STRAUB, *Circuit Judge*, dissenting:

This case is important. It is important to the role we have traditionally allotted to juries in our criminal justice system. It is important to the rule which requires judges to apply the laws written by the people's Congress, particularly to police conduct which utilizes official databases to access information about citizens where such is not part of official action. Because the majority opinion seeks to enshrine all the conduct in this case in an academic protective halo, I find it necessary to offer the realistic context of this controversy.

This is not a case about governmental intrusion on one's personal inclinations and fantasies nor is it a case about governmental punishment of one's thoughts. It is, instead, a jury's determination of guilt for a conspiracy based on definitive conduct. This is not a case of confused, accidental, or otherwise inappropriate use of a law enforcement database. It is, instead, a police officer's use of the official database to obtain, outside the boundaries of his official duties, data about a woman whom he knew.

Having so noted the context of this appeal, I now proceed to presentation of the facts and applicable law.

* * *

Defendant-Appellant/Defendant-Appellee Gilberto Valle was convicted by a jury of conspiracy to kidnap (Count I) and of improperly accessing a computer in violation of the Computer Fraud and Abuse Act ("CFAA") (Count II). Valle moved for a judgment of acquittal on both counts. As to Count I, the District Court (Paul G. Gardephe, *Judge*) granted Valle's motion, finding that the evidence at trial was insufficient to support the jury's verdict, and entered a judgment of acquittal. As to Count II, the District Court denied Valle's motion, rejecting Valle's argument that the CFAA did not proscribe his conduct, and entered a judgment of conviction.

The majority affirms the judgment of acquittal in respect of Count I and reverses the judgment of conviction in respect of Count II. I would instead vacate the District Court's judgment of acquittal in respect of Count I, affirm the District Court's judgment of conviction in respect of Count II, and remand for further proceedings. Therefore, I respectfully dissent.

I. Conspiracy to Kidnap (Count I)

The Sixth Amendment right to trial by jury is a "fundamental reservation of power in our constitutional structure," *Blakely v. Washington*, 542 U.S. 296, 306 (2004), and reflects our "deep commitment . . . to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement," *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968). "Just as suffrage ensures the people's ultimate control in the legislative and executive branches, jury trial is meant to ensure their control in the judiciary." *Blakely*, 542 U.S. at 306; *see also United States v. Bailey*, 444 U.S. 394, 435 (1980) (Blackmun, J., dissenting) ("The jury is the conscience of society and its role in a criminal prosecution is particularly important."). In this "strict division of authority between judge and jury," *Blakely*, 542 U.S. at 313, it is the sole responsibility of the jury to weigh evidence and reach the ultimate conclusion of guilt or innocence, *see United States v. Gaudin*, 515 U.S. 506, 514 (1995); *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

To preserve the jury's broad fact-finding discretion, a court can enter a judgment of acquittal only if the evidence of guilt is "nonexistent or so meager that no reasonable jury could find guilt beyond a reasonable doubt." *United*

States v. Espaillet, 380 F.3d 713, 718 (2d Cir. 2004) (internal quotation marks omitted). In making this determination, a court must defer to the jury's resolution of evidentiary conflicts. *Jackson*, 443 U.S. at 319; *see also United States v. Hamilton*, 334 F.3d 170, 179 (2d Cir.) ("[W]e must defer to the jury's resolution of the weight of the evidence and the credibility of the witnesses, and to the jury's choice of the competing inferences that can be drawn from the evidence." (internal quotation marks, citations, and brackets omitted)), *cert. denied*, 540 U.S. 985 (2003). We therefore view the evidence in the light most favorable to the government and draw all reasonable inferences in its favor. *Jackson*, 443 U.S. at 319; *see also United States v. Kozeny*, 667 F.3d 122, 139 (2d Cir. 2011) (noting the "heavy burden" that a defendant faces when seeking to overturn a jury's verdict), *cert. denied*, 133 S. Ct. 1794 (2013).

The majority blatantly disregards these constraints on a court's review of a jury's verdict and accords to itself the power to "identify" and "discern[]" "[t]he line between fantasy and criminal intent." Maj. Op. at 4. Rather, it was, and remains, for the *jury* to determine the factual question of whether Valle had criminal intent. The jury considered and rejected Valle's defense that he was simply pretending to commit a crime. It instead found, beyond a reasonable doubt, that Valle actually and genuinely conspired to kidnap someone. The majority's eloquent prose on the importance of protecting thoughts from criminal punishment, *see id*. at 4–5—perhaps better suited for an opinion editorial than a judicial opinion—is thus irrelevant, because the jury did not convict Valle for fantasizing. We are left to determine only whether the evidence, viewed in the light most favorable to the government, was sufficient for the jury to reach its verdict.

In reaching its conclusion, the majority pays lip service to the standard we apply in evaluating the sufficiency of the evidence, but then usurps the jury's role by weighing competing inferences and explanations of the evidence rather than viewing it in the government's favor. Such an undertaking is plainly inappropriate in this context.

Perhaps most tellingly, the majority imprudently structures its analysis to support its predetermined outcome by viewing the evidence "in its parts," rather than considering "the government's case in its totality," *United States v. Hawkins*, 547 F.3d 66, 70 (2d Cir. 2008) (internal quotation marks and brackets omitted): it first concludes that Valle's online communications—viewed in isolation—are "indistinguishable" from the purported "fantasy" communications, *see* Maj. Op. at 14, and then proceeds to reject the remaining evidence (of Valle's overt acts in furtherance of the conspiracy) as insufficient on its own to support the conviction, *see id*. at 25–27. When considered properly with the deference that we must apply, however, the jury's guilty verdict on the count of conspiracy to kidnap was sufficiently supported by the evidence presented at trial.

A. The Evidence Supporting the Jury's Verdict, Viewed in the Light Most Favorable to the Government

To decide that Valle was guilty of conspiracy to kidnap, all that the jury had to find was sufficient evidence in respect of one alleged coconspirator and one intended victim. *See Kozeny*, 667 F.3d at 131–32; *United States v. Thomas*, 54 F.3d 73, 81 (2d Cir. 1995). The evidence at trial provided a sufficient basis for the jury to conclude that Valle made an agreement with Dale Bollinger, a man he met on darkfetishnet.com, to kidnap and murder Kimberly Sauer, one of Valle's friends from college.

During the earliest communication in evidence between Valle and Bollinger, Valle sought Bollinger's assistance kidnapping and cannibalizing women, noting Bollinger's claimed experience, and shared pictures with Bollinger of potential victims. Bollinger accepted Valle's offer, stating that, although he lived in England, it would be easy for him to travel to Valle and help him.

The two focused on Kimberly Sauer as their preferred target. Valle told Bollinger that she would be "the easiest" to abduct. App'x at 81. He explained that, because he knew her personally, he could "just show up at her home unannounced" without "alert[ing] her" in order to "knock her out . . . and kidnap her." *Id*. at 82. Valle suggested a "Labor Day cookout," with Sauer "as the main course." *Id*. at 86. Bollinger replied that he was "looking forward to it," *id*., and would search for affordable plane tickets.

In multiple conversations over the course of a few weeks, Valle and Bollinger continued discussing the details of abducting and murdering Sauer. They considered logistical and practical concerns. They planned to use chloroform to incapacitate her, which Valle offered to make himself. They discussed stalking Sauer "in the evening," *id*. at 82, noting that she lived alone, in a small house, far from family that might notice her absence. Valle offered to "do a dry run," in which he would "show up randomly one day just being in the neighborhood." *Id*. at 93. They also decided to cover the trunk of Valle's car in plastic bags and use "gloves and a new pair of really cheap, common trainers" that should be destroyed after the abduction, "probably by burning." *Id*. at 95. They agreed that when buying materials they should use cash.

They also developed their plans to cook and eat Sauer. Valle and Bollinger debated the merits of roasting Sauer alive in an oven or over a rotisserie. They further discussed how she should be gagged and butchered. Valle promised to get a "brand new set of knives," and Bollinger advised that they would need a "cleaver, not a saw." *Id*. at 88.

As they plotted Sauer's abduction, Bollinger and Valle expressed excitement about their plan. Valle shared his happiness that Bollinger was "on board" and said that he loved imagining Sauer "asleep right now not having the slightest clue of what we have planned." *Id*. at 90. When Bollinger replied that he was "looking forward to it so much," Valle said that he could not wait to "see the look on her face when she wakes up naked and tied up." *Id*. at 96. Valle noted that it was good that they were "brainstorm[ing]," because "everything[ ]needs to be perfect." *Id*. at 93. They would "talk in great detail" about "every step," suggested Valle, "beginning with the rag in her face." *Id*.

Bollinger and Valle confirmed to each other their genuine intention to follow through on their plan. At one point, Bollinger asked Valle, "You WILL go through with this? I've been let down before. That's why i [*sic*] tend to work alone." *Id*. at 91. Valle immediately replied "yes," adding that Sauer would "never see it coming" and that he was anxious to kidnap and eat her. *Id*. Valle later stated that "kidnapping" Sauer and "getting away with it" was an "absolute truth." *Id*. at 93.

Valle took what could be viewed reasonably as concrete steps to further his plan with Bollinger. He sent Bollinger a "blueprint" of their plot, *id*. at 100, entitled "Abducting and Cooking Kimberly," *id*. at 267, which was consistent with what Valle and Bollinger had discussed up to that point. Valle searched the internet for Sauer's name, "how to kidnap someone," *id*. at 383, "how to abduct a girl," *id*. at 384, "[g]ood methods to kidnap someone," *id*., "how to knock someone unconscious," *id*. at 385, "how to chloroform a girl," *id*., "how to tie someone up," *id*. at 396, "most secure bondage," *id*., and "how to hogtie a girl," *id*. at 388. And Valle planned a trip, with his wife and young child, to Maryland, where Sauer lived. Valle contacted Sauer before the trip, and they planned a lunch while he and his family were in Maryland.

Before leaving for Maryland, Valle had further discussions with Bollinger. Valle explained that his lunch with Sauer would stimulate ideas for how to cook her, remarking that when he saw her, his mouth would "be watering." *Id*. at 110. The two also discussed the lunch as a way to confirm their choice of Sauer as their preferred target. When Valle had a moment of indecision about whether to target different women instead of Sauer, Bollinger advised that they "[k]eep the others as spares" and "see how" the lunch with Sauer goes. *Id*. at 111. Bollinger further wished Valle "good luck," *id*. at 116, cautioned him to act normally during the lunch—because he would be a "suspect" when Sauer "goes missing," *id*. at 102—and asked him to report what he learned.

On the trip to Maryland, Valle text-messaged Sauer that he had driven past her place of work. Sauer found the text message strange and doubted that her other friends knew where she worked. Shortly after having lunch with

Sauer, Valle wrote to Bollinger that Sauer "looked absolutely mouthwatering." *Id*. at 117.

B. The Crime of Conspiracy

"To be complete, a conspiracy simply requires (i) an agreement about the object of the conspiracy, (ii) specific intent to achieve that object, and (iii) an overt act in furtherance of the agreement." *United States v. Wallace*, 85 F.3d 1063, 1068 (2d Cir. 1996). A defendant is guilty of conspiracy so long as he "agreed on the essential nature of the plan," which need not accompany a fully-formed plot to constitute an illegal conspiracy. *United States v. Eppolito*, 543 F.3d 25, 47 (2d Cir. 2008) (internal quotation marks omitted); *see also United States v. Rosa*, 17 F.3d 1531, 1543–44 (2d Cir.), *cert. denied*, 513 U.S. 879 (1994).

The evidence at trial, viewed in the light most favorable to the government, supported the jury's conclusion that Valle and another agreed to commit a kidnapping, intended at the time to do so, and performed at least one overt act in furtherance of their agreement, such as Valle's creation of the "blueprint" or meeting Sauer in Maryland. The jury could reach the conclusion that a conspiracy was formed even though, as it happened, Valle and Bollinger ultimately made no attempt to kidnap Sauer on Labor Day. A conspiratorial agreement is a distinct crime that is punishable regardless of whether the plan is later abandoned. *See United States v. Jimenez Recio*, 537 U.S. 270, 275 (2003) (explaining that a conspiracy "poses a threat to the public over and above the threat of the commission of the relevant substantive crime" (internal quotation marks omitted)).

C. The Jury's Reasonable Inferences

In spite of Valle and Bollinger's express agreement in their written communications to kidnap Sauer, the majority concludes that the jury acted irrationally when it found Valle guilty of conspiracy to kidnap. The majority reasons that, because Valle fantasized about cannibalism with others over the internet, it was irrational to believe that Valle and Bollinger meant what they said to each other. *See* Maj. Op. at 25. In my view, however, the majority fails to respect the reasonable inferences that the jury could have made in determining that Valle's plot with Bollinger—unlike his other online communications—was real.

In stark contrast to any of Valle's other online communications, Valle took actions in the real world that the jury could conclude were done to effectuate his plot with Bollinger. Valle visited Sauer in Maryland, drove past her workplace, and had lunch with her—a lunch that he and Bollinger discussed as a way to further their plans.[1] But this was hardly, as the majority suggests, the "only meaningful difference," *id.*, between the plot concerning Sauer and the so-called "fantasy chats." Only in Valle's conversation with Bollinger, for example, did the jury have evidence of a "blueprint" that Valle made of the plot.

The jury could also have found that the nature of Valle's conversations with Bollinger were distinct in tenor and tone. The detail of Valle's plans with Bollinger was unparalleled in his communications with others. And though Valle made allusions to being serious in certain of the supposed "fantasy chats,"

[1] As noted earlier, Valle and Bollinger discussed the lunch over the course of multiple conversations and expressly referred to it as a way to confirm their choice of Sauer and inspire ideas for cannibalizing her. *See supra* at 10–11. In light of these discussions, it is not clear how the majority can contend that Valle and Bollinger's communications "leading up to and following the lunch" make it "impossible to conclude" that the lunch was in furtherance of their plot. Maj. Op. at 26.

at no point did he state so unequivocally, as he did to Bollinger, that it was an "absolute truth" that he and Bollinger would kidnap Sauer. App'x at 93.

Other evidence further supported the jury's conclusion that Valle's plot with Bollinger was more than mere fantasy. Valle's internet searches between the date of his first conversation with Bollinger and his lunch with Sauer were particularly relevant to his plan with Bollinger. The majority concedes that Valle's internet searches could have provided "relevant proof of intent," but nevertheless dismisses them because, in its view, Valle's searches "occurred in a context of deep fantasy." Maj. Op. at 21. This flawed analysis commits the fallacy of *petitio principii* (circular reasoning) because "what is to be proved is implicitly presumed as true in the premise." Black's Law Dictionary 1329 (10th ed. 2014); *see also Adams v. Gould, Inc.*, 687 F.2d 27, 30 (3d Cir. 1982) (explaining that "the fallacy of petitio principii" occurs when one "assum[es] the conclusion"), *cert. denied*, 460 U.S. 1085 (1983); *Nico v. Comm'r of Internal Revenue*, 565 F.2d 1234, 1238 (2d Cir. 1977) ("this court by all means eschews petitio principii"). The majority concludes that Valle was engaged in fantasy based on its reading of his written communications and then finds his internet searches consistent with this preordained conclusion. The jury, however, may have considered Valle's internet searches in deciding that very issue—whether Valle was engaged only in fantasy.

The jury could have also considered Valle's post-arrest statement to a government agent that Bollinger was "more serious" about their discussions than other individuals with whom Valle communicated. Trial Tr. at 1031.

The majority opinion takes pains to conjure innocent explanations for this evidence. Perhaps Valle's lunch with Sauer was just a normal social interaction. *See* Maj. Op. at 24–26. Maybe Valle withheld from Bollinger Sauer's address because he did not intend to actually harm her. *See id*. at 24–25. Possibly Valle conducted internet searches on how to kidnap someone simply because he had a general interest in crime rather than criminal intent.[2] *See id*. at 21. These are perspectives on the evidence that the jury conceivably could have found persuasive but did not. It was the jury's sole prerogative to decide how to

[2] Unlike the majority, the jury did not determine that Valle was merely "*interested* in committing acts of sexualized violence against women," Maj. Op. at 21; it concluded—beyond a reasonable doubt—that Valle *actually* conspired to commit a kidnapping.

interpret the evidence presented, and the majority's notions of how the evidence should instead have been interpreted are incompatible with our obligation to respect the jury's fact-finding role by viewing the evidence in the light most favorable to the government and drawing all reasonable inferences in its favor. *See United States v. Aguiar*, 737 F.3d 251, 265 (2d Cir. 2013) ("We agree that much of the evidence could be read to have an innocent meaning, but when the evidence raises two permissible inferences then we must resolve such conflicts in favor of the prosecution."), *cert. denied*, 135 S. Ct. 400 (2014); *United States v. Friedman*, 998 F.2d 53, 56 (2d Cir. 1993) (explaining that "[i]t is not for [the court] to weigh . . . competing inferences and explanations" to ascertain "which explanation [of defendant's conduct] is more likely"); *see also, e.g.*, *United States v. Pavulak*, 700 F.3d 651, 670 (3d Cir. 2012) (rejecting defendant's contention that his requests to see a child naked were "facetious 'banter'" and "fantasies," because it was not for the court "to weigh the evidence"), *cert. denied*, 133 S. Ct. 2047 (2013); *United States v. Dwinells*, 508 F.3d 63, 74 (1st Cir. 2007) (acknowledging that defendant's response to charges of attempted enticement of a minor—"that he was merely role-playing and thought that the communications were mutually entertained fantasies"—was "plausible" and "buttressed by [his] persistent dodging of suggestions that he and his correspondents meet," but concluding that "the government's theory of the case . . . also was plausible," and that "[w]hen the record is fairly susceptible to two competing scenarios, the choice between those scenarios ordinarily is for the jury"), *cert. denied*, 554 U.S. 922 (2008).

For each assessment of the evidence made by the majority in contravention of the jury's finding of guilt, there is a contrary light through which the evidence can be viewed—in fact, *must* be viewed—that supports the jury's conclusion.

The majority notes, for instance, that in his conversations with Bollinger, Valle lied about certain seemingly important facts (such as where he lived, whether he knew Sauer's address, and whether he owned a secluded mountain house). *See* Maj. Op. at 23–25. The majority similarly points out that Valle's "blueprint" of Sauer's abduction listed inaccurately much of Sauer's identifying information. *See id*. at 23. But Valle's misstatements hardly demonstrate a lack of intent. For instance, the jury could have rationally inferred from the evidence that, while the plan was still developing, Valle misled Bollinger because he did not fully trust him. Valle's "blueprint" obscures information about Sauer that could be used to find her easily, such as her last name, but other information in the document is, by contrast, accurate (*e.g.*, Sauer's picture, marital status, lack of tattoos). Bollinger, in fact, expressly assumed that mistrust was Valle's reason for not sharing certain information; when Valle claimed not to know Sauer's address, Bollinger remarked, "not like I'll get there a day early!" App'x at 101. And Valle's lies about what he possessed to facilitate the crime—such as a secluded mountain house—were in response to Bollinger's concerns about the plan's effectiveness; the jury could have reasoned that Valle fibbed to ensure Bollinger's interest. Valle would not be the first defendant to mislead a coconspirator, and his misstatements do not negate the jury's verdict. *E.g.*, *United States v. Gersh*, 328 F.2d 460, 462 (2d Cir.) (stating that there was "no less a meeting of the minds" because coconspirators decided to deceive each other), *cert. denied*, 377 U.S. 992 (1964); *cf. United States v. Farley*, 607 F.3d 1294, 1335 (11th Cir.) (rejecting defendant's assertion that his lack of intent was demonstrated by lies to his coconspirator about details in their plot to sexually abuse a minor), *cert. denied*, 562 U.S. 945 (2010).

The majority discounts Valle's internet searches as demonstrating merely an "interest" in criminal activity. *See* Maj. Op. at 21. But the jury could certainly reasonably deduce that Valle's inquiries into how to incapacitate, bind, and kidnap women—all conducted contemporaneously with his conversations with Bollinger about abducting Sauer—provided a strong indication of criminal intent.

The majority likewise supposes that the improbability of Valle and Bollinger's plot suggests that it was no more than fantasy. Valle and Bollinger met on a sexual fetish website, knew almost nothing about each other, barely discussed the logistics of Bollinger traveling thousands of miles to assist Valle, developed a "blueprint" that was "no more detailed than . . . Valle's Internet chats," *id*. at 25, and let their target date for Sauer's abduction pass without comment. Yet Valle and Bollinger explicitly stated that their plans were incomplete and needed more work. When Valle sent Bollinger the "blueprint," in fact, he acknowledged that "obviously a lot has to be added" because they were "in the beginning stages." App'x at 100. And throughout their discussions of Sauer, Valle and Bollinger contemplated additional or alternative targets. The evidence supports the inference that Valle and Bollinger agreed on a basic framework and set an aspirational date but then focused on other targets or plans that they later found more appealing.

The majority also suggests that the jury lacked evidence of Bollinger's criminal intent. *See* Maj. Op. at 27. To the contrary, the only evidence at trial as to Bollinger was his written conversations with Valle, in which he unequivocally established intent by expressly agreeing to help Valle kidnap Sauer. The majority's analysis as to why the jury should have disbelieved Valle's intent is irrelevant to the question of Bollinger's intent. Whereas the majority points to Valle's other online conversations to contend that his statements to Bollinger were feigned, no such evidence existed as to Bollinger.

D. The Jury's Verdict Was Sufficiently Supported by the Evidence

As judges reviewing the sufficiency of the evidence in a criminal trial, given the grave importance of the event, it can be tempting to view the evidence in the light most convincing to us, to discount plausible factual inferences that we find unpersuasive, and to conclude that if *we* do not believe that the evidence proved guilt beyond a reasonable doubt, then no rational juror could have so found. That, however, is simply not the standard to which we are bound, *see* *Jackson*, 443 U.S. at 318–19; *United States v. Josephberg*, 562 F.3d 478, 488 (2d Cir.) ("The weight of the evidence is a matter for argument to the jury, not a ground for reversal on appeal." (internal quotation marks omitted)), *cert. denied*, 558 U.S. 965 (2009), and we must be diligent not to overreach into the jury's domain, *cf.* *United States v. Butler*, 297 U.S. 1, 79 (1936) (Stone, J., dissenting) ("[T]he only check upon our own exercise of power is our own sense of self-restraint."). Our "deference to the jury's findings is especially important" in a conspiracy case, "because a conspiracy by its very nature is a secretive operation, and it is a rare case where all aspects of a conspiracy can be laid bare in court with the precision of a surgeon's scalpel." *United States v. Santos*, 541 F.3d 63, 70 (2d Cir. 2008) (internal quotation marks omitted), *cert. denied*, 555 U.S. 1122 (2009).

Here, I fear the majority treads beyond the strict limitations of our review by improperly weighing competing inferences and explanations of the evidence—as if deciding a motion for a new trial instead of reviewing a judgment of acquittal—rather than viewing it, as we must, "in its totality," *Hawkins*, 547 F.3d at 70 (internal quotation marks), and in the government's favor, *see Tibbs v. Florida*, 457 U.S. 31, 45 (1982) (recognizing "lower limit on an appellate court's definition of evidentiary sufficiency" compared to evidentiary weight); *see also, e.g.*, *United States v. Autuori*, 212 F.3d 105, 120 (2d Cir. 2000) (affirming grant of motion for new trial while reversing judgment of acquittal).

All that was required to find Valle guilty of conspiracy was proof of one agreement with one coconspirator to kidnap one target, as well as one overt act. *See Wallace*, 85 F.3d at 1068. Even if the government's evidence was insufficient in respect of each of the other four alleged kidnapping conspiracies, *see* Maj. Op. at 6–7, Valle's conversations with Bollinger about kidnapping and cannibalizing Sauer, together with Valle's overt acts, such as his trip to Maryland, were enough for the jury to rationally find that Valle committed the crime of conspiracy to kidnap, *see United States v. Berger*, 224 F.3d 107, 113 (2d Cir. 2000) ("[T]he government need[] only [] prove agreement on one of the objectives charged in the indictment in order to establish that a conspiracy existed.").

Of course, a jury can never determine with complete certainty what a criminal defendant was thinking at a particular moment. But here the jury had sufficient evidence to conclude, beyond a reasonable doubt, that Valle and

Bollinger meant exactly what they said to each other. *See United States v. Rowe*, 56 F.2d 747, 749 (2d Cir.) (L. Hand, J.) ("A jury alone could say whether in such a setting the hearer ought to have understood that the utterances were not to be taken at their face . . . ."), *cert. denied*, 286 U.S. 554 (1932). Valle and Bollinger targeted Sauer because she would be easy to kidnap, spent hours plotting her abduction, and repeatedly stated that they were serious—and excited—about their plan. Their words were corroborated by Valle's trip to Maryland, contemporaneous internet searches, blueprint for abducting and cooking Sauer, and post-arrest assertion that Bollinger was "more serious" than others with whom Valle communicated.[3] The jury could reasonably deduce that the tenor of Valle's conversations with Bollinger, together with his real-world actions, proved beyond a reasonable doubt that the plot to kidnap Sauer was no fantasy. We cannot second-guess the jury's rational conclusion. *See Jackson*, 443 U.S. at 319; *United States v. Allied Stevedoring Corp.*, 241 F.2d 925, 930 (2d Cir.) (L. Hand, J.)

[3] This evidence, viewed in the light most favorable to the government and "in its totality," *United States v. Florez*, 447 F.3d 145, 154 (2d Cir.), *cert. denied*, 549 U.S. 1040 (2006), is not merely "some incriminating evidence," Maj. Op. at 26, whatever that may mean.

("What weight the jury should give to [the] evidence was for them, and them alone, provided that it satisfied their minds beyond any fair doubt."), *cert. denied*, 353 U.S. 984 (1957).

I would thus vacate the District Court's judgment of acquittal in respect of Count I and remand for the District Court to consider Valle's alternative arguments for acquittal, which were raised below but did not form the basis for the District Court's decision.

II. Computer Fraud and Abuse Act (Count II)

Valle was convicted of conducting a computer search that exceeded his authorized access to a federal law enforcement database, in violation of the Computer Fraud and Abuse Act, 18 U.S.C. § 1030. Because I agree with the District Court that Valle's conduct is proscribed by the plain language of the CFAA, I would affirm his conviction.

The CFAA imposes criminal penalties on anyone who "intentionally accesses a computer without authorization or exceeds authorized access, and thereby obtains . . . information from any department or agency of the United States." 18 U.S.C. § 1030(a)(2)(B). The phrase "exceeds authorized access" is defined as "access[ing] a computer with authorization" to obtain "information in the computer that the accesser is not entitled so to obtain." *Id.* § 1030(e)(6). The CFAA therefore protects information belonging to the United States both from those who lack any authorization to access the computer system and from those, like Valle, who did not comply with restrictions on their authorized access.

The evidence at trial established that, by entering the name "Maureen Hartigan" into a federal law enforcement database, Valle obtained information that he was "not entitled so to obtain." *See United States v. Valle*, 301 F.R.D. 53, 109–10 (S.D.N.Y. 2014). Valle was instructed repeatedly that he had permission to use his credentials to access the federal National Crime Information Center ("NCIC") database only when "required to do so in the course of [his] official duties and responsibilities" as a police officer, and that there were "no exceptions to this policy." App'x at 61–62. Valle was warned that accessing law enforcement databases for non-official purposes was improper and that the penalties for so doing included termination and prosecution. And Valle concedes that he had no legitimate law enforcement purpose when he queried the database for the name "Maureen Hartigan." *See Valle*, 301 F.R.D. at 110 ("It is undisputed that Valle had no law enforcement purpose for querying Hartigan's name . . . .").

The majority nonetheless holds that, because Valle possessed the technical credentials to access the NCIC database and query Hartigan's name, he did not exceed his authorized access by so doing. *See* Maj. Op. at 29, 37–38. In reaching this result, the majority discovers ambiguity in the statutory language where there is none. Under the plain language of the statute, Valle exceeded his authorized access to a federal database in violation of the CFAA.

Statutory construction must "begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose." *Shi Liang Lin v. U.S. Dep't of Justice*, 494 F.3d 296, 305 (2d Cir. 2007) (en banc) (internal quotation marks omitted), *cert. denied*, 553 U.S. 1053 (2008). "Congress says in a statute what it means and means in a statute what it says there." *Id.*

As the majority concedes, a preponderance of our sister circuits interpreting the term "exceeds authorized access" have concluded that the statute unambiguously encompasses conduct of the type engaged in by Valle.

See Maj. Op. at 31; *see also United States v. Rodriguez*, 628 F.3d 1258, 1263 (11th Cir. 2010), *cert. denied*, 131 S. Ct. 2166 (2011); *United States v. John*, 597 F.3d 263, 270–73 (5th Cir. 2010); *Int'l Airport Ctrs., LLC v. Citrin*, 440 F.3d 418, 420–21 (7th Cir. 2006); *EF Cultural Travel BV v. Explorica, Inc.*, 274 F.3d 577, 581–84 (1st Cir. 2001). The Eleventh Circuit, in *United States v. Rodriguez*, affirmed the conviction of a Social Security Administration employee who obtained personal information about former girlfriends and other women from federal databases that he was authorized to use only for business reasons. 628 F.3d at 1260–63. Rodriguez argued that he did not violate Section 1030(a)(2)(B) because he accessed databases that he was authorized to use as a Social Security Administration employee. *See id*. at 1263. The Eleventh Circuit rejected his argument, explaining that Rodriguez clearly "exceed[ed] his authorized access" because "his access of the victims' personal information was not in furtherance of his duties" as an employee. *Id.*

Similarly, in *United States v. John*, the Fifth Circuit found that a bank employee exceeded her authorized access when, in order to facilitate fraud, she accessed confidential customer information in contravention of her employer's restrictions on computer use. 597 F.3d at 270–73. There, as here, the defendant was aware that her employer's "official policy," which was reiterated in training programs she attended, "prohibited misuse of the company's internal computer systems and confidential . . . information." *Id.* at 272.

The majority concludes that these courts "looked only at the culpable behavior of the defendants before them, and failed to consider the effect on millions of ordinary citizens caused by the statute's unitary definition of 'exceeds authorized access.'" Maj. Op. at 36 (internal quotation marks omitted). It notes concerns, articulated by two of our sister circuits, about the potentially expansive scope of the CFAA.[4] *See id*. at 31, 35–36, 38 (discussing *United States v. Nosal*, 676 F.3d 854, 859–63 (9th Cir. 2012) (en banc) (observing that a broad construction of the CFAA "would make criminals of large groups of people who have little

[4] These concerns address Section 1030(a)(2)(C) of the CFAA, which prohibits exceeding authorized access to a computer to obtain "information from any protected computer." 18 U.S.C. § 1030(a)(2)(C). The CFAA defines "protected computer" as, among other things, a computer "which is used in or affecting interstate or foreign commerce or communication," *id.* § 1030(e)(2)(B), a definition that has been interpreted to encompass any computer with an internet connection, *see United States v. Yücel*, 97 F. Supp. 3d 413, 418–19 (S.D.N.Y. 2015) (collecting cases and noting "widespread agreement in the case law" that "protected computer" includes any internet-connected computer). Valle was not charged under Section 1030(a)(2)(C).

reason to suspect they are committing a federal crime" (internal quotation marks omitted)), and *WEC Carolina Energy Sols. LLC v. Miller*, 687 F.3d 199, 206 (4th Cir. 2012), *cert. dismissed*, 133 S. Ct. 831 (2013)).

The majority opinion, apparently without irony, concludes that giving effect to the plain language of the statute would somehow "place us in the position of [the] legislature." Maj. Op. at 35. But where, as here, the statute's language is plain and unambiguous, the "sole function of the courts is to enforce it according to its terms." *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); *accord United States v. DiCristina*, 726 F.3d 92, 96 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 1281 (2014). It may well be that the CFAA sweeps broadly. But such is a matter for policy debate, *see United States v. Rodgers*, 466 U.S. 475, 483 (1984) ("Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress."), and the Congress is free to amend the statute if it chooses, *see Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 576 (1982) ("The remedy for any dissatisfaction with the results in particular cases lies with

Congress and not with this Court. Congress may amend the statute; we may not.").[5] "Any other conclusion, while purporting to be an exercise in judicial restraint, would trench upon the legislative powers vested in Congress by Art. I, § 1, of the Constitution." *Dep't of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 134–35 (2002) (internal quotation marks omitted); *cf. Dennis v. United States*, 341 U.S. 494, 526 (1951) (Frankfurter, J., concurring) ("[W]e must scrupulously observe the narrow limits of judicial authority even though self-restraint is alone set over us. Above all we must remember that this Court's power of judicial review is not an exercise of the powers of a super-Legislature.").

The majority invokes the rule of lenity in support of its view. *See* Maj. Op. at 35–38. The doctrine is a "rule of last resort." *Oppedisano v. Holder*, 769 F.3d

[5] *See also Principal Deputy Assistant Attorney General David Bitkower Delivers Keynote Address at George Washington Law Review Symposium entitled "Hacking into the Computer Fraud and Abuse Act,"* U.S. Dep't of Justice (Nov. 6, 2015), http://www.justice.gov/opa/speech/principal-deputy-assistant-attorney-general-david-bitkower-delivers-keynote-address (describing proposed amendment to CFAA to clarify definition of "exceeds authorized access"); *Cyber Crime: Modernizing our Legal Framework for the Information Age: Hearing Before the Subcommittee on Crime and Terrorism of the Senate Committee on the Judiciary*, 114th Cong. (2015) (statement of David M. Bitkower, Deputy Assistant Attorney General, Department of Justice), *available at* http://www.judiciary.senate.gov/imo/media/doc/07-08-15%20Bitkower%20Testimony.pdf (describing proposed amendments to limit breadth of CFAA).

147, 153 (2d Cir. 2014) (internal quotation marks omitted), *cert. denied*, 136 S. Ct. 211 (2015); *see also Reno v. Koray*, 515 U.S. 50, 65 (1995) ("The rule of lenity applies only if, after seizing everything from which aid can be derived, we can make no more than a guess as to what Congress intended." (internal citations and quotation marks omitted)). It "serves to aid the court in interpreting a criminal statute only if there is an ambiguity," and it cannot be "used to narrow a statute that has an unambiguously broad thrust." *United States v. Litchfield*, 986 F.2d 21, 22 (2d Cir. 1993) (per curiam); *see also Abramski v. United States*, 134 S. Ct. 2259, 2272 n.10 (2014) ("The dissent would apply the rule of lenity here because the statute's text, taken alone, permits a narrower construction, but we have repeatedly emphasized that is not the appropriate test.").

The majority concludes that the "sharp division" among our sister circuits means that whether the statute proscribes Valle's conduct cannot be resolved simply by looking at the text of the statute, requiring us to "turn to the legislative history and motivating policies for further guidance." Maj. Op. at 31. To the contrary, however, the Supreme Court has explained that "[a] statute is not ambiguous for purposes of lenity merely because there is a division of judicial authority over its proper construction." *Reno*, 515 U.S. at 64–65 (internal quotation marks omitted); *see also DiCristina*, 726 F.3d at 104 ("A statute is not '"ambiguous" for purposes of lenity merely because it [i]s *possible* to articulate a construction more narrow than that urged by the Government.'" (quoting *Moskal v. United States*, 498 U.S. 103, 108 (1990))).

Therefore, "[w]here statutory . . . provisions unambiguously cover the defendant's conduct," as Section 1030(a)(2)(B) clearly proscribes Valle's conduct here, the rule of lenity "does not come into play." *Litchfield*, 986 F.2d at 22; *see, e.g.*, *DePierre v. United States*, 131 S. Ct. 2225, 2237 (2011) (explaining that the rule of lenity was inapplicable "[b]ecause the statutory text allows us to make far more than a guess as to what Congress intended" (internal quotation marks omitted)); *Rodgers*, 466 U.S. at 484 (concluding that criminal statute was "not sufficiently ambiguous . . . to permit the rule [of lenity] to be controlling"); *see also Yates v. United States*, 135 S. Ct. 1074, 1098–99 (2015) (Kagan, J., dissenting) ("Lenity offers no proper refuge from [a] straightforward (even though capacious) construction."). For the same reason, I also have no occasion to refer to the statute's legislative history. *See United States v. Woods*, 134 S. Ct. 557, 567 n.5 (2013) (Scalia, J.) ("Whether or not legislative history is ever relevant, it need not be consulted when, as here, the statutory text is unambiguous."); *Puello v. Bureau of Citizenship & Immigration Servs.*, 511 F.3d 324, 331 (2d Cir. 2007) (Katzmann, J.) ("Because we believe the language in the statute is unambiguous, we need not examine legislative history to divine the statute's meaning.").

I emphasize that I take no position on the applicability of Section 1030(a)(2)(B) in other circumstances or the scope or validity of other provisions of the CFAA, which are not at issue here.[6] Because I find that Section 1030(a)(2)(B) of the CFAA clearly proscribes Valle's conduct, I would affirm.

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[6] The majority apparently rules not on the issue presented on this appeal—whether Valle's conduct is proscribed by the CFAA—but on the application of this statute to other circumstances not implicated here. *See* Maj. Op. at 38 (explaining that, "[w]hatever the apparent merits of imposing criminal liability may seem to be *in this case*," the majority is "constru[ing] the statute" for the purposes of "many other situations"). Because the majority's ruling might "impact[] many more people than Valle," it rejects the government's reasonable proposal that we let concerns about "the risk of criminalizing ordinary behavior" be addressed in due course when raised "by individuals actually affected by the provision at issue." *Id*. at 37 (internal quotation marks omitted). In my view, the majority's approach is unwise and improper. *See Costello v. INS*, 311 F.2d 343, 348 (2d Cir. 1962) ("[W]e think the exercise of a proper judicial restraint makes it undesirable for us to reach out and now decide more than the circumstances of this case require us to decide."), *rev'd on other grounds*, 376 U.S. 120 (1964).

CONCLUSION

I would vacate the District Court's judgment of acquittal in respect of Count I, affirm the District Court's judgment of conviction in respect of Count II, and remand for further proceedings. Therefore, I respectfully dissent.