20-3520-cr(L), 20-3789-cr(CON)

United States Court of Appeals

for the

Second Circuit

UNITED STATES OF AMERICA,

Appellee,

– v. –

ALLISON MACK, KATHY RUSSELL, LAUREN SALZMAN, NANCY SALZMAN, AKA Perfect,

Defendants,

KEITH RANIERE, AKA Vanguard, CLARE BRONFMAN,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

REPLY BRIEF FOR DEFENDANT-APPELLANT CLARE BRONFMAN

DANIEL R. KOFFMANN
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
(212) 849-7000

– and –

RONALD S. SULLIVAN, JR.
RONALD SULLIVAN LAW PLLC
1300 I Street NW, Suite 400E
Washington, DC 20005
(202) 935-4347

Attorneys for Defendant-Appellant Clare Bronfman

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PRELIMINARY STATEMENT

In the narrow portion of its brief that addresses Appellant Clare Bronfman's sentence, the government engages in revisionist history, attacks strawman arguments, and fails to offer any logical defense of the defective sentencing proceeding that resulted in her extraordinary 81-month sentence. The Court should reject the government's arguments and its years-long effort to tie Clare Bronfman to allegations of sex slavery, blackmail, and worse. Ms. Bronfman, like thousands of others around the world, was an active member of NXIVM and a zealous proponent of its teachings. But NXIVM is not DOS. Ms. Bronfman never participated in DOS, knew nothing about it, and cannot in any legitimate way be said to be culpable for it. Yet she faces years in prison because the district court saw fit to impose a sentence three times the Guidelines range based on incoherent reasoning and clearly erroneous findings that linked her to DOS. This Court should not tolerate such procedural error.

The government's primary argument is that the district court did not punish Ms. Bronfman based on a finding that she was willfully blind to DOS. That blinks reality. The transcript speaks for itself:

> [W]hile she might not have known about DOS before receiving the collateral e-mails in September 2017, *I find it clear that in her own words, she did not want to know either*.

> In determining an appropriate sentence I *also* considered the need for a sentence that I impose to reflect the seriousness of the offense, promote respect for the law and provide just punishment.
>
> …
>
> She maintains that she was an innocent bystander to Raniere's abhorrent conduct, completely blind to Raniere's crimes and the sex trafficking that occurred within the Nxivm community. As I have said, I find that *any such blindness was willful and cultivated, and Ms. Bronfman's sentence can and should serve to deter other people who find themselves in situations in which they can chose to either confront or avert their gaze* from the harm brought by their actions and the actions of those to whom they are close.

(SPA126–28 (emphases added).)[1] The government's mental gymnastics and belabored attempts to spin the transcript cannot overcome the record. There can be no legitimate dispute that the district court found that Ms. Bronfman was willfully blind to DOS, nor that this finding affected the court's determination of her sentence.

Nor can there be any dispute that the court's willful-blindness finding was clearly erroneous. The government does not even attempt to justify it—it offers no argument whatsoever that there is a basis to find that Ms. Bronfman was willfully blind to DOS. The best the government can do is to argue that, although "the court used the phrase 'willful blindness' to describe Bronfman's behavior"—and did so

[1] Citations to "SPA" refer to the special appendix submitted with Ms. Bronfman's principal brief (Dkt. No. 69); "A" to the appendix submitted with Ms. Bronfman's principal brief (Dkt. Nos. 67–68); and "SBA" to the supplemental appendix submitted with Ms. Bronfman's supplemental principal brief (Dkt. No. 138).

explicitly "in the context of DOS"—the court didn't really mean it. Instead, the government suggests, when the district court referred to the well-known legal concept that imputes culpability to a person who, like Clare Bronfman, lacked actual knowledge of the conduct at issue, the court was referring to Ms. Bronfman's state of mind "after she had actual knowledge of DOS." Government Brief 140–43. Not so. The district court's reliance on the concept of willful blindness was part of its justification for punishing Ms. Bronfman for DOS notwithstanding that she knew nothing about it and had nothing to do with it. The district court meant what it said, and it said what it meant. The government cannot salvage a prison sentence three times the Guidelines range by rewriting the record or redefining willful blindness.

The government is equally off base when it repeatedly suggests that the district court did not find that Ms. Bronfman bore culpability for DOS. The court plainly did so. It permitted eight former members of DOS, who had no connection whatsoever to Ms. Bronfman's offense conduct, to testify at length at her sentencing about their experiences in DOS. (SPA16–67.) The court delivered its own lengthy description of DOS and stated that DOS was "relevant context for [its] analysis of the appropriate sentence for Ms. Bronfman." (SPA101–04.) It stated that this "context … places her in an [altogether] different category from other defendants convicted of the same offenses." (SPA129.) It linked Jane Doe 12's subsequent "recruit[ment] into an organization like DOS" to "the kind of pressure and

mistreatment that [she] was subjected to by Ms. Bronfman," suggesting it made Jane Doe 12 "susceptible to be recruited into an organization like DOS." (SPA109.) Had the district court not believed that Ms. Bronfman bore culpability for DOS, none of this would have been relevant or appropriate to discuss at her sentencing. And, lest there be any doubt, the court stated explicitly that "Ms. Bronfman's sentence can and should serve to deter other people" who are willfully blind to conduct like "sex trafficking" and the other "abhorrent conduct" alleged in this case. (SPA127.)

Nor, as the government suggests, does it make any difference whether the district court discussed Ms. Bronfman's ostensible willful blindness in the context of her "history and characteristics" or in the context of the "nature and circumstances" of her offense. A clear factual error affecting a sentence requires vacatur whether the error relates to the first prong of Section 3553(a)(1) or the second. The government is splitting hairs, to no relevant end.

The government also halfheartedly argues that DOS, and Ms. Bronfman's ostensible willful blindness to it, were not central to the district court's assessment of the appropriate sentence. This Court can read the transcript for itself and see the importance that DOS played in the district court's decision to imprison Clare Bronfman for three times longer than the upper end of the Guidelines range. In any event, the additional justifications that the district court briefly mentioned no more support that draconian sentence than the misguided willful-blindness rationale does.

Finally, the government fails to address the key disconnect between the extraordinary harshness of the sentence it imposed on Ms. Bronfman and the sentences imposed on similarly situated defendants around the country. The government argues that "the extraordinary and unique facts underlying and surrounding [Ms. Bronfman's] offenses" make it impracticable to compare her sentence to others convicted of the same offenses. *See* Government Brief 138. Yet when the district court faced those same "extraordinary and unique facts" in sentencing Ms. Bronfman's codefendants, it imposed sentences that were extraordinarily lenient by comparison. In doing so, the district court undermined any suggestion that Ms. Bronfman's case was such an outlier that it warranted such an extraordinary disparity from similarly situated defendants. In any event, the district court's premise was wrong. The Guidelines account for potential culpability arising from facts like those in this case, and as the primary tool for minimizing unwarranted sentencing disparities, the Guidelines provided the appropriate mechanism to account for the supposedly "unique and extraordinary facts" in Ms. Bronfman's case—not a 200% upward variance.

The government's strained efforts in its brief to tie Ms. Bronfman to the racketeering conduct alleged against her codefendants illustrates further that she is collateral damage in the prosecution of DOS. Nothing in the government's brief justifies the baseless findings, incoherent reasoning, and unfair procedure the district

court employed in imposing an 81-month sentence on Clare Bronfman. Nor can the parade of disputed and prejudicial allegations that the government repeats at length throughout its brief. The individual and cumulative impact of the procedural errors underlying Ms. Bronfman's sentence is too prejudicial to let the sentence stand. The Court should vacate and remand for resentencing.

ARGUMENT

I. THE DISTRICT COURT COMMITTED REVERSIBLE ERROR BOTH IN FINDING THAT CLARE BRONFMAN WAS WILLFULLY BLIND TO DOS AND IN PUNISHING HER ON THAT BASIS.

A. The District Court Clearly Erred When It Found Ms. Bronfman Was Willfully Blind To DOS.

1. *The government's tortuous reconstruction of the district court's statement of reasons contradicts the record.*

Despite the government's best efforts to twist the transcript, there can be no legitimate dispute that the district court punished Ms. Bronfman based on its belief that she was willfully blind to DOS. It said so on the record. The court explained that, although "there is no evidence that she directly participated" in it, DOS "is relevant context for my analysis of the appropriate sentence for Ms. Bronfman." (SPA104.) It said that, in addition to other factors it "considered" in "determining an appropriate sentence," it found that, "while she might not have known about DOS before receiving the collateral e-mails in September 2017," it was "clear that in her own words, she did not want to know either." (SPA126.) And it stated that Ms. Bronfman's "blindness" both to "Raniere's abhorrent conduct … and [to] the sex

trafficking that occurred within the Nxivm community" was "willful and cultivated, and Ms. Bronfman's sentence can and should serve to deter other people who find themselves in situations in which they can choose to either confront or avert their gaze from" such conduct. (SPA127–28.) DOS was front and center at Ms. Bronfman's sentencing.

The hurdle the district court had to overcome in order to punish Ms. Bronfman for what happened in DOS was that, as the district court conceded, Ms. Bronfman played no role in DOS, knew nothing about it, and made no conscious effort to provide financial support for it. There would be no justification to punish Ms. Bronfman based on DOS unless there were some basis to find her culpable for it. *See infra* 21–23. So the district court bridged the gap with its willful-blindness finding.

The government's argument to the contrary is revisionist history. It argues that when the district court found that Ms. Bronfman was willfully blind to DOS, it was not invoking the concept by which a person is found culpable of conduct of which they lack actual knowledge. *See, e.g.*, Government Brief 140 ("the court used the phrase 'willful blindness' to describe Bronfman's behavior—not her legal culpability"). Instead, the government asserts, the court was describing Ms. Bronfman's continued support of Mr. Raniere "after she [gained] actual knowledge of DOS." Government Brief 142–43.

This argument is absurd. The transcript directly contradicts it. The district court found that "before receiving the collateral e-mails in September 2017," Ms. Bronfman "might not have known about DOS," but "she did not want to know either." (SPA126.) The record is clear on its face that the district court was purporting to describe Bronfman's state of mind *before* she gained actual knowledge of DOS. For the government to argue that the district court "discussed Bronfman's willful blindness in the context of DOS, but only because of Ms. Bronfman's behavior after she had actual knowledge of DOS," Government Brief 142–43, is pure fantasy.

This is also clear from the fact that the alternative meaning of "willful blindness" that the government advances is incompatible with the actual meaning of that term. Under this Court's long-standing precedent, "willful blindness" imposes culpability on someone who *lacked* actual knowledge of a fact. *See United States v. Kozeny*, 667 F.3d 122, 132 (2d Cir. 2011) ("Knowledge [of a fact] may be proven [under willful-blindness doctrine] if, but only if, the person suspects the fact, realized its high probability, but refrained from obtaining the final confirmation because [she] wanted to be able to deny knowledge.");[2] *see also* Bronfman Principal Brief 31–32 (collecting cases). Contrary to the government's novel definition, willful blindness

[2] Unless otherwise indicated, this brief omits from quotations and citations all internal quotation marks, alterations, footnotes, and citations.

has nothing to do with how a person reacts "after she [acquires] actual knowledge" of the relevant fact. Government Brief 143. Instead, a defendant's willful blindness can substitute for actual knowledge that the law otherwise would require for a finding of culpability, thereby enabling the court to ensure that the defendant does not avoid punishment simply because he stuck his head in the sand.

The transcript also demonstrates that the district court understood the prevailing definition. The court stated, for example, that it found it "particularly credible" that Ms. Bronfman was willfully blind to DOS because, in the court's view, "it would not be the first time that [she] exuded the sense that she wanted to participate in Raniere's world *while remain[ing] unaware* of its uglier aspects." (SPA125 (emphasis added).) It then found explicitly that her "blindness" to "Raniere's abhorrent conduct … and the sex trafficking that occurred within the Nxivm community … was willful and cultivated"—that "while she might not have known about DOS … she did not want to know either." (SPA126–27.) And it ensured that her punishment would be significant enough to "deter other people who find themselves in situations in which they can choose to either confront or avert their gaze from the harm brought by their actions and the actions of those to whom they are close." (SPA127–28.) The government's argument that when the district court repeatedly invoked the concept of willful blindness, it really meant something else, defies all logic and common sense. *Cf. Earley v. Murray*, 451 F.3d 71, 74

(2d Cir. 2006) (there is "an irrebuttable presumption" that a trial court's sentence "says what it was meant to say"); *United States v. Horta-Alvarez*, 712 F. App'x 913, 916 (11th Cir. 2017) (per curiam) (vacating sentence and remanding where district court appeared to find (without factual basis) that defendant processed cocaine into crack cocaine: "If, as the government contends, the district court did not believe that [defendant]'s offense involved processing cocaine into crack cocaine, it's unclear why the court would reference processing in the first place.").

In addition to coining a new definition of "willful blindness," the government also seeks to minimize the significance of the willful-blindness finding to Ms. Bronfman's extraordinary sentence. The record dispels any suggestion that this was a minor point. As discussed above, the district court returned multiple times to Ms. Bronfman's ostensible willful blindness and explained the impact it had on the determination of her sentence. (SPA126–28; *see also* SPA124–25 ("Ms. Bronfman seems to have a pattern of willful blindness when it comes to Raniere and his activities.… [DOS] would not be the first time that Ms. Bronfman exuded the sense that she wanted to participate in Raniere's world while remain unaware of uglier aspects.").) The government repeatedly identifies where in the transcript the district

court raised willful blindness[3] and which prong of Section 3553(a)(1) it related to,[4] but neither of these arguments moves the needle. It makes no difference whether the district court articulated this theory early in its statement of reasons or, as it did here, shortly before imposing the sentence. The government cites to no authority that excuses clear factual error so long as it occurs "just twice in more than 30 pages of transcript." Government Brief 139. Nor does the government explain why clear factual error regarding a defendant's "history and characteristics" matters less than such error regarding the "nature and circumstances of the offense." *Id.* The record is clear that the district court enhanced Ms. Bronfman's punishment because it believed Ms. Bronfman's "blindness" to "Raniere's abhorrent conduct … and the sex trafficking that occurred within the Nxivm community" was "willful and cultivated." (SPA127–28.) This Court should not countenance the government's revisionist history.

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[3] *See* Government Brief 134 ("[n]ear the end of the district court's statement of reasons"), 139 ("just twice in more than 30 pages of transcript"), 140 ("for the first time on the 25th page of its oral statement"), 141–42 ("first mention of 'willful blindness' appears some 25 transcript pages into its oral statement").

[4] *See id.* at 134 ("in the context of its discussion of Bronfman's 'history and characteristics'"), 139 ("in connection with the court's consideration of her 'history and characteristics'—not the 'nature and circumstances of [her] crimes[s]'"), 140 ("only after its detailed consideration of the 'nature and circumstances' of Bronfman's offenses"), 142 ("in connection with the court's consideration of Bronfman's 'history and characteristics'").

2. *The government's failure to defend the district court's willful-blindness finding is a concession that it is clearly erroneous.*

The reason the government goes to such lengths to spin the transcript is because there is no support for the district court's finding that Ms. Bronfman was willfully blind to DOS. The government does not even attempt to justify it: It does not identify a single fact that could support a finding that she was willfully blind to DOS, nor does it offer any theory that could lead to that conclusion. That is a concession that the district court clearly erred in finding that Ms. Bronfman's "blindness" to DOS was "willful and cultivated." *See United States v. Philippe*, 842 F. App'x 685, 690 (2d Cir. 2021) (summary order) ("the government waived that argument by failing to raise it in its brief on appeal"); *Norton v. Sam's Club*, 145 F.3d 114, 117 (2d Cir. 1998) (appellee's failure adequately to make argument deemed waiver). And because "[s]electing a sentence based on clearly erroneous facts" constitutes reversible procedural error, *United States v. Dorvee*, 616 F.3d 174, 179 (2d Cir. 2010); *see also Gall v. United States*, 552 U.S. 38, 51 (2007), Ms. Bronfman's sentence cannot stand.

3. *The government's concession renders its responses to Ms. Bronfman's Guidelines and unfair-surprise arguments irrelevant.*

In her principal brief, Ms. Bronfman identified additional evidence that the district court committed clear factual error—and thus reversible procedural error—in basing her sentence on its finding that she had a "willful and cultivated"

"blindness" to "sex trafficking that occurred within the Nxivm community." Specifically, Ms. Bronfman pointed to (1) the incoherence between the district court's Guidelines analysis and its willful-blindness finding, and (2) the court's eleventh-hour, *sua sponte* invocation of that rationale, which deprived Ms. Bronfman of a fair opportunity to rebut it. Bronfman Principal Brief 40–50.

As explained below, the government has no adequate response to these points. Instead, it responds to arguments Ms. Bronfman did not make and myopically focuses on narrow aspects without addressing the key issues. But its responses, however weak, are actually irrelevant. Ms. Bronfman's argument was that the inconsistency between the district court's willful-blindness finding and its Guidelines analysis demonstrated that the court's willful-blindness finding was clearly erroneous. *Id.* at 45. The government conceded that the willful-blindness finding is clear error by failing to offer any basis to support the finding. *See supra* 12. So its strained attempt to reconcile that finding with the district court's Guidelines analysis is beside the point.

In any event, the government's response proceeds from the obtuse premise that Ms. Bronfman is "asserting, incongruously and for the first time on appeal, that the court erred by failing to apply certain Guidelines enhancements." Government Brief 145–46. Not so. Ms. Bronfman's argument was that "[r]emand for resentencing is appropriate where a district court's statement of reasons contains"

inconsistencies between its Guidelines analysis and its Section 3553(a) analysis. Bronfman Principal Brief 45. That principle is well-settled. *See id.* at 45–46 (collecting cases). Obviously Ms. Bronfman is not suggesting that the district court's Guidelines analysis was wrong and that her offense level should have been higher. *See id.* at n.2. Instead, she is challenging the clearly erroneous factual finding that is inconsistent with the district court's Guidelines analysis.

The government's substantive responses are unpersuasive too. Its assertion that the court declined to apply the enhancement in Section 2L1.1(b)(2)(A) because there was a pattern of five, not six, noncitizens is baseless. *See* Government Brief 146–47. The transcript speaks for itself: "Because the charged conduct to which Ms. Bronfman pleaded encompassed only one victim, Jane Doe 12, I will not apply the enhancement as set forth in Sentencing Guideline 2L1.1(b)(2)(A)." (SPA13.) And the government's responses regarding Sections 2L1.1(b)(6)–(7) and 3E1.1 once again require suspension of disbelief that the district court sentenced Ms. Bronfman based on its finding that she "did not want to know" about DOS and thus had a "willful and cultivated" "blindness" to it. (SPA126–27.)

The government also fails to address the thrust of Ms. Bronfman's argument that the district court deprived her of an adequate opportunity to dispute the willful-blindness finding. When the district court stated that a Guidelines sentence would not be sufficient because Ms. Bronfman "did not want to know" about DOS and her

"blindness" to it was "willful and cultivated" (SPA126–27), it was the first time anyone had raised that concept. Ms. Bronfman had no notice of or adequate opportunity to address it. That is improper. *United States v. Delacruz*, 862 F.3d 163, 175 (2d Cir. 2017) ("[T]he Due Process Clause [] require[s] that a defendant … have an opportunity to respond to material allegations that he disputes, in order that the court not sentence him in reliance on misinformation."). Particularly in light of the magnitude of the variance of Ms. Bronfman's 81-month sentence from both the Guidelines range (21 to 27 months) and the sentence the government recommended (60 months), this procedure was unreasonable. *See United States v. Fleming*, 894 F.3d 764, 768–70 (6th Cir. 2018) (procedural error where district court imposed sentence twice the Guidelines range based on factors not raised in presentence report nor parties' sentencing submissions); *United States v. Millan-Isaac*, 749 F.3d 57, 71 (1st Cir. 2014) ("The consideration of such new information is particularly concerning here given the court's subsequent announcement that it would sentence [the defendant] to … a period of incarceration more than twice as long [as] the government's recommended sentence."); *see also United States v. Seabrook*, 968 F.3d 224, 235 (2d Cir. 2020) ("A district court that chooses to impose a non-Guidelines sentence should say why it is doing so, bearing in mind that a major departure from the Guidelines should be supported by a more significant justification than a minor one.").

The government focuses on whether Ms. Bronfman was entitled to a *Fatico* hearing, Government Brief 144–45, but the district court's refusal to hold a hearing merely illustrates (and exacerbates) the underlying procedural error. Both the presentence investigation report and the government's sentencing memorandum had suggested that Ms. Bronfman supported DOS and helped to source sexual partners for Mr. Raniere. (PSR ¶¶16, 21; A226.) Ms. Bronfman sought a hearing to rebut these inflammatory, prejudicial, and completely untrue allegations and to demonstrate that there would be no basis to find she had a culpable mental state regarding DOS. (A117–19.) The district court's refusal to hold a hearing because it did not sentence Ms. Bronfman based on a finding that she had actual knowledge of DOS, and subsequent imposition of an extraordinary upward variance based on a finding that she had an *alternative* culpable mental state, was procedurally unreasonable. *See* Bronfman Principal Brief 40–45.

Whether this Court chooses to assess the merits of the arguments, or simply dismiss them as irrelevant, the government's responses do nothing to justify the district court's imposition of a sentence three times the Guidelines range based on a finding that Ms. Bronfman was willfully blind to DOS.

B. The District Court's Erroneous Willful-Blindness Finding Requires Vacatur.

The government's failure to offer any support for the district court's finding that Ms. Bronfman's "blindness" to DOS was "willful and cultivated" is fatal to its

opposition and to Ms. Bronfman's sentence. The district court explicitly found that Ms. Bronfman was willfully blind to DOS. *See supra* 6–10. There is no dispute that this finding was clearly erroneous. *See supra* 12. And this finding plainly affected the district court's decision to vary 200% upward from the Guidelines and impose an 81-month prison sentence on Clare Bronfman. *See supra* 10–11. "[S]electing a sentence based on clearly erroneous facts" constitutes reversible procedural error. *Dorvee*, 616 F.3d at 179; *see also Gall*, 552 U.S. at 51.

This is particularly true here given the significance of the variance from the Guidelines range. A "major departure from the Guidelines should be supported by a more significant justification than a minor one." *Unites States v. Cavera*, 550 F.3d 180, 193 (2d Cir. 2008) (en banc). The government argues that "upward variances no matter the size" are subject to the same review as "any other sentence," Government Brief 136, yet it fails to acknowledge extensive caselaw to the contrary, including a decision on which *the government itself relies*. *See United States v. Dean*, 792 F. App'x 842, 845 (2d Cir. 2019) (summary order) ("When a district court deviates from an advisory Guidelines range, it must consider the 'extent of the deviation and ensure that the justification is sufficiently compelling to support the degree of the variance.'" (quoting *Cavera*, 550 F.3d at 189)); Government Brief 149 (citing *Dean*); *see also Gall*, 552 U.S. at 51 ("When conducting [abuse-of-discretion] review, the court [of appeals] will, of course, take into account the totality

of the circumstances, including the extent of any variance from the Guidelines range.").

Nor can the government salvage Ms. Bronfman's sentence by reciting a litany of inflammatory and disputed allegations about her. Where the record indicates that a district court's erroneous belief influenced the sentence ultimately imposed, it makes no difference that there were other factors that also affected the court's decision. *See Seabrook*, 968 F.3d at 233–34 (vacating sentence and remanding where district court "returned multiple times" to inapplicable Guidelines provision even though it may have attempted to "insulate its sentence from [appellate] review" by stating it would have imposed the same sentence regardless of the Guidelines); *United States v. Halliday*, 672 F.3d 462, 474–75 (7th Cir. 2012) (vacating sentence and remanding where district court's "repeated focus" on erroneous factual finding appeared to affect sentence); *Horta-Alvarez*, 712 F. App'x at 916 (vacating sentence and remanding where the district court made two references to unsupported finding, notwithstanding that another factor also had an impact on the sentence imposed). Ms. Bronfman's sentence cannot withstand scrutiny regardless of Jane Doe 12's purported "very vulnerable state" and "susceptib[ility] to be recruited into an organization like DOS" (SPA109); the ostensible "culture of stifling and threatening dissenters … that gave rise to the darkest and most horrific crimes that Raniere and

others committed" (SPA115); or Ms. Bronfman's unwitting facilitation of Mr. Raniere's alleged tax evasion (SPA111–12).

The government's efforts to rehabilitate these aspects of the district court's decision confirm that they cannot bear the weight of the extreme upward variance the district court imposed on Ms. Bronfman. As to Jane Doe 12's subsequent recruitment into DOS, the government makes no argument this was a foreseeable consequence of the "emotional and financial pressure" Ms. Bronfman allegedly inflicted on her. Government Brief 148–49. And even if there had been a "culture of stifling and threatening dissenters" within NXIVM (there wasn't), the government identifies no factual basis to infer a causal relationship between that culture and the "darkest and most horrific crimes that Raniere and others committed." *Id.* at 150–51. Yet the transcript is clear that the district court drew an explicit link between Ms. Bronfman's conduct and harms associated with DOS, and it is equally clear that it enhanced her sentence based on that purported association. (SPA109 ("the kind of pressure and mistreatment that Jane Doe 12 was subjected to by Ms. Bronfman put her in a very vulnerable state, the kind of state that could make a person more susceptible to be recruited into an organization like DOS"), 115 ("This culture of stifling and threatening dissenters, a culture that Ms. Bronfman clearly participated in and perpetuated, is the same culture that gave rise to the darkest and most horrific crimes that Raniere and others committed.").) As discussed further below at 21–23,

this Court cannot condone a sentence three times the Guidelines range based on fortuitous, unforeseeable conduct for which a defendant bears no culpability.

Nor can Ms. Bronfman's identity theft-related conduct support her extraordinary sentence. The government appears to concede this when it argues that the district court did not sentence Ms. Bronfman to a sentence three times the Guidelines range "because" of this conduct. Government Brief 152. Its only other response then is to misconstrue the record by asserting that Ms. Bronfman admitted in her guilty plea allocution that she was facilitating Mr. Raniere's tax evasion. Not so. The government's unilateral insertion of "[i.e., Raniere]" to a quotation from her allocution is without basis. *See id*. To the contrary, Ms. Bronfman was not referring to Mr. Raniere, who, to her knowledge, was not "the person using the credit card." Instead, Ms. Bronfman was referring to Mariana, who lived with Mr. Raniere and, to Ms. Bronfman's understanding, used the card but did not pay income tax in the United States because she was a Mexican citizen.

The district court's clearly erroneous finding that Ms. Bronfman was willfully blind to DOS dooms her sentence. The Court need not reach any other issue. Yet even if it chooses to consider the additional considerations the district court referenced in its statement of reasons, those rationales cannot withstand scrutiny. They certainly cannot bear the weight needed to justify an upward variance of the magnitude present here. Nor can the rest of the mud that the government has slung

at Ms. Bronfman throughout this case. The Court should vacate and remand for resentencing.

C. This Court Should Reject The Government's Suggestion That Ms. Bronfman May Be Punished Based On Conduct For Which She Bears No Culpability.

The government's opposition is problematic for other reasons. It asserts that the district court "repeatedly made clear that it was not holding Bronfman responsible for DOS." Government Brief 139; *see also id.* at 141. As discussed above at 6–11, the record directly contradicts this. Nor does the government's laundry list of citations support its assertion, because those portions of the transcript simply reflect the district court's begrudging concession that there is no evidence that Ms. Bronfman was *directly* involved in or had *actual* knowledge of DOS.[5] Far from showing that the district court did not punish Ms. Bronfman for DOS, these citations simply explain why the district court felt compelled to resort to its erroneous willful-blindness theory.

[5] (*See* SPA103 ("this paragraph [of the presentence investigation report] does not state that Bronfman was *aware of or involved* with DOS"), 104 ("the available evidence does not establish that she was *aware of* DOS prior to June 2017"), 109 ("I am not suggesting that Ms. Bronfman had a *direct* role in Jane Doe 12's recruitment into DOS or even if she was *aware* of it."), 118 ("I do not find that Ms. Bronfman *knowingly* funded a sex cult."), 120 ("I do not base Ms. Bronfman's sentence on the assumption that she *knew* about DOS prior to receiving these e-mails."), 124 ("Ms. Bronfman repeatedly argues that she *knew* nothing about and never funded DOS. As I said earlier, I do not base my sentence on a finding that contradicts either of those claims."). All emphases added.)

But even if the government were correct that the district court did not find Ms. Bronfman bore culpability for DOS (it isn't), that would require this Court to approve a drastic upward variance based on conduct for which the defendant did *not* bear responsibility. The notion that it would be permissible to sentence a defendant for conduct for which she is not culpable should be anathema to this Court. *See, e.g.*, *Graham v. Fla.*, 560 U.S. 48, 71 (2010) ("[T]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender."); *Dorvee*, 616 F.3d at 184 (vacating sentence where defendant "appears to have been punished as though he already had, or would" engage in conduct that he had not committed); *United States v. Cossey*, 632 F.3d 82, 87 (2d Cir. 2011) (vacating and remanding to different judge where district court based sentence on "unsupported belief"); *cf. United States v. Aldeen*, 792 F.3d 247, 253–54 (2d Cir. 2015) (vacating above-Guidelines sentence apparently based on conduct not proven by a preponderance).

The government's citations to *Dean*, 792 F. App'x 842, and *United States v. Brass*, 527 F. App'x 70 (2d Cir. 2013) (summary order), do not alter that conclusion. Those were fraud cases in which the district courts considered both the financial and the emotional injuries that victims sustained. In *Dean*, the defendant rented out vacation properties that did not belong to him, collecting payment but never providing the accommodations. 792 F. App'x at 843. This Court held it was not

substantively unreasonable for the district court to consider both the financial impact on the victims and nonfinancial harms such as not being able to attend a long-planned family reunion, interference with vacations and wedding plans, and embarrassment from being scammed. *Id.* at 845; *see also* Appendix 91–92, *Dean*, No. 18-3690 (2d Cir. Apr. 11, 2019) (Dkt. No. 35). *Brass* involved a Ponzi scheme in which the district court imposed an upward variance on a defendant whose "extraordinary betrayal of [victims'] trust" deprived them of money that "they needed for mortgage payments, health care, college tuition and expenses of daily living" and also caused nonmonetary injuries that left their lives "permanently altered." Appendix 126, *Brass*, No. 12-3179 (2d Cir. Dec. 17, 2012) (Dkt. No. 16). But these nonfinancial harms were direct consequences of the fraud, not unforeseeable conduct by third parties other than the defendant. *Dean* and *Brass* provide no justification for the type of strict liability the district court employed here, sentencing Ms. Bronfman based on harm caused by the independent, unforeseeable actions of others.

This Court should reject the government's invitation to approve a sentence three times the Guidelines range based on harms for which Ms. Bronfman bears no culpability.

II. CLARE BRONFMAN'S 81-MONTH SENTENCE CREATES UNWARRANTED SENTENCING DISPARITIES THAT AMOUNT TO PROCEDURAL ERROR.

The government's response regarding the unwarranted disparity between Ms. Bronfman's excessively harsh sentence and those imposed on similarly situated defendants misapprehends Ms. Bronfman's argument. At sentencing, the district court dismissed this Section 3553(a) factor on the purported basis that "the context of Ms. Bronfman's criminal conduct places her in [an altogether] different category from other defendants convicted of the same offenses." (SPA129.) But when faced with that very same "context" in sentencing Ms. Bronfman's codefendants—including Allison Mack and Lauren Salzman, whose racketeering crimes put them elbow-deep in DOS—the court faced no similar obstacle to showing extraordinary lenience. *See* Bronfman Supplemental Principal Brief 8. This fatally undermines the district court's proffered basis for disregarding this Section 3553(a) factor.

The district court's failure to identify any support for its conclusory, unreasoned assertion that Ms. Bronfman's "circumstances defy easy comparison" also requires vacatur. (SPA129.) There are, of course, many immigration cases involving allegations of sex trafficking. *See, e.g.*, *United States v. Rivera*, 799 F.3d 180, 189 (2d Cir. 2015) (vacating sentence imposed for alien-harboring offenses that involved sex-trafficking); *United States v. Zitlalpopoca-Hernandez*, 495 F. App'x 833, 836 (9th Cir. 2012) (unpublished) (vacating convictions for prostitution-related

offenses and remanding for resentencing on alien-harboring and similar offenses). And the Sentencing Guidelines contemplate immigration offenses in which victims are subjected to criminal sexual abuse. *See* Bronfman Principal Brief 46–47 (discussing Section 2L1.1(b)(6)–(7)).

The Guidelines are the "primary vehicle for reducing nationwide sentence disparities." *United States v. Wills*, 476 F.3d 103, 110 (2d Cir. 2007), *abrogated on other grounds by Kimbrough v. United States*, 552 U.S. 85 (2007). For the district court to justify its extraordinary variance from the Guidelines—and the gaping sentencing disparity that results from that variance—with elliptical references to "context" and "circumstances" that the Guidelines *already account for* does violence to this principle. At a minimum, the district court's conclusory explanation was insufficient: "When a § 3553(a) consideration is already accounted for in the guideline range, a sentencing court must articulate specifically the reasons that this particular defendant's situation is different from the ordinary situation covered by the guidelines calculation." *United States v. Rivera-Santiago*, 919 F.3d 82, 85 (1st Cir. 2019); *United States v. Garcia-Perez*, 9 F.4th 48, 53 (1st Cir. 2021) (one-sentence explanation could not justify a 12-month upward variance from Guidelines recommendation of 30-month prison term when court had accounted for the same issue in calculating the offense level); *United States v. Warren*, 771 F. App'x 637, 642 (6th Cir. 2019) (unpublished) (district court failed to provide adequate

explanation for "extreme variance"—double the Guidelines recommendation—when it relied on factors that "the Guidelines already account for").

Nor does the government dispute that Ms. Bronfman's sentence is an extreme outlier compared to every relevant benchmark. *See* Bronfman Principal Brief 27–28; *see also* A194–206 (Ms. Bronfman's sentencing memorandum discussing relevant sentencing data). The government suggests that "the analysis that Bronfman claims to have done" in her principal brief "may not be possible," Government Brief 137 n.23, yet in the *10 months* the government had to respond to Ms. Bronfman's brief, it never asked counsel to clarify the basis for the analysis. Its belated complaint about lack of transparency smacks of gamesmanship. In any event, Ms. Bronfman has moved to supplement the record to include the analysis, *see* Dkt. No. 183, so the Court can judge the data and the disparity for itself.

The government also takes umbrage at Ms. Bronfman's comparison of her sentence to her codefendants', arguing vociferously that sentencing courts need not consider sentencing disparities among codefendants and that "[t]his settled understanding of § 3553(a)(6) is fatal to Bronfman's argument." Government Brief 153–54. But when a sentencing court "opts to compare the relative culpability of co-defendants" during sentencing, its reasoning must be consistently and logically applied. *United States v. Mumuni*, 946 F.3d 97, 111 (2d Cir. 2019); *United States v. Esso*, 486 F. App'x 200, 202 (2d Cir. 2012) (summary order); Bronfman

Supplemental Principal Brief 7–8, 10–11 (collecting cases). The court may not "selectively rely" on mitigating or aggravating factors in sentencing one defendant while ignoring them in sentencing a codefendant. *Mumuni*, 946 F.3d at 113–14.

The government does not dispute that the district court opted to compare the relative culpability of Ms. Bronfman and her codefendants. Nor could it. (*Compare* SPA125 ("Ms. Bronfman's allegiance to Raniere shines through time and again.") *with* SBA75–76 ("In contrast to other individuals who have remained deferential to Mr. Raniere, even as the artifice of his virtues crumbled, you [Allison Mack] have begun the hard work of unravelling the lies and grappling with your culpability and the consequences of your behavior.").)

Nor can the government explain why the district court's justification for imposing a far more punitive sentence on Ms. Bronfman than on her far more culpable codefendants stands up to scrutiny. The district court's explanations were neither consistent nor logical. For example, the government offers no reason why the district court's belief that Mr. Raniere coerces, manipulates, and victimizes women who are close to him is a mitigating factor for Allison Mack, Lauren Salzman, and Kathy Russell (SBA75, 117, 145), but not Clare Bronfman. Nor does the government dispute that Ms. Mack's and Ms. Salzman's racketeering crimes eclipse anything Ms. Bronfman did. And it has no adequate response to the fact that

Ms. Russell, whose conduct parallels Ms. Bronfman's, and who also did not cooperate, nevertheless received a non-Guidelines, nonincarceratory sentence.

There is no dispute that there is a massive disparity between Ms. Bronfman's 81-month prison sentence and both the sentences imposed on other defendants convicted of the same crimes, and the sentences imposed on other defendants in this case. The district court offered no logical reason why such a disparity was warranted. Nor does the government. This violates Section 3553(a)(6) and is an independent procedural error requiring vacatur of Ms. Bronfman's sentence and remand for resentencing. *Esso*, 486 F. App'x at 203 (vacating and remanding in light of district court's failure to explain sentencing disparity); *United States v. Harper*, 374 F. App'x 124, 129 (2d Cir. 2010) (summary order) (vacating and remanding because "on this record, we cannot be certain that the District Court properly considered the need to avoid unwarranted sentence disparities as required by 18 U.S.C. § 3553(a)(6)").

And this was hardly the only procedural error the district court committed in sentencing Ms. Bronfman. The court based Ms. Bronfman's sentence on a clearly erroneous finding that her "blindness" to "Raniere's abhorrent conduct … and the sex trafficking that occurred within the Nxivm community" was "willful and cultivated." It denied Ms. Bronfman a fair opportunity to rebut that finding. And it offered other ill-conceived and unsupported justifications for the sentence. Each of

these errors, as well as the alarming unwarranted sentencing disparity, violates Ms. Bronfman's rights and constitutes reversible procedural error. Taken together, they leave no doubt that Ms. Bronfman is entitled to resentencing.

CONCLUSION

The Court should vacate Ms. Bronfman's sentence and remand for resentencing.

Dated: New York, New York
January 26, 2022

Respectfully submitted,

/s/ Daniel R. Koffmann

Daniel R. Koffmann
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York
Tel: (212) 849-7000
danielkoffmann@quinnemanuel.com

Ronald S. Sullivan, Jr.
RONALD SULLIVAN LAW PLLC
1300 I Street NW, Suite 400E
Washington, D.C. 20005
Tel: (202) 935-4347
rsullivan@ronaldsullivanlaw.com

Attorneys for Defendant-Appellant Clare Bronfman

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

No. 20-3520
Caption: *United States v. Bronfman*

CERTIFICATE OF COMPLIANCE WITH THE TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

I certify that this brief complies with the type-volume limitation of Rule 32(a) of the Federal Rules of Appellate Procedure and Local Rule 32.1. This brief is written in Times New Roman, a proportionally spaced font with serifs, has a typeface of 14 points, and contains 6,824 words (as counted by Microsoft Word), excluding the parts of the brief exempted by Rule 32(f) of the Federal Rules of Appellate Procedure.

/s/ Daniel R. Koffmann
Daniel R. Koffmann

Attorney for Defendant-Appellant
Clare Bronfman