IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff – Appellee,

v.

ANDREW B. KATAKIS and DONALD M. PARKER,
Defendants – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA
Honorable William B. Shubb
District Court Nos. 2:11-cr-00511-WBS-2 and -3

ANSWERING BRIEF FOR THE UNITED STATES OF AMERICA

MAKAN DELRAHIM
Assistant Attorney General

ANDREW C. FINCH
Principal Deputy Assistant Attorney General

MICHAEL F. MURRAY
RICHARD A. POWERS
Deputy Assistant Attorneys General

STRATTON C. STRAND
ADAM D. CHANDLER
Attorneys

U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Room 3224
Washington, DC 20530-0001
202-353-6638
adam.chandler@usdoj.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

STATEMENT OF JURISDICTION

These appeals arise from a criminal prosecution in the U.S. District Court for the Eastern District of California. The district court had jurisdiction under 18 U.S.C. § 3231. This Court has jurisdiction under 28 U.S.C. § 1291. The district court entered judgment against Defendant-Appellant Katakis on November 7, 2017. KER.65-72.[1] Katakis filed a timely notice of appeal on November 13, 2017. KER.63-64; *see* Fed R. App. P. 4(b)(1)(A). The district court entered judgment against Defendant-Appellant Parker on January 9, 2018. PER.105-11; *see also* PER.114-21 (amending judgment on February 5, 2018, to include restitution amount). Parker filed a timely notice of appeal on January 19, 2018. PER.112-13; *see* Fed. R. App. P. 4(b)(1)(A).

---

[1] Throughout this brief, "KER" refers to Katakis's excerpts of record, "PER" to Parker's excerpts of record, "SER" to the United States' supplemental excerpts of record, "KBr" to Katakis's opening brief, and "PBr" to Parker's opening brief.

BAIL STATUS

Katakis is on bail pending appeal, which the district court granted on December 18, 2017. KER.61. Parker has completed his sentence of imprisonment, is not in custody, and is serving a two-year term of supervised release.

STATEMENT OF ISSUES PRESENTED

1. Whether the district court abused its discretion by denying Katakis and Parker a new trial based on post-trial evidence of a side conspiracy. (Katakis I, Parker II)

2. Whether the district court plainly erred by giving a standard jury instruction on aiding-and-abetting liability. (Katakis III, Parker I)

3. Whether the district court abused its discretion by denying Parker's motion to sever his trial from Katakis's, or by denying Parker a new trial for alleged retroactive misjoinder. (Parker III)

4. Whether the district court abused its discretion by denying Katakis a new trial based on his claims of ineffective assistance of trial counsel. (Katakis II & IV)

5. Whether either defendant has identified a set of errors that, taken together, warrant a new trial. (Katakis V, Parker IV)

STATEMENT OF THE CASE

I. Procedural History

On December 7, 2011, a federal grand jury sitting in the Eastern District of California returned an indictment charging four real-estate investors, including Defendants-Appellants Andrew Katakis and Donald Parker, as well as an auctioneer, with conspiring to rig bids, in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1, and conspiring to commit mail fraud, in violation of 18 U.S.C. § 1349. KER.887-97. The indictment alleged that they ran a scheme to suppress competition and defraud banks at home-foreclosure auctions in San Joaquin County, California. *Id.* The alleged scheme involved agreeing not to compete to purchase certain properties at auction, designating which conspirator would bid for those properties, refraining from bidding for the properties otherwise, and making payoffs to and receiving payoffs from one another in exchange for not bidding. KER.888-93.

On May 8, 2013, the grand jury returned a superseding indictment further charging Katakis with obstruction of justice, in violation of 18 U.S.C. § 1519. KER.860-61. The superseding indictment alleged that Katakis, upon learning of the government's investigation into the

conspiracy, procured and used software to erase electronic records of the conspiracy in an effort to obstruct the investigation and cover up his wrongdoing. *Id.*

Before trial, Parker and another defendant moved to sever their cases from Katakis's, or in the alternative, to sever the obstruction count from the joint trial. Dist. Ct. Dkt. Nos. 154, 156, 172 (Parker joinder). The district court denied the motions, holding that there was no reason to depart from the general principle that defendants charged together should be tried together, especially in conspiracy cases. PER.1-2.

Two of the indicted investors—Anthony Joachim and Wiley Chandler—agreed to cooperate and pleaded guilty pursuant to plea agreements. Dist. Ct. Dkt. Nos. 64 (Chandler's plea and cooperation agreement), 187 (Joachim's). They joined nine other investors who had pleaded guilty prior to indictment. *See* Dist. Ct. Dkt. No. 12 (related case memorandum).

Katakis, Parker, and the auctioneer went to trial. On March 11, 2014, following 23 days of trial, the jury found Katakis and Parker guilty of conspiring to rig bids, and further found Katakis guilty of

obstructing justice. KER.413-15; SER.74, 80-81. The jurors did not reach a decision on the mail fraud count against Katakis and Parker, and the court declared a mistrial as to that count. KER.413-15; SER.74, 76, 79-81. The government elected not to retry Katakis and Parker on the mail fraud count. SER.5, 7. The jury acquitted the auctioneer on both the bid rigging and mail fraud counts. KER.415; SER.73, 81.

After the verdict, Katakis moved for a judgment of acquittal on the obstruction-of-justice count, notwithstanding the jury's guilty verdict. Dist. Ct. Dkt. No. 310. The district court granted the acquittal, citing insufficient evidence that Katakis's attempts to conceal or destroy electronic records had succeeded. KER.396-412. The government appealed that ruling, and this Court affirmed. *United States v. Katakis*, 800 F.3d 1017 (9th Cir. 2015) (No. 14-10283). Like the district court, this Court found "truly overwhelming" evidence that Katakis intended to obstruct justice, *id.* at 1027, but not enough evidence that he accomplished what he intended, *id.* at 1020.

Following the appeal, Katakis and Parker filed a series of motions for a new trial on a variety of grounds, some of which they raise in this

appeal. Dist. Ct. Dkt. Nos. 373, 444, 445, 611, 678. The two motions relevant to this appeal are Katakis and Parker's third amended motion under Fed. R. Crim. P. 33, KER.100-46 (styled as a "second amended motion"); PER.98 (Parker joinder), and Katakis's motion for a new trial on grounds of ineffective assistance of counsel, KER.279-305. The district court denied both. KER.1-19, 20-27.

On November 6, 2017, the district court sentenced Katakis to 10 months in prison, 3 years of supervised release, and a $1 million fine, and ordered him to pay $505,014.59 in restitution. KER.65-72. Two months later, the court sentenced Parker to 6 months in prison and 2 years of supervised release, and ordered him to pay $84,470.47 in restitution. PER.105-11; *see* PER.114-21 (amending judgment on February 5, 2018, to include restitution amount).

These consolidated appeals followed.

II. Factual Statement

A. The Bid-Rigging Conspiracy

From September 2008 to October 2009, a group of real-estate investors operated a bid-rigging conspiracy, which suppressed competition at hundreds of home-foreclosure auctions in San Joaquin

County, California. *E.g.*, KER.700-01; SER.205-07, 242, 247, 297-98, 318-19, 332-33, 350, 365, 382, 389, 405-07. The investors agreed not to bid against each other, designating one investor—often Wiley Chandler—to bid at the public auction while the rest refrained. *E.g.*, SER.122, 242, 315, 355-56, 368, 382, 392-93. The reduced competition meant that the conspirators purchased the foreclosed homes at artificially low prices. SER.369, 373, 376.

Sometimes, the investors received a flat payoff in exchange for not bidding. SER.359-60, 369-70, 379. Other times, especially as the conspiracy continued, the group would hold a second, private auction among themselves, called a "round-robin." SER.370-71. The difference between the round-robin price and the public auction price was divvied up among the group members as a payout. SER.371-72. The group also paid the auctioneer $1,000 per day to help them conceal their pact. SER.169, 239, 363-64.

B. Katakis's Role in the Conspiracy

Katakis was an active and dominant member of the conspiracy from its inception. He personally made agreements with other real-estate investors not to compete against one another in the auctions. *E.g.*,

KER.700-01; SER.279-80. He also personally approached potential conspirators, proposing that they "could all get along and not beat each other up every day." SER.347.

Once, before an auction at the courthouse, Katakis approached a pair of investors with his co-conspirator Wiley Chandler, who asked them, "Why bid against each other, let's work something out now." SER.396. The investors were skeptical, so Katakis pulled an envelope from his back pocket and flashed "approximately $800,000 or more" to show that he was serious about bidding. SER.397; *see* SER.385-86 ("Short Angry Guy" in the testimony refers to Katakis). The investors were still not persuaded and proceeded to bid against Katakis, who "got pumped up, clinched his fists," and cursed at them. SER.399. As the bidding advanced, Chandler told them, "You just paid the bank 10k, you could have paid us." *Id.* The investors then agreed, mid-auction, to give Chandler $10,000 to stop Katakis from bidding against them further. SER.401. Katakis "[i]mmediately" stopped bidding, which ended the auction, and the investors walked with Chandler to a bank one block away to retrieve $10,000 in cash. *Id.* When they returned to the

courthouse steps, Katakis warned the investors to "stay out" in Alameda County; "don't come back here." SER.402.

Katakis "micromanaged" the operation, staying "deeply involved in all aspects of it" and earning a reputation for being "[c]ontrolling." KER.696; *see also* SER.104 (Katakis describing himself as a "control freak"). He expected to be kept informed of "what was happening at the auctions," KER.696, and he repeatedly cruised by the courthouse on auction days in his unmistakable brown Hummer, KER.712. He did not attend the round-robins himself—instead sending subordinates from his office on his behalf, SER.243, 273-74, 311, 342 ("Katakis was the one who the money was coming and going from . . . .")—but he wanted frequent and detailed updates on them, SER.202, 270.

Chandler and another co-conspirator investor, Rick Northcutt, managed Katakis's incoming and outgoing payouts, SER.243-44, 275-76, 306-07, 310-12, 338-39, but Katakis paid close attention to the round-robin payoff amounts, SER.189-90, 194-95, 198-99. Katakis also instructed a work subordinate, Steve Swanger, to mislabel the payout invoices as repairs or rehabilitation, SER.164, 186, 191, and at one point directed Swanger to discreetly encode the payout invoices because

Katakis's accountant was raising questions about them, KER.631-33; SER.98-99. *See generally* KER.688-89 (Swanger explaining that he worked for Katakis's company and reported to Katakis but "was paid as a subcontractor").

Katakis's incoming and outgoing payouts during the conspiracy period totaled "just over a million dollars," SER.109, 162, and his profit from reselling 60 homes purchased at round-robins exceeded $1.9 million, SER.107-08, 167.

C. Parker's Role in the Conspiracy

Parker started attending foreclosure auctions in San Joaquin County in April 2009, the middle of the conspiracy period, and quickly became one of the "regulars," "part of the group." SER.353. The conspirators at the time regarded him as a "serious buyer" with "substantial funds" who was "willing to buy property." SER.354. They "felt that [they] could have him come into the group and buy with [them], and then split the proceeds." SER.353-54.

Parker played a significant role in the conspiracy, choosing the location for the round-robins, bidding for the group at auctions, and once announcing his intent to "tak[e] over the group" and "run things"

as the "new sheriff in town." SER.283-85, 301-03, 345-46, 354, 365. Parker kept track of the round-robins he took part in, as well as the payoffs he made and received, in a notebook containing more than 80 entries. SER.137. Another conspirator's records showed Parker attending "approximately a hundred" round-robins. SER.345. Testifying at trial, Parker admitted that he participated in the round-robins, SER.119, 128, and that he took part in divvying up the proceeds, SER.116, 125.

D. Katakis's Attempts To Conceal His Actions

On September 1, 2010, Katakis received a letter from his bank informing him that the bank had been served with a federal grand jury subpoena for his bank records. SER.131-34. Two days later, late on a Friday evening, Katakis purchased, downloaded, and installed a program called DriveScrubber 3 on his work computer. SER.111, 153-59.

The next day, a Saturday, Katakis summoned his subordinate Steve Swanger to the office and told Swanger about a "scrub program" that he was going to install on Swanger's computer. SER.178-79. Katakis sat at Swanger's computer and searched it for "Northcutt" and "Wiley," the

names of two co-conspirators. SER.179-81. The searches "pulled up a bunch of documents and e-mails." SER.180. Katakis then installed DriveScrubber. SER.112, 150, 180-81.

Katakis "looked down" and was surprised to see a second computer in Swanger's office. SER.182. He turned it on, saw more than 4,000 emails, and cursed aloud. *Id.* Katakis installed DriveScrubber on the second computer, too. SER.112-13, 140, 182. Swanger saw him clicking on emails, checking boxes. SER.182. Katakis reviewed the documents he had selected, then hit delete. *Id.* He had selected so many documents that the deletion "went at a snail's pace." *Id.* When Swanger returned to work the following Monday, he found "a lot less stuff" on his computers: "[e]-mails deleted," "[s]ome files deleted," and "almost all the e-mails" on his second computer "gone." SER.183.

Katakis also installed DriveScrubber on the office email server, SER.142-44, and on his accountant's computer, SER.144-47.

III. Rulings Under Review

Each ruling under review is identified below in the applicable argument section.

SUMMARY OF ARGUMENT

Katakis and Parker's scattershot complaints about post-trial evidence, jury instructions, ineffective assistance, prejudicial spillover, and cumulative error are all misplaced. Some were not preserved; others misconstrue the record; still others misread the law. All are incorrect, and none warrants a new trial for either defendant.

1. Both defendants point to evidence assembled after trial to argue that a subset of their co-conspirators were actually conspiring against Katakis to enrich themselves. This evidence falls well short of the standard for reversing the district court's denial of a new trial for several reasons: the evidence could have been introduced at trial, and in most respects it was; it only buttresses the charged conspiracy; and it does nothing to diminish the overwhelming evidence of the defendants' guilt.

2. Both defendants take issue with a standard aiding-and-abetting instruction, though they did not object to it below. They must identify a plain error, but they point to no authority supporting the error they claim, that giving an aiding-and-abetting instruction alongside a conspiracy instruction violates due process. In fact, the instructions at

issue are routinely given together, and there is no reason to think that they confused the jury. Even if they did, the jury's confusion would have *helped* the defendants by raising the burden on the government. Thus, there was no error in giving the aiding-and-abetting instruction, let alone a plain one.

3. Parker claims that evidence on the obstruction-of-justice count against Katakis somehow "infected the trial," such that the jury could not fairly assess the evidence of Parker's guilt on the bid-rigging count, even with instructions to consider the evidence on each count and against each defendant separately. Parker's claim is meritless. He offers no meaningful connection between the obstruction evidence against Katakis and his own bid-rigging conviction. Nor does he explain why the jury could not or did not follow the district court's clear instructions, as they are presumed to have done. The district court did not abuse its discretion in adhering to the typical practice—especially appropriate in conspiracy cases—of trying defendants together when they are charged together.

4. Katakis makes two erroneous assertions of ineffective assistance of trial counsel. First, he claims that his trial counsel should have

called three witnesses whom he believes would have given exculpatory testimony. The district court heard testimony from all three at a post-trial hearing and decided, perfectly within its discretion, that trial counsel's strategic decisions were not deficient because calling any of the witnesses would have been unwise. Second, Katakis misconstrues a statement his trial counsel made at the post-trial hearing to claim that his trial counsel refused to let him testify at trial. Katakis did not make that argument below, and it is groundless in any event.

5. As a last resort, both defendants turn to the cumulative-error doctrine in hopes of stacking up the preceding issues to make a whole greater than their sum. The defendants have not identified any errors, though, so there is nothing to cumulate. Even if there were a combined error to consider, it would not be reversible in light of the overwhelming evidence that Katakis and Parker knowingly participated in the conspiracy to rig bids at San Joaquin County foreclosure auctions.

ARGUMENT

I. The District Court Did Not Abuse Its Discretion by Denying the Defendants' Motion for a New Trial Based on Post-Trial Evidence of a Side Conspiracy Against Katakis

Both defendants point to evidence assembled after trial to argue that a subset of their co-conspirators—namely, Wiley Chandler, Rick Northcutt, Ken Swanger, and Steve Swanger—also were conspiring against Katakis to enrich themselves. KBr.37-45; PBr.15-17. This evidence includes declarations from Chandler, KER.73-79, and one of his associates, Philippe Lauren, KER.96-99, as well as testimony from Chandler, Northcutt, Ken Swanger, and others at a post-trial evidentiary hearing in August 2016, *see* Dist. Ct. Dkt. Nos. 539 & 540.

The evidence falls well short of the standard for reversing the district court's denial of a new trial for several reasons: nothing kept the defendants from introducing the evidence at trial; the evidence is redundant of the evidence that was introduced at trial; it reinforces, rather than undermines, the proof of the charged conspiracy; and it does nothing to diminish the overwhelming evidence of the defendants' guilt.

A. Ruling Under Review

On May 11, 2017, the district court denied defendants' final motion for a new trial, KER.100-46; PER.98 (Parker joinder), including their contention that "[n]ewly discovered evidence establishes that during the alleged conspiracy, Ken [Swanger] was working for Chandler and Northcutt and one of their joint objectives was to defraud Katakis," KER.112. KER.1-19 (district court order).

The district court reasoned that, even if Chandler, Northcutt, and the Swangers "were profiting at Katakis' expense," their side conspiracy would "not disprove the persuasive evidence presented at trial tending to show Katakis was a participant in the primary conspiracy of bid rigging." KER.5-6; *see also* KER.6-8 (recounting such evidence). Katakis would have had "the financial incentive to participate in bid rigging" whether or not there was a side conspiracy, and "Chandler has never stated that Katakis did not participate in the agreements not to bid or that Katakis did not give or receive payouts." KER.6&n.4. As a result, the district court concluded that the proffered evidence would be unlikely to result in an acquittal if presented in a new trial. KER.8.

B. Standard of Review

This Court "review[s] a district court's order denying a motion for a new trial made on the ground of newly discovered evidence for abuse of discretion." *United States v. Hinkson*, 585 F.3d 1247, 1259 (9th Cir. 2009) (en banc); *accord* KBr.37; PBr.15. To overcome that standard, this Court would have to find that the district court's conclusion was "illogical, implausible, or without support in inferences that may be drawn from facts in the record." *Hinkson*, 585 F.3d at 1251.

Parker posits that "[t]he proper question" for the district court was whether the evidence "would have been 'sufficient to raise a reasonable doubt' at a new trial," PBr.16 (quoting *Mejia v. United States*, 291 F.2d 198, 201 (9th Cir. 1961)), but the case he relies on for that standard limited its rationale to "the special and peculiar facts" in that case and expressly disavowed that it was "stat[ing] any . . . broad rule," *Mejia*, 291 F.2d at 201 n.3.

In fact, the proper standard is "stringent." *United States v. Hanoum*, 33 F.3d 1128, 1131 (9th Cir. 1994). In the district court, the defendant must satisfy each prong of a five-part test: "(1) the evidence must be newly discovered; (2) the failure to discover the evidence sooner

must not be the result of a lack of diligence on the defendant's part; (3) the evidence must be material to the issues at trial; (4) the evidence must be neither cumulative nor merely impeaching; and (5) the evidence must indicate that a new trial would probably result in acquittal." *United States v. Harrington*, 410 F.3d 598, 601 (9th Cir. 2005) (quoting *United States v. Kulczyk*, 931 F.2d 542, 548 (9th Cir. 1991)).[2]

C. The Post-Trial Evidence Offers Nothing New

Defendants did not satisfy any of the five prongs, so the district court acted within its discretion in denying the motion for a new trial. For starters, there is nothing revelatory about the claim of a side conspiracy against Katakis—it was one of his primary defense strategies at trial. The trial record is replete with references to cheating Katakis through the round-robins, and the scheme described

---

[2] In denying the motion for a new trial, the district court reached only the last of the five prongs, KER.5, and its judgment on that prong is reviewed for abuse of discretion. The government raised all five prongs below and does so again on appeal, as this Court "may affirm a district court's judgment on any ground supported by the record, whether or not the decision of the district court relied on the same grounds or reasoning." *Atel Fin. Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003).

in the new evidence—Chandler's obtaining Katakis's bidding plan from his subordinates and hiring a fake bidder to drive up the round-robin price Katakis would pay—was already part of the trial testimony about the round-robins.

Katakis's own brief does an admirable job laying out the essentials of the side scheme as presented at trial. The brief recounts testimony about how Chandler "would make '*a ton of money*' from knowing [Katakis's] bid-to number," KBr.14 (citing KER.822-23), i.e., the maximum amount Katakis was willing to bid on a property at the round-robin. It explains more generally that "[k]nowing Mr. Katakis' bid-to number allowed the group to drive up the prices at the round-robins and increase their profit." *Id.* (citing KER.829-30). The brief quotes Parker's testimony from trial that he "underst[oo]d" why Ken Swanger gave Katakis's bid-to number to Chandler ("to cheat," KER.482), that Parker once "called out Ken" for doing so, and that Parker thought Ken "seemed to be kind of controlled by" Chandler and Northcutt. KBr.21 (citing KER.482, 483, 485). Katakis's brief also states that "Chandler brought in a bidder, Philippe Lauren, who everyone thought was a legitimate bidder but in fact worked for

Chandler. . . . in order to drive up the bids at the round-robins," KBr.14 (citing KER.826-27), and that "Katakis was always the one buying the properties," KBr.15 (citing KER.766).

All of this was presented at trial, along with much else. The trial featured extensive discussion of Chandler's obtaining Katakis's bid-to number from Ken Swanger. *See, e.g.*, SER.250, 257, 262-63, 266-67, 288, 328-29. Even the district court asked a witness questions about it. SER.322-23. Multiple witnesses testified about Chandler's hiring Lauren as a faux independent bidder for the round-robins. *See, e.g.*, KER.826; SER.259, 326.

Painting Katakis as a victim of a side conspiracy was one of his trial counsel's primary strategies at trial. Katakis's counsel knew enough of the scheme to ask witnesses about "the scam" of "inflating property values beyond what they would have been even at the courthouse," "basically . . . taking money from the bank of Katakis." SER.328. He asked one witness whether Katakis's co-conspirators had "found a way to make money without buying properties" and whether "that came out of the pocket of Mr. Katakis." SER.335. He also dwelled on the business relationships between Northcutt, Chandler, and the Swangers

when he questioned them during trial and in giving his closing argument. SER.84-92, 172-75, 210-12, 215-23, 226-31, 234-36, 251-54, 291-94. *See generally* KBr.30 ("It was also a part of the theory of defense that 'the Swangers had a secret financial relationship with Wiley Chandler and Rick Northcutt.'" (emphasis omitted) (quoting KER.223)).

The "new" evidence Katakis points to, KBr.23-28, adds little to this picture—a picture that Katakis's trial counsel and Parker himself painted over the course of the trial. If the post-trial hearing or declarations filled in any details around the edges, that can only be due to the defendants' lack of diligence in seeking those details sooner—particularly during trial, when all four members of the supposed side conspiracy took the stand for questioning. Consequently, the first two prongs of the *Harrington* test cannot be satisfied, and denying a new trial for either of those reasons was within the district court's discretion. *See, e.g.*, *Hinkson*, 585 F.3d at 1264-65 (affirming denial of a new-trial motion predicated on post-trial affidavits that, "while newly written, did not provide any new *information* that was not already

considered"; "the affidavits merely supported the previously proffered evidence").

D. The Post-Trial Evidence Does Not Contradict or Diminish the Ample Trial Evidence That Katakis (and Parker) Knowingly Took Part in an Illegal Bid-Rigging Conspiracy

Besides being redundant, the post-trial evidence does not make Katakis and Parker's knowing involvement in the bid-rigging conspiracy any less likely. It does not touch the wealth of evidence introduced at trial that proved that Katakis and Parker knowingly participated in a straightforward bid-rigging conspiracy. That conspiracy and the purported side conspiracy are not mutually exclusive. If anything, the side conspiracy implies the existence of the bid-rigging conspiracy. As a result, the new evidence does not help defendants and is exceptionally unlikely to result in an acquittal.

For newly discovered evidence to be material, it must relate to the elements of the crime charged. *Hanoum*, 33 F.3d at 1130. The defendants' briefs point to only one element that might be relevant: whether Katakis (and presumably Parker) *knowingly* joined the bid-rigging conspiracy. KBr.40-41. If there were a side conspiracy, according to Katakis, then "common sense dictates that Mr. Katakis

would have been much less likely to knowingly become a member of such a conspiracy." KBr.41; *see also* KBr.45 ("[I]t simply makes no sense for Mr. Katakis to join a conspiracy to cheat himself.").

This argument—a seeming non-sequitur—is perplexing, in part because it ignores the substantial evidence of Katakis's leadership role in the bid-rigging conspiracy and his consciousness of guilt, such as his efforts to erase records of the conspiracy. KER.6-8; *see supra* Statement Parts II.B & II.D. It also conflates the two conspiracies, even though the side conspiracy does not imply that Katakis and Parker were not participants in the primary conspiracy. In the district court's words, one "does not disprove" the other, KER.5; they can readily co-exist.

As the district court pointed out, the new evidence does not include statements "that Katakis did not participate in the agreements not to bid or that Katakis did not give or receive payouts." KER.6. The same is true of Parker. The district court also noted that Katakis could have come out ahead financially even if his co-conspirators were cheating him on the side, so the defendants had an incentive to be involved and stay involved in the primary bid-rigging conspiracy regardless. KER.6 n.4. That would be true even if they knew about the side conspiracy.

If anything, the defendants' side-conspiracy theory *assumes* their participation in the primary conspiracy. They say they were taken advantage of at the round-robins, but the round-robins themselves and the payouts that followed are compelling evidence of the charged agreement not to bid at the public auctions.

Because any evidence of cheating at the round-robins is not pertinent to whether the defendants knowingly joined the charged conspiracy, it does not meet the materiality requirement. Moreover, because the new evidence is not material, its only value to the defendants is for impeaching Northcutt, Chandler, and the Swangers. Evidence serving only to impeach, however, is insufficient for a new trial under Fed. R. Crim. P. 33. *See Lindsey v. United States*, 368 F.2d 633, 636 (9th Cir. 1966). Even if it were permitted for impeachment, the evidence would be cumulative. The four members of the supposed side conspiracy testified extensively on these matters, *see supra* Argument Part I.C, so confronting them with peripheral details of a story they already told at trial would add little to any showing of bias. Thus, the fourth *Harrington* requirement—that the evidence be neither cumulative nor merely impeaching—also cannot be satisfied.

For all these reasons and more, the defendants cannot meet the fifth requirement, either: that the evidence, if presented in a new trial, would likely lead to a different outcome. Even if the defendants had come up with revealing new evidence of a side conspiracy that was somehow related to an element of the charged conspiracy, that evidence would still have to contend with the "persuasive evidence" presented at trial that Katakis and Parker knowingly participated in the primary bid-rigging conspiracy. KER.6, 18.

That evidence includes emails and documents, many in Katakis's own words, as well as his actions to destroy them. The district court pointed to Katakis's emails regarding buyouts, *e.g.*, SER.94-97, an email from Katakis telling Steve Swanger to buy gift cards for the auctioneer, SER.101-02, and an email from Katakis instructing Steve Swanger how to discreetly label buyouts for accounting purposes, SER.98-99, among others. KER.6-7. This Court has also found "truly overwhelming" evidence that Katakis wanted to destroy many of these records, *Katakis*, 800 F.3d at 1027, indicating a guilty mind. The evidence against Parker is equally compelling, not least because he admitted on the stand that he participated in the round-robins, SER.119, 128, and

that he took part in divvying up the proceeds, SER.116, 125. *See generally* KER.18 (noting "the persuasive evidence of both Katakis' and Parker's direct involvement in the bid rigging conspiracy"). It is difficult to see how evidence of a side conspiracy, even if new and relevant, could undermine the government's showing at trial. *See generally United States v. Sangalang*, 580 F. App'x 597, 599 (9th Cir. 2014) (unpublished) (affirming denial of a new-trial motion on the third, fourth, and fifth *Harrington* prongs, in part because "the jury watched extensive recordings of [the defendants] selling guns and drugs to undercover ATF agents").

E. Parker's Waived Argument for a Multiple-Conspiracies Instruction Is Unavailing

All of these points apply with even more force to Parker, who mostly piggybacks on Katakis's argument. *See* PBr.15-17; *see also* KER.5n.3 ("Parker does not address Katakis' new evidence in his joinder or reply."). The evidence of a side conspiracy against Katakis casts no doubt on *Katakis's* involvement in the charged conspiracy, much less on Parker's involvement.

Parker raises only one distinct point—that the new evidence would have "bolstered" his request for a multiple-conspiracies instruction—but

he does so only by reference to his trial brief. PBr.17 (citing PER.99-100). He has therefore waived the argument. *See* 9th Cir. R. 28-1 ("Parties must not . . . incorporate by reference briefs submitted to the district court."); *Lawson v. Carney*, 2019 WL 1503806, at *1 (9th Cir. 2019) (unpublished); *United States v. Cassidy*, 2007 WL 1578293, at *1 (9th Cir. 2007) (unpublished).

Even if this Court were to consider the argument, the Court would find that the argument badly misunderstands the law. As the proposed instruction he cites states, "[a] multiple conspiracies instruction is generally required where the indictment charges several defendants with one overall conspiracy, but the proof at trial indicates that a jury could reasonably conclude that some of the defendants were *only* involved in separate conspiracies unrelated to the overall conspiracy charged in the indictment." PER.102 (emphasis added) (quoting *United States v. Anguiano*, 873 F.2d 1314, 1317 (9th Cir. 1989)).

That is not this case. As explained above, the charged conspiracy and the side conspiracy are not mutually exclusive—in fact, the latter reinforces the former, with the side-conspirators participating in both at once. The government charged a bid-rigging conspiracy involving

Katakis, Parker, Chandler, Northcutt, Swanger, and others. An additional, related conspiracy among a subset of the bid-rigging conspirators to defraud Katakis does not contradict or detract from the overall conspiracy. The district court understood all of this, having heard testimony during trial about the side conspiracy, when it declined to give a multiple-conspiracy instruction. Such an instruction was inapplicable and unnecessary.

II. The Jury Instruction on Aiding and Abetting Was Correct, Unambiguous, and Unobjected To at Trial

Both defendants take issue with a simple, standard aiding-and-abetting instruction. KBr.52-58; PBr.9-14. Their issue is not with the correctness of the instruction but rather with how it interacts with other instructions. They did not timely object below and point to no authority supporting the error they now claim. In fact, the instructions at issue are routinely given together, and there is no reason to think that they confused the jury. Even if they did, the jury's confusion would have *helped* the defendants by raising the burden on the government, as the court pointed out below. Thus, there was no error in giving the aiding-and-abetting instruction, let alone a plain one.

A. Ruling Under Review

Katakis, joined by Parker, first complained about the aiding-and-abetting jury instruction after trial in a Rule 33 motion for a new trial. KER.140-45; PER98 (Parker joinder). The district court denied the motion, holding that the defendants "have not shown the required reasonable likelihood that the jury applied the court's aiding and abetting instruction in a way that violated the Constitution." KER.15.

The court was "not convinced that th[e] instruction," "which largely tracks the Ninth Circuit's pattern jury instruction," "is erroneous," in part because the court saw no "authority showing that giving an aiding and abetting instruction along with a Sherman antitrust conspiracy instruction . . . is improper." KER.16. The court further reasoned that, even if the aiding-and-abetting instruction were "redundant," "any confusion resulting from [it] would inure to the benefit of the defendants, not the government." KER.17. There was also "no indication that the jury was confused regarding the concept of aiding and abetting" and "no reasonable likelihood that giving the aiding and abetting instruction caused the jury to convict Katakis without finding

that all the elements of an antitrust conspiracy had been proven." KER.17-18.

B. Standard of Review

Both defendants concede that they did not preserve their objection to the aiding-and-abetting instruction, so plain error review applies. KBr.23, 52; PBr.10 (quoting a case about plain error and otherwise not citing an objection during trial); *see United States v. Dipentino*, 242 F.3d 1090, 1094 (9th Cir. 2001). Thus, their convictions must be affirmed unless "(1) there has been an error in the proceedings below; (2) that error was plain; (3) it affected substantial rights; and (4) it seriously affected the fairness, integrity, or public reputation of judicial proceedings." *United States v. Teague*, 722 F.3d 1187, 1190 (9th Cir. 2013). Reversal is highly unlikely because even "[a]n improper instruction rarely justifies a plain error finding." *United States v. Payseno*, 782 F.2d 832, 834 (9th Cir. 1986).

Even absent plain-error review, the defendants would need to show both that the instruction is ambiguous and that "'there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72

(1991) (quoting *Boyde v. California*, 494 U.S. 370, 380 (1990)). In making those determinations, "the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Id.* (quoting *Cupp v. Naughten*, 414 U.S. 141, 147 (1973)).

C. There Was No Error, Much Less a Plain Error, in Instructing the Jury on Aiding-and-Abetting Liability in the Context of a Sherman Act Conspiracy Case

Although Katakis accurately describes the plain-error standard, neither of the defendants' briefs includes an argument that the second and third prongs—that the supposed error is plain and that it affects substantial rights—are satisfied. As a result, they have forfeited those arguments, and their claim fails on that basis alone. *See Ind. Towers of Wash. v. Washington*, 350 F.3d 925, 929 (9th Cir. 2003) ("[W]e will not consider any claims that were not actually argued in appellant's opening brief.").

Nor have they shown that there was an error to begin with. As the district court observed, the instruction the defendants complain about "largely tracks the Ninth Circuit's pattern jury instruction on aiding and abetting." KER.16; *see* KER.54, 436-37 (the instruction as given).

It is a correct statement of law, and the defendants do not claim otherwise.

They also provide no reason to think that its combination with another correct instruction, on the elements of a Sherman Act crime, somehow gives rise to a constitutional due process violation. Here, as in the district court, "no defendant has presented the court with any authority showing that giving an aiding and abetting instruction along with a Sherman antitrust conspiracy instruction (or the instruction for any type of conspiracy), without further guidance, is improper." KER.16.

Indeed, there is nothing contradictory or exceptional about combining the concepts of conspiracy and aiding and abetting. Trial courts do it all the time, and appeals courts approve. *See United States v. Galiffa*, 734 F.2d 306, 309-11 (7th Cir. 1984) (collecting cases); *see also United States v. Loscalzo*, 18 F.3d 374, 383 (7th Cir. 1994) ("The aiding and abetting statute serves to complement the substantive offense of conspiracy."). In a case involving a bid-rigging conspiracy, this Court confirmed that "it is a crime to aid and abet an existing conspiracy," as well as to "aid and abet the *formation* of a conspiracy."

United States v. Portac, Inc., 869 F.2d 1288, 1293 (9th Cir. 1989) (citing *United States v. Lane*, 514 F.2d 22, 26-27 (9th Cir. 1975)); *see also United States v. Gaskins*, 849 F.2d 454, 459 (9th Cir. 1988) ("[A]ll indictments for substantive offenses must be read as if the alternative provided by [the aiding-and-abetting statute] were embodied in the indictment."). None of these cases suggests there is anything "ambiguous" about the intersection of conspiracy law and aiding-and-abetting liability. Even if there were an error, this wealth of case law and experience supporting the jury charge would undermine any claim that the error was "plain."

The defendants' assumption that the jurors must have been confused because they sought clarification on the intent requirement of a Sherman Act violation, KBr.56; PBr.12-13, is unfounded. The jury's question to the court during deliberations, explicitly about the Sherman Act conspiracy instruction (KER.47-48), was whether a defendant must have had the "motive . . . to eliminate . . . competition" or must simply have joined the conspiracy "knowingly." KER.416.[3]

---

[3] In response, the district court told the jurors, "if you will go back and look at the Court's other instructions, including this instruction, I

The query had nothing to do with the aiding-and-abetting instruction—about which the jury posed no questions, as both defendants concede. *See* KBr.55 ("[T]he jury had trouble . . . even without the added complexity of" the aiding-and-abetting instruction.); KBr.56 ("[T]he jury did not inquire about the aiding and abetting instruction."); PBr.13 ("[E]ven without the aiding and abetting overlay, the jury was confused."); *see also* KER.17 ("[T]he jury asked no questions regarding . . . the aiding and abetting instruction."). The jury's requested clarification on one instruction cannot support an inference of reversible confusion on another.[4] *See United States v. Summers*, 268 F.3d 683, 688 (9th Cir. 2001) (rejecting an argument that a separate, correct instruction on mental state did not raise "the likelihood that the first instruction was misunderstood").

---

think you will find the answer to your question. I don't think I can answer it any other way more directly. So, go back and resume your deliberations." KER.445-46.

[4] Confusion as to aiding and abetting was also unlikely because only the auctioneer was charged with aiding and abetting. KER.890, 892. Accordingly, the government only argued an aiding-and-abetting theory with respect to the auctioneer, never as to Katakis or Parker.

Moreover, as the district court pointed out, the jury's question indicated that, if anything, "the jury may have sought to apply a higher burden than necessary"—that is, to the defendants' benefit—because a "defendant need not have the intent to eliminate competition." KER.17 (citing *United States v. Brown*, 936 F.2d 1042, 1046 (9th Cir. 1991); *United States v. Brinkley & Son Constr. Co.*, 783 F.2d 1157, 1162 (4th Cir. 1986)). Consequently, "any confusion resulting from this theory [of aiding and abetting a conspiracy] and the related instructions would inure to the benefit of the defendants, not the government." *Id.*

For that reason, as well as what the district court found to be "persuasive evidence of both Katakis' and Parker's direct involvement in the bid rigging conspiracy," there is no legitimate argument that the instructions—even if plainly erroneous—affected the defendants' substantial rights or seriously affected the fairness or integrity of the judicial proceedings. That conclusion is reinforced by the fact that none of the defendants objected to the jury instructions during trial. *See Henderson v. United States*, 568 U.S. 266, 278-79 (2013) ("[T]he fact that a defendant did not object . . . may well count against" both the third and fourth prongs of the plain-error standard.) If the instructions

were as gravely erroneous as defendants now claim, they ought to have noticed sooner.

III. The District Court Properly Tried Katakis and Parker Together

As a general rule, "defendants jointly charged are to be jointly tried," *United States v. Ramirez*, 710 F.2d 535, 545 (9th Cir. 1983), and that is "particularly appropriate where the co-defendants are charged with conspiracy," *United States v. Fernandez*, 388 F.3d 1199, 1242 (9th Cir. 2004). Parker disagrees, claiming that evidence on the obstruction-of-justice count against Katakis somehow "infected the trial," PBr.20, such that the jury could not fairly assess the evidence of Parker's guilt of the bid-rigging count. PBr.18-21. He presses this claim despite instructions to the jury to consider the evidence on each count and against each defendant separately, instructions the jury is presumed to have followed. Parker's claim reflects an argument that Katakis has dropped on appeal.

A. Rulings Under Review

Before trial, Parker and another defendant moved to sever their cases from Katakis's, or at least to sever the obstruction count from the joint trial. Dist. Ct. Dkt. Nos. 154, 156, 172 (Parker joinder). The

district court denied the motions, holding that there was no reason to depart from the general principle that defendants charged together should be tried together, especially in conspiracy cases. PER.1-2. The court said it would address their concerns "through proper limiting instructions" and that "it is reasonable to expect that the jury will be able to compartmentalize the evidence as it relates to the separate defendants." PER.2.

After trial, Katakis moved for a new trial in light of his acquittal on the obstruction-of-justice count, arguing that the "DriveScrubber evidence resulted in prejudicial spillover that prejudiced Katakis's bid-rigging defense." PER.72. Parker joined the motion. PER.98.

The district court denied it, PER.3-21, and gave a litany of reasons: "it is not at all clear that an obstruction of justice charge based on deleting emails is any more inflammatory than allegations of bid rigging, the charges are very dissimilar," "the evidence of Katakis' participation in the bid rigging scheme was more than enough for a jury to convict him of the Sherman antitrust conspiracy charge," "the court carefully instructed the jury to consider each count and each defendant separately," and "the mixed verdicts reached by the jury tend to show

that the obstruction of justice evidence was not so inflammatory that it would tend to cause the jury to convict on the remaining counts." PER.11-12 (footnote omitted).

B. Standard of Review

This Court reviews both the denial of a motion to sever and the denial of a new-trial motion based on retroactive misjoinder for abuse of discretion. *United States v. Lazarenko*, 564 F.3d 1026, 1042-43 (9th Cir. 2009); *United States v. Cuozzo*, 962 F.2d 945, 949 (9th Cir. 1992).

Prejudicial spillover or retroactive misjoinder—closely related concepts that are often used interchangeably—occurs when multiple counts or multiple defendants are properly joined initially, but then subsequent developments, such as the dismissal of some counts for insufficient evidence, render the initial joinder improper. *Lazarenko*, 564 F.3d at 1042-43 & n.10. "[T]he primary consideration" for courts "is whether 'the jury can reasonably be expected to compartmentalize the evidence as it relates to separate defendants.'" *Cuozzo*, 962 F.2d at 950 (quoting *United States v. Escalante*, 637 F.2d 1197, 1201 (9th Cir. 1980)).

To assess prejudicial spillover, this Court considers several factors: "(1) whether the evidence was so inflammatory that it would tend to cause the jury to convict on the remaining counts; (2) the degree of overlap and similarity between the dismissed and remaining counts; . . . (3) a general assessment of the strength of the government's case on the remaining counts"; (4) "whether the trial court diligently instructed the jury"; and (5) "whether there is evidence, such as the jury's rendering of selective verdicts, to indicate that the jury compartmentalized the evidence." *Lazarenko*, 564 F.3d at 1044.

C. Evidence of Katakis's Attempts To Obstruct Justice Did Not Prejudice Parker

All the *Lazarenko* factors cut against Parker and underscore the weakness of his prejudicial-spillover argument, which occupies just two paragraphs of his brief, PBr.20-21. The district court was correct to observe that "it is not at all clear that an obstruction of justice charge based on deleting emails is any more inflammatory than allegations of bid rigging," PER.11, particularly because the obstruction-of-justice charge was only against Katakis, not Parker. The district court was also correct that the bid-rigging charge and the obstruction charge were "very dissimilar," *id.*, especially considering that the latter was an

entirely separate offense in both time and substance, resulting from the investigation of the former and necessitating a superseding indictment. The strength of the evidence of the bid-rigging conspiracy is also not seriously in question. *Id.*; *see also* PER.8-10 (recounting evidence against Katakis); PER.20 (citing "the persuasive evidence of both Katakis' and Parker's direct involvement in the bid rigging conspiracy"); *supra* Statement Part II (laying out the evidence); *supra* Argument Part I.D (making the same point).

In addition, the jury was carefully instructed to consider each count and each defendant individually. *Contra* PBr.21 ("There was no limiting instruction."). The district court instructed the jury that:

> Your verdict on one count should not control your verdict on any other count, and you do not have to return the same verdict for all counts. Although the defendants are being tried together, you must give separate consideration to each defendant. . . . The fact that you may find one of the defendants guilty or not guilty should not control your verdict as to any other defendant.

KER.41, 426. The district court also stated twice during the jury charge that the obstruction count applied only to Katakis. KER.41, 53. The district court's instructions to the jury are a "critical factor" in assessing whether the jury could compartmentalize the evidence against each

defendant on each charge, *Cuozzo*, 962 F.2d at 950, and these instructions could not be more clear or more sound.

Finally, "[t]he fact that the jury rendered selective verdicts is highly indicative of its ability to compartmentalize the evidence." *Id.* The jury here made distinctions between the defendants and between the charges. It acquitted the auctioneer of the same bid-rigging charge it found Katakis and Parker guilty of, even as it hung on the mail-fraud count against Katakis and Parker. Contrary to Parker's argument on appeal, PBr.21, the jury's apparent discernment shows that the jury was capable of making fine judgments based on the evidence, and it reinforces the fact that the obstruction evidence was not so inflammatory that the jury simply threw up its hands and convicted on all counts.

The district court went further and said it would have admitted evidence regarding Katakis's attempts to delete emails under Federal Rules of Evidence 404(b) and 403 even if the obstruction-of-justice count had been dismissed before trial. PER.12. That was because such evidence "was highly probative in showing Katakis' consciousness of guilt, which outweighs any dangers of unfair prejudice" and "tends to

show that Katakis knowingly participated in the bid rigging conspiracy." PER.13-14. This conclusion makes the prospect that the district court abused its discretion even more remote.

Once again, none of this is especially relevant to Parker. Because Parker was not charged with obstruction of justice, his claim to prejudicial spillover must necessarily be weaker than Katakis's—and Katakis has dropped this argument on appeal. As the district court observed at Parker's bail hearing, the government "never argued nor was there ever any inference raised that the DriveScrubber evidence was attributable to Mr. Parker, or that the jury should consider the DriveScrubber evidence against Mr. Parker." SER.2. "Even if for some reason the Court of Appeals should accept every argument Mr. Katakis is making on appeal," the district court mused, "there is no way that this court could imagine that they would reverse as to Mr. Parker." *Id.*

Parker offers no meaningful connection between the obstruction evidence against Katakis and his own bid-rigging conviction. Nor does he explain why the jury could not or did not follow the district court's clear instructions. *See Escalante*, 637 F.2d at 1202 ("[O]ur court assumes that the jury listen[s] to and follow[s] the trial judge's

instructions."). Accordingly, the district court acted within its discretion in trying two co-conspirators together and in finding no prejudicial spillover from one count against one defendant to another count against another defendant.

IV. Katakis Has Not Shown That His Trial Counsel Rendered Ineffective Assistance

Katakis makes two misguided assertions of ineffective assistance of trial counsel. First, he claims that his trial counsel should have called three witnesses whom he believes would have given exculpatory testimony. KBr.46-51. The district court heard testimony from all three at a post-trial hearing and decided, well within its discretion, that calling any of them would have been unwise. KER.21-26. Second, Katakis misconstrues a statement his trial counsel made at the post-trial hearing to claim that his trial counsel refused to let him testify at trial. KBr.59-61. Katakis did not make that argument below, and it is meritless in any event.

A. Ruling Under Review

After trial, Katakis moved for a new trial under Rule 33 based on ineffective assistance of counsel. KER.279-305. The motion claimed a number of deficiencies in his trial counsel's performance, including trial

counsel's decision not to call three witnesses whose testimony Katakis thought would be exculpatory. KER.287-94. The motion did not say that trial counsel had refused to allow Katakis to testify.

The district court held a two-day hearing on the motion, at the end of which it indicated orally that it was ruling against Katakis on the argument about the three potentially exculpatory witnesses. KER.21-26. The district court said that trial counsel's decision not to call one witness, Eric Tolman, "made a lot of sense," KER.22, and "was a wise decision," KER.23. As for a second witness, Theodore Hutz, the court said that "[t]he reasons for not calling him as a character witness are clear." KER.23. The court "d[id]n't see what Mr. Hutz would have added" and thought "it was a wise decision not to call him." KER.24. For the final potential witness, William Trawick, the court noted that trial counsel "didn't have the benefit of seeing Mr. Trawick or hearing the testimony that he gave in court today. I think if he had, he would be all the more convinced that his decision not to call him was correct." *Id.* For the third time, the court said that declining to call the witness "was a wise decision." KER.25.

The court concluded that Katakis's "defense would have been worse and not better" if these witnesses had testified at trial and that Katakis's trial counsel "acted as a conscientious, competent lawyer in service of his client." KER.26. The court therefore announced that Katakis's trial counsel's decisions "did not fall below the standard of practice, nor did they result in any harm to Mr. Katakis' defense." *Id.* Katakis subsequently withdrew his remaining claims of ineffective assistance of counsel. SER.8-10.

There is no ruling below on Katakis's claim that his trial counsel rendered ineffective assistance by refusing to allow him to testify, because Katakis never presented that claim to the district court. *See* KBr.59 ("Trial Counsel's failure to inform Mr. Katakis of his right to testify was not specifically argued in the District Court."); SER.30 ("[W]hy Mr. Katakis elected not to testify . . . hasn't been raised.").

B. Standard of Review

In assessing ineffective-assistance-of-counsel claims, this Court reviews the findings of fact for clear error and the ultimate determination de novo. *United States v. Garcia*, 997 F.2d 1273, 1283 (9th Cir. 1993). When a defendant argues ineffective assistance of

counsel in a motion for a new trial, this Court reviews the district court's denial for abuse of discretion. *United States v. Cochrane*, 985 F.2d 1027, 1029 (9th Cir. 1993) (per curiam).

To prevail on an ineffective-assistance-of-counsel claim, a defendant "must show that counsel made errors that a reasonably competent attorney acting as a diligent and conscientious advocate would not have made, and . . . must also demonstrate prejudice." *Butcher v. Marquez*, 758 F.2d 373, 376 (9th Cir. 1985) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). On the deficiency prong, the Court applies "a strong presumption that counsel rendered adequate assistance and exercised reasonable professional judgment in all significant decisions made." *Id.* Judicial scrutiny is "highly deferential." *Strickland*, 466 U.S. at 689. On the prejudice prong, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. The likelihood of a different result must be "substantial, not just conceivable." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (internal quotation marks omitted).

"[I]neffective assistance claims based on a duty to investigate must [furthermore] be considered in light of the strength of the government's case." *Eggleston v. United States*, 798 F.2d 374, 376 (9th Cir. 1986).

C. This Court Can Resolve Katakis's Ineffective-Assistance Claims on Direct Appeal

Claims of ineffective assistance of counsel are not ordinarily reviewed on direct appeal. *United States v. Pope*, 841 F.2d 954, 958 (9th Cir. 1988). "Challenge by way of a habeas corpus proceeding is preferable as it permits the defendant to develop a record as to what counsel did, why it was done, and what, if any, prejudice resulted." *Id.* The Court makes an exception, however, "when the record on appeal is sufficiently developed to permit review and determination of the issue." *United States v. Ross*, 206 F.3d 896, 900 (9th Cir. 2000) (quoting *United States v. Robinson*, 967 F.2d 287, 290 (9th Cir. 1992)).

Katakis believes this exception applies to his first ineffective-assistance claim—that his trial counsel should have interviewed and called three additional witnesses—in light of the district court's two-day evidentiary hearing, at which his trial counsel and the three witnesses all testified. KBr.46-47. The government does not dispute that this Court could apply the exception to Katakis's claim about the three

witnesses. *See generally United States v. Cates*, 283 F. App'x 562, 562 (9th Cir. 2008) (unpublished) (reviewing ineffective-assistance claims on direct appeal partly because "both parties requested that we reach the issue"); *United States v. Woolley*, 123 F.3d 627, 634 (7th Cir. 1997) (applying that court's "rule that we will consider ineffective assistance claims on direct appeal upon the request of both parties").

There is no record, however, on Katakis's second ineffective-assistance claim—that his trial counsel refused to allow him to testify—beyond his counsel's stray statement at the post-trial hearing that "Mr. Katakis was not available as a witness." KER.216. The government again does not dispute that the claim can be resolved on direct appeal, but for different reasons than Katakis provides. *See* KBr.59. The claim as he presents it is sufficiently unconvincing—twisting a single statement out of context and urging this Court to act on it, KBr.61; *see infra* Argument Part IV.D.iv—that it need not be developed further. *Cf. United States v. Anderson*, 850 F.2d 563, 565 n.1 (9th Cir. 1988) (reviewing ineffective assistance on direct appeal because "it is not necessary to expand the record").

Because Katakis's ineffective-assistance claims on appeal arise from the district court's denial of a new-trial motion, the abuse-of-discretion standard normally would apply. *See supra* Argument Part IV.B (citing *Cochrane*, 985 F.2d at 1029). Here, however, Katakis did not raise his second claim—that he was barred from testifying—in his new-trial motion based on ineffective assistance of counsel, or anywhere else until now. *See* KER.279-305; KBr.59 ("Trial Counsel's failure to inform Mr. Katakis of his right to testify was not specifically argued in the District Court."); SER.30 (district court noting that "why Mr. Katakis elected not to testify . . . hasn't been raised as an issue on the motion"). He has therefore forfeited the argument on his second claim. *Hillis v. Heineman*, 626 F.3d 1014, 1019 (9th Cir. 2010) ("These arguments are raised for the first time on appeal, and because they were never argued before the district court, we deem them waived.").

D. Trial Counsel Explained Convincingly Why He Declined To Call Additional Witnesses, Including Katakis

Katakis raises two baseless claims of ineffective assistance of counsel, neither of which substantiates deficient performance by his trial counsel nor prejudice against him. The district court had no trouble seeing through Katakis's first claim—that defense counsel

should have interviewed and called three individuals who allegedly had exculpatory information. The same judge who tried the case heard exactly how these witnesses would have testified at trial and was blunt in his assessment of their value as witnesses. KER.21-26. Making that assessment was well within the district court's discretion.

The district court did not pass on Katakis's second claim—that defense counsel barred Katakis from testifying in his own defense—because Katakis did not make such a claim. He has therefore waived that argument. *See supra* Argument Part IV.C. It is, in any event, based on a heedless distortion of an unremarkable statement his trial counsel made at the post-trial hearing.

i. Eric Tolman

Katakis suggests that Eric Tolman, a general contractor who began working with Katakis and the Swangers after the conspiracy period ended, would have testified that, while the FBI was investigating the bid-rigging conspiracy, Steve Swanger told Tolman that Katakis knew nothing about the conspiracy—"That's all I have to say about that," Steve supposedly declared, KER.259—and that Ken Swanger nodded in agreement. KBr.28-29; KER.259-60. Tolman testified that this

exchange occurred in early 2011, SER.71, several months after Katakis enlisted Steve Swanger to help him delete records from Swanger's computers, *see supra* Statement Part II.D.

Katakis's trial counsel testified that he "knew what [Tolman] was going to say" and that Tolman's account was not "significant information to the defense" because it was "consistent with the prosecutor's theory" that Katakis, Chandler, and Steve Swanger "had discussed a cover story to protect Mr. Katakis." KER.213-14. In the trial counsel's judgment, a jury "could [have] perceived [Tolman's testimony] as a statement implementing the coverup theory." KER.214. Besides, he pointed out, "why would any juror expect that Mr. Steve Swanger is going to confess to being involved in a criminal conspiracy to Eric Tolman, who he barely knew, during the pendency of an FBI investigation, when everybody on God's green earth knew that there was an FBI investigation and was clamming up?" SER.48-49; *see also* SER.56 (same).

Trial counsel further explained that he saw little upside in using Tolman to "nibble around the edges of Steve Swanger's credibility," SER.53; *see* SER.59 (Tolman "wouldn't have had any impeachment

value at all, in my judgment, based upon the circumstances of the statement."); *see also* SER.55 ("I was monitoring [Steve Swanger's] credibility very carefully."), and much downside in giving the government "an opportunity to savage the defense by saying, Look at all he did not touch," SER.54; *see also* SER.57 ("[N]ormally, I don't like to present partial defenses."). Tolman also would not have been useful as a character witness because he and Katakis "just simply didn't have a relationship that would justify" it. SER.12.

To the district court, trial counsel's "explanation for why he did not elect to interview Mr. Tolman . . . made a lot of sense." KER.22. After hearing Tolman's testimony, the court credited trial counsel's concerns about "what doors it might open," that it could confirm the coverup agreement, that "it would add nothing," and that "the jury wouldn't believe that Swanger would confess his own involvement to Tolman." KER.22-23. Not calling Tolman, in the court's view, "was a wise decision." KER.23.

The trial counsel's strategic judgment is entitled to deference, *Strickland*, 466 U.S. at 689, as is the district court's exercise of discretion, *Cochrane*, 985 F.2d at 1029. Defense attorneys are not

obligated to interview every conceivable witness, particularly when those witnesses' potential testimony is "tenuously related to the defense." *Hendricks v. Calderon*, 70 F.3d 1032, 1040 (9th Cir. 1995). In such instances, "the decision to search for [their testimony] or neglect it is left to the discretion of the attorney." *Id.*

Katakis's trial counsel provided adequate and persuasive reasons for excluding Tolman from the defense. Those reasons convinced the district court of trial counsel's efficacy, even after the district court heard the full testimony and cross-examination of Tolman as they would have occurred at trial. On appeal, Katakis claims that Tolman's account "would have been the most compelling piece of evidence for the defense at trial," KBr.49, but in light of the testimony at the post-trial hearing, that assertion says more about the state of the trial record than it does about trial counsel's performance.

ii. Theodore Hutz

Theodore Hutz was a "close friend" of Katakis's, SER.19; *see also* KER.266-67, and a member of the bid-rigging conspiracy who pleaded guilty before Katakis went to trial, *see* Dist. Ct. Dkt. No. 12 (related case memorandum). Katakis claims that Hutz would have testified that

Katakis did not participate in the auctions or round-robins, that Katakis "just provided capital to the Swangers," and that Hutz did not personally know whether Katakis had entered into an agreement not to bid at the foreclosure auctions. KBr.29 (citing KER.264, 266, 268).

Katakis's trial counsel testified that, as with Tolman, he was aware of what Hutz might say and considered it of "no value." SER.41-42. Hutz's potential testimony would be either inadmissible hearsay from Katakis or would duplicate other witnesses' testimony, such that Hutz "add[ed] nothing to the case." SER.42-45; *accord* SER.19. Trial counsel was also concerned that Hutz's close relationship with Katakis would "detract from his credibility" and might raise suspicions among the jurors about why Katakis was still meeting with Hutz and not "kicking him out of his office under all of these circumstances." SER.19. Hutz, in the defense's view, was all "downside with no upside," an "easy call." SER.15-16.

The district court also could not see "what it was that Mr. Katakis thinks [Hutz] could have contributed to the trial." KER.23. "[H]e could be cross-examined as a character witness," the court explained, and his testimony about Katakis's statements to him "would have been

hearsay," which the court "would not have allowed." KER.23-24. "Again," the court concluded, "it was a wise decision not to call him." KER.24.

Katakis's trial counsel provided adequate and persuasive reasons for excluding Hutz from the defense. All Hutz had to offer was inadmissible hearsay evidence and cumulative testimony. *See Bragg v. Galaza*, 242 F.3d 1082, 1088 (9th Cir. 2001) (rejecting an ineffective-assistance claim because the defendant did not "identify any information that [his trial counsel] had not already gained from other witnesses that he would have gained from interviewing" the defendant's desired witness). The district court ratified trial counsel's judgment, even after hearing the full testimony and cross-examination of Hutz as they would have occurred at trial. The district court's decision was reasonable and well within its discretion. As trial counsel testified, "Ted Hutz was an easy call. They don't get easier than that in this business." SER.16.

iii. William Trawick

William Trawick is a real-estate agent who purportedly trained under Katakis starting in July 2009, during the conspiracy period;

transitioned to a paid position after the conspiracy period; and continued in that position up to and through the time of the post-trial hearing. KER.271, 276; SER.62, 65. Katakis wanted Trawick to testify to Katakis's "honest and ethical" conduct and to the fact that Katakis did not participate in the round-robins. KBr.30.

Katakis's trial counsel was aware of what Trawick could offer as a witness, SER.33, 35, 37, which he thought was "potentially significant information"—but only "[f]or the prosecution," SER.38. As a defense strategy, trial counsel had tried to avoid "the fact that Mr. Katakis was a micromanager, and highly involved in the purchase of the properties, and setting prices" because "someone who was that involved in all the intricacies of the business could not have missed what was going on with Steve Swanger and other people." SER.23. Trawick "would have severely undercut" trial counsel's effort to distance Katakis from Steve Swanger and the property purchases. *Id.* "[A]nybody who followed [Katakis] around could not help but be impressed about how much knowledge he had about everything that was going on inside the business," which "was contrary to what [trial counsel] was trying to suggest to the jury." *Id.*

As for Trawick's potential service as a character witness, trial counsel was not convinced. Trial counsel testified that as a general matter, "the government would be delighted with a character defense with Mr. Katakis." SER.27. Regardless, in trial counsel's estimation, Trawick was not "in the class of character witnesses, even if they were helpful, that would be persuasive with the jury." SER.26. Trial counsel was also concerned that Trawick's testimony would "open the door to a flood of e-mails showing Mr. Katakis' attention to details inside the . . . business," which was "inconsistent with what [he] felt was [Katakis's] strongest defense." SER.27.

The district court understood and credited trial counsel's explanations. The court ventured that, after hearing Trawick testify post-trial, trial counsel "would be all the more convinced that his decision not to call [Trawick] was correct." KER.24. Trawick's testimony that he spent weeks "hanging around as Mr. Katakis' shadow" was, in the court's view, "incredible, unbelievable." KER.24-25. The court also agreed that Trawick's testimony could lead the jury to infer that "Katakis was aware of criminal activity and wasn't taking steps to do something about it." KER.25. Ultimately, the court deemed

Trawick a "sad witness" whom trial counsel was "wise" not to call. KER.24-25.

Katakis's trial counsel provided adequate and persuasive reasons for excluding Trawick from the defense. Trial counsel, not to mention the district court, understood what Trawick had to offer on the stand and how damaging it could be to the defense. Trial counsel's decisionmaking was sound, and far from deficient. *See, e.g.*, *Eggleston*, 798 F.2d at 376 (Declining to pursue a witness "cannot establish ineffective assistance when the person's account is otherwise fairly known to defense counsel." (quoting *United States v. Decoster*, 624 F.2d 196, 209 (D.C. Cir. 1976) (en banc))). The district court's judgment, in turn, was far from an abuse of the court's discretion.

iv. Andrew Katakis

For the first time on appeal, Katakis complains that his trial counsel refused to let him testify in his own defense. KBr.59-61. His complaint stems from a single statement by his trial counsel during the post-trial hearing, which he stretches far from its meaning.

The statement arose in response to a question from Katakis's post-trial counsel about "the downside of Mr. Tolman" as a witness. SER.52.

In responding, trial counsel took a step back to explain that the government's case "was broadly based on a combination of factors, the most important factors being Mr. Katakis' personal e-mails," as well as "invoices," "payments," uncharacteristic "property transfer agreements," and "five or six percipient witnesses who had personally said that they had been involved with Mr. Katakis." SER.52-53. Trial counsel added that "Katakis was [also] involved with installing scrubber programs on the computers." KER.216. For all of those reasons, trial counsel explained, "Katakis was not available as a witness in the defense. He would not be able to take the stand." *Id.* At that point, the post-trial counsel interrupted to steer the trial counsel back to the question about Tolman. *Id.* ("Were you going to get to Mr. Tolman here?").

The only fair reading of this exchange is that Katakis's trial counsel was explaining why he thought calling Katakis to the stand was strategically unsound. He gave no indication that he had blocked Katakis from testifying or even that Katakis had wanted to testify. *Cf. United States v. Edwards*, 897 F.2d 445, 447 (9th Cir. 1990) ("Neither the prosecution nor the court was given any reason to think the defendant desired to testify."). Nor did he give any reason to believe

that Katakis had not knowingly and intentionally relinquished his right to testify. *See United States v. Joelson*, 7 F.3d 174, 177 (9th Cir. 1993). To the contrary, a defendant like Katakis "is presumed to assent to his attorney's tactical decision not to have him testify." *Id.*

In the post-trial hearing, Katakis's trial counsel did nothing more than lay out the complications and downsides of putting Katakis on the stand, based on his experience as a criminal defense attorney. He was merely explaining the wisdom of not calling Katakis to testify; he never said or insinuated that he had not or would not allow Katakis to do so. His thoughtfulness is an indication of his effectiveness as counsel, not any deficiency. Thus, the premise of Katakis's argument is incorrect, even if it had been preserved.

Katakis is correct to point out that the district court had no duty to advise Katakis of his right to testify, KBr.60 (citing *Joelsen*, 7 F.3d at 177), and that failing to inform a client of his right to testify is not ineffective assistance, *id.* (citing *Edwards*, 897 F.2d at 446-47 (9th Cir. 1990)). Courts can infer a waiver of the right from "the defendant's silence in the face of his attorney's decision not to call him." *Edwards*, 897 F.2d at 446.

Katakis sees his situation as "different from the usual scenario," however, because "Katakis did not have any say in the matter." KBr.61. Setting aside the prior point that trial counsel's testimony is silent as to Katakis's desire to testify, Katakis's situation is no different from *Edwards* or *United States v. Martinez*, 883 F.2d 750 (9th Cir. 1989), in which the defendants, like Katakis, said nothing during trial about wanting to testify. Even defendants who are ignorant of the right are expected to speak up to exercise it. *E.g.*, *United States v. Nohara*, 3 F.3d 1239, 1244 (9th Cir. 1993). Thus, even accepting the premise of Katakis's argument, nothing about his circumstance is "different from the usual scenario" or warrants relief.

E. The Testimony Would Not Have Changed the Trial's Outcome

Even if Katakis's trial counsel's strategic judgments were deficient under the first *Strickland* prong, Katakis has not shown a substantial likelihood that he would have been acquitted otherwise. Katakis's principal argument for prejudice, no matter the issue, is that "the Government's case against Mr. Katakis was not overwhelming." KBr.51; KBr.61 ("[T]he evidence against Mr. Katakis was not overwhelming."); KBr.3 (same); KBr.58 (same); KBr.63 (same). The

government disagrees, and so did the district court. *See* KER.6-8 (recounting evidence against Katakis); KER.9 ("[T]he evidence of Katakis' participation in the bid rigging scheme was more than enough for a jury to convict him of the Sherman antitrust conspiracy charge."); KER.18 (citing "the persuasive evidence of both Katakis' and Parker's direct involvement in the bid rigging conspiracy"); *supra* Statement Part II (laying out the evidence); *supra* Argument Part I.D (making the same point).

Just as in Argument Part I.C, the additional testimony Katakis wants to introduce adds little, if anything, to the conduct already described at trial. It is not news at this point that Katakis did not attend the round-robins himself, nor a revelation that Katakis's co-conspirators might not play by the rules. The extra evidence also does not diminish, even slightly, the sweeping and consistent testimony at trial portraying Katakis as a (self-described) "control freak," SER.104, at the helm of a bid-rigging conspiracy, who took steps to cover his tracks when his accountant raised questions and sought to erase incriminating records when he got wind of a federal investigation. The testimony of the four witnesses Katakis identifies, even collectively,

would not alter that portrait, much less lead a jury to decide his case differently. *See* KER.26 ("The Court believes that if any of those witnesses had, in fact, been called, his defense would have been worse and not better."). Katakis has not demonstrated prejudice from his trial counsel's strategic judgments, and the district court acted within its discretion in concluding that Katakis had satisfied neither prong of the *Strickland* test.

V. The Cumulative-Error Doctrine Is Inapplicable

The defendants' briefs present distinct but overlapping sets of issues that they claim, in the end, must amount to a collective error worthy of reversal. Beneath their issues, however, lie no actual errors, dooming their hunt for a reversible cumulative error. In any event, the mountain of evidence of the defendants' involvement in the bid-rigging conspiracy makes overcoming the harmless-error standard an uphill climb indeed.

A. Ruling Under Review

As their final argument for a new trial below, Katakis, joined by Parker, asserted that, even if none of the errors they claimed below was sufficiently prejudicial in isolation, those errors' cumulative effect

necessitated a retrial. KER.145; PER98 (Parker joinder). The district court rejected the argument because the court did "not find that the alleged prejudicial spillover, alleged prosecutorial misconduct, and alleged erroneous jury instructions collectively show that the trial was rendered fundamentally unfair." KER.18.

The sets of errors alleged in (1) the relevant new-trial motion below, (2) Katakis's brief on appeal, and (3) Parker's brief on appeal, are not exactly the same, but they do overlap.

B. Standard of Review

In reviewing a claim of cumulative prejudicial error, this Court "consider[s] all errors . . . which were preserved for appeal with a proper objection or which were plain error." *United States v. Berry*, 627 F.2d 193, 200 (9th Cir. 1980). The Court "analyz[es] the overall effect of all the errors in the context of the evidence introduced at trial against the defendant." *United States v. Frederick*, 78 F.3d 1370, 1381 (1996). The Court then applies "the harmless error doctrine which requires [it] to affirm a conviction if there is overwhelming evidence of guilt." *Id.* (quoting *Berry*, 627 F.2d at 201).

Because the defendants made their claims of cumulative error as part of a new-trial motion, this Court reviews the district court's denial of the claim for abuse of discretion. *United States v. French*, 748 F.3d 922, 934 (9th Cir. 2014) ("We review the district court's denial of a motion for a new trial for abuse of discretion.").

C. Defendants Have Not Shown a Single Error, Much Less a Cumulative One

Defendants' arguments for reversible cumulative error simply reiterate their preceding arguments in cursory form—one paragraph for Parker, three for Katakis. KBr.62-63; PBr.22. The scant treatment presents no new analysis. For Katakis, this means relisting his complaints about the "new" evidence of a side conspiracy, the aiding-and-abetting instruction, and his trial counsel's alleged ineffectiveness. KBr.63. Parker matches Katakis on the first two but makes prejudicial spillover his third. PBr.22.

Neither list includes a single error, as this brief has thoroughly explained. *See Moore v. Reynolds*, 153 F.3d 1086, 1113 (10th Cir. 1998) ("Cumulative error analysis applies where there are two or more actual errors; it does not apply to the cumulative effect of non-errors."). Moreover, as this brief has shown, the strength of the evidence of the

bid-rigging conspiracy is not seriously in question. *See* KER.6-8 (recounting evidence against Katakis); KER.9 ("[T]he evidence of Katakis' participation in the bid rigging scheme was more than enough for a jury to convict him of the Sherman antitrust conspiracy charge."); KER.18 (citing "the persuasive evidence of both Katakis' and Parker's direct involvement in the bid rigging conspiracy"); *supra* Statement Part II (laying out the evidence); *supra* Argument Part I.D (making the same point). The mass of evidence against them makes the harmless-error inquiry an essentially insuperable hurdle for the defendants.

Notably, neither defendant claims that the evidence presented at trial was insufficient to convict him of conspiring to rig bids. Both defendants claim that the supposed errors "undermined [their] defense that [they] lacked the requisite knowledge and intent to be guilty of the Sherman Act bid-rigging conspiracy," PBr.22; *accord* KBr.63, but neither suggests that the government's evidence fell short of its burden.

Defendants have raised an array of issues in this appeal and, perhaps sensing that each alone is insufficient, ask this Court to add them up to see if the total is somehow greater. This Court should instead conclude that the district court did not abuse its discretion in

finding that the alleged errors, even collectively, failed to demonstrate anything "fundamentally unfair" about the trial. KER.18.

CONCLUSION

This Court should affirm the judgments below.

Respectfully submitted.

s/ Adam D. Chandler

MAKAN DELRAHIM
Assistant Attorney General

ANDREW C. FINCH
Principal Deputy Assistant Attorney General

MICHAEL F. MURRAY
RICHARD A. POWERS
Deputy Assistant Attorneys General

STRATTON C. STRAND
ADAM D. CHANDLER
Attorneys

U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, NW
Room 3224
Washington, DC 20530-0001
202-353-6638
adam.chandler@usdoj.gov

Counsel for the United States of America

May 24, 2019

STATEMENT OF RELATED CASES

The government agrees with Katakis and Parker's statements of related cases under Ninth Circuit Rule 28-2.6. KBr.65; PBr.24. The only case in this Court related to these consolidated appeals was a prior government appeal concerning Count 3 (obstruction of justice) against Katakis. That appeal was resolved in 2015. *See United States v. Katakis*, 800 F.3d 1017 (9th Cir. 2015) (No. 14-10283).

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 17-10487, 18-10027

I am the attorney or self-represented party.

This brief contains 12,843 **words**, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- (•) complies with the word limit of Cir. R. 32-1.
- ( ) is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ( ) is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ( ) is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ( ) complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one):*
  - ( ) it is a joint brief submitted by separately represented parties;
  - ( ) a party or parties are filing a single brief in response to multiple briefs; or
  - ( ) a party or parties are filing a single brief in response to a longer joint brief.
- ( ) complies with the length limit designated by court order dated _____.
- ( ) is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature s/ Adam D. Chandler **Date** May 24, 2019

(use "s/[typed name]" to sign electronically-filed documents)

Feedback or questions about this form? Email us at forms@ca9.uscourts.gov

CERTIFICATE OF SERVICE

I, Adam D. Chandler, hereby certify that on May 24, 2019, I electronically filed the foregoing Answering Brief for the United States of America and the accompanying Supplemental Excerpts of Record with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF System.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

May 24, 2019

s/ Adam D. Chandler
Counsel for the United States