp. 3d 698, 706 (S.D.N.Y. 2016).

16 *United States v. Wellington*, 2022 WL 3345759, at *7 (D.N.M. Aug. 12, 2022) (noting courts have critiqued the statute for "not explicitly defining 'money transmitting business'").

17 *Murgio*, 209 F. Supp. 3d at 706.

18 *Id*.

19 *Id*.; *see also Wellington*, 2022 WL 3345759 at *7 (the statute "focuses on what would constitute 'unlicensed' by providing three distinct, clear options").

20 *United States v. E-Gold, Ltd.*, 550 F. Supp. 2d 82, 90 (D.D.C. 2008); *see also United States v. Mazza-Alaluf*, 607 F. Supp. 2d 484, 497 (S.D.N.Y. 2009), *aff'd*, 621 F.3d 205 (2d Cir. 2010); *United States v. $215,587.22 in U.S. Currency Seized from Bank Acct. No. 100606401387436 held in the Name of JJ Szlavik Companies, Inc. at Citizens Bank*, 306 F. Supp. 3d 213, 217–18 (D.D.C. 2018).

This is because to be an "unlicensed money transmitting business" the entity must be a "money transmitting business" *and* engage in activities that run "afoul of (1) state law, (2) section 5330's registration requirements, or (3) otherwise implicated the transportation or transmission of funds known to support unlawful activity."[21] Therefore, "[b]y design, the terms of section 1960 contemplate that a defendant may satisfy the definition of an unlicensed money-transmitting business at section 1960(a) and (b)(2), but not meet the criteria for any of the three subsections to section 1960(b)(1)."[22] This paper analyzes the key threshold questions for establishing Section 1960 liability: what exactly "money transmitting" and "business" mean under Section 1960(b)(1).[23]

III. Analyzing what "money transmitting" means under Section 1960

In order to be within the scope of Section 1960, "an entity must first, as a prerequisite, be a business that engages in 'money transmitting' as so defined in Section 1960(b)(2)."[24] Therefore, a threshold question for establishing Section 1960 liability is what exactly "money transmitting" under Section 1960(b)(1) means. As a reminder, Section 1960(b)(2) states that the term "money transmitting" "includes[25] transferring funds on behalf of the public by any and all means." While many courts have analyzed what "funds"[26] and "the public"[27] mean, few have expanded on what the terms "transfer" and "on behalf of" mean.

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21 *Mazza-Alaluf*, 607 F. Supp. 2d at 497.

22 *Id*.

23 Many courts have critiqued Section 1960 as circular, confusing and hard to parse. *See, e.g.*, *Ali*, 2008 WL 4773422 at *12 ("That the statute essentially defines the term 'money transmitting business' as 'money transmitting business' in subsection (b)(1) is among the more glaring problems the statute presents. With the individual terms 'money,' 'transmitting' and 'business' all somehow managing to emerge from this definition with no greater degree of clarity, obvious questions jump to the fore: What constitutes a 'business'? What sorts of instruments fall within the category of 'money,' and which do not? What is 'transmitting'?"); *Petix*, 2016 WL 7017919 at *3 ("Analysis of the statute quickly becomes complicated, though; of all the terms and phrases used in the operational subsection, the definitional subsection partially defines only two of them."). Due to its vagueness and ambiguity, Section 1960 should be vulnerable to challenge on grounds of due process and the rule of lenity. *See* Peter Van Valkenburgh, Coin Center, *Analysis: the disappointing denial of Tornado dev's motion to dismiss* (Oct. 8, 2024), *available at* https://tinyurl.com/3ha55bnh.

24 *See E-Gold*, 550 F. Supp. 2d at 90; *Mazza-Alaluf*, 607 F. Supp. 2d at 497; *United States v. $215,587.22*, 306 F. Supp. 3d at 217–18.

25 While "Congress's use of the word 'includes' generally indicates that what comes next is 'illustrative, not exclusive,'" courts have held that "this is one of the rare statutes where 'includes' should be read as 'means.'" *United States v. $215,587.22*, 306 F. Supp. 3d at 218 (collecting cases). "The language in subsection (b)(2) is so capacious that it is hard to imagine Congress intended it as merely illustrative. That interpretation would leave courts with no meaningful boundary as to what counts as money transmitting; it would potentially sweep in all conduct and make subsection (b)(2) unnecessary." *Id*. This interpretation is also consistent with the legislative history of Section 1960. S. Rep. No. 101–460, at 36 (1990), reprinted in 1990 U.S.C.C.A.N. 6645, 6681 ("'Money transmitting' *means* transferring funds on behalf of the public.") (emphasis added). *But see United States v. Singh*, 995 F.3d 1069, 1077 (9th Cir. 2021) ("We believe that 'includes' deems what follows to be read as a non-exhaustive list of what the statute covers.").

26 *See, e.g.*, *Murgio*, 209 F. Supp. 3d at 707–08.

27 *See, e.g.*, *United States v. Bennett*, 2024 WL 96667, at *5 (E.D. Tex. Jan. 9, 2024).

They are not defined terms, and thus, they take their plain meanings; the "interpretive process . . . ends there."[28]

A. The plain meaning of "transfer[] funds on behalf of" necessitates receipt and transmission, which requires obtaining and relinquishing control over funds.

A party can only "transfer[] funds on behalf" of another if, it *receives* funds by obtaining control over those funds, and *transmits* funds by relinquishing that control. This conclusion is evident from the plain meaning of Section 1960(b)(2).

The Second Circuit case *Bah* demonstrates why. Evidence at trial showed that "certain customers came to Bah's restaurant in the Bronx, delivered U.S. currency, and instructed Bah to deliver the equivalent value of local currency to recipients in West Africa."[29] Bah would then travel with the U.S. currency from New York to New Jersey, where he would transmit it to West Africa. While Bah did not obtain a money transmitting license in New York, he did in New Jersey.

The government charged Bah for violating Section 1960(b)(1)(A), operating an illegal money transmitting business without the proper license in New York. The relevant New York statute "establishe[d] licensing requirements for two distinct activities: '[i] engag[ing] in the business of receiving money for transmission or [ii] transmitting the same.'"[30] In denying a clarifying jury instruction from Bah, the district court held that "'merely receiving money for transmission'" could constitute "money transmitting" to violate Section 1960 because it violated prong (i) of the New York statute.[31]

The Second Circuit disagreed with the district court's conclusion. The court first noted that the "New York statutory prohibition is broader than the federal," and "while New York law prohibits engaging in the unlicensed business of *receiving* money for transmission, federal law does not."[32] Therefore, "[t]o prove a violation of Section 1960, the government was required to come forward with evidence that Bah was in the business of transmitting money from New York during the period charged in the indictment."[33] That is, mere receipt of funds without transmitting those funds was not sufficient to be a money transmitting business under Section 1960 because that did not constitute "money transmitting" under the federal statute.[34]

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28 *United States v. Goklu*, 2023 WL 184254, at *5 n.7 (E.D.N.Y. Jan. 13, 2023) ("First, the term 'transfer' is not so restricted in Section 1960 and, in fact, it is undefined. In this Circuit, a statutory term is generally 'interpreted as taking [its] ordinary, contemporary, common meaning.'").

29 *United States v. Bah*, 574 F.3d 106, 110 (2d Cir. 2009).

30 *Id.* at 112.

31 *Id.* at 113.

32 *Id.* at 114 (emphasis added).

33 *Id.* at 115.

34 *Id.* at 114 (rejecting the government's argument that "receiving money is 'part' of conducting a money transmitting business" as sufficient to establish a 1960 violation; "even accepting the government's analysis, the receipt of money would be prohibited only if it is incident to 'an unlicensed money transmitting business'").

When does a party transition from *receiving* funds to *transferring* them under Section 1960(b)(2)? After all, it was undisputed that Bah would "receive" U.S. currency in his restaurant in New York and drive it across the Hudson to New Jersey before sending it to West Africa.[35] Did the movement of U.S. currency from one location (New York) to another (New Jersey) constitute the "transfer[] of funds on behalf" of the public for the purposes of Section 1960? No, according to the Second Circuit. The reason was that received funds only become transferred on behalf of another under Section 1960(b)(2) when the party relinquishes control over such funds:

> So long as Bah (or his agents) maintained possession of any payments, the movement of the money across state lines would not itself violate the statute, because Section 1960 prohibits the "*transfer*" of money, not the transportation of money by an individual.[36]

The court reasoned that "the receipt of money would be prohibited only if it is incident to 'an unlicensed money transmitting business.' Thus, it would be a defense to the federal charge (not a basis for conviction) that Bah received money in New York (in violation of the New York licensing laws) and transmitted the money via his licensed business in New Jersey."[37] The act of bringing the money from New York to New Jersey, as part of this flow, was not a "transfer" under Section 1960(b)(2). The district court's denial of Bah's jury instruction was therefore in error; the Second Circuit vacated the conviction and remanded the case for a new trial.[38]

Bah clarifies that to "transfer" funds under Section 1960(b)(2), a party must relinquish control over the funds. Logically, for a party to relinquish control, it must first obtain control. This is what it means to "receive" funds: it is the process of a party first obtaining control over funds that might later be part of a transmission. The case *United States v. $1,370,851.62 in United States Currency* demonstrates why.

In *$1,370,851.62 in United States Currency,* an entity named COINSA LLC would: (1) receive invoices from customers in Honduras who owed payment to suppliers in the United States; (2) transfer from its bank account the money to pay those United States suppliers on behalf of the Honduran customers; and (3) after the payment was sent to the suppliers (fulfilling the invoice), the customers would then repay COINSA LLC, who would take a fee for providing the service.[39] The court first established that "both the COINSA LLC and the Government appear to agree that a 'money transmitting business' under § 1960 begins

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35 *Id*. at 108 ("There is no doubt that Bah received money in New York for transmittal abroad; Bah tried to defend on the ground that the money he received in New York was transmitted from New Jersey, and that he was licensed to operate a money transmitting business in that state.").

36 *Id.* at 114 n.6.

37 *Id*. at 114.

38 *Id.* at 119.

39 *United States v. $1,370,851.62 in United States Currency, Seized from Total Bank Acct. No.: XXXXXXXXXX,* 2010 WL 11650916, at *1–3 (S.D. Fla. Oct. 6, 2010). After the magistrate judge's decision recommending granting motion for summary judgment in favor of COINSA LLC rather than the government, the parties settled the dispute and agreed COINSA LLC's money would be returned and the government would pay its legal fees. *See id*. ECF Nos. 99, 100.

with receipt of money from another and then a transmittal of that money to a third party."[40] But the court rejected the government's position "that section 1960 'implicitly' covers COINSA LLC's activities regardless of when it received monies from its clients."[41] The court clarified that to be a money transmitting business under Section 1960, the entity must have "*first* receive[d] money from its clients and then transmit[ted] client funds to suppliers in the United States."[42] Because COINSA LLC had merely received *invoices* from customers before transferring funds — but not the funds themselves — there had been no change in control over funds, and COINSA LLC therefore did not "receive" funds. COINSA LLC's subsequent payment of funds to the suppliers was, therefore, not a "transfer" or "transmittance" under Section 1960 because COINSA LLC did not obtain control over customer funds.

In sum, "money transmitting" under Section 1960(b)(2) — "transferring funds on behalf of" another — is the process of an intermediary receiving funds from a customer it is acting on behalf of and transmitting those funds to another person. An intermediary "receives" funds when there is a change of control over the funds from a customer to the intermediary. An intermediary "transfers" funds when it relinquishes the control it has obtained over those funds to another.

It is therefore unsurprising that circuit courts have adopted a definition of a "money transmitting business" under Section 1960 to mean an entity that receives and transmits funds. For example, the Second Circuit in *Velastegui* defined a money transmitting business as one that "*receives* money from a customer and then, for a fee paid by the customer, *transmits* that money to a recipient in a place that the customer designates, usually a foreign country."[43] Similarly, in *United States v. Banki*, the Second Circuit cited the *Velastegui* definition and held that it was "legally correct" that "[t]o be a 'money transmitting business,' the business must *transmit* money to a recipient in a place that the customer designates, for a fee paid by the customer."[44] In *United States v. Singh*, the Ninth Circuit adopted *Velastegui*'s definition.[45]

These important circuit precedents are not anomalies. Courts have repeatedly recognized that to "transfer[] funds on behalf of" under Section 1960(b)(2), it requires the receipt

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40 *Id.* at *6.

41 *Id.*

42 *Id.*

43 *United States v. Velastegui*, 199 F.3d 590, 592 (2d Cir. 1999) (emphasis added).

44 *United States v. Banki*, 685 F.3d 99, 113, 113 n.9 (2d Cir. 2012), *as amended* (Feb. 22, 2012) (emphasis added). Although the defendant himself did not transmit funds to any third parties, and relied on the hawala to act as an intermediary, *Banki* nonetheless supports the requirement that a business must obtain and relinquish control of funds to engage in money transmission. *Banki* dealt with a type of money transmitting business called a "hawala" — an informal value transfer system in which a sender gives funds to a local hawalader in the sender's jurisdiction, and then a different hawalader in the recipient's jurisdiction pays the same amount to the recipient, minus a fee. The defendant in *Banki* participated as a recipient in the United States; the payments he received corresponded to funds that his family sent to local hawaladers in Iran.

45 *Singh*, 995 F.3d at 1077; *see also Wellington*, 2022 WL 3345759 at *8.

and transmission of funds.[46] Indeed, there does not appear to be a single case where a party was found to be an "unlicensed money transmitting business" under Section 1960, and did not obtain control, and then relinquish control.[47] To further evidence this point, consider the following Section 1960 cases involving digital assets.

In *United States v. Harmon*, a customer would transfer funds from a wallet controlled by the "Darknet" marketplace AlphaBay to a custodial wallet controlled by Helix, to a fresh address or centralized exchange designated by the customer to "'erase any trace of [the customer's] coins coming from AlphaBay."[48] The court held that the "indictment alleges both that Helix enabled transmission of — and that it did transmit — bitcoin between parties" in violation of Section 1960 because a customer's "transaction started at an address controlled by or associated with a Darknet market and ended at a clean address controlled by a mainstream exchange or by the [customer]."[49] In other words, Helix "received" bitcoin from customers by obtaining control over the bitcoin that originated from the Darknet marketplace, and would "transmit" the bitcoin through its relinquishment of control to the clean address.

In *United States v. Faiella*, the court held that the defendant's "'activities on Silk Road constituted 'transmitting' money under Section 1960."[50] The government alleged "that Faiella received cash deposits from his customers and then, after exchanging them for Bitcoins, transferred those funds to the customers' accounts on Silk Road."[51] Again, the court focused on how it was the relinquishment in control that constituted the transfer relevant to Section 1960 — the receipt and transmission of funds — stating: "[t]hese were, in essence, transfers to a third-party agent, Silk Road, for Silk Road users did not have full

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46 *See, e.g.*, *United States v. $829,422.42 in U.S. Currency*, 2013 WL 2446486, at *9 (D. Conn. June 5, 2013) ("[T]he instant case falls squarely in line with the conduct Congress intended to prohibit by enacting section 1960 . . . [the defendant] knowingly accepted and transmitted funds via wire transfers . . . [the] business objective was to receive and obtain wires of funds from various sources in the United States for the purpose of transferring funds via wire transfers to bank accounts of various entities.").

47 In addition to the cases discussed in the body of this paper, we examined all circuit cases that substantively interpret the text of Section 1960, and did not identify a single such case where a party was "money transmitting" under Section 1960 and did not obtain and relinquish control over funds. *See United States v. Altareb*, 758 F. App'x 116, 121 (2d Cir. 2018) (defendant "transferred money to Yemen four times for Saleh and twice for Kassim" and "was arrested in possession of $776,814 at an airport while trying to fly to Yemen"); *United States v. Elfgeeh*, 515 F.3d 100, 109 (2d Cir. 2008) (defendant operated hawala in which money from 12 feeder accounts was "deposited" into defendant's bank account and "large sums of money wired out of the" account "to accounts in 25 other countries"); *United States v. Lopez*, 2021 WL 5750497, at *2 (W.D.N.C. Dec. 2, 2021) (rejecting defendant's argument that government failed to prove existence of a "money transmitting business" under Section 1960 where evidence was presented that "not only was Defendant going to receive the seized parcels, but that he also sent them"), *aff'd on other grounds*, 2024 WL 94101, at *3 (4th Cir. Jan. 9, 2024); *United States v. Talebnejad*, 342 F. Supp. 2d 346, 350 (D. Md. 2004) (defendant operated "entities . . . 'in the business of accepting currency and money for transfer into and out of the United States"), *aff'd and rev'd on other grounds*, 460 F.3d 563, 567 (4th Cir. 2006) (reversing district court on *mens rea* but affirming on "money transmitting"); *United States v. Dimitrov*, 546 F.3d 409, 411 (7th Cir. 2008) (defendants would receive funds through cash or bank transfer and wire the funds to designated recipients abroad); *United States v. Abdullahi*, 520 F.3d 890, 892 (8th Cir. 2008) (defendant "collected money" from customers into his bank accounts and "transferred" and "transmitted" to others).

48 *United States v. Harmon,* No. 19-CR-395 (BAH), ECF No. 1 ¶ 6 (D.D.C. Dec. 3, 2019) (Indictment); *United States v. Harmon*, 474 F. Supp. 3d 76, 103–04 (D.D.C. 2020).

49 *Harmon*, 474 F. Supp. 3d at 104–05.

50 *United States v. Faiella*, 39 F. Supp. 3d 544, 546 (S.D.N.Y. 2014).

51 *Id*.

control over the Bitcoins transferred into their accounts. Rather, Silk Road administrators could block or seize user funds."[52]

In *United States v. Goklu*, the government alleged the defendant "engaged in a series of transactions converting cryptocurrencies, including Bitcoin that an undercover agent represented to Defendant were narcotics-trafficking proceeds, into United States dollars."[53] The defense counsel during closing arguments asserted that the movement of funds from a customer to the defendant and back was not a "transfer" under Section 1960. The court clarified that the "transfer" relevant under Section 1960 occurred not merely from receiving bitcoin from customers, but from receiving that bitcoin and "transferr[ing] cash by hand exchange" back to the customers.[54] The court noted that "nothing on the face of the statute suggests that a transfer of funds from a defendant back to his customer does not qualify as a 'transfer' for Section 1960 purposes."[55] The change in control over the funds was what was relevant, first in who controlled the bitcoin (moving from the customer's control to the defendant's), and then in who controlled the cash (moving from the defendant's control to the customer's).

B. The Tornado Cash court and the government in *Storm* do not properly analyze Section 1960(b)(2)'s requirement that an entity must "transfer[] funds on behalf of the public."

Although the cases above show a clear requirement for control, the Tornado Cash court, on the motion to dismiss the Indictment, held that control was not required:

> Here, this Court agrees with the government that control is not a necessary requirement of the Section 1960 offense . . . the control requirement is not in the statute, and this Court is not going to read it in.
>
> [. . .]
>
> At its core, the Section 1960 offense seeks to prevent the unlicensed transmission of customer funds from one location to another, irrespective of whether the transmitter obtained temporary control over the funds to effectuate the transfers or constructed the transfers specifically in a manner to avoid such control.[56]

While the Tornado Cash court holds that "the control requirement is not in the statute," this interpretation fails to appreciate that control is implicit in what it means to "transfer[] funds on behalf of." As discussed above, for a party to "transfer[] funds on behalf of" another, that party must obtain control over that thing to receive it, and then relinquish

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52 *Id*.

53 *Goklu*, 2023 WL 184254 at *1.

54 *Id*. at *3 n.5.

55 *Id*. at *5 n.7.

56 *See* Storm MTD Order at 21–22.

that control to transmit it.[57] The Tornado Cash court does not attempt to distinguish the above cases on the control point, which is particularly concerning as it relates to *Bah*, *Velastegui*, and *Banki*, all of which are binding Second Circuit precedent in the Southern District of New York, where *Storm* is being heard. Moreover, Storm explicitly cited *Bah* and *Velastegui* in his motion to dismiss, specifically for the control proposition, making it even more egregious that the court did not engage with them.[58]

As background, in its opposition to Storm's motion to dismiss the Indictment, the government argued that the Tornado Cash founders did in fact conspire to operate a money transmitting business. In response to Storm's argument, that this could not be true because the Tornado Cash protocol never took custody of or controlled user funds, and therefore, never "transfer[red] funds on behalf of" users under Section 1960(b)(2),[59] the government argued that the ordinary meaning of "transfer" does not require control:

> Under the ordinary meaning of the word "transfer," there is no requirement that the transferer exercise control over the funds being transferred. For instance, in the very definition cited by the defendant, the word "transfer" means "to convey from one person, place, or situation to another," or "to cause to pass from one to another." These definitions do not require "control" over the thing that is being conveyed or caused to pass from one to another. For instance, a USB cable transfers data from one device to another, and a frying pan transfers heat from a stove to the contents of the pan, although neither situation involves exercising "control" over what is being transferred.[60]

But *Bah* — binding precedent on the Southern District of New York — rejects the government's conclusion that "[u]nder the ordinary meaning of the word 'transfer,' there is no requirement that the transferer exercise control over the funds being transferred . . . the word 'transfer' means 'to convey from one . . . place . . . to another,' or 'to cause to pass from one to another.' These definitions do not require 'control' over the thing that is being

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57 That control is required to "transfer" under Section 1960 should hardly surprise the government as, in a separate Section 1960 case involving digital assets, the government precisely described why control is necessary to "transfer." In *Faiella*, the government's brief in opposition to the defendant's motion to dismiss stated that "by sending his customers' funds to Silk Road, Faiella effected a change in the possession or control over those funds, and in that sense alone, 'transferred' them." *See United States v. Faiella,* No. 1:14-cr-00243 (JSR), ECF No. 37 at 12 (S.D.N.Y. July 25, 2014) (Gov. Br. in Opp. to Def's Motion to Dismiss, hereinafter, "Faiella Gov. Oppo"); *see also United States v. Talebnejad*, 342 F. Supp. 2d 346, 350 (D. Md. 2004), *rev'd in part, appeal dismissed in part,* 460 F.3d 563 (4th Cir. 2006) ("Both entities, according to the Indictment, are 'in the business of *accepting* currency and money *for transfer* into and out of the United States."). This is precisely what it means to "transfer" money under Section 1960, but the government curiously reads out the requirement of control in *Storm*. *See United States v. Storm*, No. 1:23-cr-00430 (KPF), ECF No. 53 (S.D.N.Y. April 26, 2024) (Government Opposition to Defendant Roman Storm's Pretrial Motions, hereinafter, "Storm Gov. Oppo"). In response, the government will likely point to its footnote in this brief where it states: "Although Faiella's business thus involved transfers to a third-party, this is not to suggest that *such transfers* are the only type of transfers covered by Section 1960's 'money transmitting' definition. Faiella appears to concede as much, as he acknowledges that the term 'transfer' encompasses transfers to 'a third party *or location*.'" Faiella Gov. Oppo. at 13 n.3. (emphasis added). But the government's clarification here is not that control is no longer required under other definitions of "transfer," but instead that transfers can be to people *or* locations.

58 Storm MTD at 21.

59 *Id*. at 20–23.

60 Storm Gov. Oppo. at 24 (citations omitted).

conveyed or caused to pass from one to another."[61] The problem with the government's argument is that Bah *did* "convey" U.S. currency "from one . . . place . . . to another" — New York to New Jersey — and the Second Circuit held that was "transportation" of funds, but not the "transfer" of funds in scope of "money transmitting" under Section 1960 because Bah maintained control over the funds at all times.

Unlike the Tornado Cash court, the government did attempt to refute the relevance of some of the above cases by accusing Storm of "selectively quot[ing]" them in support of his argument that "those cases implicitly held that *only* the described facts — and not the facts described above [of how the government alleges Tornado Cash worked] — could constitute money transmitting."[62] The government references Storm's citation to *Bah* and *Velastegui*.

As to *Bah*, the government simply states that it "says nothing about a case like the one here, where the defendant and his co-conspirators operated a business that did engage in large-scale transferring of funds from one person or place to another."[63] But the scale of business operations does not distinguish *Bah* from *Storm*; it is entirely tangential to whether the business must obtain, and relinquish control, to be a money transmitting business under Section 1960. The government simply does not engage with *Bah*'s analysis of control.

As to *Velastegui*, the government attempts to discount the case entirely, stating that its receive and transmit framing "was not a holding of the court; rather, it was in the section of the opinion labeled 'background,' in which the court provided an overview of the facts of that particular case."[64] The government then cites another Southern District of New York case, *United States v. Neumann*, that stated *Velastegui*'s definition is not the definitive test.[65]

There are several problems with the government's argument here. *First*, while the government is correct that *Velastegui*'s definition is geographically located in the "background" section, it is incorrect that it is not a definitive statement of the law. The court applies the very "receive and transmit" definition of "money transmitting" in the *ratio dicidendi* of the opinion around the Section 1960 violation: "section 1960 applies to Defendants because GMJ was transmitting money directly without a license."[66]

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61 *Id.* (citing Storm MTD at 21).

62 *See* Storm Gov. Oppo. at 26.

63 *Id.* at 27.

64 *Id.* at 26–27.

65 *United States v. Neumann*, 2022 WL 3445820, at *6–7 (S.D.N.Y. 2022); *see also Goklu*, 2023 WL 184254 at *5 n.7 ("There is no indication in *Velastegui* or any other decision, that this explanation, which appears in the 'Background' section of *Velastegui*, was intended to define the universe of conduct that qualifies as money transmitting under Section 1960.").

66 *Velastegui*, 199 F.3d at 595.

Specifically, GMJ engaged in a business of "collecting money . . . left for transmission by its principals" and then "sen[ding]" those funds to third parties.[67] As the definition in the "background" section states, this business is a money transmitting business because it "receives money from a customer and then . . . transmits that money to a recipient in a place that the customer designates."[68]

Second, the overwhelming majority of courts citing *Velastegui have* relied on it as the definitive test for what it means to be a "money transmitting business" in Section 1960 case law.[69] The government does not address this precedent, let alone explain why these cases are wrong for following *Velastegui*'s holding.

Third, *Neumann*, the case the government cites for stating *Velastegui*'s definition was made in "*dicta*," applied *Velastegui*'s definition "assuming without deciding that" it controlled and demonstrated that the defendant's "alleged scheme involved Defendant first receiving money [and] . . . then . . . transmit[ting] the money" to a recipient.[70]

Additionally, the government's review of the plain meaning of "transfer," primarily through the use of analogies, is a sleight of hand that only confuses the statutory interpretation: "[f]or instance, a USB cable transfers data from one device to another, and a frying pan transfers heat from a stove to the contents of the pan, although neither situation involves exercising 'control' over what is being transferred."

First, the government's analogies confuse what "transfer" means in Section 1960(b)(2) because while the transfer of heat and electricity is governed by *physics,* the transfer of funds is governed by *who controls it*. In the USB and frying pan analogy, for example, it may make sense to say that atoms or energy moving from one place to another through a conduit constitutes a "transfer." That said, the act of physical movement alone does not constitute a "transfer" in the context of money; we would never say that bringing your purse from one room to another in your house has resulted in a "transfer," even though there has been movement of funds in physical space. It is the change in physical (and legal) *control* of the money that results in a transfer, not its movement through space alone. This is why even though funds were moved from New York to New Jersey in

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67 *Id*. at 592.

68 *Id*.

69 *See, e.g.*, *Wellington*, 2022 WL 3345759 at *8 (noting that "the receipt of a fee is a fact required to prove a business under [Section 1960]" and citing *Velastegui*; the requirement of a "fee" is nowhere directly stated in the statute, but instead comes from *Velastegui*'s definition of a "money transmitting business," meaning the court adopted satisfying *Velastegui*'s test as required for a Section 1960 violation).

70 *Neumann*, 2022 WL 3445820 at *7. The government's reliance on *Neumann* is also curious because that court cites Section 5330(d)'s definition of a "money transmitting business" to understand what "transferring funds" under Section 1960 means; however, as discussed below, the government explicitly rejects that approach in its brief in *Storm*. *Id*. (citing Section 5330(d)'s definition of "money transmitting business" to include cash checking and that "it stands to reason that even Defendant's own characterization of his own conduct as a 'reverse form of check cashing' could constitute 'transferring funds' under 18 U.S.C. § 1960"). It is not clear why the government insists the Tornado Cash court should heed to *Neumann* for the proposition that *Velastegui*'s definition is *dicta*, while ignoring it for the role of Section 5330 in Section 1960.

Bah — just like electrons and heat move from one place to another in the government's analogies — the funds did not "transfer," but were "transported." What it means to "transfer" is entirely contingent upon the thing being transferred, and using an analogy of an irrelevant "thing" does nothing to illuminate what transfer means in the context of "funds" in Section 1960(b)(2).

Second, the government describes the word "transfer" in a vacuum, ignoring the phrase "on behalf of" from Section 1960(b)(2). But inanimate objects like USB cables and frying pans do not have any agency to transfer data or heat "on behalf of" people. It is *people* who can *use* inanimate objects to transfer "on behalf of" other people, but such people must be in control of the thing being transferred to act on behalf of another. Under the government's analogy, Bah's *car* would "transfer" funds "on behalf" of Bah from New York to New Jersey, which is a plainly absurd result.

C. Any doubt that a money transmitting business under Section 1960 necessitates control is resolved by looking to Section 5330.

1. While Section 1960 does not import the definition of "money transmitting business" from Section 5330, it — and regulations and guidance interpreting it — are probative for understanding the plain meaning of "transmitting," which has the same meaning in Section 1960 and Section 5330.

Section 5330 defines the federal registration requirement for money transmitting businesses. The statute defines a "money transmitting business" to include a "money transmitting service," which includes "accepting currency, funds, or value that substitutes for currency and transmitting the currency, funds, or value that substitutes for currency by any means."[71] Section 5330 is explicitly referenced in Section 1960(b)(1)(B).

Some defendants to a Section 1960 charge have argued that because the term "money transmitting business" is only defined in Section 5330,[72] and not in Section 1960, Section 1960 should import the definition of that term from Section 5330. It does not.

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71 31 U.S.C. § 5330(d).

72 "Section 5330 was enacted as part of the Bank Secrecy Act . . . and was intended to provide an investigative tool for criminal, tax and regulatory matters." *Mazza-Alaluf*, 607 F. Supp. 2d at 493. With its direct reference to Section 5330 in Section 1960(b)(1)(B), Section 1960 acts in part as an enforcement vehicle for that statute. *See* 31 C.F.R. § 103.41(e) (describing section 1960 as establishing "a criminal penalty for failure to comply with the registration requirements of 31 U.S.C. 5330 or this section"); *Mazza-Alaluf*, 607 F. Supp. 2d at 496.

Section 5330 uses the exact same term as Section 1960(b), "money transmitting business," and defines it as: "[a]ny person who owns or controls a money transmitting business shall register the business (whether or not the business is licensed as a money transmitting business institution in any State) with the Secretary of Treasury." It further provides that a "money transmitting business" is one that:

(A) provides check cashing, currency exchange, or money transmitting or remittance services, or issues or redeems money orders, travelers' checks, and other similar instruments or any other person who engages as a business in the transmission of funds, including any person who engages as a business in an informal money transfer system or any network of people who engage as a business in facilitating the transfer of money domestically or internationally outside of the conventional financial institutions system;

(B) is required to file reports under section 5313; and

(C) is not a depository institution (as defined in section 5313(g)).

In *E-Gold v. United States*, the defendant was "an issuer of digital currency known as 'e-gold'"[73] The defendants acted as a digital currency exchanger, "tak[ing] national currency from account holders and exchang[ing] it for e-gold" and vice-versa.[74] The defendants were charged with violating Section 1960. The defendants argued on a motion to dismiss that: (1) a "money transmitting business" under Section 5330 only applies to entities that transfer cash; (2) E-Gold did not transfer cash; (3) the definition of "money transmitting business" in Section 1960 borrows from Section 5330; and (4) E-Gold was not a "money transmitting business" under Section 5330, so it could not be an "unlicensed money transmitting business" under Section 1960.[75] The court rejected this argument and held that the term "money transmitting business" in Section 1960 does not borrow its definition from Section 5330, and therefore, the motion to dismiss must be denied. Among the reasons why, the court highlighted that Congress did not include a definition of "money transmitting business" in Section 1960 when it easily could have and that the definition of "money transmitting business" in Section 5330 states that it is "[f]or the purposes of this section," meaning it should be given that definition only in that section.[76]

In *Mazza-Alaluf v. United States*, the defendant operated a Chilean business that engaged in various services, including relaying payments and exchanging currency for customers.[77] After a bench trial found him guilty of violating Section 1960, the defendant appealed to the Second Circuit. The defendant argued that: (1) a "money transmitting business" under Section 5330 only applies to "domestic financial institutions"; (2) the relevant entity was a company whose office and employees were located in Chile, so it was not a "domestic financial institution"; (3) the definition of "money transmitting business" in Section 1960 borrows from Section 5330; and (4) the defendant was not a "money transmitting business" under Section 5330, so it could not be an "unlicensed money transmitting business" under Section 1960. Like *E-Gold*, the court rejected this argument and held that the term "money transmitting business" in Section 1960 does not borrow its definition from Section 5330, and upheld the defendant's conviction.[78] The court's reasoning closely tracked *E-Gold*, including concerns that such an interpretation would render the definition of "money transmitting" in Section 1960 "superfluous," violating canons of statutory construction.[79]

E-Gold and *Mazza-Alaluf* are mirror images of each other, and their conclusion that the definition of a "*money transmitting business*" in Section 1960 is not borrowed from Section 5330 is well-supported. Principles of statutory interpretation highlighted by these cases,

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73 *E-Gold*, 550 F. Supp. 2d at 85.

74 *Id*.

75 *Id*. at 99 n.18.

76 *Id.* at 92.

77 *Mazza-Alaluf*, 607 F. Supp. 2d at 486–87.

78 *United States v. Mazza-Alaluf*, 621 F.3d 205, 210 (2d Cir. 2010) ("Mazza–Alaluf contends that for him to be guilty of violating § 1960(b)(1)(A), the government was required to prove that Turismo was a 'money transmitting business,' as defined by 31 U.S.C. § 5330(d)(1)(B), because that statute contains the only definition of 'money transmitting business' in the United States Code. We are not persuaded.").

79 *E-Gold*, 550 F. Supp. 2d at 92–93.

such as the rule against surplusage, and the fact that Section 5330(d) states "[f]or purposes of this section," are compelling. And as a practical matter, there are clearly entities that Section 5330 chose not to subject to its procedural requirements, such as depository institutions, which are explicitly carved out from the definition of a "money transmitting business" in Section 5330(d). It would be nonsensical to conclude that a depository institution — the quintessential entity involved in the transfer of money on behalf of the public — could not violate Section 1960(b)(1)(C), simply because it is carved out from the definition of "money transmitting business" in Section 5330. Depository institutions need not be subject to Section 5330's definition because their anti-money laundering oversight is covered in other sections of the BSA.[80] While Section 5330 and Section 1960 are intimately related, they have different objectives. Section 5330 is a procedural statute, and "Section 1960 acts in part as an enforcement vehicle for section 5330."[81]

Yet, even though Section 1960 does not adopt the definition of "money transmitting business" from Section 5330, it nonetheless makes sense to draw on Section 5330 case law and the Department of the Treasury's Financial Crimes Enforcement Network ("FinCEN") regulations and guidance to explain the meaning of "money transmission" in Section 1960. The court in *E-Gold* itself recognized that "there is virtually no substantive difference, nor did Congress intend there to be a substantive difference, between the terms 'money transmitting' in Section 1960 and 'money transmitting business' in Section 5330."[82] The court explained that "[t]he actual definition of a 'money transmitting business' under Section 5330 tracks the language of Section 1960 so closely . . . as to be virtually indistinguishable."[83] In other words, the term "transmit" must mean the same thing in both Section 1960, and Section 5330, because the verb takes its plain meaning. Any conclusion otherwise "would create a regulatory lacuna,"[84] given that Section 1960 is meant to be an enforcement tool for violating Section 5330.[85]

2. The Tornado Cash court and the government in *Storm* do not properly analyze how Section 5330 relates to Section 1960.

The Tornado Cash court and the government do not properly analyze how Section 5330 relates to Section 1960; they both misquote the defendant's brief as to what exactly is

80 *See* 31 U.S.C. § 5318(h).
81 *Mazza-Alaluf*, 607 F. Supp. 2d at 496.
82 *E-Gold*, 550 F. Supp. 2d at 92 n.10; *See also United States v. Harmon*, 474 F. Supp. 3d at 101.
83 *E-Gold*, 550 F. Supp. 2d at 92 n.10.
84 *Goklu*, 2023 WL 184254 at *5 n.7 ("Finally, Defendant's interpretation of the statute would create a regulatory lacuna: Section 5330 would require currency exchange businesses to be licensed, but Section 1960 would attach no penalty for their failure to do so because such businesses are not engaged in 'transfers.' Thus, for these reasons . . . were the Court to consider Defendant's argument about the proper interpretation of Section 1960, it would have rejected that argument.").
85 *See* 31 C.F.R. § 103.41(e); *Mazza-Alaluf*, 607 F. Supp. 2d at 496.

"coextensive" between Section 1960 and Section 5330, which led them to ignore the real import of Storm's argument.[86]

Storm argued that the definition of "money transmitting business" in Section 1960 is "coextensive" with the definition in Section 5330:

> Section 1960's definition of a "money transmitting business" has been interpreted to be coextensive with the BSA's [Section 5330] definition of that same phrase . . . . Therefore, it is the regulatory definition of money transmitter, promulgated by the Secretary [of Treasury], that bears the most relevance in this case.[87]

The Tornado Cash court purported to disagree with this conclusion:

> And so on this point, I won't get into the minutia of all the various definitions, except to disagree, to the extent that anyone, including Mr. Storm, is arguing that the definitions of "money transmitting" in Sections 1960 and 5330 are co-extensive. I do not believe that to be the case.[88]

Similarly, the government purported to counter the defendant's argument, citing *E-Gold* and *Mazza-Alaluf*, and argued that Section 5330 "would only apply" to the Section 1960(b)(1)(B) claim, not the (C) claim:

> In his brief, the defendant suggests that the definition of "money transmitting" in Section 1960 is "coextensive" with the definition in Section 5330. That is wrong. While the two definitions are plainly similar, to the extent there is any difference between them that is relevant here, that difference would only apply to the Indictment's Section 1960(b)(1)(B) theory. However, Section 1960 has its own definition of "money transmitting," and "Section 1960 does not borrow the

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86 Much has been made of the use of the word "coextensive." It seems the Tornado Cash court, and the government, believe Storm used it to mean the term "money transmitting business" in Section 1960 must be explicitly borrowed from Section 5330 because it is used in both places. *See* Storm MTD Order at 20; Storm Gov. Oppo. at 19 n.4 (but also acknowledging "the two definitions are plainly similar"). However, Storm's argument is better understood as arguing the term is "substantively coextensive" and acknowledging the reality that Congress's choice to use the same term in two different statutes was not a coincidence and it is, therefore, helpful to look to see how the term is used and interpreted under Section 5330 and related provisions.

Cambridge Dictionary defines "coextensive" as: "reach[ing] the same limits or cover[ing] the same area." *See* Cambridge Dictionary, Coextensive, https://tinyurl.com/22txvjd5 (last visited Nov. 6, 2024). In other words, a "business" that engages in "money transmitting" under Section 1960 overall would cover the same kinds of businesses as a "money transmitting business" defined in Section 5330 (except as otherwise exempted from that provision). This meaning of "coextensive" makes much more sense considering that Section 1960 is meant as an enforcement tool for Section 5330. *See Mazza-Alaluf*, 607 F. Supp. 2d at 496; 31 C.F.R. § 103.41(e) (describing section 1960 as establishing "a criminal penalty for failure to comply with the registration requirements of 31 U.S.C. 5330 or this section"). If the opposite were true — if a business that engages in "money transmitting" under Section 1960 was subject to criminal penalty for doing something totally different from a Section 5330 "money transmitting business" — that would not make Section 1960 an effective "enforcement tool" for Section 5330.

87 Storm MTD at 19–20 (emphasis added).

88 Storm MTD Order at 20 (emphasis added).

> definition of 'money transmitting business' from Section 5330." *United States v. E-Gold, Ltd.*, 550 F. Supp. 2d 82, 89 (D.D.C. 2008); *see also United States v. Mazza-Alaluf*, 621 F.3d 205, 210 (2d Cir. 2010) . . . . Accordingly, even if the Court were to accept the defendant's arguments for a narrow reading of the definition of money transmitting in Section 5330 and its implementing regulations, that would only apply to the Indictment's allegation that the defendant conspired to violate Section 1960(b)(1)(B), and would not apply to the allegation that the defendant conspired to violate Section 1960(b)(1)(C).[89]

The Tornado Cash court and the government's error is apparent: Storm argued that the term "money transmitting *business*" is "coextensive" between Section 5330 and Section 1960, but the government and the Tornado Cash court instead represented Storm as arguing "money transmitting" is coextensive, stopping the analysis there and stating that was incorrect. But these terms are very different things. The two cases the government cites for its conclusion, *E-Gold* and *Mazza-Alaluf*, *do* stand for the proposition that the definition of "money transmitting business" in Section 5330 is not imported into Section 1960. But they *do not* support the proposition that "money transmitting," the verb itself, is different between the statutes. It is the government's own cited case, *E-Gold*, that makes clear that "there is virtually no substantive difference, nor did Congress intend there to be a substantive difference, between the terms 'money transmitting' in Section 1960 and 'money transmitting business' in Section 5330."[90] The Tornado Cash court does not even engage with the difference between a "money transmitting business" and "money transmitting" across both statutes, and while the government does offer some analysis on this point, it never refutes that to "transmit" money means the same thing in both Section 5330 and Section 1960.

This incorrect conclusion about the relevance of Section 5330 led the Tornado Cash court to ignore FinCEN regulations and guidance issued in relation to Section 5330, even though both are relevant to unpack the plain meaning of "transmitting" funds in Section 1960.[91] Courts have repeatedly looked to Section 5330, FinCEN regulations, and FinCEN's guidance, for this precise purpose of understanding what "money transmitting" means *under Section 1960(b)(2)*.[92] These sources repeatedly confirm that transmission of funds is the act of obtaining and relinquishing control.

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89 Storm Gov. Oppo. at 19 n.4 (emphasis added and cleaned up).

90 *E-Gold*, 550 F. Supp. 2d at 92 n.10.

91 The Tornado Cash court did superficially engage with 2019 FinCEN Guidance, but *not* to understand what the "transmission" of funds means under Section 1960. For example, the court rejected the defendant's argument that this guidance demonstrates control is required because, while the wallet section of such guidance explicitly mentions control, "[t]he section addressing cryptocurrency mixing services does not similarly require control." Storm MTD Order at 22. But simply noting this section does not use the word "control" is not the same thing as using the guidance to understand what "transmission" means. This section makes it very clear that anonymizing service providers must "accept[] value from a customer and transmit[] the same or another type of value to the recipient" to engage in money transmission. FinCEN, FIN-2019-G001 Application of FinCEN's Regulations to Certain Business Models Involving Convertible Virtual Currencies (May 9, 2019) 20, *available at* https://tinyurl.com/245626v5. As discussed at length in this paper, to accept and transmit requires the obtaining and relinquishing of control.

92 *See, e.g.*, *United States v. Stetkiw,* 2019 WL 417404 at *2 (E.D. Mich. Feb. 1, 2019) ("That Stetkiw's transactions constitute 'money transmitting' under § 1960 is confirmed by an interpretive 'Guidance' issued by" FinCEN).

IV. Analyzing what "business" means under Section 1960

A. The plain meaning of the term "business" requires a commercial money transmitting enterprise that performed multiple transmissions of money in exchange for a fee paid by a customer.

In order to determine whether an entity is operating an unlicensed money transmitting business for the purposes of Section 1960, the court must also analyze whether the entity is running a "business" in the first place. While it may seem like an obvious analysis on its face — and courts generally agree that the term "business" should be afforded its plain meaning — there is significant nuance to the inquiry. Below, we identify three factors for assessing whether an entity is operating a money transmitting "business."

To begin with, it is clear from the plain language of Section 1960 that it is not sufficient for the government to prove an individual is engaged in unlicensed "money transmitting" alone.[93] Instead, to be found guilty of violating Section 1960, a person must be in the "business" of "money transmitting" without a license. Section 1960(a) penalizes any person who "knowingly conducts, controls, manages, supervises, directs or owns all or part of an unlicensed money transmitting *business*," where, under subsection (b)(1), the term "unlicensed money transmitting *business*" means a "money transmitting *business* which affects interstate or foreign commerce" and meets additional criteria.[94] Putting aside that this language is clearly circular, and the term "business" is not separately defined while "money transmitting" is,[95] the repetition of the term "business" in each relevant subsection of Section 1960 and its connection to an individual's active conduct ("knowingly conducts, controls, manages . . . [a] business"), show that the term is a necessary component of a Section 1960 violation. Nor does the statute criminalize simply engaging in "money transmitting" or owning a money transmitter.[96] Instead, the statute clearly targets an individual actively operating a "business" that is money transmitting without a license.

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93 *See* 18 U.S.C. § 1960.

94 *Id*. (emphasis added).

95 *Accord Ali*, 2008 WL 4773422 at *12 ("That the statute essentially defines the term 'money transmitting business' as 'money transmitting business' in subsection (b)(1) is among the more glaring problems the statute presents. With the individual terms 'money,' 'transmitting' and 'business' all somehow managing to emerge from this definition with no greater degree of clarity, obvious questions jump to the fore: What constitutes a 'business'? . . . What is 'transmitting'?").

96 *See* 18 U.S.C. § 1960; *see also E-Gold*, 550 F. Supp. 2d at 89–90.

The statutory history also supports the notion that Congress intended Section 1960 to criminalize operating an unlicensed money transmitting "business" of substantial size, rather than one-off, incidental examples of money transmission.[97] Section 1960 was modeled on 18 U.S.C. § 1955, titled "Prohibition on illegal gambling business," "which makes it a federal crime to operate a gambling *business* in violation of state law."[98] "Although Congress could have made all instances of gambling illegal" when it enacted Section 1955 as part of the Organized Crime Control Act of 1970, it instead "used the term 'business' because it evidently sought to proscribe only large-scale illegal gambling operations."[99] Since Section 1960 was modeled on Section 1955, Congress's decision to use the term "business" after "money transmitting" in Sections 1960(a) and (b)(1) indicates that the statute was "designed to tackle large-scale operations as opposed to small-scale or individual money transmitters."[100]

So what constitutes a money transmitting "business"? Courts agree that since Section 1960 does not define the word "business" as a separate term, under standard principles of statutory interpretation, it "should be afforded its ordinary meaning as an enterprise that operates for profit."[101] Many courts have also called the term "self-explanatory," yet still later analyze the factual record for support that a defendant was operating a "business."[102] That scrutiny is necessary because the facts presented by a particular case may not provide such a clearcut example of running a "business" that engages in money transmitting. For example, if a defendant runs a law firm that happens to engage in money transmitting for a client in exchange for compensation, is the defendant operating a "money transmitting business"?[103] Or if the defendant performs one or two instances of money transmission for close friends and family, is the defendant in the

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97 *See E-Gold*, 550 F. Supp. 2d at 89–90*; Bah,* 574 F.3d at 112 (distinguishing New York money transmitting statutory prohibition as "broader than the federal" and Section 1960 "was enacted in order to combat the growing use of money transmitting businesses to transfer large amounts of the monetary proceeds of unlawful enterprises") (quoting *Velastegui,* 199 F.3d at 593).

98 *See E-Gold*, 550 F. Supp. 2d at 89–90 (discussing statutory history) (emphasis added).

99 *Id*.

100 *Id*.; *Singh*, 995 F.3d at 1078 ("Given the numerosity, scale, and frequency of Singh's transactions, a jury could reasonably have concluded that his conduct was what Congress intended to proscribe and what the statute in fact proscribes. Singh, after all, was not a small-time hawala courier who limited his dealings to a small circle of family and friends: he was involved in dozens and dozens of transactions.").

101 *Banki*, 685 F.3d at 113–14 ("giving the term 'business' its 'plain and unambiguous' meaning") (citing *inter alia* Merriam–Webster's Collegiate Dictionary 1067 (10th ed. 2000) (defining "business" as "a commercial or sometimes an industrial enterprise")); *see also Mazza-Alaluf*, 607 F. Supp. 2d at 489 (citing Black's Law Dictionary (8th ed. 2004) (defining business as "[a] commercial enterprise carried on for profit")); *Ali*, 2008 WL 4773422 at *13 (citing Black's Law Dictionary 192 (7th ed.1999) (defining "business" as "a commercial enterprise carried on for profit")).

102 *See, e.g., Banki*, 685 F.3d at 113–14 ("While we largely agree with the district court that the term 'business' is self-explanatory, we conclude that the district court erred in its charge here" and going on to analyze the record supporting whether defendant operated a "business"); *Mazza-Alaluf*, 607 F. Supp. 2d at 489–91; *Ali*, 2008 WL 4773422 at *13; *Wellington,* 2022 WL 3345759 at *8.

103 At least one case says yes. *See Bennett*, 2024 WL 96667 at *5 (holding government proved defendant was running an unlicensed money transmitting business because he transferred funds on behalf of two clients "for compensation" in an effort to assist them in concealing funds: "[a]nd here, the uncontroverted evidence showed that Bennett was transmitting (and receiving) funds on behalf of his law firm clients . . . for compensation . . . . The transfers, moreover, occurred 'as part of a commercial or business relationship,' not with Bennett's 'own money or for family or personal acquaintances'").

"business" of money transmitting?[104] It is even more difficult to determine whether a particular defendant is operating a "business" when the evidence shows they set out to create a digital asset protocol that enables peer-to-peer financial transactions versus something closer to a traditional financial institution.

From analyzing the cases that interpret the term "business" in Section 1960, there are three elements that courts routinely look for in deciding whether an entity qualifies as a "business." As detailed below, the government must prove the defendant: (1) operated a commercial enterprise established for money transmitting; (2) conducted multiple transmissions of money; and (3) received a fee paid by a customer in exchange for money transmitting services.

First, the defendant must operate a commercial enterprise whose purpose includes money transmitting.[105] In other words, the defendant cannot be running a business to create widgets that also happens to engage in a few instances of money transmission, but rather, must be running a business that is in a commercial relationship with its customers *to do* money transmission.[106] While it may be the case that the defendant operates a business that performs other services as well, money transmitting must be "among the suite of services he has provided" to suffice for a Section 1960 violation.[107]

Second, the defendant must conduct more than one "single, isolated transmission of money."[108] There is unequivocal precedent that the defendant's commercial enterprise

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104 Very unlikely. *See United States v. $215,587.22*, 306 F. Supp. 3d at 218 ("Rather, the most natural reading of the phrase is that the money transmissions must be made for third-parties or customers as part of a commercial or business relationship, instead of with one's own money or for family or personal acquaintances."); *see also Singh*, 995 F.3d at 1077–78 (to constitute a money transmitting business, the transfers "must occur within a transactional, business dealing or for a member of the broader community rather than within a personal or close relationship").

105 *See Bah*, 574 F.3d at 109 (distinguishing between a conviction "for operating an unlicensed money transmitting business, which is prohibited by federal law" under Section 1960 and "engaging (without a license) in the business of receiving money for transmission, which is prohibited by New York law, but not federal law"); *Singh*, 995 F.3d at 1077–78 (to constitute a money transmitting business, the transfers "must occur within a transactional, business dealing or for a member of the broader community rather than within a personal or close relationship").

106 *See Bah*, 574 F.3d at 114 ("However, even accepting the government's analysis, the receipt of money would be prohibited only if it is incident to 'an unlicensed money transmitting business.' Thus, it would be a *defense* to the federal charge (not a basis for conviction) that Bah received money in New York (in violation of the New York licensing laws) and transmitted the money via his licensed business in New Jersey."); *see also Ali*, 2008 WL 4773422 at *13, 13 n.7 (noting "[a]bsent evidence of a commission paid by the transmitter to the payer, the government would have at best shown the creation of a home-grown Yemeni-American UPS, not requiring [an MSB] license" and "the evidence offered in support of these charges-mainly Ali's business ledgers-arguably left a genuine question as to whether it proved the existence of money transmitting business or merely a separate lending operation"); *see also Bennett*, 2024 WL 96667 at *5 (defendant lawyer transferred funds on behalf of clients to assist them in concealing payments "as part of a commercial or business relationship") (citing *United States v. $215,587.22*, 306 F. Supp at 218).

107 *See United States v. $215,587.22*, 306 F. Supp. 3d at 215 (government sufficiently alleged defendant ran an unlicensed money transmitting business where defendant ran "government-affairs and public-relations 'consultancy'"; "[w]hile Szlavik may offer bona fide professional services to his clients, the complete nature of his business activities remains disputed at this stage. The government's theory is that among the suite of services he has provided is money transmitting").

108 *Banki*, 685 F.3d at 113–14 ("Thus, to find a defendant liable for operating an unlicensed money transmitting business, a jury must find that he participated in more than a 'single, isolated transmission of money.'") (citing *Velastegui*, 199 F.3d at 595 n.4); *accord Neumann*, 2022 WL 3445820 at *5 (citing *Velastegui* and *Banki* for the proposition that a "business" means the jury must find that the defendant participated in more than one isolated transmission of money).

must have actually performed multiple instances of money transmission. For example, in *Velastegui*, the Second Circuit held that "an agent could [not] face federal criminal prosecution [under Section 1960] . . . for an isolated instance of improper transmittal of money" because "section 1960(a) requires that the unlicensed entity be 'an illegal money transmitting business.'"[109] This comports with the statutory history discussed above, which evidences that Congress intended Section 1960 to penalize "large-scale" money transmitting operations, rather than smaller enterprises, or one-off transmissions of money. While no minimum threshold has been set for how many money transmissions need to occur before the pattern becomes a "business," it is clear that the defendant must engage in money transmitting on behalf of the public multiple times.[110]

Third, the defendant's customers must pay a fee to the "business" in connection with the money transmitting service.[111] Courts analyzing "business" in Section 1960 interpret its plain meaning to include that a fee is required: "[t]hat a fee paid by the customer to the transmitter and a commission by the transmitter . . . would be required comports with the commonsense definition of a business."[112] The fee must be *incidental* to the money transmitting service, meaning the customer must pay a fee to the money transmitter for the money transmitting service, rather than for some unrelated purpose.[113]

B. Neither the Tornado Cash court nor the government properly analyzed whether the Tornado Cash founders operated a money transmitting "business."

Applying the above test for a Section 1960 "business" to the Tornado Cash court's opinion on the defendant Storm's motion to dismiss the Indictment, the court conducted an incomplete analysis of whether Storm was running a money transmitting "business." The government, in its opposition to Storm's motion to dismiss the Indictment, only discussed whether the Tornado Cash "service" resulted in some kind of profit or financial gain to

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109 *Velastegui*, 199 F.3d at 595 n.4.

110 *See, e.g., Altareb*, 758 F. App'x 116 at 120–21 (affirming conviction for violating Section 1960 where defendant made six transfers on behalf of two individuals); *Singh*, 995 F.3d at 1078 (affirming conviction: "Singh, after all, was not a small-time hawala courier who limited his dealings to a small circle of family and friends: he was involved in dozens and dozens of transactions. For example, he picked up hundreds of thousands of dollars from Taran on 30–35 occasions, and he made 10–15 deliveries on Isshpunani's behalf in amounts between $100,000 and $800,000").

111 *Singh*, 995 F.3d at 1077 (adopting Second Circuit definition in *Velastegui*); *Banki*, 685 F.3d at 114 ("[U]nder § 1960 a 'business' is an enterprise that is carried on for profit or financial gain.") (citing Merriam–Webster's Collegiate Dictionary 1067 (10th ed. 2000) (defining "business" as "a commercial or sometimes an industrial enterprise") and *Velastegui*, 199 F.3d at 592); *Wellington*, 2022 WL 3345759 at *8 ("Indeed, the receipt of a fee is a fact required to prove a business under this statute.") (citing *Velastegui*, 199 F.3d at 592).

112 *See Ali*, 2008 WL 4773422 at *13 (citing Black's Law Dictionary 192 (7th ed.1999)); *accord Wellington,* 2022 WL 3345759 at *8 ("Nevertheless, the term 'business' is self-explanatory . . . [i]t does require the receipt of a fee, but this goes without saying because businesses are, by nature, enterprises carried out for financial gain.") (citing *E-Gold,* 550 F. Supp. at 88; *Banki*, 685 F.3d at 114).

113 *See Banki*, 685 F.3d at 113 (reiterating the definition in *Velastegui*, the Second Circuit reversed the district court's denial to instruct the jury that a money transmitting business was an enterprise that is conducted for a fee or profit); *see also Velastegui*, 199 F.3d at 592 (noting that the typical "money transmitting business" transaction ends when "transmitter then remits to the payer the amount paid to the designee, *plus the payer's commission*") (emphasis added); *Ali*, 2008 WL 4773422 at *13 ("The government essentially charged the defendants with concocting a home-grown Yemeni-American version of Western Union, requiring a New York State money transmitting license. Even the showing of a fee by the customer might not prove that. Absent evidence of a commission paid by the transmitter to the payer, the government would have at best shown the creation of a home-grown Yemeni-American UPS, not requiring such a license.").

the founders, without further analysis.[114] Both the court and the government grouped together distinct entities with some connection to the supposed Tornado Cash "service" to conclude that because the Tornado Cash founders allegedly made money, nothing more was needed to establish they ran a "business."[115] That said, this analysis is plainly insufficient to hold that the software developers were actually in the "business" of money transmission.

The government did not allege, and the court did not imply, that the Tornado Cash developers created a commercial enterprise with the *objective* of providing money transmitting services — the first factor. In fact, the Indictment acknowledges the contrary — the software developers set out to build a privacy-preserving software protocol that would allow users to engage in self-directed peer-to-peer transactions.[116] The protocol was always intended to be, and indeed was, self-custodial, meaning users never gave up control or custody of their funds to Tornado Cash. Therefore, as explained above, it could not have been the *goal* of the "business" to engage in "money transmitting" (to "transfer funds *on behalf of* the public") for the purpose of Section 1960.

This failure to establish that Tornado Cash provided money transmitting services is also fatal to the second factor. As discussed in Section III(B) of this paper, the government did not allege that Tornado Cash had the requisite control over funds necessary to be "money transmitting" under Section 1960(b)(2), and therefore, it obviously did not allege that the protocol did so multiple times, sufficient to be a "business."

The third factor, that a customer pays a fee to the money transmitter for the money transmitting service, is the only factor the Tornado Cash court purports to address. The court concludes that the government need not allege that Storm received a fee for money transmitting to meet their burden of showing a money transmitting business, explicitly "rejecting . . . that the government was required to allege that [Storm] or his colleagues or Tornado Cash charged a fee for money transmitting services."[117] This conclusion is incorrect as a matter of law. Numerous courts have analyzed Second Circuit precedent on the necessity of a fee for a Section 1960 violation, explicitly concluding that they are bound by *Velastegui*'s requirement that an entity must charge a fee, or make a profit *in exchange for money transmitting* to constitute a "business."[118]

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114 Gov. Opp. to Storm's MTD at 35–36.

115 *See* Storm Oral Decision on MTD Tr. at 24–25; Gov. Opp. to Storm's MTD at 35.

116 *See* Indictment ¶ 1, 9–11.

117 Storm Oral Decision on MTD Tr. at 24. In its opposition brief, the government argued that alleging Storm "charged a fee" is not needed because it is only "one way" of showing that a defendant was running a "commercial enterprise" and the "true hallmark of a business is the pursuit of profit." Gov. Opp. to Storm's MTD at 35.

118 *See, e.g.*, *Banki*, 685 F.3d at 114 (citing *Velastegui* two times *for this exact sentence*: "A money transmitting business receives money from a customer and then, *for a fee paid by the customer,* transmits that money to a recipient" (emphasis in original)); *Ali*, 2008 WL 4773422 at *13 (considering and rejecting the government's "dubious" theory that *Velastegui* did not constitute a "clear holding, on a specifically raised issue, as to the reach of 18 U.S.C. § 1960" that a fee is required for a "business"); *Wellington*, 2022 WL 3345759 at *8 ("Indeed, the receipt of a fee is a fact required to prove a business under this statute. In defining a 'money transmitting business' under § 1960, the Second Circuit stated that a money transmitting business 'receives money from a customer and then, for a fee paid by the customer, transmits that money to a recipient in a place that the customer designates.'") (citing *Velastegui*, 199 F.3d at 592). The Ninth Circuit also adopted the *Velastegui* definition in *Singh*, 995 F.3d 1069.

The Tornado Cash court itself quotes from the passage in *Velastegui* that unequivocally requires a fee: "a money transmitting business receiving money from a customer and then, *for a fee* paid by the customer, transmitting that money to a recipient in a place that the customer designates, usually a foreign country."[119] Yet the court then says the "description" in *Velastegui* is not meant to be "definite" and cites to *Banki* and *Mazza-Alaluf* to imply these cases "clarified" that a fee was not required.[120] They do not. Both cases explicitly rely on the same quote from *Velastegui* as a "definition" supporting their holding on what constitutes a "business."[121] In fact, in *Banki,* the Second Circuit relied on *Velastegui* in reversing the district court and holding the court below erred in *not* giving Banki's requested instruction to the jury because Banki's requested instruction—which included the sentence, "'[t]o be a "money transmitting business," the business must transmit money to a recipient in a place that the customer designates, for a fee paid by the customer'"—was "'legally correct.'"[122]

The Tornado Cash court then bundles together the government's allegations that the Tornado Cash founders solicited venture capital financing, used a bank account to pay for the Tornado Cash user interface, created the relayer registry and fee structure, and sold TORN tokens to conclude that "the Tornado Cash enterprise was not an altruistic venture" and "the fees that were charged and received by the relayer co-conspirators . . . suffice."[123] However, the court's list of financial transactions in the Indictment does not differentiate among corporate entities or people involved, and inappropriately groups them together in order to opaquely find the Tornado Cash founders made money. [124] At no point does the court analyze whether a *customer* pays a *fee* to an identifiable commercial enterprise in exchange for money transmitting. The court may have identified financial transactions that would inure to the benefit of the Tornado Cash founders, but it did not analyze and did not hold that fees were paid to compensate them for money transmitting services.

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119 Storm Oral Decision on MTD Tr. at 24 (emphasis added).

120 Storm Oral Decision on MTD Tr. at 24 (citing *Banki*, 685 F.3d 99, and *Mazza-Alaluf*, 607 F. Supp. 2d 284)

121 *Banki* 685 F.3d at 113–14 (citing *Velastegui*); *see also Mazza-Alaluf*, 607 F. Supp. 2d at 489–90 (relying on *Velastegui* to define a money transmitting business in the sentence directly preceding the holding: "beyond a reasonable doubt that Turismo was a business that transferred funds on behalf of the public within the United States or to locations abroad . . . and is a money-transmitting business within the meaning set forth at section 1960").

122 *Banki*, 685 F.3d at 113 n.9, 113–14 (citing *Han*, 230 F.3d at 565).

123 *See* Storm Oral Decision on MTD Tr. at 24–25; Gov. Opp. to Storm's MTD at 35. Notably, the government's only argument in its brief that the Tornado Cash founders received a fee is specifically in connection with the relayer registry; there is no allegation in its brief that the founders profited from the protocol itself. *See* Gov. Opp. to Storm's MTD at 2, 6, 12–13, 15, 22, 23, 26, 35–36. It may be the case that *at trial*, the government can prove that the Tornado Cash founders themselves ran a relayer and in so doing, received fees from users of the protocol for that service. Bound up in that analysis is the key question: were users paying a fee to relayers for privacy, or for money transmission? For example, if you access your online bank account through a VPN, the VPN provider routes your request to your bank and is paid money for its service. However, the VPN is not in the "business" of money transmitting. Similarly, to the extent relayers received a fee, it could be for *privacy* services rather than money transmitting services, particularly because the relayers have no control over the assets themselves and simply route user requests to the protocol (just as a VPN does not actually control your requests made to your bank). Regardless, the Indictment contains *no allegation* that Storm himself ran a relayer and no such specificity that the relayer registry is the purported money transmitting business at issue. It will be a question for the jury as to whether the government's evidence is sufficient to find the relayer registry itself was an unlicensed money transmitting business.

124 *See* Storm Oral Decision on MTD Tr. at 25.

To explain why this is critical, take for example a profitable law firm partnership where the partners hold a partnership interest that allows them to share in the business's profits. The law firm also transfers money for clients in connection with paying for legal fees, but it does not take a fee for doing those transfers. Under the court's conception of TORN tokens, holding a partnership interest in the law firm turns this into a "business" under Section 1960 merely because it is a profitable enterprise for services unrelated to money transmission. This result is nonsensical, demonstrating why it is critical to show a customer paid a fee for the service of money transmitting; profit is only relevant to the extent that it supports that the enterprise charged fees *for* money transmitting.

V. Analyzing *mens rea* for the purpose of Section 1960

Even if the government can prove that a defendant operated an unlicensed money transmitting business, it cannot obtain a conviction without also establishing that the defendant acted with requisite intent. Criminal law does not merely regulate conduct — it defines offenses against society so morally blameworthy as to justify depriving individuals of their liberty "based upon a theory of punishing the vicious will."[125] For that reason, the law adheres to "the basic principle that 'wrongdoing must be conscious to be criminal.'"[126] "The 'central thought' is that a defendant must be 'blameworthy in mind' before he can be found guilty, a concept courts have expressed over time through various terms such as *mens rea*, scienter, malice aforethought, guilty knowledge, and the like."[127] Given the "general rule" that a guilty mind is "a necessary element in the indictment and proof of every crime,"[128] it is crucial to define the *mens rea* required under Section 1960.

A. Courts have consistently held that Section 1960 requires that a defendant know the facts that make his conduct illegal, *i.e.*, that he operated an unlicensed money transmitting business, but not that the business was legally required to be licensed or registered.

Defining the *mens rea* requirement for any criminal offense begins with analyzing the plain language of the statute to determine Congress' intended degree of culpability for the offense. Section 1960(a) sets forth an explicit *mens rea* requirement: it criminalizes the act of "knowingly" operating "an unlicensed money transmitting business."[129]

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125 *Morissette v. United States*, 342 U.S. 246, 250 n.4 (1952) ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

126 *Elonis v. United States*, 575 U.S. 723, 745 (2015) (quoting *Morissette*, 342 U.S. at 252).

127 *Id.*

128 *United States v. Balint*, 258 U.S. 250, 251 (1922).

129 18 U.S.C. § 1960(a).

Notably, the *mens rea* required for a Section 1960 conviction was more significant before Congress amended the statute through the PATRIOT Act in October 2001. Before then, to convict a defendant of violating Section 1960(a), the government was required to prove that the defendant had "*know[ledge* that] the business [wa]s an *illegal* money transmitting business," *i.e.*, one that was "*intentionally operated without* an appropriate money transmitting license."[130] When Congress amended Section 1960 with the passage of the PATRIOT Act, it "substituted for the phrase 'illegal money transmitting business' in the statute the phrase 'unlicensed money transmitting business.'"[131]

Courts, including the Second Circuit, have interpreted this amendment as making Section 1960(a) more strict by "eliminating the requirement of proof that the defendant knew that a license was required."[132] In other words, consistent with the principle that "ignorance of the law or a mistake of law is no defense to criminal prosecution," courts have held that the amended statute "does not require the defendant to know that his conduct is illegal" in order to be convicted.[133] But even if the statute does not require "legal knowledge,"[134] it still requires "factual knowledge," including "proof that the defendant knew that the business was engaged in money-transmitting and also knew that the business had no money-transfer license."[135]

Further to the requirement in Section 1960(a) that a defendant act "knowingly," the definition of "unlicensed money transmitting business" in Section 1960(b) contains additional provisions explicitly related to *mens rea*. As a reminder, Section 1960(b)(1) defines three categories of money transmitting businesses as "unlicensed": (A) those operated without an appropriate state license; (B) those which fail to comply with federal registration requirements under Section 5330 or its implementing regulations; and (C) those which otherwise involve the transportation or transmission of funds.[136]

Category (A) explicitly eliminates the *mens rea* requirement by authorizing liability when a defendant does not know that a license is required; it specifies that the definition applies "whether or not the defendant knew that the operation was required to be licensed or that the operation was so punishable."[137] Conversely, category (C) explicitly

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130 *Elfgeeh*, 515 F.3d at 132 (emphasis in original).

131 *Id.* at 141.

132 *Id.* at 132; *see, e.g., Talebnejad*, 460 F.3d at 568; *United States v. Keleta*, 441 F. Supp. 2d 1, 2 (D.D.C. 2006); *United States v. Uddin*, 354 F. Supp. 2d 825, 829 (E.D. Mich. 2005).

133 *Dimitrov*, 546 F.3d at 414 (quoting *Cheek v. United States*, 498 U.S. 192, 199 (1991)).

134 *Id.* at 414 ("[T]he statute requires a defendant to the facts that make his conduct illegal — *i.e.*, that he is operating an unlicensed money transmitting business.") (citing *Talebnajad*, 460 F.3d at 570).

135 *Elfgeeh*, 515 F.3d at 133; *see also Talebnejad*, 460 F.3d at 568 ("As noted above, § 1960(b)(1)(A) provides that it is a federal offense to (1) operate a money transmitting business, (2) that affects interstate commerce, and (3) that is unlicensed under state law . . . . The parties agree that the Government must allege and prove the defendant's knowledge with respect to [these] three elements.").

136 *See* 18 U.S.C. § 1960(b).

137 18 U.S.C. § 1960(b)(1)(A).

enhances the *mens rea* requirement by adding that the funds at issue must be "known to the defendant to have been derived from a criminal offense" or "intended to be used to promote or support unlawful activity."[138] Notably, category (B) — which applies to unlicensed money transmitting businesses that fail to comply with Section 5330 — is silent on *mens rea*.[139]

B. Courts should interpret Section 1960 as requiring knowledge that a money transmitting business must be licensed under U.S. Supreme Court precedent analyzing the presumption of *mens rea*.

Since the PATRIOT Act was enacted in 2001, and amended Section 1960(a) to remove the "knowledge" requirement, federal courts have regularly held that a defendant need not know that a money transmitting business was required to be licensed in order to be convicted for violating Section 1960(b)(1)(B). Yet, Supreme Court precedent from the last decade addressing the presumption of *mens rea* demands reversing that conclusion.[140]

The presumption of *mens rea* requires courts interpreting criminal statutes to "'start from a longstanding presumption, traceable to the common law, that Congress intends to require a defendant to possess a culpable mental state.'"[141] The animating force behind the presumption of *mens rea* is "to separate wrongful conduct from 'otherwise innocent conduct.'"[142] That separation is critical to achieve the goals of criminal justice, since "[t]o inflict substantial punishment upon one who is morally entirely innocent, who caused injury through reasonable mistake or pure accident, would so outrage the feelings of the community as to nullify its own enforcement."[143]

Under the presumption of *mens rea*, when a criminal statute is silent on the mental state required for conviction, courts must "read into" the statute a *mens rea* requirement to separate wrongful from innocent acts.[144] Most often, the *mens rea* requirement that courts read into such statutes is "that of knowledge or intent."[145] "And when a statute is not silent as to *mens rea* but instead 'includes a general scienter provision,' 'the presumption applies with equal or greater force' to the scope of that provision."[146] Specifically, the

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138 18 U.S.C. § 1960(b)(1)(C).

139 *See generally* 18 U.S.C. § 1960(b)(1)(B).

140 *See Ruan v. United States*, 597 U.S. 450 (2022); *Rehaif v. United States*, 588 U.S. 225 (2019); *Elonis*, 575 U.S. at 723.

141 *Ruan*, 597 U.S. at 457-58 (quoting *Rehaif*, 588 U.S. at 228–29).

142 *Carter v. United States*, 530 U.S. 255, 269 (2000) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 72 (1994)).

143 *Morissette*, 342 U.S. at 254 n.14; *see id.* at 250 ("The contention that an injury can amount to a crime only when inflicted by intention is no provincial or transient notion. It is as universal and persistent in mature systems of law as belief in freedom of the human will and a consequent ability and duty of the normal individual to choose between good and evil.").

144 *Ruan*, 597 U.S. at 458; *see also Rehaif*, 588 U.S. at 231 ("We have interpreted statutes to include a scienter requirement even where the statutory text is silent on the question.").

145 *Ruan*, 597 U.S. at 458.

146 *Id.* (quoting *Rehaif*, 588 U.S. at 229).

presumption requires courts to "read the statutory term 'knowingly' as applying to all the subsequently listed elements of the crime."[147]

Although the presumption of *mens rea* is "ancient,"[148] the Supreme Court first gave it structure in a group of cases in the 1980s and 1990s.

In *Liparota v. United States*, the Court "considered a statute making it a crime to knowingly possess or use food stamps in an unauthorized manner."[149] The statute imposes criminal liability on anyone who "knowingly uses, transfers, acquires, alters, or possesses coupons or authorization cards in any manner not authorized by [the statute] or the regulations."[150] "The government argued that [the] defendant's conviction could be upheld if he knowingly possessed or used the food stamps, and in fact his possession or use was unauthorized," even if he did not know that fact.[151] The Court rejected the government's view, holding that "it would have criminalized 'a broad range of apparently innocent conduct' and swept in individuals who had no knowledge of the facts that made their conduct blameworthy."[152] The Court therefore "construed the statute to require knowledge of the facts that made the use of the food stamps unauthorized."[153]

In *Staples v. United States*, the Court considered a prosecution under the National Firearms Act for possession of an unregistered firearm.[154] The statute defined the term "firearm" to include "fully automatic" weapons.[155] "Congress had not expressly imposed any *mens rea* requirement in the provision criminalizing the possession of a firearm in the absence of a proper registration."[156] Nonetheless, the Court applied the presumption of *mens rea* to every element of the offense, including both the charging statute, 26 U.S.C. § 5861(d), and the related definitions set forth separately in 26 U.S.C. § 5845(a) and (b). The Court read a *mens rea* requirement into the statute, holding that "to be criminally liable a defendant must know that his weapon possessed automatic firing capability so as to make it a machine gun defined by the National Firearms Act."[157]

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147 *Rehaif*, 588 U.S. at 230 (citing *Flores-Figueroa v. United States*, 556 U.S. 646, 650 (2009) ("[C]ourts ordinarily read a phrase in a criminal statute that introduces the elements of a crime with the word 'knowingly' as applying that word to each element.")).

148 *Morissette*, 342 U.S. at 250.

149 *Elonis*, 575 U.S. at 735 (citing *United States v. Liparota*, 471 U.S. 419, 420 (1985)).

150 *Liparota*, 471 U.S. at 420.

151 *Elonis*, 575 U.S. at 735 (citing *Liparota*, 471 U.S. at 423).

152 *Id.* (quoting *Liparota*, 471 U.S. at 426).

153 *Id.* at 736 (citing *Liparota*, 471 U.S. at 425).

154 *Staples v. United States*, 511 U.S. 600, 602 (1994).

155 *Id.* (citing 26 U.S.C. § 5845(a)(6) & (b)).

156 *X-Citement Video, Inc.*, 513 U.S. at 71.

157 *Id.*

In *United States v. X-Citement Video, Inc.*, the Court "considered a statute criminalizing the distribution of visual depictions of minors engaged in sexually explicit conduct."[158] The Ninth Circuit had interpreted the statute to require "only that a defendant knowingly send the prohibited materials, regardless of whether he knew the age of the performers"[159] based on a "natural grammatical reading" that "the term 'knowingly' modifies only the surrounding verbs" and not "the elements of the minority performers, or the sexually explicit nature of the material, because they are set forth in independent clauses separated by interruptive punctuation."[160] The Court reversed and read in a *mens rea* requirement, holding that "a defendant must also know those depicted were minors, because that was 'the crucial element separating legal innocence from wrongful conduct.'"[161]

In each of these cases, "the Court saw a potential for punishment without culpability and, unwilling to rely on prosecutorial discretion as an adequate safeguard, responded with heightened *mens rea* requirements."[162] To avoid interpreting statutes in a way that might "criminalize a broad range of apparently innocent conduct,"[163] the Court read a *mens rea* requirement into statutes that had none.[164] It also presumed that a *mens rea* requirement applied "to each of the statutory elements" of each offense.[165] And it "established its willingness to extend a *mens rea* requirement to protect apparently innocent conduct, even if doing so violated the 'most natural grammatical reading' of a statute."[166]

How does the presumption of *mens rea* apply to a charge of operating an unlicensed money transmitting business under Section 1960? Under *Liparota*, *Staples*, and *X-Citement Video, Inc.*, it seems clear that the "knowingly" requirement in Section 1960(a) should apply to each element of the offense, including the definition of "unlicensed money transmitting business" set forth in Section 1960(b). Specifically, the presumption of *mens rea* should require proof that a defendant charged under Section 1960(b)(1)(B) — operating a money transmitting business which "fails to comply" with Section 5330 — must have known that compliance was necessary in the first place.

Although the presumption of *mens rea* was well-established before Section 1960 was amended by the PATRIOT Act in October 2001, the courts in *United States v. Elfgeeh*, *United States v. Talebnejad*, *United States v. Dimitrov*, and others nonetheless found no *mens rea* requirement related to federal compliance obligations in the amended Section

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158 *Elonis*, 575 U.S. at 736 (citing *X-Citement Video, Inc.*, 513 U.S. at 68).

159 *Id.*

160 *Id.* (citing *X-Citement Video, Inc.*, 513 U.S. at 68–69).

161 *X-Citement Video, Inc.*, 513 U.S. at 68.

162 *Elonis*, 575 U.S. at 736 (quoting *X-Citement Video, Inc.*, 513 U.S. at 73).

163 *See* Stephen Smith, *"Innocence" and the Guilty Mind*, 69 Hastings L.J. 1609, 1621–24 (2018).

164 *Liparota*, 471 U.S. at 426.

165 *See Staples*, 511 U.S. at 619 ("In short, we conclude that the background rule of the common law favoring *mens rea* should govern interpretation of § 5861(d) in this case. Silence does not suggest that Congress dispensed with *mens rea* for the element of § 5861(d) at issue here.").

166 *X-Citement Video, Inc.*, 513 U.S. at 72 (citing *Staples*, 511 U.S. at 619).

1960.[167] The only Section 1960 case we reviewed that addresses the presumption of *mens rea* directly is *Talebnejad*, but that case dealt exclusively with Section 1960(b)(1)(A), in which Congress dispensed with a *mens rea* requirement by imposing liability "whether or not the defendant knew that the operation was required to be licensed."[168] The other cases did not engage with the presumption of *mens rea* at all.

In the years since those cases were decided, a new wave of Supreme Court precedent has invigorated the presumption of *mens rea* and demands a new approach to Section 1960.

In *Elonis v. United States*, the Court considered a statute that criminalizes threatening communications, but lacked an explicit *mens rea* requirement. The Court applied the presumption of *mens rea*, holding that the statute required the defendant to transmit a communication "for the purpose of issuing a threat, or with knowledge that the communication will be viewed as a threat."[169] The Court reiterated that the "presumption in favor of a scienter requirement should apply to each of the statutory elements that criminalize otherwise innocent conduct."[170]

In *Rehaif v. United States*, the Court considered a statute making it unlawful for certain persons, including felons and "aliens" who are "illegally or unlawfully in the United States" to possess firearms.[171] The statute prohibiting possession of firearms — 18 U.S.C. § 924(a)(2) — applies to persons who act "knowingly." The separate statute that defines the categories of persons who are subject to the prohibition — 18 U.S.C. § 922(g) — contains no explicit *mens rea* requirement.[172] The Court held that to sustain a conviction, the government must prove both that the defendant knew he possessed a firearm, and that he knew he belonged to a category of persons (felons or "aliens") subject to the prohibition.[173]

Importantly, the Court in *Rehaif* rejected the government's argument that "whether an alien is 'illegally or unlawfully in the United States' is a question of law, not fact, and thus appeals to the well-known maxim that 'ignorance of the law' (or a 'mistake of law') is no excuse." The Court explained that this maxim normally applies when the defendant knows the facts that make up the offense, "but claims to be 'unaware of the existence of a statute proscribing his conduct.'" But the Court said that this maxim does not normally

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167 *See, e.g.*, *Elfgeeh*, 515 F.3d at 133; *Talebnejad*, 460 F.3d at 568; *Dimitrov*, 546 F.3d at 414; *Keleta*, 441 F. Supp. 2d at 2 ("Furthermore, 18 U.S.C. § 1960(b)(1)(B) on its face does not contain a knowledge or willfulness requirement, nor does 31 U.S.C. § 5330 to which it refers."); *United States v. Barre,* 324 F .Supp.2d 1173, 1177 (D. Colo. 2004) ("A 'failure to comply' does not connote a knowledge of the need to comply with the section 5330 of Title 31 in the first place, just as a failure to obtain a license does not connote a knowledge that a license is required."); *Uddin*, 365 F. Supp. 2d at 829 ("Moreover, placing the description of the offense and the definition of the terms used to describe the offense in separate subsections of Section 1960 demonstrates that Congress did not intend for proof of the defendant's knowledge of either state licensing or federal registration requirements to be an element of a Section 1960 offense.").

168 *Talebnejad*, 460 F.3d at 566, 568–70.

169 *Elonis*, 575 U.S. at 740.

170 *Id.* at 737.

171 *Rehaif*, 588 U.S. at 227.

172 *Id.* at 229.

173 *Id.* at 233.

apply "where a defendant 'has a mistaken impression concerning the legal effect of some collateral matter and that mistake results in his misunderstanding the full significance of his conduct,' thereby negating an element of the offense."[174]

The Court in *Rehaif* analogized to *Liparota*, where it "held that the statute required scienter not only in respect to the defendant's use of food stamps, but also in respect to whether the food stamps were used in a 'manner not authorized by statute or regulations." The Court "therefore required the Government to prove that the defendant knew that his use of food stamps was unlawful — even though that was a question of law."[175] The Court explained that the instant case was similar in that the defendant's status as a member of a prohibited category "refers to a legal matter, but this legal matter is what commentators refer to as a 'collateral' question of law." The Court held that a "defendant who does not know that he is an alien 'illegally or unlawfully in the United States' does not have the guilty state of mind that the statute's language and purposes require."[176]

In *Ruan v. United States*, the Court considered a statute that criminalizes knowingly manufacturing, distributing, or dispensing a controlled substance "except as authorized."[177] The case dealt with medical doctor defendants who had been convicted for dispensing controlled substances by prescribing them without authorization. The Court applied the presumption of *mens rea* to the "except as authorized" clause, holding that a conviction requires proof "that the defendant knew that he or she was acting in an unauthorized manner, or intended to do so."[178] The court explained that it was appropriate to apply the presumption of *mens rea* to the "except as authorized" clause because "a lack of authorization is often the critical thing distinguishing wrongful from proper conduct."[179]

Applying these cases to Section 1960(b)(1)(B) makes clear that a defendant cannot be convicted under that subsection unless he knows that he has "fail[ed] to comply" with Section 5330. Although a compliance obligation may "refer to a legal matter," it is exactly the type of legal matter that the Supreme Court deemed "collateral" in *Ruan, Rehaif*, and *Liparota*. A defendant who knows he is operating a money transmitting business, but not that he has a compliance obligation, would be similarly situated to the defendants in all of those cases. For example: the doctor who knows he is prescribing controlled substances, but not that he lacks authorization;[180] the felon who knows he "was convicted of a prior

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174 *Id.* at 234.

175 *Id.* at 234.

176 *Id.* at 235.

177 *Ruan*, 597 U.S. at 457.

178 *Id.* at 454.

179 *Id.* at 459–60.

180 *Id.* ("[T]he regulatory language defining an authorized prescription is, we have said, 'ambiguous,' written in 'generalit[ies], susceptible to more precise definition and open to varying constructions . . . . A strong scienter requirement helps to diminish the risk of 'overdeterrence,' *i.e.*, punishing acceptable and beneficial conduct that lies close to, but on the permissible side of, the criminal line.").

crime but . . . does not know that the crime is [a felony]";[181] or "the food stamp recipient" who "used stamps to purchase food from a store that, unknown to him, charged higher than normal prices" unauthorized by law.[182]

The Supreme Court has consistently held that the presumption applies to each element of a criminal offense, regardless of whether the statute contains an explicit *mens rea* requirement.[183] Just like the statutes considered in *Ruan, Rehaif*, and *Liparota*, Section 1960(b)(1)(B) makes "fail[ure] to comply" a discrete element of the offense to which the presumption of *mens rea* should apply. A defendant who does not know that he has "fail[ed] to comply" is not merely "claim[ing] to be 'unaware of the existence of a statute proscribing his conduct." Rather, without that knowledge, he "may well lack the intent needed to make his behavior wrongful."[184]

Applying the presumption of *mens rea* to Section 1960(b)(1)(B) would also be consistent with fundamental principles of statutory interpretation. The Supreme Court has held that a *mens rea* requirement in one part of a criminal statute should apply across the whole statute, and to separate sections of the U.S. Code, grammar notwithstanding.[185] That holding supports applying the term "knowingly" — even "in its isolated position" in Section 1960(a) — to the phrase "failed to comply" in Section 1960(b)(1)(B).[186] The Supreme Court has also recognized the canon of statutory construction that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."[187] Congress explicitly dispensed with *mens rea* in Section 1960(b)(1)(A), providing that the definition applied "whether or not the defendant knew that the operation was required to be licensed." If Congress had wanted to eliminate the *mens rea* requirement from Section 1960(b)(1)(B) as well, it could have included the same language. It chose not to.

Due process and the rule of lenity also support applying the presumption of *mens rea* to Section 1960(b)(1)(B). The Supreme Court has held that "requiring *mens rea* is in keeping with our longstanding recognition of the principle that 'ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity."[188] In *Liparota*, the court found

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181 *Rehaif*, 588 U.S. at 233 ("Nor do we believe that Congress would have expected defendants under § 922(g) and § 924(a)(2) to know their own statuses . . . . As we have said, we normally presume that Congress did not intend to impose criminal liability on persons who, due to lack of knowledge, did not have a wrongful mental state.").

182 *Liparota*, 471 U.S. at 426–27 ("Absent indication of contrary purpose in the language or legislative history of the statute, we believe that § 2024(b)(1) requires a showing that the defendant knew his conduct to be unauthorized by statute or regulations.").

183 *Elonis*, 575 U.S. at 737.

184 *Ruan*, 597 U.S. at 461 (quoting *Rehaif*, 588 U.S. at 232).

185 *X-Citement Video, Inc.*, 513 U.S. at 68–69.

186 *Id.* at 468 (citing *Morrisette*, 342 U.S. at 271).

187 *Russello v. United States*, 464 U.S. 16, 23 (1983).

188 *Liparota*, 471 U.S. 427.

that the rule of lenity "directly supports petitioner's contention that the Government must prove knowledge of illegality to convict him."[189] The rule of lenity is particularly important here, in the context of Section 1960(b)(1)(B), "where administrative actions rather than Congress create criminal liability."[190] It is also particularly important given how Section 1960 "imposes severe penalties upon those who violate it," which "counsel in favor of a strong scienter requirement."[191]

Requiring that a defendant know he is subject to federal compliance obligations in order to be convicted under Section 1960(b)(1)(B) is exactly the type of "shield . . . against punishment for apparently innocent activity" that the presumption of *mens rea* aims to provide.[192] Although no lower courts have yet extended the presumption to this statute, "[t]he Supreme Court's case law demonstrates that the Court has applied the presumption of *mens rea* consistently, forcefully, and broadly."[193] After *Elonis*, *Rehaif*, and *Ruan*, the presumption must apply to Section 1960(b)(1)(B) as well.

C. The *Storm* Indictment failed to adequately allege facts supporting *mens rea* with respect to Section 1960(b)(1)(B), which reinforces the need for the Tornado Cash court to properly instruct the jury on the government's burden to prove *mens rea* at trial.

In the *Storm* Indictment, the government alleges that "all money transmitting businesses, including businesses engaged in transmission of cryptocurrencies[,] are required to register" with FinCEN.[194] The government further alleges that "neither the Tornado Cash service, nor any of the Tornado Cash founders, was registered with FinCEN as a money transmitting business," and copies Section 1960 word-for-word — including the term "knowingly" — into Count Two alleging conspiracy to operate an unlicensed money transmitting business.[195]

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189 *Id.* at 427–28.

190 Valkenburgh, Coin Center; *see Banki*, 685 F.3d at 109 ("We hold that, at a minimum, the regulation is ambiguous in this respect. Consequently, we are required to interpret the regulation in Banki's favor, for "'[t]he rule of lenity requires ambiguous criminal laws to be interpreted in favor of the defendants subjected to them.'"); *United States v. Santos*, 553 U.S. 507, 514 (2008) ("This venerable rule not only vindicates the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed.").

191 *Ruan*, 597 U.S. at 460 (citing *Staples*, 511 U.S. at 618–619 (noting that "a severe penalty is a further factor tending to suggest that . . . the usual presumption that a defendant must know the facts that make his conduct illegal should apply")); *see also* 18 U.S.C. § 1960(a) (authorizing a penalty of a fine up to $250,000 and imprisonment up to five years).

192 *Staples*, 511 U.S. at 622; *see also* Andrew Schouten, *Unlicensed Money Transmitting Businesses and Mens Rea Under the USA PATRIOT Act*, 39 McGeorge L. Rev. 1097, 1115 (2008).

193 *United States v. Burwell*, 690 F.3d 500, 537 (D.C. Cir. 2012) (Kavanaugh, J., dissenting); *see also Wooden v. United States*, 595 U.S. 360, 378–79 (2022) (Kavanaugh, J., dissenting) ("To be sure, if a federal criminal statute does not contain a 'willfulness' requirement and if a defendant is prosecuted for violating a legal prohibition or requirement that the defendant honestly was unaware of and reasonably may not have anticipated, unfairness can result because of a lack of fair notice.").

194 Indictment ¶ 32.

195 *Id.* ¶¶ 32, 81.

The Indictment betrays the government's misunderstanding of the *mens rea* required to sustain a conviction under Section 1960(b)(1)(B).[196] The Indictment may sufficiently allege that Tornado Cash was unlicensed under that subsection because it "fail[ed] to comply" with a supposed registration requirement imposed by Section 5330. But the Indictment fails to allege that the defendant knew anything about Section 5330, let alone that it obligated Storm to register an open-source software protocol with FinCEN.[197] That factual knowledge is "the critical thing" necessary for a Section 1960(b)(1)(B) conviction.[198]

Storm did not argue that the Indictment failed to allege *mens rea* with respect to Count Two in his motion to dismiss, so the Tornado Cash court did not have occasion to address the *mens rea* required by Section 1960(b)(1)(B) in its ruling on the motion. Even if Storm had made that argument, the court likely would have rejected it based on the government's mere recitation of the language of the statute, as it did with Storm's *mens rea* challenge on Count One.[199]

But as the court noted, the government must be held to its burden of proof at trial. As explained above, that burden includes proving not only that Tornado Cash was a money transmitting business subject to registration under Section 5330, but also that Storm knew registration was required. If the government were to prove only the facts alleged in the Indictment during its case-in-chief at trial, the Court would be compelled to dismiss Count Two with respect to Section 1960(b)(1)(B) on a Rule 29 motion for judgment of acquittal.[200] And if the case reaches the jury, the court must instruct the jury as to the correct standard for *mens rea* in accordance with the Supreme Court's holdings in *Elonis*, *Rehaif*, and *Ruan*.

VI. Conclusion

Money laundering is a particularly subversive crime. It is not only a serious offense against society in its own right, but also a key enabler of illicit activity, allowing bad actors to obscure the origins of their ill-gotten gains and enjoy the proceeds of their crimes. The

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196 The government also charged Storm under Section 1960(b)(1)(C), which sets forth an explicit *mens rea* requirement that the defendant know that the funds involved in his money transmission were "derived from a criminal offense or are intended to be used to promote or support unlawful activity." The Indictment does allege that Storm "kn[ew] full well that the Tornado Cash service was being used to launder criminal proceeds," Indictment ¶ 50, so we do not analyze *mens rea* with respect to Section 1960(b)(1)(C) here.

197 *See generally id.*

198 *Ruan*, 597 U.S. at 460.

199 *See* Storm MTD Order at 30 ("I also find unavailing the argument that the government did not sufficiently allege *mens rea*. The indictment alleges that Mr. Storm 'willfully and knowingly' entered into the conspiracy. I don't get to make a determination of Mr. Storm's intent at this stage; and the government having adequately alleged the requisite intent, the decision regarding the sufficiency of the evidence of that intent is for the jury and not for me.").

200 *See* Fed R. Crim. P. 29 ("After the government closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction").

government is rightly focused on combating money laundering to ensure that "crime doesn't pay," and Section 1960 rightly serves as a powerful tool in the effort to disrupt criminal enterprises and prevent the exploitation of the global financial system.

Yet, as explained above, the government has stretched Section 1960 far beyond its proper limits. Instead of confining the statute to those whom Congress intended to target — unlicensed business operators who knowingly obtain and relinquish control of customer funds — the government has sought to apply the statute to software developers who build technology that is later misused by third parties. If the government were correct, then Section 1960 would become not merely a powerful tool, but rather, an unchecked license to prosecute blockchain developers and participants who are powerless to prevent money laundering.

Section 1960 must be subject to limiting principles other than prosecutorial discretion. This paper articulates those principles and demonstrates their support through all of the primary methods of interpretation in the U.S. criminal justice system: binding and persuasive case law, the plain meaning of the statutory text, canons of statutory construction, and the common law doctrines of due process and the rule of lenity. Although the court in *Storm* has thus far failed to recognize these principles, we expect that further litigation, along with appellate and Supreme Court review, will cement them as well-settled law.

Although we are confident that the courts will ultimately confirm our analysis of Section 1960, we fear the irreparable damage that the government's expansive view will cause in the intervening years. Novel theories like this one wind their way slowly through the judiciary, and meanwhile the burden of the government's error will be shouldered by the American taxpayer, the American blockchain industry, and the American economy. We urge Congress to step in and set the record straight by amending Section 1960 to clarify what it always intended: that only those who knowingly *control* criminal funds should be treated as criminals themselves.