

# 10-3381-CR

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In the United States Court of Appeals for the Second Circuit

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**UNITED STATES OF AMERICA,**

**Appellee,**

**v.**

**MAHMOUD REZA BANKI,**

**Defendant-Appellant.**

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**On Appeal from the United States District Court  
for the Southern District of New York**

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**Brief of Amici Curiae**

**In Support of Defendant-Appellant and In Support of Reversal  
Iranian American Bar Association, Asian Law Caucus,  
Bay Area Association of Muslim Lawyers, Equal Justice Society,  
Muslim Advocates, National Iranian American Council,  
Network of Iranian American Professionals of Orange County,  
Omid Advocates for Human Rights, Persian Center,  
Progressive Jewish Alliance, and Society of Iranian American Professionals**

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Raymond A. Cardozo, Esq.  
Paige H. Forster, Esq.  
Donna M. Doblack, Esq.  
REED SMITH LLP  
225 Fifth Avenue  
Pittsburgh, PA 15222  
Tel. (412) 288-3131  
Fax (412) 288-3063  
*Counsel for Amici Curiae*

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As required by Fed. R. App. P. 26.1, amici curiae disclose that no amicus curiae has a parent corporation and no publicly-held company owns ten percent or more of any amicus curiae.

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## **IDENTITY OF THE AMICI CURIAE**

This appeal involves a criminal conviction for aiding and abetting the transfer of noncommercial family remittances from the United States to Iran through an informal money transfer system (hawala)—something that is permitted under the regulatory law governing U.S. sanctions against Iran. The amici curiae fall into two broad categories. The first is a group of Iranian American membership organizations representing a broad cross section of the Iranian American community.<sup>1</sup> These amici are intimately familiar with issues facing the Iranian American community, including its strong ties with family members in Iran, the frequent transfer of money among Iranian and Iranian American family members, the extensive use of hawala, and the widespread belief that the type of actions for which Mr. Banki was prosecuted are permitted under the family remittance exemption from the sanctions against Iran. The second category of amici is a group of legal organizations that promote constitutional rights with a specific focus on due process and equal protection. These amici have expertise in litigation, education, and advocacy that guarantee all persons the ability to enjoy and exercise their rights.

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<sup>1</sup> In compliance with Local Rule 29.1, amici state that (1) no party's counsel authored this brief in whole or in part; (2) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (3) because Reed Smith LLP represents the amici pro bono, no person—amici curiae, their members, their counsel, or any other person—contributed money intended to fund preparing or submitting the brief.

Incorporated in 2000 in the District of Columbia, the **Iranian American Bar Association** (IABA) is a non-profit 501(c)(3) organization. IABA has more than 1,500 attorneys in over nine official chapters nationwide. IABA is the only national association of Iranian judges, lawyers, and law students organized for the specific purpose of protecting the rights of the Iranian American community. IABA's core mission is to promote the "social, economic, professional and educational advancement of the Iranian American community and the community at large." Additionally, IABA advocates nationally on legal issues that are of widespread interest to the Iranian American community. To accomplish these goals, one of IABA's primary tasks is to prevent discrimination based on ethnic, cultural or religious background.

Founded in 1972, The **Asian Law Caucus** (ALC) is the nation's first legal and civil rights organization serving low-income Asian Pacific American communities. The ALC strives to create informed and educated Asian Pacific American communities empowered to assert their rights and to participate actively in American society. Among other activities, the ALC advocates for the rights of U.S. citizens and residents who are Muslim and/or Asian (including South Asian and Middle Eastern).

The **Bay Area Association of Muslim Lawyers** (BAAML) was founded in 2001 to respond to backlash, discrimination, and hate crimes against Muslims residing in the United States. The purposes of BAAML include serving as a legal resource for Muslim communities and educating and advocating for Muslims and other people regarding their Constitutional, civil and human rights.

The **Equal Justice Society** (EJS) is a national organization of scholars, advocates, and citizens that seeks to promote equality and enduring social change through law, public policy, public education, and research. The primary mission of EJS is to combat the continuing scourge of racial discrimination and inequality in America. Consistent with that mission, EJS works to confront all manifestations of invidious discrimination and second-class citizenship. Such threats to dignity spring from a common source and endanger everyone, no matter the context in which they arise.

**Muslim Advocates** envisions a world in which equality, liberty, and justice are guaranteed for all, regardless of faith, and in which the Muslim American legal community is vital to promoting and protecting these values. In pursuit of this vision, Muslim Advocates' mission is to promote equality, liberty, and justice for all by providing leadership through legal advocacy, policy engagement, and civic education, and by serving as a legal resource to promote the full and meaningful participation of Muslims in American public life.

The **National Iranian American Council** (NIAC) is a nonpartisan, nonprofit organization. NIAC supplies resources, knowledge and tools to enable greater civic participation by Iranian Americans and informed decision making by lawmakers. NIAC emerged after September 11, 2001 as an Iranian American voice to help address profound issues of national security, immigration and the character of American society. NIAC has effectively represented Iranian Americans on Capitol Hill and is the largest Iranian American grassroots organization in the country, with supporters in all 50 states.

The **Network of Iranian American Professionals of Orange County**, California (NIPOC) is a grass-roots, non-profit, non-religious and non-political organization founded in 1986. NIPOC unifies Iranian Americans in serving public and social causes; promotes professional and business opportunities; and raises awareness of Persian heritage and culture.

The mission of **Omid Advocates for Human Rights** is to promote the human, legal and civil rights of Middle Eastern communities in the United States. Omid Advocates is committed to the pursuit of equality and justice for all sectors of our society through organizing, advocacy, and service. Its goals are: to deepen Iranian Americans' understanding of their history and culture, to heighten their consciousness of civil and human rights, to build civic participation and grassroots leadership, and to strengthen their commitment and responsibility to each other, the community, and the larger society.

The **Persian Center** is a non-profit charitable 501(c)(3) organization whose mission is to create an environment in which to conduct social, cultural, educational, and recreational activities designed to strengthen the sense of identity and integrity of all Iranians and Iranian descendants, and to engage individuals interested in or related to Persian community and culture.

The **Progressive Jewish Alliance** (PJA) was founded in 1999 in Los Angeles to assert an authentic progressive Jewish presence in the campaigns for social justice in Southern California. In 2005 PJA established a regional office in the San Francisco Bay Area. PJA engages in community organizing and also advocates on issues of peace, equality, diversity and justice. PJA promotes a

criminal justice system that adheres to the best principles of Jewish tradition and American democracy: fundamental fairness and equality under the law.

Founded in 1982, the **Society of Iranian American Professionals (SIP)** is a nonprofit, non-religious organization formed to promote recognition for Iranian Americans in a wide range of disciplines and professions. SIP promotes the personal, professional, social, and economic well being of its members and the Iranian American community.

## INTRODUCTION

This case requires the Court to interpret the portion of the Iranian Transaction Regulations (ITR) that exempts from the U.S. sanctions a transfer of funds either to or from Iran that is “a family remittance not related to a family-owned enterprise.” 31 C.F.R. § 560.516(a). In interpreting a regulation, this Court “must begin by examining the language of the provision at issue.” *Resnik v. Swartz*, 303 F.3d 147, 151 (2d Cir. 2002). In doing so, it is appropriate to consider the language of the regulation in the context of the government’s stated purpose when it enacted the underlying statute. *See United States v. Pesaturo*, 476 F.3d 60, 68 (1st Cir. 2007) (adopting regulatory interpretation that was “more persuasive both textually and in the context of the government’s stated purpose” in enacting the statute). The Court should effectuate the plain language and purpose of the ITR by concluding that non-commercial remittances to and from family members in Iran are lawful.

Mahmoud Reza Banki was convicted of violating the ITR by providing services to Iran. This Court has previously concluded:

The obvious purpose of [the prohibition on the export of services] is to isolate Iran from trade with the United States .... This broad export ban reflected the President’s appraisal of the nation’s interest in sanctioning Iran’s sponsorship of international terrorism, its frustration of the Middle East peace process, and its pursuit of weapons of mass destruction.

*United States v. Homa Int’l Trading Corp.*, 387 F.3d 144, 146 (2d Cir. 2004) (per curiam) (internal citation omitted). As this Court’s analysis makes clear, and as

will be described further below, the sanctions aim at isolating the Iranian government and preventing nuclear proliferation, financing, petroleum development, and terrorism. The sanctions are not aimed at the Iranian people, and therefore they contain exemptions permitting certain humanitarian transactions and family remittances. 31 C.F.R. § 560.516(a) (exempting “exportation to Iran ... of information and informational materials, a travel-related remittance, ... payment for the shipment of a donation of articles to relieve human suffering,” or “a family remittance not related to a family-owned enterprise”).

Despite the regulation’s clear language, the District Court refused to instruct the jury that family remittances are permitted under the ITR. The jury convicted Mr. Banki of violating the sanctions by aiding and abetting transfers of money to Iran, even though the Government failed to prove that the transactions at issue were anything but non-commercial family remittances. This outcome squarely conflicts with the plain language and purpose of the ITR—not to mention the practices of the Iranian American community and their reasonable belief that they act legally when they send money to or receive money from family members in Iran.

This Court should reject the District Court’s interpretation of the ITR, which effectively eliminates the family-remittance exemption. In doing so, this Court will be faithful to the plain meaning of the regulation and the executive branch’s policy statements regarding the sanctions, and will uphold the reasonable expectations of a loyal community of American citizens and permanent residents who wish to avail themselves of the sanctions exemption for family remittances.

In these ways, this Court’s decision will have important consequences for Mr. Banki and broader consequences as well for the Iranian American community.

## ARGUMENT

### **I. The Legal Backdrop: The Sanctions Against Iran**

Since Iran’s 1979 revolution, U.S. foreign policy towards Iran has been marked by the use of economic sanctions. U.S. Department of the Treasury Office of Foreign Assets Control (OFAC), *Iran: What You Need To Know About U.S. Economic Sanctions*, p. 1.<sup>2</sup> The sanctions have become more severe over time. *Id.*; see also David E. Sanger, *U.S. Seeks to Offer a Balm to Iran for Sanctions’ Sting*, N.Y. TIMES, Aug. 7, 2010<sup>3</sup> (describing the Obama administration’s “decision to push for ever tightening sanctions” in the hope of “bring[ing] Iran to the negotiating table”); Robert F. Worth, *U.S. Rules Bar Banks That Violate Iran Sanctions*, N.Y. TIMES, AUG. 13, 2010<sup>4</sup> (describing “new regulations ... that could bar foreign banks or companies from accessing the financial system in the United States,” and reporting that while violation of the previous sanctions would result mostly in fines, the new “threat of being cut off from the United States economy

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<sup>2</sup> <http://www.ustreas.gov/offices/enforcement/ofac/programs/iran/iran.pdf>

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[http://www.nytimes.com/2010/08/08/world/middleeast/08sanctions.html?\\_r=1&ref=islamic\\_revolutionary\\_guard\\_corps](http://www.nytimes.com/2010/08/08/world/middleeast/08sanctions.html?_r=1&ref=islamic_revolutionary_guard_corps)

<sup>4</sup>

[http://www.nytimes.com/2010/08/14/business/global/14sanctions.html?ref=islamic\\_revolutionary\\_guard\\_corps](http://www.nytimes.com/2010/08/14/business/global/14sanctions.html?ref=islamic_revolutionary_guard_corps)

adds a significant dimension”); David E. Sanger, *Obama Set to Offer Stricter Nuclear Deal to Iran*, N.Y. TIMES, Oct. 27, 2010<sup>5</sup> (referring to “a new and surprisingly broad set of economic sanctions”).

Although the sanctions have extended across decades and have tightened over time, they are intended specifically to undermine the Iranian government and stop nuclear proliferation, financing, petroleum development, and terrorism. See Comprehensive Iran Sanctions, Accountability, and Divestment Act of 2010, H.R. 2194 § 102.<sup>6</sup> The President recently reaffirmed: “[E]ven as we continue to have differences with the Iranian Government, we will sustain our commitment to a more hopeful future for the Iranian people.” Barack H. Obama, *Videotaped Remarks on the Observance of Nowruz*, 2010 DCPD No. 00190, p. 1 (Mar. 20, 2010).<sup>7</sup> The Iranian Transaction Regulations (ITR), which implement the sanctions, do not prohibit “exportation to Iran ... of information and informational materials, a travel-related remittance, ... payment for the shipment of a donation of articles to relieve human suffering,” or—relevant in Mr. Banki’s case—“a family remittance not related to a family-owned enterprise.” 31 C.F.R. § 560.516(a).

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[http://www.nytimes.com/2010/10/28/world/middleeast/28iran.html?ref=nuclear\\_program](http://www.nytimes.com/2010/10/28/world/middleeast/28iran.html?ref=nuclear_program)

<sup>6</sup> <http://www.hcfa.house.gov/111/MAR10505.pdf>

<sup>7</sup> <http://www.gpoaccess.gov/presdocs/2010/DCPD-201000190.pdf>

## II. The Cultural Backdrop: Iranian Immigration To The U.S. And The Iranian American Community

Immigration to the U.S. from Iran has taken place in “three major waves.” Shirin Hakimzadeh, *Iran: A Vast Diaspora Abroad and Millions of Refugees at Home*, MIGRATION INFORMATION SOURCE, Sept. 2006.<sup>8</sup> The first wave ended in 1979. *Id.* Thousands of Iranian students who were studying in the U.S. when the 1979 revolution took place decided to remain and (eventually) bring their families to join them. *Id.* The second wave took place after the revolution, when Iranians—many of them academics and professionals—fled military service, the privations of the Iran-Iraq war, and “overly confining gender restrictions.” *Id.* The third wave, starting in about 1995, has consisted of both professionals and laborers. *Id.*

As a result of the preponderance of educated professionals among Iranian immigrants, Iranian Americans have higher levels of income and educational attainment than the American population as a whole. Ali Mostashari & Ali Khodamhosseini, *An Overview of Socioeconomic Characteristics of the Iranian-American Community Based on the 2000 U.S. Census*, February 2004<sup>9</sup> (fifty-seven percent of Iranian Americans over age 25 have attained a bachelor’s degree or higher, compared with 24 percent of the entire U.S. population); *see also* Farzan

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<sup>8</sup> <http://www.migrationinformation.org/feature/display.cfm?ID=424>

<sup>9</sup> <http://isg-mit.org/projects-storage/census/socioeconomic.pdf>

Parsinejad, *An Opinion Survey of the Iranian-American Community*, 2005.<sup>10</sup> Nearly three quarters of Iranian American households communicate in both English and Farsi (Persian). Mostashari & Khodamhosseini, *supra* note 9. Reflecting their high education levels, Iranian Americans' per capita average income is 50 percent higher and family average income is 38 percent higher than the population as a whole. *Id.*; see also Zogby Int'l & Pub. Affairs Alliance of Iranian Americans (PAAIA), *Public Opinion Survey of Iranian Americans*, Dec. 2008, p. 10.<sup>11</sup>

Most Iranian Americans are citizens or permanent residents of the U.S. *Id.* at 2 (finding that 81 percent of respondents were citizens and another 15 percent were permanent residents). "More than six in ten Iranian Americans have immediate family members in Iran." Zogby Int'l & Pub. Affairs Alliance of Iranian Americans (PAAIA), *2009 National Public Opinion Survey of Iranian Americans*, November 2009, p. 2.<sup>12</sup> Even with sanctions in place, the majority of Iranian Americans maintain close ties with their family members: two thirds communicate frequently with their family or friends in Iran (several times a month or more). *Id.* However, "[u]ntil recently, due to the strict socio-political situation,

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<sup>10</sup> <http://web.mit.edu/isg/surveysummary.htm>

<sup>11</sup>

[http://paaia.org/CMS/Data/Sites/1/PDFs/survey\\_of\\_iranian\\_americans\\_final\\_report\\_dec\\_102008.pdf](http://paaia.org/CMS/Data/Sites/1/PDFs/survey_of_iranian_americans_final_report_dec_102008.pdf)

<sup>12</sup> <http://paaia.org/CMS/Data/Sites/1/PDFs/surveyofiasnov09.pdf>

the thought of return was unimaginable, even for a visit.” Nilou Mostofi, *Who We Are: The Perplexity of Iranian-American Identity*, 44 Soc. Q. 681, 686 (2003). Polls in 2008 and 2009 found that only 7 percent and 11 percent, respectively, of Iranian Americans visit Iran once a year or more. Zogby Int’l & PAAIA, *2009 Public Opinion Survey*, *supra* note 12, at 15; Zogby Int’l & PAAIA, *2008 Public Opinion Survey*, *supra* note 11, at 22. The majority (64 percent in 2008 and 58 percent in 2009) reported that they visit rarely or never. *Id.* Another survey showed that 45 percent of respondents’ children had never visited Iran. Parsinejad, *supra* note 10.

As might be expected, remittances of money to Iran are significant. Although exact figures do not exist, the World Bank estimated that between 1994 and 2004, “annual remittances, compensation of employees, and migration transfers back to Iran” from around the world ranged from a low of \$400 million to a high of \$1.6 billion. Hakimzadeh, *supra* note 8 (citing World Bank, *Global Economic Prospects 2006: Economic Implications of Remittances and Migration*). The U.S. is home to the largest number of Iranians outside Iran, perhaps 45 percent of all Iranian emigrants, so it is logical to infer that a significant portion of total worldwide remittances to Iran comes from the United States. *Id.*

### **III. The Use Of Hawala: The Intersection Of Legal And Cultural Factors Leads Iranian Americans To Rely On Informal Money Transfer Systems**

The U.S.’s escalating sanctions against Iran, described *supra* Section I, have included measures specifically targeting banking and financial systems. OFAC,

*Iran: What You Need to Know*, *supra* note 2. Investment in Iran is also prohibited. *Id.* In 2008, the Treasury Department further closed off the Iranian banking system from the rest of the world by prohibiting U.S. banks from engaging in “U-turn” transactions that benefit a party in Iran. U.S. Dep’t of the Treasury, *Treasury Revokes Iran’s U-Turn License*, Nov. 6, 2008.<sup>13</sup> U-turn transactions begin and end in non-U.S., non-Iranian banks, but use U.S. financial institutions as an intermediate step in order to “dollarize” the transactions. *Id.*; *see also* OFAC, *Iran: What you Need to Know*, *supra* note 2. Under the 2008 rule, even these indirect transactions are prohibited. *Id.*

This summer, Treasury promulgated new regulations that “effectively bar foreign banks from doing business in dollars if they engage in transactions with anyone suspected of involvement in Iran’s nuclear or missile programs.” Worth, *supra* note 4. And OFAC has placed most Iranian banks that are still in business onto its “specially designated nationals” list, meaning that it is impermissible for United States individuals or companies to do business with them. U.S. Dep’t of the Treasury, *Alphabetical Listing of Specially Designated Nationals and Blocked Persons List*<sup>14</sup> (listing Iranian banks such as Bank Melli and Bank Saderat); Legal Info. Inst. of Cornell Univ. L. Sch., *Specially Designated Nationals and Blocked*

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<sup>13</sup> <http://www.ustreas.gov/press/releases/hp1257.htm>

<sup>14</sup> <http://www.ustreas.gov/offices/enforcement/ofac/sdn/sdnlist.txt>

*Persons List*<sup>15</sup> (explaining significance of list). The result of these varied measures is that the Iranian financial system is effectively isolated from the U.S.

Against this backdrop of escalating sanctions, banks are unwilling to process family remittances to or from Iran, even though family remittances are expressly permitted by the ITR, 31 C.F.R. § 560.516(a), and were exempted from the 2008 rule prohibiting U-turn transactions. *Treasury Revokes Iran's U-Turn License*, *supra* note 13 (“[T]oday’s action will not affect ... several types of underlying transactions, including ... a family remittance ...”). “[S]ome banks, from Europe to Pakistan,” in an apparent abundance of caution, “have cut off dealings with [Iran] for fear that they will lose access to the United States financial system.” Sanger, *supra* note 3. This makes it virtually impossible for Iranian Americans to use banks—even third-country banks outside the U.S. and Iran—to remit funds to or receive funds from their families. The Iranian financial system is not only cut off from the U.S., but from banks throughout the world. U.S. Dep’t of the Treasury, *Treasury Department Targets Iranian-Owned Bank in Germany Facilitating Iran’s Proliferation Activities*, Sept. 7, 2010<sup>16</sup> (announcing that Treasury had cut off “one of Iran’s few remaining access points to the European financial system” by blocking the property of a German bank).

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[http://topics.law.cornell.edu/wex/specially\\_designated\\_nationals\\_and\\_blocked\\_persons\\_list](http://topics.law.cornell.edu/wex/specially_designated_nationals_and_blocked_persons_list)

<sup>16</sup> <http://www.treas.gov/press/releases/tg847.htm>

In the midst of the sanctions, Iranian Americans have been able to maintain their family ties and support family in Iran through the traditional, informal hawala system of funds transfer. Hawala, which was fully described at Mr. Banki's trial and in papers filed in the trial court, is "a longstanding method of money transfer" widely used in "Middle Eastern and South Asian countries." Rachana Pathak, *The Obstacles to Regulating the Hawala: A Cultural Norm or a Terrorist Hotbed?*, 27 FORDHAM INT'L L.J. 2007, 2008 (2004). The word "hawala" is an umbrella term that refers to numerous types of informal transactions. *Id.* at 2011. Nothing in U.S. law prohibits the use of hawala. Indeed, there are many reasons why Iranian Americans such as Mr. Banki turn to hawala to transfer money back and forth with family in Iran. *See id.*

Most importantly, as described, it is virtually impossible to transfer funds through U.S., Iranian, or third-country banks. Moreover, hawala is inexpensive, efficient, and a widely-accepted cultural norm. Mohammed El Qorchi, Samuel Munzele Maimbo & John F. Wilson, *Informal Funds Transfer Systems: An Analysis of the Informal Hawala System*, Joint IMF-World Bank Paper, Mar. 24, 2003, pp. 15-17.<sup>17</sup> Hawala is quick, particularly for transferring funds between major cities. Pathak, 27 FORDHAM INT'L L. J. at 2015. "In contrast, banks or money service businesses usually take several business days, and could involve additional delays due to holidays, weekends and time differences." *Id.*

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<sup>17</sup> [http://johnfwilson.net/resources/Hawala+Occasional+Paper+\\_3.24.03\\_.pdf](http://johnfwilson.net/resources/Hawala+Occasional+Paper+_3.24.03_.pdf)

Hawala is widespread, as various branches of the government have acknowledged. “The international flows of [informal value transfer systems such as hawala] are most likely staggering ... An IMF/World Bank estimate that is likely on the conservative side and only covers select countries puts annual worldwide ... transfers at tens of billions of dollars.” Sec’y of the U.S. Dep’t of the Treasury, *A Report to Congress in Accordance with Section 359 of the USA PATRIOT Act of 2001*, Nov. 2002, p. 5.<sup>18</sup> In 2004, nearly 160,000 hawala outlets were operating in the U.S. Andrew Schouten, *Unlicensed Money Transmitting Businesses and Mens Rea Under the USA PATRIOT Act*, 39 McGeorge L. Rev. 1097, 1101 (2008).

**IV. The District Court Misconstrued The Limited Role Of A Hawala Customer Who Simply Accepts Or Transmits Money, And Affirmance Of Its Heavy-Handed Construction Would Not Only Write The Family Remittance Exemption Out Of The Regulations But Would Also Run Counter To U.S. Interests**

The District Court was wrong to interpret the ITR to permit family remittances only if they are processed through U.S. banks. The ITR simply does not state that the remittance must be through a bank. Appellant’s Opening Brief at 34-39. Thus, because family remittances in either direction are exempt under the ITR, the jury should have been instructed that Mr. Banki could not be convicted unless the Government proved that he facilitated the transfer of funds for commercial purposes. In addition, Mr. Banki did nothing to aid and abet the

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<sup>18</sup> <http://www.fincen.gov/hawalarptfinal11222002.pdf>

movement of funds *to* Iran beyond that of any hawala customer who receives funds from Iran in a circular or “matching” hawala. The system’s operator, the hawaladar, may be engaging in a parallel transaction, but the hawala customer’s only desire is to receive the money being sent to him or her.

Iranian Americans have no meaningful alternative to the use of hawala to accomplish family remittances. “[T]he U.S. government is aware, or should be aware, of the regular use of remittance forwarding services including hawalas by the Iranian-American community, especially in recent years . . . .” A1394 (Letter from Richard H. Newcomb to District Court, p. 2). But just as banks have refused to process family remittances because of the threat of sanctions liability, Iranian Americans could not feasibly use hawala if they were held criminally liable simply for sending or receiving a family remittance through a hawala transaction. The Court’s interpretation would therefore write the family remittance exception out of the ITR altogether. That is an impermissible result, since this Court rejects an interpretation that would render a regulation a nullity. *Sharkey v. Quarantillo*, 541 F.3d 75, 93 (2d Cir. 2008); *accord Sec’y of Labor v. Twentymile Coal Co.*, 411 F.3d 256, 261 (D.C. Cir. 2005) (petitioner’s interpretation of regulation was “particularly untenable because it would render the pertinent regulation a *nullity*”). The former head of the Office of Foreign Assets Control (OFAC), the agency responsible for implementing the sanctions, opined as much at sentencing: “[I]f OFAC were to try to close down this avenue of family remittance, it would effectively cut off most such family remittances that were intended to be exempt

from the prohibition of the Iran sanctions . . . .” A1400 (Letter from Richard H. Newcomb to District Court, p. 8).

Mr. Banki was prosecuted for transfers of money between the U.S. and Iran that were never proven to be anything other than “family remittances” under the ITR.<sup>19</sup> His case, therefore, is likely to cause confusion among Iranian Americans about what conduct carries the risk of criminal prosecution. Aside from being an untenable reading of the regulations, the District Court’s determination that family remittances are permissible only if they go through U.S. banks has the practical impact of misleading Iranian Americans about the legality of hawala. A1400 (Letter from Richard H. Newcomb to District Court, p. 8) (“[T]he verdict does send a very strong message that the use of the hawala system to transfer monies between the U.S. and Iran will not be tolerated.”). That could create a “serious dilemma” and a “troubling conflict” for many who want to send money to their family members in Iran as the ITR allow. A1401 (*Id.* at 9).

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<sup>19</sup> The few wire originators who were witnesses at trial testified to the non-commercial nature of their transfers. As for the rest of the transfers, the prosecution failed to prove—and the District Court failed to tell the jury that the government was required to prove—that the transfers were commercial transfers, as opposed to family remittances. Appellant’s Opening Brief at 39-40.

The *Houston Chronicle* explained the bind in which many Iranian Americans found themselves following a 2003 criminal prosecution of a hawala operator<sup>20</sup>:

Here is the question now faced by the former clients of Ali Mohseni and thousands of other Iranian Americans: How do you send money back to an ailing grandmother living in a country considered part of the “axis of evil”? ....

U.S. banks refuse to wire money to Iran, even indirectly, because bankers ... are afraid of getting in trouble with the sanctions law.

“No commercial bank in the United States will handle wire transfers to Iran,” said Mohseni’s attorney, Ted Hirtz. So those seeking to send money to relatives in Iran “have reverted to a traditional set of financial relationships based on trust” – the hawala ....

Edward Hegstrom, *Iranian Exiles in Quandary*, HOUSTON CHRONICLE, May 5, 2003, p. A14.<sup>21</sup>

The only steps Mr. Banki took were those any customer would take when receiving family remittances through a hawala transfer, and yet the government prosecuted him based on what happened in other parallel hawala transactions. If Iranian Americans are held *criminally* liable simply for sending or receiving money to or from family based on the government’s view of the legitimacy of other contemporaneous actions of the hawaladar—similar to a customer being held

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<sup>20</sup> The prosecution described in the *Houston Chronicle* targeted an individual who operated a hawala business. Mr. Banki’s case is different, since he was only a hawala customer. Appellant’s Opening Brief at 1, 7, 9.

<sup>21</sup> [http://www.chron.com/CDA/archives/archive.mpl?id=2003\\_3651220](http://www.chron.com/CDA/archives/archive.mpl?id=2003_3651220)

liable for the lawfulness of a bank's conduct—Iranian Americans could not feasibly use hawala. Because banks are not willing to engage in these legal family remittances, affirmance of the judgment would deprive Iranian Americans of the only remaining way to transfer money to or from family in Iran. *See id.*

In Mr. Banki's case, the District Court abandoned limits contained within the law that would have eliminated these problems. First, the District Court failed to instruct the jury that in order to convict, it needed to conclude that the transfers to and from Iran were for commercial purposes (since sending and receiving family remittances is legal). Second, the District Court did not hold the government to its burden of proving that Mr. Banki was anything other than a mere hawala customer—as it should have been required to do to support a conviction under an aiding and abetting theory. If these legal limits are not enforced, Iranian Americans effectively cannot use hawala, even to receive family funds.

The U.S. government itself has used hawala to transfer funds when no other option was available. In 2002, “foreign aid money going to Afghanistan [was] disbursed through [informal value transfer systems] due to a lack of banking infrastructure.” Sec'y of the Treasury, *Report in Accordance with the USA PATRIOT Act*, *supra* note 18, at 5. Iranian Americans should be assured that they can employ the same solution when faced with the same problem.

In addition to availing itself of the hawala system, the federal government has endorsed regulating hawala and educating law enforcement officials about its use:

The U.S. approach of regulating [hawala] activity is preferable to outlawing the activity altogether, a course chosen by some nations. Attempting to outlaw [hawala] ultimately deprives law enforcement of potentially valuable information and drives the informal remittance providers further “underground.” Outlawing the activity also ***deprives the mostly law-abiding [hawala] customers of the primary channel through which they transfer funds.***

*Id.* at 15 (emphasis added).

Despite the federal government’s use of hawala transfers and their broad use within domestic immigrant populations, the Treasury Secretary has expressed concern over law enforcement agencies’ lack of familiarity with hawala: “Education is ... critically needed within the law enforcement and regulatory communities, as there needs to be a greater understanding of how these systems operate.” *Id.* at 17. Mr. Banki’s prosecution, far from furthering the Secretary’s goals of education, understanding, and effective law enforcement, serves to perpetuate misunderstandings about the uses and purposes of hawala.

Moreover, prosecutions such as Mr. Banki’s are a source of alienation and fear among Iranian Americans. The former head of OFAC explained to the District Court that conduct such as Mr. Banki’s “would traditionally have been handled as a civil penalty matter,” if it were pursued at all. A1394 (Letter from Richard H. Newcomb to District Court, p. 2). He added:

If the message that [the District Court] send[s] in sentencing is too strong and not carefully calibrated to the U.S. foreign policy goals, it could have a very negative effect and send the wrong message to the Iranian-American community—that the U.S. has no sympathy and understanding for the plight of an Iranian family caught in the middle of an international political standoff .... and the need for the expat communities to provide financial support for family members ....

A1401 (*Id.* at 9). This prosecution and the message that it sends is thus inconsistent with the President's recent affirmation of support for the Iranian people. Alienating the Iranian American community by unjustly cracking down on their rights is not only adverse to the plain meaning of the ITR, but also negatively affects long-term U.S. foreign policy interests.

### **CONCLUSION**

For the reasons noted, amici respectfully urge this Court to reverse the conviction on Count Two and direct the entry of a judgment of acquittal, and to reverse the convictions on the remaining counts and remand for a new trial. Alternatively, amici urge this Court to reverse the convictions and remand for a new trial on all counts, or at a minimum, to reverse and order resentencing.

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Respectfully submitted,

/s/ Paige H. Forster

Raymond A. Cardozo, Esq.

Paige H. Forster, Esq.

pforster@reedsmith.com

Donna M. Dobblick, Esq.

ddobblick@reedsmith.com

Reed Smith LLP

225 Fifth Avenue

Pittsburgh, PA 15222

Tel.: (412) 288-3131

Fax: (412) 288-3063

*Counsel for Amici Curiae*

**CERTIFICATE OF COMPLIANCE WITH RULE 32(a) OF  
THE FEDERAL RULES OF APPELLATE PROCEDURE**

I hereby certify that this Brief of Amici Curiae in Support of Defendant-Appellant and in Support of Reversal complies with the type-style, type-face and volume limitations contained in Rule 32(a) of the Federal Rules of Appellate Procedure. The brief contains 5,033 words, excluding the Cover Page, Table of Contents, Table of Authorities, and Certificates.

/s/ Donna M. Doblack

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that the foregoing Brief of Amici Curiae in Support of Defendant-Appellant and in Support of Reversal was filed electronically on this 1st day of February, 2011. Notice of this filing will be sent by operation of the ECF system to all counsel of record, who are deemed served upon receipt of the notice of docket activity pursuant to Local Rule 25.1.

United States Attorney's Office  
Southern District of New York  
United States of America  
One St. Andrews Plaza, Room 844  
New York, New York 10007  
212-637-2324  
Attorneys for Appellee

Baruch Weiss  
ARNOLD & PORTER LLP  
555 12th Street, NW  
Washington, DC 20004  
202-942-6819  
Attorney for Appellant

Tai H. Park  
PARK & JENSEN LLP  
630 3rd Avenue, 7th Floor  
New York, New York 10017  
646-200-6310  
Attorney for Appellant

Kathleen M. Sullivan  
Christine H. Chung  
Marc L. Greenwald  
William B. Adams  
QUINN EMANUEL URQUHART  
& SULLIVAN, LLP  
51 Madison Avenue, 22nd Floor  
New York, New York 10010  
212-849-7000  
Attorneys for Appellant

/s/ Donna M. Doblack