No. 18-1443

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Petitioner, formerly a D.C. police officer, is serving a 15-year prison sentence for sending Google Play gift cards ("material support") to undercover agents who had been investigating his nonexistent Islamist terrorism links for six years. The government has conceded it lacked sufficient evidence to defeat his entrapment defense without the cynical use of inflammatory white supremacist-themed predisposition "evidence," possession of which is protected by the First Amendment. In closing argument, the government displayed burning crosses on each juror's screen—said to be evidence of Petitioner's character.

This bizarre injustice arises from two longstanding ambiguities in the Court's entrapment jurisprudence. In the 25 years since the Court decided its last entrapment case, *Jacobson v. United States*, 503 U.S. 540 (1992), the courts of appeals have divided over the two questions presented, whether: (1) a defendant's prior, constitutionally protected activity may be admitted to prove the predisposition element of the entrapment defense; and (2) the predisposition element requires a showing that the defendant was objectively positioned to commit the crime absent government intervention.

Scarcely contesting the petition's merits, the government instead raises procedural default arguments. These fail, legally and factually.

I. BOTH QUESTIONS ARE REVIEWABLE

The government contends the petition should be denied because it is "interlocutory." Even if not, the

government argues, Petitioner "did not present either of his contentions in the court of appeals." BIO 7. The government is wrong.

A. The Petition Is Not Interlocutory

The petition is not "interlocutory." BIO 7. Petitioner appeals here his *conviction* on the material-support count, affirmed by the court of appeals in February 2019. That Petitioner, following the filing of this petition, separately challenged in the court of appeals his *resentencing* judgment on that count, entered by the district court in June 2019, does not give rise to the concerns underpinning "this Court's usual practice of declining to review interlocutory petitions." *Id.* That is because no order or judgment entered by the court of appeals regarding Petitioner's sentence can affect the existence of his conviction, appealed here without regard to the scope of his punishment. Indeed, had Petitioner tarried until after his June 2019 resentencing hearing to file this petition concerning his trial and conviction, affirmed in February 2019, the government would then contend his petition was not filed within the requisite 90 days after entry of judgment. Sup. Ct. R. 13. None of the decisions cited by the government supports its argument. BIO 7.

B. The First Question Was Pressed Below

The government contends the two questions presented should not be considered as they were "'not pressed or passed upon below.'" BIO 8 (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)). As to the first question, the government represents that, in the district court, Petitioner did not argue that "Nazi and

white supremacist paraphernalia were inadmissible [predisposition evidence] because they were 'lawful' and 'protected by the First Amendment,'" but instead "argued only that the material was 'irrelevant,' asserting 'differences between Nazism and radical Islamism.'" BIO 8.

This distinction fails, for undersigned counsel has been raising the lawful-to-possess and protected-by-the-First-Amendment arguments for nearly three years. That is why the district court ruled on them in a published opinion, distinguishing this Court's First Amendment precedent. *United States v. Young*, 260 F.Supp.3d 530, 545 (E.D. Va. 2017) ("Although it is true that the First Amendment protects advocating for the use of force, *see Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969), the First Amendment does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent."); D. Ct. Dkt. 76 at 15 (Mar. 6, 2017) (Petitioner arguing white supremacist materials not unlawful to possess); Hr'g Tr. at 15 (Mar. 10, 2017) (same); Trial Tr. Dec. 15, 2017 ("It's not a crime in this country to own radical literature, and owning [it] doesn't get the government there."). This ruling was affirmed by the court of appeals in another published opinion. *United States v. Young*, 916 F.3d 368, 377 (4th Cir. 2019).[1]

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[1] The government cavils that these arguments were made "only" in the context of a suppression motion. BIO 8. It cites no authority that a question is not sufficiently "pressed or passed upon below" unless petitioner "presses" the court below to "pass upon" it even after the court has addressed it once in a published decision, however erroneously. Anyway, the district court made clear that, since the government indicated it would use all the

C. The Second Question Was Pressed Below

As to the second question presented—whether the government must show the defendant was objectively positioned to commit the crime absent government intervention—the government sketches an incomplete account of the record. It is true Petitioner did not cite *United States v. Hollingsworth*, 27 F.3d 1196 (7th Cir. 1994) (en banc) (Posner, C.J.), in the court of appeals. But the question was pressed below all the same.

Petitioner argued in the district court that the government had failed to offer any evidence that, in reality, the FTO at issue requests gift cards or small financial donations from Americans, which would imply that "left to his own devices," Petitioner "likely would have [] run afoul of the law." *Jacobson*, 503 U.S. at 553-54. That inspired the government's attempt to introduce all such evidence it could muster. D. Ct. Dkt. 137-1 (Nov. 17, 2017). Yet the district court barred the (thin) evidence as unreliable hearsay. D. Ct. Dkt. 161 (Dec. 1, 2017).

The government then requested, and received, a jury instruction stating: "Factual impossibility is not a defense: the fact that the defendant was dealing with undercover government agents, rather than real members of the Islamic State, is not a defense to any charge in the indictment." CAJA 1695. Yet, during closing argument, Petitioner's case for innocence argued that "the government has shown you no evidence

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Nazi/white supremacist "evidence" at trial, the court was effectively deciding the admissibility of this material in the suppression phase, reserving only the Rule 403 "undue prejudice" question for "pre-trial motions *in limine*." 260 F.Supp.3d at 553-54.

ISIS does, in fact, request gift cards from anyone in this country." CAJA 1452. And, precisely because the government had failed to produce such evidence, Petitioner had moved for a judgment of acquittal before submission to the jury. The district court denied the motion and, moreover, denied Petitioner's request to file a legal brief in support, in which he could cite such precedent as *Hollingsworth*. App. 39a. Finally, in the court of appeals, Petitioner argued, in a briefing section entitled "*evidentiary lacunae*," that the government had failed to introduce necessary evidence that ISIS, or any other FTO, requests or is likely to request gift cards or other small financial contributions from Americans. Pet. C.A. Br. 33.

This Court may address a question presented for the first time in the petition for certiorari, provided it "is an important, recurring issue." *Carlson v. Green*, 446 U.S. 14, 17 n. 2 (1980). And the petition's questions *are* important and recurring, as seen in the leading treatise on entrapment law, as well as the continuous warnings of various Justices of the dangers inherent in leaving the contours of predisposition evidence marked only by a given prosecutor's good (or poor) sportsmanship. Paul Marcus, *The Entrapment Defense* § 4.05D (4th ed. 2009) (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"); *Sorrells v. United States*, 287 U.S. 435, 458-59 (1932) (Justice Roberts: subjective entrapment test unfairly "pivots 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"); *Sherman v. United States*, 356 U.S. 369, 383 (1958) (Justice Frankfurter: "no matter what the defendant's past record [], 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"); *United States v. Russell*, 411 U.S. 423, 440 (1973) (Justice Stewart: 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"); *see also* LaFave, *Criminal Procedure* § 5.2(b) (4th ed. 2015) (many legal commentators support *Hollingsworth-Jacobson* rule requiring the government to show defendant was objectively positioned to commit the crime absent government intervention).

Anyway, both questions presented *have* been raised repeatedly in the three years of this litigation, affording the government ample opportunity to present facts and arguments to address them.

II. BOTH QUESTIONS DIVIDE THE COURTS OF APPEALS

The government also contends that the courts of appeals are not divided as to whether predisposition evidence may consist of noncriminal, constitutionally protected activity. BIO 11-14. As for the second question presented, the government concedes a circuit split as to whether the predisposition element of entrapment requires the government to show the defendant was objectively positioned to commit the crime absent government intervention, but urges that Petitioner's case is an inappropriate vehicle to resolve it. BIO 14-16. These arguments fail.

A. Post-*Jacobson*, Predisposition Evidence Caselaw Is an Unjust Muddle

The government characterizes *Jacobson* as "involve[ing] the *sufficiency* rather than the *admissibility* of [entrapment] evidence." BIO 11 (emphasis original). Yet *Jacobson* entailed both. The prosecution's evidence of predisposition fell into two categories: evidence developed prior to the government's multi-year attempt to lure Jacobson into acquiring child pornography, and that developed during the investigation. 503 U.S. at 550.

The first category consisted of Jacobson's independent acquisition of Bare Boys magazine—before it was illegal to acquire or possess. 503 U.S. at 550. True, the Court weighed this "proof" as a question of sufficiency of the evidence. But the Court ventured further. The problem with this evidence was not only its insufficiency. It also failed even to concern the central predisposition criterion: a disposition to *break the law* before the sting operation:

> [P]etitioner was acting within the law at the time he received these magazines. . . . 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. This obedience may reflect a generalized respect for legality or the fear of prosecution, but for whatever reason, the law's prohibitions are matters of consequence. Hence, the fact that petitioner legally ordered and received the Bare Boys magazine does little to further the government's

> burden of proving that petitioner was predisposed to commit a criminal act.

503 U.S. at 551-52.

Pace the government's caselaw overview, the courts of appeals *are* divided as to whether *Jacobson* permits the introduction of predisposition evidence of legally protected—but prejudicial—activity. In *United States v. Harvey*, 991 F.2d 981 (2d Cir. 1993), the Second Circuit applied *Jacobson* as an *admissibility* rule, not a *sufficiency* one, finding error in the *admission* of predisposition evidence of legally acquired pornography in a child pornography trial. *Id.* at 995-97. The court of appeals reasoned:

> While it is true that the presentation of the entrapment defense permits "an appropriate and searching inquiry" into a defendant's conduct, *Sorrells*, 287 U.S. at 451, one must be mindful both of *Jacobson's* caution [*i.e.*, that the predisposition question asks whether the defendant is predisposed to *break the law*] and that, even as to erotic material, a person's possession of some of this material for non-commercial use may well be entitled to protection under the first amendment.

991 F.2d at 995.

The government protests that *Harvey* separately affirmed the trial court's decision to admit a narrow category of legally acquired "simulated" child pornography. BIO 13. But the court did so only because it was not "the government's principal evidence." Had it been, it would hold *no* probative value under *Jacob-*

son. 991 F.2d at 995. Here, the government has conceded it required lawfully possessed Nazi/white supremacist "evidence" to satisfy its predisposition burden. CAJA 114-15 (Government: "[E]vidence of his adherence [sic] to Nazi ideology before 2010 is necessary to show predisposition").[2]

The government argues that in *United States v. Cromitie*, 727 F.3d 194 (2d Cir. 2013), the Second Circuit affirmed the admission of predisposition evidence comprising the terrorism-defendant's *lawful* statements that he wanted to join a terror group, bomb someplace, buy missiles. BIO 13. That misses the point. Even if the uttering of those statements was lawful, they nevertheless tended to show a predisposition to *break the (relevant) law*, as bombing places and joining terror groups is *always illegal*. Conversely, owning a music album on whose cover art can be seen the record label "Burning Cross Records" with an eponymous image neither breaks the law nor necessarily shows a predisposition to break it (to say nothing of bearing no relevance to Islamic terrorism).

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[2] The government cites a lone example of non-Nazi/white supremacist predisposition evidence: Petitioner "[a]traveled to Libya where [b] he fought with a militia group that [c] had connections to al Qaeda and that [d] had been fighting Muammar al Qaddafi's regime." BIO 11. Damning, except that, barring point "a"—a lawful trip Petitioner publicly avowed—the government offered no evidence to establish points "b" through "d." Pet. C.A. Rep. 5-6. Had it such evidence, it is strange the government would concede it needed white-supremacist baubles to convict Petitioner, CAJA 114-15, and stranger still that Petitioner was charged with gifting Google cards in D.C. rather than with "fighting with" an "al-Qaeda-linked group" in Libya.

Contrary to governmental spin, the Eighth Circuit too has interpreted *Jacobson's* lawful/unlawful distinction as going to *admissibility* not merely *sufficiency* and found error in the introduction at trial of lawful predisposition activity as such. *United States v. LaChapelle*, 969 F.2d 632, 638 (8th Cir. 1992). In a child pornography case, introduction of lawfully acquired pornography raised not merely a sufficiency question, but "under *Jacobson*, the contested evidence *cannot be considered as evidence of predisposition*." 969 F.2d at 638 (emphasis added). Accordingly, the government's reliance here on the district court's limiting instruction—that the jury should consider Nazi/white supremacist material "only" for predisposition purposes—is a *non sequitur*. BIO 13.

As for the Ninth Circuit, in *United States v. Bramble*, 641 F.2d 681 (9th Cir. 1981), a cocaine-conspiracy case, the court held that predisposition evidence of defendant's "cultivation of 21 marijuana plants" was inappropriately *admitted* precisely because "[i]n the absence of evidence that the planting was of commercial quality, no rational inference can be drawn from the fact of cultivation that it was for the purpose of sale," *i.e.*, that the predisposition activity *was illegal*. 641 F.2d at 683; *see also United States v. Blankenship*, 775 F.2d 735, 739-40 (6th Cir. 1985) (error to introduce predisposition evidence comprising defendant's prior speculations about purloining a coin collection).

So: four Circuits hew to *Jacobson*'s rule that activity having no bearing on the defendant's willingness to break the law is inadmissible predisposition evidence. Contrariwise, the government does not dis-

pute that other circuits—including the Fourth Circuit—follow a farrago of *Jacobson*-defying standards. Pet. 15-17.[3]

B. The *Hollingsworth* Circuit Split Should Be Resolved Here

The government concedes a circuit split over the *Hollingsworth* rule, *supra* at 4-5, but claims Petitioner is "not entitled to relief" under it. BIO 15.

The government errs. "Petitioner," it contends, "traveled to Libya [in 2011] where he fought with a militia group with connections to al Qaeda" and "maintained contact with members of the militia group." BIO 15. As indicated, it is disconcerting how freely the government has made use of these inaccurate representations in court without supporting evidence. *Supra* at 9 n. 2. "Petitioner also claimed [in 2010] to possess the skills needed to attack an FBI or a federal office." BIO 15. The insinuation Petitioner had a plan or even a desire to "attack an FBI or federal office" was debunked by the government's own

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[3] The government contends both courts below *correctly* determined it was relevant to show the jury over three dozen pieces of Nazi/white supremacist "evidence" in a militant-Islam case based on the false-equivalence-nexus of anti-Semitism. BIO 9-10. But the courts below erred: (1) no evidence was offered to overbalance the common sense that white supremacism is definitionally antithetical to majority-minority Islamism and the DOJ's own empirical terrorism study refuted the "convergence" thesis; and (2) solely supporting the convergence hypothesis was an "expert witness" who had never testified in a criminal case and had never published any peer-reviewed papers on a so-called Muslim-Nazi convergence, nor had anyone else. Pet. 9-10.

agent at trial. Pet. C.A. Reply 2-4. Perhaps that accounts for why Petitioner remained on the police force for five years after returning from Libya and the conversation in question. CAJA 1432.

Petitioner is "entitled to relief" under *Hollingsworth-Jacobson* because the government offered no *objective* evidence that "left to his own devices," Petitioner would have provided material support to an FTO, *Jacobson*, 503 U.S. at 553: no evidence that ISIS requests gift cards or other small financial contributions from Americans; that Petitioner had ever communicated with any person affiliated with an FTO; or that a willingness to send gift cards to an informant, pretending for years to be Petitioner's friend, betokened a predisposition to commit any of the violent crimes *actually* practiced by the FTO. CAJA 1452.

In certain areas of criminal procedure, the Court has spent decades refining "intricate bod[ies] of law" so nuanced the original sources became "riddled" beyond recognition. *California v. Acevedo*, 500 U.S. 565, 583 (1991) (Scalia, J., concurring). Not having addressed entrapment for 25 years, it is time for the Court to shift attention to ambiguities at the heart of this critical criminal defense.

CONCLUSION

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

Respectfully submitted,

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