No. 17-1110

In the Supreme Court of the United States

PAUL A. SLOUGH, EVAN S. LIBERTY,
DUSTIN L. HEARD, NICHOLAS SLATTEN,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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I. THE DECISIONS AT ISSUE ARE FINAL AND RIPE FOR REVIEW

Petitioners Slough's, Liberty's, and Heard's convictions are affirmed and final. Their pending resentencings will not affect their convictions or the legal issues raised on certiorari. The D.C. Circuit's legal rulings affirming Petitioners' convictions are final and ripe for review.

None of the government's authorities concerning interlocutory review (BIO 13-14) were from affirmed convictions (or even criminal cases). This Court has reviewed statutory interpretation and jurisdictional issues in criminal cases without awaiting final judgment. *See Bates v. United States*, 522 U.S. 23, 29 (1997) (reviewing reinstatement of prosecution after pretrial dismissal); *Solorio v. United States*, 483 U.S. 435, 437-38 (1987) (same).

Here, the government is whipsawing Petitioners on timing. When Slough, Liberty, and Heard sought prompt resentencing in the district court, the government opposed, arguing resentencing would be premature until this Court had considered Petitioners' challenge to their convictions.[1] The government now tells this Court the opposite: that it should decline such review until Petitioners have been resentenced. BIO 13. The government cannot have it both ways. Having obtained relief below

[1] *See* Appendix hereto, at 2a (arguing resentencing would be "needless and wasteful" if this Court grants certiorari and vacates Petitioners' convictions).

based on one position,[2] the government is judicially estopped from taking the opposite position here. *See New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

The same legal rulings that are final for Slough, Liberty, and Heard apply on Slatten's remand. There is no efficiency in requiring Slough, Liberty and Heard to await the outcome of Slatten's retrial, or in requiring Slatten to bring a later duplicative petition raising the same questions presented here.

II. THE MEJA STATUTORY QUESTION IS NOT FACT-BOUND

The government argues that Petitioners' MEJA claim is solely about the sufficiency of the evidence. Not so. The D.C. Circuit's affirmance of the verdict and jury instructions depended on an erroneous interpretation of the statute. *See* Pet. 9-12, 14-15, 16-19, 22-27. When this Court reviews expansive interpretations of criminal statutes, it focuses on the meaning of the statutory terms in context, not merely the facts in evidence. *See, e.g.*, *Bond v. United States*, 134 S. Ct. 2077, 2090-91 (2014) (interpreting "chemical weapon"); *McDonnell v. United States*, 136 S. Ct. 2355, 2367-72 (2016) ("official act"); *Yates v. United States*, 135 S. Ct. 1074, 1081-88 (2015) ("tangible object"). These are conventional exercises in statutory interpretation,

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[2] The district court granted the government's request for delay, by failing to act on Petitioners' motion (which remains pending more than three months after filing). Had Petitioners been resentenced promptly after the November 2017 mandate, their cases would now be complete through judgment.

not fact-bound inquiries into the sufficiency of the evidence.

Far from being fact-bound, this case turns only on facts that are *undisputed*: (i) Petitioners were contracted by the State Department to protect U.S. diplomats in Baghdad; (ii) providing such diplomatic security is by law the *State Department's*, not the Defense Department's, mission; and (iii) Petitioners' charged conduct consisted precisely of performing that non-Defense function. Pet. 22-23. The question presented is thus a purely legal one: whether guards contracted by a non-Defense agency, to perform non-Defense work, whose charged conduct consisted of performing that non-Defense work, were "employed by the Armed Forces" under the *Military* Extraterritorial Jurisdiction Act. Pet. 22-23.

To answer that question in the affirmative, the court below relied on the attenuated theory that the *entire State Department, and all who worked for it*, were "supporting" the Defense Department's supposed "mission" to "rebuild Iraq." *See* Pet. 16-18, 24; Pet. App. 14a. Whether that decision was correct is an issue of statutory interpretation, not an "evidence-driven inquiry." BIO 15.[3]

The government faults Petitioners for the brevity of their argument concerning the textual flaw in the

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[3] The government also loads its opposition with graphic depictions of bloodshed in Nisur Square. Those cherry-picked facts—not reflected in the jury's general verdict, hotly disputed at trial, and attributable to a 2-way firefight and admitted "suppressive fire" by the government's cooperating witness—have nothing to do with the legal questions presented in this petition.

panel's statutory interpretation—that it reads the limiting term "to the extent" out of the statute. BIO 19-20. As Petitioners argued, the panel majority's interpretation effectively nullified that limiting term, applying the statute as though it read "if" instead. *See* Pet. 26 (citing *John Hancock Mut. Life Ins. Co. v. Harris Tr. & Sav. Bank*, 510 U.S. 86, 105 (1993)). Petitioners invoked Judge Brown's dissent (Pet. 26, citing Pet. App. 129a, 134a-135a; *see* Pet. 14-15), which fully explicated this flaw in the panel opinion.[4]

The consequences of the panel majority's erroneous interpretation are not limited to insufficiency of the evidence. *Contra* BIO 13. It infected the court's review of the jury instructions as well. *See* Pet. 9-12, 14-15. As Judge Brown explained in dissent, treating MEJA coverage in Iraq as an all-or-nothing proposition, rather than assessing *to what extent* Defendants' contract employment related to supporting the military mission, effectively read the "to the extent" limitation out of the statute, thereby "eliminat[ing] the connection to military employment." Pet. App. 134a-135a. The jury thus was told it could find Petitioners "employed by the Armed Forces" based on remote actions taken on other occasions by Petitioners or *other* Blackwater contractors in Iraq

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[4] Contrary to the government's contention (BIO 19), Petitioners responded to the panel's expansive interpretation of "relates to," pointing out that this Court has rejected such "uncritical literalism," even in the broad area of ERISA preemption. Pet. 26. The additional cases cited by the panel majority (Pet. App. 11-12; BIO 19) add nothing but repetition.

("such as providing assistance to distressed military units or training Army security escorts"), even if those actions had nothing to do with whether "the Defendants' action on the day of the Nisur Square incident related to supporting the DOD's mission." Pet. App. 136a; *see* Pet. 10-11, 14-15.

Petitioners have not abandoned this issue, as the government suggests (BIO 20). The petition explains the competing interpretations presented in the parties' proposed instructions, Pet. 9-11, identifies the district court's adoption of the theory affirmed by the D.C. Circuit, Pet. 11-12, and invokes the dissenting judge's interpretation as the correct one, Pet. 26. The Petition expressly argues that "[t]he dissent's interpretation"—*including* its application of that interpretation to the jury instruction issue, App. 134a-135a (invoked at Pet. 26)—"is the one faithful to [MEJA's] statutory text." Pet. 26. That interpretation implicates the viability of the entire prosecution under MEJA, with two cascading consequences: first, Petitioners' convictions simply cannot stand, but second, at a minimum, Petitioners are entitled to trial by a correctly instructed jury.

III. THE D.C. CIRCUIT'S VENUE DECISION IS CONTRARY TO *GAUDIN* AND *JACKALOW* AND DEEPENS AN ENTRENCHED CIRCUIT SPLIT

A. It is universally accepted that the government must prove venue for every count charged. *See*, *e.g.*, *United States v. Davis*, 689 F.3d 179, 185 (2d Cir. 2012) (cited BIO 21); Pet. 28 (citing cases). The government claims that "venue does not constitute an element of a criminal offense," and cites a few cases containing such language. BIO 21. But every one of those cases holds only that venue must be

proved *under a reduced preponderance standard*—not that it is not part of the government's required proof. Indeed, every case the government cites in contending venue is not a "substantive element" of guilt (BIO 21-22 & n.6) recognizes the government's burden to prove venue for every count charged.

The question is not whether venue is labeled a "substantive" or "essential" element," BIO 21, 23, or what *level* of proof is required. The question is whether this universal proof requirement must be submitted to the jury when requested, or whether the court may decide it over defense objection.

B. The government contends that "because venue is not a substantive element of an offense and has no bearing on guilt or innocence," this Court's decision in *United States v. Gaudin*, 515 U.S. 506 (1995), does not apply. BIO 23. But this distinction hangs too much importance on the label "substantive element," ignoring that venue is also part of the government's required proof. *Jurisdictional* facts (e.g., a connection to interstate commerce) are also referred to as non-"substantive elements," which do not prove guilt or innocence. *See e.g.*, *Torres v. Lynch*, 136 S. Ct. 1619, 1630 (2016). Yet those elements, necessary for conviction, still must be decided by the jury. *Id.* Venue, constitutionally required for conviction in every case, is no different.

The government argues *Gaudin* recognized that "not every mixed question of law and fact must be submitted to a jury." BIO 23. But in *Gaudin*, this Court noted that mixed questions necessary for conviction *have* "typically been resolved by juries." 515 U.S. at 512 (citing J. Thayer, *Preliminary Treatise on Evidence at Common Law* 194, 249-250

(1898)); *see also id.* at 513-14 (citing *Sparf v. United States*, 156 U.S. 51, 90 (1895), and trial rulings by Chief Justice Marshall and Justice Story). This practice was not limited to any particular element, but instead inhered in the right of the defendant to demand, and the jury to return, a general verdict, which could not be set aside. That general verdict necessarily incorporated the jury's application of the law to the facts for every issue required for conviction. *See id.* at 513 (citations omitted).

This Court demonstrated the point in *Gaudin* at the very pages cited by the government. When mixed questions of fact and law arise for some preliminary purpose—e.g., relevancy or probable cause as a predicate to admitting evidence—they are determined by the court. But when those same issues are necessary to convict at trial, they must be proved to the jury. *See id.* at 520-22 (cited BIO 23). This Court repudiated the notion that a "pure question of law" necessary for conviction could be determined by the trial court alone. *See id.* (repudiating *Sinclair v. United States*, 279 U.S. 263, 298 (1929)).

The same reasoning applies to the *Gaudin* concurrence's observation that the "propriety of venue" *under Federal Rule of Criminal Procedure 18* is a question within the trial court's domain. *Gaudin*, 515 U.S. at 526 (Rehnquist, C.J., concurring) (cited BIO 23). Rule 18 governs the trial court's setting the place of trial *within the district*, "for the convenience of the defendant, any victim, and the witnesses." Rule 18 & adv. comm. notes. That is a "preliminary question" committed to the court, in the same vein as "the admissibility of

evidence, the competency of witnesses, the voluntariness of confessions, [and] the legality of searches and seizures." *Gaudin*, 515 U.S. at 525-26 (Rehnquist, C.J., concurring) (citations omitted). It is wholly different than deciding whether the government has met its burden to prove venue at trial, as required for conviction. *See Gaudin*, 515 U.S. at 512-15, 520-21; Pet. 29 n.16; *supra* at 5-6.[5]

The government acknowledges the holding of *United States v. Jackalow*, 1 Black (66 U.S.) 484 (1862): whether a crime was committed within the jurisdiction of another State, which determined whether venue was proper, was a mixed question of law and fact required to be submitted to the jury. The trial court's determination of the issue as a matter of law was reversible error, necessitating a new trial. *Id.* at 486-88; BIO 24-25.

Seizing on the words "material fact" in the *Jackalow* opinion, however, the government claims *Jackalow* supports its position that venue need only be submitted to the jury when a material fact is *disputed*. BIO 25. But *Jackalow* did not mention, much less turn on, whether the facts were "in dispute." Instead, this Court held that a mixed

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[5] The government's citations of *United States v. Svoboda*, 347 F.3d 471 (2d Cir. 2003), and *United States v. Tinoco*, 304 F.3d 1088 (11th Cir. 2002) (BIO 23-24), focus on language quoted out of context, rather than holdings. *Svoboda* concerned only the preponderance level of proof, not submission of venue to the jury. *See* 347 F.3d at 484-85 & n.14. *Tinoco* was not a venue decision at all—it involved a maritime jurisdiction requirement in an unrelated statute, where Congress *specified in the statute* that the vessel's jurisdiction was not an element of the offense. 304 F.3d at 1102.

question of law and fact determinative of venue "belongs to the jury," and must "be submitted to them under proper instructions." 1 Black (66 U.S.) at 487, 488. The trial court's determination of the venue issue as a matter of law was *reversed,* and required a new trial. *Id.*

The "material facts" required to determine venue here—whether cooperating witness Jeremy Ridgeway was a "joint offender" with Petitioners on every count charged, and whether he was "arrested" in D.C. (*see* Pet. App. 25a-30a)—were just as much mixed questions of law and fact as whether the ship Jackalow robbed was within the boundary of a State. They were not "legal matters for the court to decide," as the government asserts (BIO 25) and the D.C. Circuit ruled (Pet. App. 31 n.5). Even though they contained legal components, they "belong[ed] to the jury," "under proper instructions." *Jackalow*, 1 Black (66 U.S.) at 487-88.

Deciding venue as a matter of law on the ground that the facts are not in dispute amounts to directing a finding on a question the government is required to prove—which is permissible only in civil trials, not criminal ones. Pet. 31. The government's response that the court here did not direct a guilty verdict, only a finding on one issue (BIO 26), overlooks the obvious: the government's burden to prove that issue. *See supra* at 5-6. The government's further assertion that a defendant does not have a right to jury determination of venue because "venue is not a substantive element of the offense," BIO 26, is a question-begging assertion, relying on a misplaced label ("substantive element"). It again ignores the

government's burden to prove venue for every charge in every case. *See supra* at 5-6.

C. The government tries to minimize the extent of the conceded circuit split (BIO 26-27) by citing cases that are not part of it (BIO 27-29)—either because they did not concern defense requests to submit venue to the jury (and thus are pure dicta),[6] or are harmless error cases not affecting the underlying requirement that venue be submitted to the jury.[7] These misleading citations do not diminish the circuit split.

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[6] *See Davis*, 689 F.3d at 183-84 (venue submitted to jury); *United States v. Rommy*, 506 F.3d 108, 116-17 (2d Cir. 2007) (same); *United States v. Grammatikos*, 633 F.2d 1013, 1022 (2d Cir. 1980) (court *acknowledged* venue "must be submitted to a properly instructed jury," but defendant did not request venue instruction); *United States v. Acosta-Gallardo*, 656 F.3d 1109, 1122 (10th Cir. 2011) (same); *United States v. Engle*, 676 F.3d 405, 412 (4th Cir. 2012) (issue was trial court's refusal to dismiss pretrial under Rule 12). In both *Davis* and *Rommy*, the Second Circuit *expressly stated* that whether venue must be submitted to the jury *was not at issue*. *Davis,* 689 F.2d at 182 n.5; *Rommy*, 506 F.3d at 119 n.5.

[7] *United States v. Zamora*, 661 F.3d 200 (5th Cir. 2011) (cited BIO 27-28), like *United States v. Winship*, 724 F.2d 1116, 1124-25 (5th Cir. 1984) (cited Pet. 33), is a harmless-error case: it did not address whether failure to instruct on venue is error, but only whether such error is "reversible," or instead "at worst, harmless error." *See* 661 F.3d at 208. *United States v. Casch*, 448 F.3d 1115 (9th Cir. 2006), and *United States v. Lukashov*, 694 F.3d 1107, 1120, (9th Cir. 2012), both turn on harmless error analysis, after expressly acknowledging that venue is for the jury, not the court, and refusal to instruct is error. *See Casch*, 448 F.3d at 1117; *Lukashov*, 694 F.3d at 1120. *Lukashov*'s approval of the district court's deciding venue as a matter of law was limited to that case's unique circumstances,

(Continued …)

United States v. Bascope-Zurita, 68 F.3d 1057, 1063 (8th Cir. 1995), simply confirms post-*Gaudin* what was true pre-*Gaudin*: that the Eighth Circuit straddles both sides of the issue. *See* Pet. 32. Venue must ordinarily be submitted to the jury, but where the facts are undisputed, the trial court can decide the issue as a matter of law, *Bascope-Zurita*, 68 F.3d at 1062 (citing *United States v. Redfearn*, 906 F.2d 352, 354 (8th Cir. 1990)), and failure to instruct may be harmless error, *id.* (citing *United States v. Moeckly*, 769 F.2d 453, 459 (8th Cir. 1985)). Likewise, *United States v. Acosta-Gallardo*, 656 F.3d 1109 (10th Cir. 2011), merely acknowledges this Court's resolution of the harmless-error standard applicable to a trial court's failure to instruct. *See id.* at 1122 n.3 (citing *Neder v. United States*, 527 U.S. 1, 12-13 (1999)).[8] *Acosta-Gallardo* does not put the Tenth Circuit's rule "in flux" as the government claims. BIO 28.

None of these cases undercut the entrenched circuit split set forth in the Petition. If anything, courts' increasing use of harmless-error (or "reversible error") analysis to restrict a defendant's right to jury determination of an issue the government must prove for conviction increases the need for this Court to confirm its long-established rule: a court may not determine venue as a matter of

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where the trial court instructed on venue; the jury convicted; and the court (on post-trial motion) then revised its earlier ruling based on the verdict. *See id.* at 1112-14 & n.2, 1120.

[8] In this case, the trial court's failure to submit venue to the jury cannot have been harmless beyond a reasonable doubt, as *Neder* requires. Pet. 34.

law over objection, but instead must submit the issue to the jury with instructions when requested. *Jackalow*, 1 Black (66 U.S.) at 487-88.

CONCLUSION

For the reasons stated above and in the Petition, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APRIL 23, 2018

APPENDIX

APPENDIX — EXCERPTS OF GOVERNMENT'S OPPOSITION TO DEFENDANTS' MOTION IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA, FILED JANUARY 18, 2018

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Cr. No. 08-360 (RCL)

UNITED STATES OF AMERICA

v.

PAUL ALVIN SLOUGH, EVAN SHAWN LIBERTY, AND DUSTIN LAURENT HEARD,

Defendants.

GOVERNMENT'S OPPOSITION TO DEFENDANTS' MOTION TO SCHEDULE RESENTENCING

The United States of America, by and through its attorney, the United States for the District of Columbia, respectfully submits this opposition to Defendants' Motion to Schedule Resentencing (the "Motion").

The Court should decline defendants' premature request to proceed to resentencing for two reasons. First, defendants intend to seek certiorari review of the D.C. Circuit's ruling affirming their convictions, and it would be needlessly burdensome and potentially wasteful to proceed to resentencing absent Supreme Court action on their petition. Second, contrary to defendants' assertions,

there is no practicable or equitable reason to rush to resentencing at this time—(i) the relative length of defendants' sentences is not the sole or primary factor that determines where and under what conditions they are imprisoned; and (ii) defendants improperly hypothesize that this Court would impose substantially lighter sentences even though it previously indicated that the 30-year and a day sentences were warranted and appropriate as part of its overall sentencing package. Accordingly, the Court should deny defendants' motion.

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ARGUMENT

Because defendants are seeking further appellate review, it is premature, unduly burdensome, and potentially wasteful to proceed to resentencing at this time.

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Here, defendants ask this Court to schedule resentencing before the Supreme Court acts on their petition for certiorari. If defendants were to be resentenced, and then the Supreme Court were to grant certiorari and later issue an opinion vacating defendants' sentences, the expenditure of limited judicial and other resources at a premature resentencing will have been needless and wasteful. Similarly, the families and victims from Iraq that may wish to personally appear at any resentencing would have been forced to travel to the United States needlessly. For the benefit of all parties and the Court, the Court can and should avoid this unnecessary occurrence.

Cf. United States v. Quinn, 475 F.3d 1289, 1291 (D.C. Cir. 2007), as amended (Feb. 6, 2007) ("In following this procedure, we conserve judicial resources - neither needlessly remanding the case, nor addressing issues on appeal that may ultimately be mooted by the grant of a new trial." (citation omitted)).

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CONCLUSION

For the foregoing reasons, the government respectfully requests that the Court deny Defendants' Motion to Schedule Resentencing.

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