No. 18-__

IN THE

Supreme Court of the United States

NICHOLAS YOUNG,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

David B. Smith
Counsel of Record
Nicholas David Smith
DAVID B. SMITH PLLC
7 East 20th Street, Suite 4R
New York, NY 10003
(917) 722-1096
nds@davidbsmithpllc.com
dbs@davidbsmithpllc.com

Counsel for Petitioner

QUESTIONS PRESENTED

The decision below affirmed Petitioner's conviction for attempting to provide material support to a Foreign Terrorist Organization ("FTO") pursuant to 18 U.S.C. § 2339B. Following a six-year investigation, Petitioner's crime was to send $245 in gift cards to an undercover agent, posing as an FTO member, who solicited them. During the former police officer's entrapment trial, the district court admitted dozens of white nationalism artifacts as evidence of Petitioner's predisposition to materially support militant Islamism and permitted an expert to educate the jury on a perceived white nationalist-militant Islamic "convergence." The government offered no evidence the FTO seeks small financial contributions from Americans, or that Petitioner ever considered making one prior to the sting operation. The following questions are presented in this case:

1. Whether evidence of a criminal defendant's prior, constitutionally protected activity may be admitted to prove the predisposition element of the entrapment defense, and if so, whether such activity must be "similar" in nature to the charged crime.

2. Whether, to avoid prosecution of thoughtcrime, the predisposition element contains an objective "positional" component in addition to a subjective "dispositional" one. *United States v. Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994) (en banc) (Posner, C.J.).

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES AND RULES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Nicholas Young respectfully requests a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit is reported at 916 F.3d 368 and is reprinted in the Appendix to the Petition ("App.") at 1a-38a.

JURISDICTION

The court of appeals issued its decision on February 21, 2019. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT STATUTORY PROVISIONS

The pertinent provision in the U.S. Code is reprinted at App. 43a.

STATEMENT OF THE CASE

Following a six-year undercover investigation, petitioner Nicholas Young was charged with attempting to provide material support to an FTO after sending $245 in Google Play gift cards to an undercover agent who had requested them. Young had served with distinction in law enforcement for the entire investigation. Convicted at trial over his entrapment defense, he is now serving a fifteen-year prison sentence.

At trial, the government offered no evidence that Young had ever communicated with any person affiliated with an FTO in the real world, entertained any plans to join an FTO, or ever contemplated materially contributing to one prior to sending the gift cards in

this case. Nor did the government offer evidence that Young ever planned, attempted to commit, participated in, or encouraged, any act of violence.

No real-world terrorist appeared in the investigation. The charge was simply that, after various undercover agents befriended Young for over half a decade, he was ultimately prevailed upon to send gift cards to one of them after an agent pretended in 2016 to travel to Syria to join the Islamic State, otherwise known as ISIS, a group that did not exist when Young's investigation began in 2010. No evidence was offered that ISIS in fact requests, or has requested, Google gift cards or other small-donor financial contributions from Americans.

Young's conviction was built on two legal errors, reflecting splits among the courts of appeals on key entrapment defense questions that have remained unresolved for at least 25 years.

First, although Young was charged with attempting to support a militant Islamist terror group in the Middle East, the district court allowed the government to show the jury over three dozen pieces of Nazi and white supremacist "evidence"—including images of burning crosses displayed to the jury in closing argument—to establish Young's predisposition to commit the gift-card offense. The Fourth Circuit affirmed, holding the entrapment defense opens the evidentiary door to "a broad swath of evidence [] of the defendant's character"—criminal or otherwise. That is inconsistent with the more surgical approach of the Second, Sixth, Eighth and Ninth Circuits, as well as with this Court's decisions, which require predisposition evidence to consist of prior, similar criminal acts,

not just disreputable but constitutionally protected behavior or beliefs. *Jacobson v. United States*, 503 U.S. 540 (1992); *United States v. Russell*, 411 U.S. 423 (1973); *Sherman v. United States*, 356 U.S. 369 (1958).

Second, the district court found the evidence sufficient to convict Young even though it was undisputed the government offered no proof that ISIS (or another FTO) in fact requests—or was likely to request—small financial contributions from Americans, or that Young had ever considered making one before sending the gift cards. That does not square with *Jacobson*'s cardinal holding that entrapment is "the apprehension of an otherwise law-abiding citizen who, left to his own devices, likely would have never run afoul of the law." 503 U.S. at 553-54. The Court should clarify that—consistent with the interpretation of the First, Fifth and Seventh Circuits—*Jacobson* demands the government make a "positional" showing that, in the totality of the objective circumstances, the crime was of a sort the defendant likely would commit absent government intervention.

To avoid thoughtcrime prosecution, entrapment cannot be merely a question of the defendant's mental state; it must also incorporate objective probability.

A. The Six-Year Undercover Investigation

From 2003 to the day of his arrest in August 2016, Petitioner served as a Metro police officer in Washington, D.C. In 2006 the U.S. Attorney's Office for the District of Columbia awarded him a commendation for subduing a robber brandishing a butcher's knife, without reaching for his police firearm. 4th Cir. Joint

Appendix ("CAJA") at 1744-46. The following year, in 2007, Petitioner's father died of myocardial infarction, bringing on Petitioner's clinical depression. Around the same time, he converted from Catholicism to Islam. *Id.* at 1798-99.

In 2010 the FBI opened a counterterrorism investigation into Petitioner, code-named Slow Decline. CAJA 1394. The predicate was Young's "connection" to a fellow George Mason University student who had been arrested that year for attempting to provide material support to an FTO. However, the government would later learn this "connection" consisted of a single phone call and mutual participation in the Muslim Student Association at GMU. *Id.* at 513.

That same year, the Bureau tasked an undercover agent with the pseudonym "Khalil Sullivan" to befriend Young and assess whether he posed a threat. CAJA 509-11. Sullivan's "legend"—his fictitious background—was that he was a recent convert to Islam from Catholicism, as well as a U.S. Marine, both of which traits would appeal to the patriotic Young, who, horrified by the terror attacks on 9/11, had himself registered for the National Guard. Over nearly two years, the government agent fabricated a friendship with Young, watching movies in Young's home, and praying with him in places of religious worship. *Id.* at 504-13.

A questing personality led Young to travel the world. Half a year after meeting Sullivan, in May 2011 Young ventured to Cairo, Egypt and, together with a BBC reporter, across the border to Libya, then in the midst of civil strife, with the U.S. Government

and its NATO allies giving material support to partisans contesting the rule of then-dictator Muammar Qaddafi. CAJA 530-32. Young made no secret of traveling to Libya (later placing a bumper sticker on his pickup truck unabashedly declaring, "Libya Civil War Vet"), sharing the Government's condemnation of Qaddafian atrocities, encountering "migrant workers, rebels, and humanitarian aid people," and packing a flak jacket, which he duly disclosed to customs agents. *Id.* at 530-41. The sole documentary evidence of the trip comprised photographs of Young riding a tourist's camel in the shadow of the pyramids, posing on the beach with ordinary Libyans, and of children playing with dogs. *Id.* at 1645-51; *see also* Eric Lichtblau, *How an American Ended Up Accused of Aiding ISIS with Gift Cards*, N.Y.TIMES, Jan. 29, 2017 at A15 (Young confiding to Lichtblau that although he got "shot at a lot," he didn't join up with any terrorists).

After Young returned to the U.S. the same month—May 2011—the Bureau took actions indicating it did not regard his Libya trip as a terrorism threat. Agent "Sullivan" ceased investigating Young in April 2012. CAJA 471. Shortly after his return, the Bureau indicated it wished to recruit Young as a paid informant. *Id.* at 1426-29. An internal Bureau analysis determined (at "less than high confidence") that he had not traveled to Libya to join an FTO. *Id.* at 1411-14. And when a Libyan national emailed Young in June 2011 requesting a night-vision scope, Young declined, noting it would be illegal under export laws. *Id.* at 1300-03. He remained on the police force, carrying a firearm every day, for the next five years.

Three years later, in May 2014, the Bureau paid $34,000 to an informant with the pseudonym "Mo" to befriend Young at a mosque and test again his willingness to support terrorism. CAJA 670-71. Young's "friendship" with the Bureau's informant would continue for the next two years, through August 2016. *Id.*

Mirroring Young's own personal history, "Mo's" legend was that he attended GMU, had a religious conflict at work and a strained relationship with his father, and served in the military reserves. CAJA 567, 670. Over two years, Young and the FBI informant shared meals, prayed together, and held deeply personal conversations about family and their love lives (he had a weak point—this Fortunato). *Id.* at 714-16.

In summer of 2014, when ISIS emerged in Iraq, Mo's handler instructed him to broach the new terror group with Young. CAJA 693. Among other remarks, Young responded that ISIS were "a bunch of criminals who are hungry for power and money"; that he was "against ISIS because of all the bad stuff" he was hearing about them; and that it was "un-Islamic to rebel against the legitimate government." *Id.* at 684-85; 688-89. On the orders of his handler, Mo continued to press Young to support ISIS. When Mo indicated he wished to travel to Turkey, and perhaps then on to Syria to join ISIS, Young admonished, *inter alia*, that Mo should instead find a new job in America—where Muslims are not restricted from practicing their religion—and that joining an FTO was a crime. *Id.* at 683, 692-94, 724-25.

Nevertheless, Young agreed to continue emailing with Mo, even after the latter pretended to travel to Turkey and then on to Syria. Then, for almost another two years, between December 2014 and August 2016, undercover agents posing as Mo sporadically emailed Young "from Syria." At this time, agents began acknowledging internally to one another that the five-year-old investigation of Slow Decline was going nowhere. Quipped one agent: nothing less than a "defibrillator" was needed to resurrect the investigation. CAJA 1866-71.

At length, in July 2016 the agents posing as Mo emailed and texted Young to send some Google Play gift cards, putatively so the "brothers in Syria" could purchase an encrypted chat app and communicate with potential recruits outside Mesopotamia. (Google Play gift cards can be redeemed for apps, podcasts, movies and music retailed by Google.) After making their solicitation, agents set forth the national security stakes of the Google card scheme as follows:

Agent A: "Let's hope he goes 1 more step further."

Agent B: "just 1 more step."

Agent A: "1 huge step !!!!"

Agent B: "1 small step for [the counterterrorism section], 1 giant leap for Slow Decline." CAJA 1868 (email produced to the defense in classified format one business day before the original trial date, together with suggestion of the spoliation of multiple informant audio recordings of Petitioner).

Young ignored the agents' first two attempts to solicit gift cards. On July 28, 2016, the agents asked

Young, for a third time, to send "any [gift card] codes you can get. . . ." CAJA 855-58. This time Young sent Google cards worth $245. A few days later, he was arrested at his police station and charged with attempting to materially support the Islamic State.

B. Pretrial Proceedings and Trial

Young's six-year probe never investigated a hate crime; he had no criminal history. CAJA 1409. Accordingly, when agents searched his home following his arrest in August 2016, it was pursuant to a warrant focused on evidence of FTO crimes, specifically pertaining to ISIS. *Id.* at 55. The agents found no evidence tying Young to any FTO.

Agents found something else. Entering a room containing historical memorabilia from various world wars and conflicts—Vietnam, Civil War, Crimean War—agents spotted Nazi and white supremacist posters, literature and curios. They placed a mid-search call to an Assistant United States Attorney, asking how to proceed. The AUSA ordered the agents to seize the Nazi "evidence." CAJA 89-90.

Young indicated he would raise an entrapment defense, requiring the government to prove he had a predisposition to give material support to an FTO "prior to first being approached by government agents," *Jacobson*, 503 U.S. at 549—*i.e.*, before 2010, when agent "Sullivan" met Young—and four years before ISIS came into existence. The government conceded it could not satisfy the predisposition element with evidence of Young's proclivity for militant Islamism—it would need to offer the Nazi and white supremacist "evidence." CAJA 114-15.

Denying Young's pretrial objections under Rules 401, 403 and 404(b) of the Federal Rules of Evidence, the district court allowed Nazi and white supremacist evidence to be presented to the jury, predicating this on a single comment Young had allegedly made fifteen years before trial. A fellow police officer "recalled" that, when they were both enrolled in a GMU course entitled European Racism, they attended a British National Party conference in 2001 for a class project. Young was said to have remarked, "Do not discount the idea of an alliance with the Muslims to combat the Jews." CAJA 139.

At the same time, the government proffered the expert opinion of Dr. Daveed Gartenstein-Ross, the owner of a for-profit national security consultancy. Gartenstein-Ross proposed to testify that, in his expert opinion, there existed a white supremacist-militant Islamic "convergence." His proposed testimony included displaying for the jury dozens of Nazi, white supremacist and anti-Semitic pictures and objects. Gartenstein-Ross had never testified in a criminal case or published any peer-reviewed papers on a Muslim-Nazi "convergence" (nor had any other person) or on any ethnic nationalism subject. Before being engaged by the government, Gartenstein-Ross had undertaken no study to establish the "convergence," nor had any other researcher. Gartenstein-Ross was compensated $16,000 for his testimony.

The expert report omitted the findings of the country's leading terrorism study, sponsored by the Department of Justice: Jensen and LaFree, *Final Report: Empirical Assessment of Domestic Radicalization* (College Park, Md.: University of Maryland,

2016) (the "EADR"). Having built the largest known database on radicalization in the U.S., the EADR concluded:

(i) insufficient data exist to compare militant Islamist and far-right radicalization; but that,

(ii) initial indicators suggest dozens of material distinctions in radicalization between the two groups. EADR, p. 15.

In moving to exclude the "expert," Young presented all this information to the district court. CAJA 154-72. Denying the motion, the district court: considered none of the Rule 702 factors; held no *Daubert* hearing; and permitted no *voir dire* of the expert prior to admitting his opinion. The court simply stated, "he's a better expert in some areas than others" and admitted Gartenstein-Ross. CAJA 163-64.

At trial, the expert displayed for the jury over three dozen pieces of white supremacist "evidence," including SS images, swastikas, pictures of Adolf Hitler, photographs of Young costumed as a Nazi for World War II reenactment, Nazi history books, an anti-Semitic cartoon. The government offered an Israeli flag seized from Young's home, said to have been disrespected by Petitioner. During closing argument, a cross burned on each juror's personal screen as an AUSA averred that this evidence reflected Young's character. CAJA 1631-44. No evidence was offered at trial that Young had ever considered materially contributing to an FTO before the sting, or that ISIS in fact seeks out financial contributions from Americans. The district court denied Young's motion for

judgment of acquittal before submission to the jury. App. 39a.

The jury found Young guilty of attempting to provide material support to the Islamic State. Making no reference to ISIS or the gift cards—instead referencing his (nonexistent) "association" with white supremacists and his lawful ownership of firearms—the district court delivered a sentence of fifteen years' incarceration.

C. The Fourth Circuit's Decision

The Fourth Circuit affirmed Young's attempted material-support conviction. App. 2a. (Separately, it reversed Young's two convictions for attempted obstruction of justice for insufficient evidence. Of the four original charges filed against Young, three have been dismissed or vacated on appeal for having been supported by evidence insufficient for any rational juror to find guilt. *Id.* at 22a.)

Regarding predisposition evidence, the Fourth Circuit, relying on pre-*Jacobson* precedent from the Seventh Circuit, held that although white supremacism and militant Islamism are antithetical ideologies, the entrapment defense opens the door to, and renders probative, "a broad swath of evidence [] of the defendant's character." App. 11a. That distinguishes the Fourth Circuit's approach from that of the Second, Sixth, Eighth and Ninth Circuits—and from this Court's precedent—which require that predisposition proof consist of evidence the defendant previously committed the same—or at least a similar—crime.

REASONS FOR GRANTING THE WRIT

The entrapment defense has long played a significant role in American criminal jurisprudence. But in the aftermath of the September 11 terrorism attacks, it has acquired new prominence in prosecutions involving the highest stakes in public policy. Since 9/11 over 800 individuals have been prosecuted in federal courts for terrorism-related offenses. By some estimates, at least one of every three cases has been built on a sting operation where an undercover agent played an active role in the charged crime. Complicating matters further, the unbounded scope of activity swept up by terrorism "material support" statutes has further muddied ambiguities in entrapment law. *See* Human Rights Watch, *Illusion of Justice: Human Rights Abuses in US Terrorism Prosecutions* 3 (2014) ("Illusion of Justice"), available at http://bit.ly/2VNhnck; *see also* Norris and Grol-Prokopczyk, *Estimating the Prevalence of Entrapment in Post-9/11 Terrorism Cases*, 105 Crim. L. & Criminology 663 (2015) (database of post-9/11 sting operations indicating approximately 5% of investigations thwarted bona fide domestic security threats).

Yet the Court has not clarified entrapment doctrine in over 25 years. *Jacobson v. United States*, 503 U.S. 540 (1992). Since 1992, the courts of appeals have divided in their interpretation of *Jacobson* along two fundamental lines, both at issue here. First, they disagree over the type of evidence the government must offer to establish the defendant's "predisposition" to commit the offense before the sting operation: whether it must consist of a prior "similar" crime, or

merely of any derogatory information about the defendant's character, constitutionally protected or no.

The courts of appeals are also split on another entrapment question: whether *Jacobson* requires a governmental showing not just that the defendant was psychologically disposed to commit the offense, but that he was also objectively positioned to commit it in the totality of the circumstances. Courts hewing to the latter interpretation reason that if entrapment exists to exculpate objectively harmless people—as *Jacobson* so holds—then predisposition law must be drawn to exclude from penalty those who are unlikely to commit the offense because of *either* their mental disposition or lack of real-world opportunity.

The Court should use this case, which touches on both these recurring questions arising in the post-9/11 legal landscape, to settle them squarely.

I. THE COURTS OF APPEALS ARE DIVIDED OVER THE CONTOURS OF "PREDISPOSITION" EVIDENCE

A. Following *Jacobson*, the Second, Sixth, Eighth and Ninth Circuits Only Permit Predisposition Evidence of Prior *Crimes*

In *Jacobson v. United States*, the Court considered a sting operation remarkably similar to this case, in form if not criminal content. Federal agents began investigating Jacobson when he purchased magazines catering to an interest in preteen sex, though such periodicals were not then illegal to possess. For the next two years—four fewer than here—the government waged a campaign to lure Jacobson into buying magazines that, because they included photographs of

children engaged in sex, violated newly minted child pornography laws. Agents advised Jacobson he would be striking a blow for the First Amendment. He ultimately succumbed to the sting. 503 U.S. at 543-50.

Reversing his conviction, the Court clarified two points of law relevant to this petition. First, "the prosecution must prove [] the defendant was disposed to commit the criminal act prior to first being approached by government agents." 503 U.S. at 549. And, secondly, predisposition evidence may not consist of legal, constitutionally protected activity. That is why Jacobson's pre-investigation acquisition of legal but prurient magazines could not constitute predisposition evidence, for "evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal, for there is a common understanding that most people obey the law even when they disapprove of it." *Id.* at 551.

The Second, Sixth, Eighth and Ninth Circuits have kept faith with *Jacobson*'s holding that when the government has induced the defendant to commit crime X, in an entrapment trial his predisposition must be proven with evidence of his prior conviction of crime X, or at least by making a showing that he committed prior crime X, or a *crime* "similar" to X. *See United States v. Harvey*, 991 F. 2d 981, 996 (2d Cir. 1993) (citing *Jacobson* and reversing conviction for predisposition-admission of legal, adult X-rated videotapes in child pornography trial); *United States v. Lachapelle*, 969 F.2d 632, 638 (8th Cir. 1992) (in child pornography case following *Jacobson*, district court abused discretion by admitting predisposition evidence consisting of legally acquired pornography);

United States v. Blankenship, 775 F.2d 735, 739-40 (6th Cir. 1985) (in an illegal firearms dealing entrapment case, error to admit predisposition evidence consisting of defendant's earlier discussion of purloining a rare coin collection); *United States v. Bramble*, F.2d 681, 682-83 (9th Cir. 1981) (in cocaine distribution sting trial, abuse of discretion for district court to admit predisposition evidence of defendant's prior "cultivation of 21 marijuana plants").

More recently, the Second Circuit addressed the contours of predisposition evidence in the context of militant Islamist terrorism. *See United States v. Cromitie*, 727 F.3d 194, 207 (2d Cir. 2013). And although the panel's majority opinion strayed from *Jacobson* in other respects (addressed *infra*), it nevertheless clearly held that predisposition evidence must at least concern the defendant's prior *criminal* activity, even if merely at the incipient "design" stage. 727 F.3d at 212 (citing defendant's pre-investigation "designs" to: join a Pakistani terror group; buy missiles; bomb someplace; take out an American plane: all *criminal* activities); *see also United States v. Becker*, 62 F.2d 1007 (2d Cir. 1933) (Judge Hand focusing predisposition inquiry on "existing course of similar *criminal* conduct") (emphasis added).

B. The Fourth Circuit and Others Have Unwisely Split with *Jacobson*

Prior to *Jacobson*, in *United States v. Kaminski*, 703 F.2d 1004, 1007 (7th Cir. 1983), the Seventh Circuit crafted a taxonomy of predisposition evidence. Among other things, it held that the government may offer predisposition proof showing the general "character and reputation of the defendant," criminal or

otherwise. 703 F.2d at 1007. Although *Kaminski* preceded *Jacobson*, its inconsistent predisposition taxonomy—porous enough for the government to drive through with a coach-and-four—has been widely followed by various federal appellate and hundreds of trial courts. *See* Paul Marcus, *The Entrapment Defense* § 4.05D (4th ed. 2009) (collecting *Kaminski*-inspired federal and state cases).

Here, the Fourth Circuit followed *Kaminski* in lieu of *Jacobson*. In a case concerning Petitioner's alleged support for a militant Islamist group in the Middle East, the district court admitted over three dozen pieces of "evidence" comprising SS images, swastikas, pictures of Adolf Hitler, burning crosses, photographs of Petitioner costumed as a Nazi for World War II reenactment, Nazi history books, and anti-Semitic cartoons. This "evidence" was not only not criminal in nature, as required by *Jacobson*. It was also activity protected by the First Amendment, *see*, *e.g.*, *Brandenburg v. Ohio*, 395 U.S. 444 (1969), as well as being irrelevant to the crime charged, an attempt to provide material support to an Islamist Foreign Terrorist Organization.[1] The Fourth Circuit affirmed the decision to admit such "predisposition evidence" inasmuch as the entrapment defense opens the door to "'a broad

---

[1] The exquisitely inflammatory irrelevance of this "evidence" echoes an episode from the Moscow show trials in the 1930s. On trial for his supposed terroristic support for a Rightist-Trotskyite convergence, the USSR announced that former KGB chief Yagoda's dacha contained 3,904 pornographic images. Simon Sebag Montefiore, *Stalin: The Court of the Red Tsar*, p. 195 (Knopf 2007).

swath of evidence, including aspects of the defendant's character….'" App. 11a. (*quoting United States v. McLaurin*, 764 F.3d 372, 381 (4th Cir. 2014)). For this predisposition-proof-may-comprise-general-character-evidence point of law, *McLaurin* in turn relies on a Sixth Circuit decision. 764 F.3d at 381 (*citing United States v. Khalil*, 279 F.3d 358, 365 (6th Cir. 2002)). *Khalil* in turn relies on *United States v. Barger*, 931 F.2d 359 (6th Cir. 1991), which is itself rooted in *Kaminski*. 931 F.2d at 366.

Inconsistent with *Jacobson*—and Rules 403 and 404 of the Federal Rules of Evidence—*Kaminski* is bad law. *See* Marcus, *supra*, § 4.05I (Stressing the need, post-*Jacobson*, "to distinguish between prior *acts*, as opposed to prior *crimes*. The former involves far more dangerous [predisposition] possibilities than the latter") (emphasis original). Indeed, the Fourth Circuit's decision to follow *Kaminski* over *Jacobson* creates a set piece of the injustices posed by a bluntly defined "subjective" entrapment test of which various Justices have presciently warned over the years.

The subjective entrapment test, also known as the *Sherman-Sorrells* test, focuses on the defendant's psychological state—his thoughts—before being induced to commit the crime. *Sherman*, 356 U.S. at 376; *Sorrells v. United States*, 287 U.S. 435 (1932). Both decisions drew sharp concurrences that homed in on the subjective test's drawbacks. In *Sorrells*, Justice Roberts, joined by Justices Brandeis and Stone, faulted the subjective test for "pivot[ing] conviction [] not on the commission of the crime charged, but on the *prior reputation* or some former act of the defendant not

mentioned in the indictment." 287 U.S. at 458-59 (emphasis added). Building on Justice Roberts' concurrence, Justice Frankfurter, concurring in *Sherman* and joined by Justices Douglas, Harlan and Brennan, added that, *contra* the subjective test, "no matter what the defendant's past record and present inclinations to criminality, *or the depths to which he has sunk in the estimation of society*, certain police conduct to ensnare him into further crime is not to be tolerated by an advanced society." 356 U.S. at 383 (emphasis added); *see also Russell*, 411 U.S. at 440 (Justice Stewart objecting in dissent that the subjective test threatens "the introduction into evidence of all kinds of hearsay, suspicion and rumor—all of which would be inadmissible in any other context").

Justices Roberts and Frankfurter were making the case for an objective entrapment test—one exclusively asking whether the government "employed methods of persuasion or inducement which create a substantial risk that such an offense will be committed by persons other than those who are ready to commit it" and considering "surrounding circumstances such as evidence of the manner in which the particular criminal business is unusually carried on." LaFave, Israel, King, Kerr, *Criminal Procedure* § 5.2(a) (4th ed. 2015). Although some courts of appeals hold that objectivity plays no current role in entrapment law (see *infra*), the objective test is favored by a majority of criminal law commentators and has been adopted by the American Law Institute's Model Penal Code (ALI Model Penal Code § 2.13) and by one-third of the states either by statute or judicial decision. *Id.* at § 5.2(b).

The current circuit split notwithstanding, one prominent criminal law commentator has observed that "it is important to recognize that [an] indiscriminate attitude toward predisposition evidence is by no means a necessary feature of the subjective test." LaFave, Israel, King, Kerr, *supra*, at § 5.2(b). To take the example ready to hand, the Court can clarify here that *Jacobson* limited predisposition proof to evidence that the defendant has previously been convicted of the charged crime or a "similar" one, or evidence the defendant previously committed—or planned, attempted or conspired to commit—the same or similar crime but was not charged. 503 U.S. at 551 ("evidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal.").

In material-support cases such as this one, the balance between the accused's First Amendment rights and the government's predisposition burden would pivot on *Brandenburg*. If the proposed predisposition evidence amounted to the announcement of a concrete plan, boasting of past terrorism-related offenses, or incitement to imminent terrorism, it is admissible under *Jacobson-Brandenburg*. Mere statements of sympathy or political advocacy would not be. *Brandenburg*, 395 U.S. at 447; *see also* Sherman, "*A Person Otherwise Innocent*": *Policing Entrapment in Preventative, Undercover Counterterrorism Investigations*, 11 U. PA. J. CONST. L. 1475, 1506 (2009) (advocating *Brandenburg* predisposition test).

Such clarification would correctly identify the district court's grievous twofold error here: converting a

militant Islamist terrorism trial into a hate crime trial where no hate crime was ever so much as investigated; and effectively convicting a man for the exercise of his First Amendment rights. Left alone, the precedent is set for politically motivated sting operations lurking behind the fig leaf of token pretextual crime.

II. THE COURTS OF APPEALS ARE DIVIDED OVER WHETHER THE PREDISPOSITION ELEMENT CONTAINS AN OBJECTIVE "POSITIONAL" COMPONENT BEYOND THE SUBJECTIVE "DISPOSITIONAL" ONE

A. The Seventh, First and Fifth Circuits Require Proof the Defendant Was Objectively Positioned to Commit the Crime Absent Government Intervention

Part of *Jacobson*'s analysis is not found in the Court's previous entrapment decisions. Entrapment, *Jacobson* uniquely held, is "the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law." 503 U.S. at 553-54. That citizen was Jacobson. Yet Jacobson *did* have a psychological predisposition to consume child pornography (albeit one that was demonstrated with then legally acquired magazines). Only, as a farmer in Nebraska, his ability to obtain child pornography in the pre-internet age was nonexistent. Duly, over the course of the two-year investigation, agents did not witness Jacobson receiving any non-governmental solicitations to buy pornography. 503 U.S. at 545. It was not Jacobson's mental state alone—or at all—that allowed the Court to conclude

that had he been "left to his own devices," in all likelihood he would "have never run afoul of the law." *Id.* at 553-54. It was the totality of the circumstances—subjective and objective.

This reading of *Jacobson* neatly harmonizes with the Court's foundational precedent in another area of criminal law—probable cause. Entrapment and probable cause analyses are illuminatingly analogous. In both situations, the court understands in hindsight a crime has been committed. The court then temporally places itself in law enforcement's mindset before the crime was committed (entrapment) or uncovered (probable cause) and asks whether it was probable that a crime *would* be committed or found. In *Illinois v. Gates*, for example, the Court held that, in such a "fluid" context, "turning on the assessment of probabilities in particular factual contexts," common sense dictates that "[r]igid legal rules are ill-suited to an area of such diversity [probable cause determinations]." 462 U.S. 213, 232 (1983). An objective, totality-of-the-circumstances test was applied. *Id.* Just as the rigid pre-*Gates* probable cause formulae did not adequately capture the true probability of uncovering evidence of crime, a rigidly psychological entrapment test fails to measure the probability of a future crime's commission. *See*, *e.g.*, *Zalaski v. City of Hartford*, 723 F.3d 382, 393-94 (2d Cir. 2013) (probable cause determination blends assessment of defendant's subjective intent with objective surrounding circumstances).

The Seventh Circuit has adopted this interpretation of *Jacobson*. *See United States v. Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994) (en banc) (Posner, C.J.).

There, a dentist tried his hand at international finance, opening a Virgin Islands bank and advertising for customers. While attending a money laundering seminar, a customs agent spotted the dentist's ad. Assuming a pseudonym, the agent began pitching money laundering schemes to the dentist. For over half a year, the agent could not get the dentist to express agreement. Ultimately, nearly a year after they first communicated, the agent persuaded the dentist to launder $200,000 in proceeds from "the smuggling of guns to [then apartheid] South Africa." Arrested, the dentist was carrying a fake-name passport issued by the mythical "Dominion of Melchizedek," acquired after meeting the agent. 27 F.3d at 1200-03.

Applying *Jacobson*, Chief Judge Posner elucidated why "left to his own devices," in all likelihood the dentist never would "have never run afoul of the law." *Id.* at 1202. Before the agent began his sting, there was no evidence the dentist had ever considered money laundering or ever engaged in any financial wrongdoing. The dentist's bank was on the verge of closing. The bank had never attracted a single customer other than the agent, who was the only person to ever respond to the ad. The dentist was in slow decline: "Had [the agent] not answered the ad, [the dentist] would have soon folded his financial venture. It would have joined his other failures—his movie theaters that failed, his amusement park that failed, his apartment building that failed, his attempt to market cookbooks written by his wife that failed." *Id.* at 1202.

The point was not that the dentist was psychologically "*incapable* of engaging in the act of money laundering. . . . But to get into the international money-

laundering business you need underworld contacts, financial acumen or assets, access to foreign banks or bankers, or other assets. [The dentist] had none. Even if [he] wanted to go into money laundering before [he] met [the agent], the likelihood that [he] could have done so was remote. [Like Jacobson, he] was objectively harmless." 27 F.3d at 1202 (emphasis original); *see also United States v. Mayfield*, 771 F.3d 417, 428 (7th Cir. 2014) ("[P]redisposition is largely probabilistic, not psychological.")

Decisions in the Fifth and First Circuits are in accord. *See United States v. Reyes*, 239 F.3d 722, 739 (5th Cir. 2001) (applying *Hollingsworth*); *United States v. Wise*, 221 F.3d 140, 155-56 (5th Cir. 2000) (same); *Untied States v. Gamache*, 156 F.3d 1, 11-12 (1st Cir. 1998) (*citing Hollingsworth* and holding that the defendant's "stated willingness to commit the crime, although clearly relevant to the jury's inquiry, is not sufficient by itself to mandate a finding that he was predisposed"); *United States v. Gendron*, 18 F.3d 955, 963 (1st Cir. 1993) (Breyer, C.J.) (Following *Jacobson*, a defendant is not entrapped if "[h]e is [] someone who would likely commit the crime *under the circumstances and for the reasons normally associated with that crime*….") (emphasis added).

B. The Second and Ninth Circuits, and the District Court Here, Have Strayed from *Jacobson*

The Second and Ninth Circuits have rejected *Hollingsworth*'s interpretation of *Jacobson*. *See Cromitie*, 727 F.3d at 216-17; *United States v. Thickstun*, 110 F. 3d 1394, 1398 (9th Cir. 1997). Rather, both decisions reject caricatures of the *Hollingsworth* rule.

In *Thickstun*, a bribery case, the Ninth Circuit reasoned that *Hollingsworth*'s interpretation of *Jacobson* must be misplaced, as it was unnecessary for the *Jacobson* court to transcend ordinary subjective analysis given the "absence of evidence of predisposition." 110 F.3d at 1398. Yet, as shown above, there *was* evidence of Jacobson's pre-investigation interest in child pornography. *Jacobson*, 503 U.S. at 542. *Thickstun* also reasoned that *Jacobson-Hollingsworth* "would be especially problematic in bribery cases [since] a person is never 'positionally' able to bribe a public official without cooperation from that official." 110 F.3d at 1398. That is a crabbed understanding of *Jacobson-Hollingsworth*. In a bribery case, *Jacobson-Hollingsworth* does not turn a blind eye to every circumstance beyond the briber's personal "position." Instead, it inquires whether, for example, apart from the sting operation, the briber enjoyed contacts with real world officials, whether he had ever attempted to make contacts, whether those officials were venal, whether the briber had ever attempted to bribe them, and whether he had a motive to do so.

In *Cromitie*, a material-support-for-terrorism entrapment case, the panel's majority rejected an objective "positional" predisposition analysis with one sentence: "A person who has a pre-existing design to commit terrorist acts against United States interests, or who promptly agrees to play a part in such activity, should not escape punishment just because he was not in a position to obtain Stinger missiles and launch them at United States airplanes." 727 F.3d at 216.

What this abbreviated analysis neglects to consider are the primary statutes with which terrorism

defendants are charged—18 U.S.C. §§ 2339A and 2339B—which do not merely cover such support as the provision of Stinger missiles. *See*, *e.g.*, *Trial and Terror*, The Intercept_(Mar. 7, 2019), http://trial-and-terror.theintercept.com (51% of terrorism defendants charged with §§ 2339A and 2339B). Indeed, "Material support or resources" in those statutes means:

> any property, tangible or intangible, or service, including currency or monetary instruments or financial securities, financial services, lodging, training, expert advice or assistance, safehouses, false documentation or identification, communications equipment, facilities, weapons, lethal substances, explosives, personnel (1 or more individuals who may be or include oneself), and transportation, except medicine or religious materials.

18 U.S.C. § 2339A(b)(1).

There is no *de minimis* exception to "material support or resources" and the government need not prove the defendant provided the support or resources with the specific intent to further the FTO's illegal activities; it must only show the defendant knew the recipient of the support or resources was affiliated with a group connected to terrorism. *See*, *e.g.*, *Rayamajhi v. Whitaker*, 912 F.3d 1241, 1245 (9th Cir. 2019) ("[T]he material support bar does not contain an exception for people who merely give *de minimis* funds to a terrorist organization."); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 (2010) (specific intent to advance the FTO's terrorist activities is not essential).

With the full sweep of the material-support statutes in view, the danger of rejecting *Jacobson-Hollingsworth*'s objective positional test in terrorism sting operations becomes no less clear than the absence of true risk in its proper application. Consider the following hypothetical material-support investigations.

In the first, assume A falsely believes that his friend, undercover informant B, has associated himself with an FTO. Over dinner at a fine restaurant, A admonishes B to discontinue immediately his relationship with the terror group. B demurs. Following the meal, B confesses he has forgotten his wallet—would A mind paying the $245 bill this time? (B had insisted on ordering expensive arak.) Although initially disinclined, A is at length prevailed upon to foot the bill. Since money is fungible—and specific intent to further the FTO's illegal activities is not required—A is now guilty of attempting to provide material support to an FTO, unless he was entrapped. The *Jacobson-Hollingsworth* test does not eschew an analysis of A's mental disposition prior to meeting B. It simply adds such commonsense questions as: in the real world, does this FTO acquire resources in this manner from Americans? Is it likely to? If not, can it be fairly inferred from a person's willingness to split a dinner bill that he would be willing to send money overseas, willing to harm the innocent? Have any of the FTO's members ever communicated with A? Has he tried to communicate with them? Are they likely to in the future?

In the second case, again assume A falsely believes that his friend, undercover informant B, has associated himself with an FTO. This time, however, B tells A the FTO is searching for a secret weapon called Melchizedek. In reality, Melchizedek either does not exist or is virtually impossible to secure, but B leads A to believe it does. B asks A to provide $245 to acquire one component of Melchizedek. A obliges. Here, it is true, the *Jacobson-Hollingsworth* test would indeed ask whether, absent government intervention, A would likely have given resources to the FTO for the acquisition of nonexistent Melchizedek. But *Jacobson-Hollingsworth*'s totality-of-the-circumstances test would not stop there. It would also ask: what did A "know" about the purpose of the weapon? Is that purpose analogous to one pursued by the FTO in the real world? Does the FTO seek resources from Americans to acquire its real weapons? Even if not, as an empirical matter is a demonstrated willingness to send money to an FTO indicative of a disposition to commit a "lone-wolf" act of terrorism, which demonstrably exists in the real world?

Properly applied, then, *Jacobson-Hollingsworth* does not create the "Stinger missile problem" identified by the *Cromitie* majority. 727 F.3d at 216. It does, however, prevent cases—like this one—which flout *Jacobson*'s rule that entrapment is "the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law." 503 U.S. at 553-54. Or, more precisely, it arms fact-finders with a discretionary veto over liberty/security balancing which would otherwise be struck by

security services *sub rosa*, without public accountability. Here, the district court denied Petitioner's motion for acquittal before submission of the case to the jury even though the government offered no evidence that: (1) the FTO seeks Google Play gift cards, or other small financial contributions, from Americans; (2) Petitioner ever communicated with, or attempted to communicate with, the FTO in the real world; (3) the FTO was likely to request a contribution from Petitioner; or (4) Petitioner's willingness to send gift cards foreshadowed an inclination to contribute to activities actually practiced by an FTO. App. 39a.

Petitioner's case is not *sui generis*. Starting with the most specific comparison, this particular gift-card operation has been repeatedly used by the FBI—though without evidence presented that it reflects the real-world activity of the relevant FTO. *See*, *e.g.*, *United States v. Lionel Williams*, 17-CR-01, Dkt. 47 (E.D. Va. Dec. 20, 2017) (sentencing defendant to twenty years' incarceration for sending $50 to an undercover agent he believed was associated with an FTO); *United States v. Harris Qamar*, 16-CR-227, Dkt. 43 (E.D. Va. Feb. 17, 2017) (sentencing defendant to eight years' incarceration for sending $40 in Google Play gift cards to a person he believed was associated with an FTO).

Myriad similar cases appear to involve defendants lacking demonstrated connections to real-world terror groups prior to sting operations. *See*, *e.g.*, *United States v. Bouterse*, 13-CR-635 (S.D.N.Y. Mar. 3, 2015) (sentencing son of president of Suriname to 16 years' incarceration for *inter alia* agreeing to informant's scheme to send "Hezbollah trainees" to Caribbean

country with no known connections to international terrorism); *United States v. Rahatul Kahn*, 14-CR-212, Dkt. 53 (W.D. Tex. Sept. 29, 2015) (sentencing defendant to ten years' incarceration for conversations with informant about the latter's feigned interest in joining FTO); *United States v. Oumar Issa*, *et al.*, 09-CR-1244 (S.D.N.Y. Mar. 12, 2012) (sentencing defendants from poor African village to five years' incarceration for agreeing with an informant, posing as a "Colombian narco-gang member," to "transport cocaine" from West Africa to Spain "on behalf of al Qaeda"). *See generally Trial and Terror*, The Intercept (Mar. 7, 2019), http://trial-and-terror.theintercept.com.

Since it ameliorates some of the strongest criticisms of a subjective entrapment test, many legal commentators have supported *Hollingsworth*'s interpretation of *Jacobson*. LaFave, Israel, King, Kerr, *supra*, § 5.2(b); *see also* McAdams, Reforming Entrapment Doctrine in United States v. Hollingsworth, 74 U.Chi.L.Rev.1795 (2007).

This case presents an opportunity for the Court to resolve the circuit split over *Hollingsworth* and thereby improve on the subjective entrapment test. When the government secures a man's conviction of a crime it induced him to commit—and which he may have been mentally disposed to commit—but which he likely would not have committed in his objective circumstances absent government intervention, it is punishing thoughtcrime. That is Petitioner's case.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

David B. Smith
Counsel of Record
Nicholas David Smith
DAVID B. SMITH PLLC
7 East 20th Street, Suite 4R
New York, NY 10003
(917) 722-1096
nds@davidbsmithpllc.com
dbs@davidbsmithpllc.com

Counsel for Petitioner

May 16, 2019