No. 19-572

In the Supreme Court of the United States

RAVNEET SINGH, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly determined that petitioner's convictions for causing the falsification of campaign records, in violation of 18 U.S.C. 2 and 1519, were supported by sufficient evidence.

2. Whether the federal prohibition on foreign nationals making financial contributions in connection with a state or local election, 52 U.S.C. 30121(a)(1)(A) (Supp. II 2012), exceeds Congress's legislative authority.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1-49) is reported at 924 F.3d 1030.[1]

JURISDICTION

The judgment of the court of appeals was entered on May 16, 2019. A petition for rehearing was denied on July 30, 2019 (Pet. App. II). The petition for a writ of certiorari was filed on October 28, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of California, petitioner was convicted on one count of conspiring to commit offenses against the United States, in violation of 18 U.S.C.

[1] Except as noted, all citations to the appendix to the petition for a writ of certiorari refer to "App. I."

371; one count of aiding and abetting the making of unlawful campaign contributions by a foreign national, in violation of 18 U.S.C. 2 and 52 U.S.C. 30109(d)(1)(A) and 30121(a)(1)(A); and two counts of causing the falsification of records relating to campaign finance, in violation of 18 U.S.C. 2 and 1519. Judgment 1.[2] The district court sentenced petitioner to 15 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals reversed one of petitioner's convictions for causing the falsification of campaign records, affirmed his other convictions, and remanded for resentencing. Pet. App. 49.

1. Petitioner's co-conspirator, Jose Susumo Azano Matsura, was a Mexican businessman who aspired to develop San Diego "into the Miami Beach of the west coast." Pet. App. 2. Azano believed that his plan to pursue a large-scale development project would require significant government buy-in, including from the mayor of San Diego. Gov't C.A. Br. 7-8. Azano had previously made campaign contributions in Mexican elections to cultivate political relationships beneficial to his business interests. *Id.* at 8. As a foreign national, however, he was prohibited by the Federal Election Campaign Act of 1971 (FECA), 52 U.S.C. 30101 *et seq.*, from contributing to federal, state, or local campaigns in the United States. Gov't C.A. Br. 8-9. To circumvent those limitations, Azano concocted a plan to contribute hundreds of thousands of dollars in the 2012 election cycle to elect a mayor who would support his development

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[2] Before they were moved to Title 52, Sections 30109(d)(1)(A) and 30121(a)(1)(A) were found at 2 U.S.C. 437g(d)(1)(A) and 441e(a)(1)(A) (2012). See 52 U.S.C. 30109(d)(1)(A) and 30121(a)(1)(A) (Supp. II 2012). The judgment in this case used the prior Title 2 citations.

plans, while concealing his identity from campaign disclosure reports. *Id.* at 9; see Pet. App. 3-4.

Petitioner helped Azano to disguise Azano's illegal campaign contributions. Petitioner "was the CEO of ElectionMall, a media platform offering a 'one-stop shop * * * of technology to candidates and political parties running for office.'" Pet. App. 4 (brackets omitted). Azano paid petitioner's company to provide services to two San Diego mayoral campaigns. *Id.* at 4-5. To hide Azano's involvement, petitioner caused an affiliate of ElectionMall to bill one of Azano's Mexican businesses for the work, using invoices that never directly referred to the mayoral campaigns but instead used code words for each candidate. Gov't C.A. Br. 20, 27. Petitioner took steps to conceal the arrangements to hide Azano's funding of campaign activity, repeatedly warning others not to discuss the services that ElectionMall was providing to the campaigns at Azano's behest. *Id.* at 27-28. For example, in an internal email about "Old invoices for Mr. A" (*i.e.*, Azano), petitioner warned that it was "stupid and dangerous" to "send things with a code name" while also "list[ing] the client[']s name" in the email. Pet. App. 5. Of the hundreds of projects that ElectionMall undertook for U.S. elections, the company used code names only for the two mayoral campaigns that Azano paid the firm to support. Gov't C.A. Br. 27. Azano or his businesses ultimately paid ElectionMall more than $250,000 for services that ElectionMall provided to the two mayoral campaigns. *Id.* at 21, 27.

Petitioner also caused one of the mayoral campaigns to file false reports that failed to reflect that Azano was the source of funding for ElectionMall's services. A staffer on the campaign warned petitioner that the campaign would need to report, as a campaign contribution,

any payments by a third party to ElectionMall for its work on the campaign. Pet. App. 27. "Knowing these reporting requirements," petitioner falsely represented to the campaign staffer that ElectionMall was "voluntarily help[ing]" the campaign for free, as a way to showcase its products and services in the San Diego market. *Ibid.*; see Gov't C.A. Br. 67-68. As a result, the campaign's public disclosures omitted the in-kind contribution of ElectionMall's services, paid for by Azano. Pet. App. 27-28.

With respect to the second campaign, campaign staff asked petitioner about payment for ElectionMall's services, and petitioner responded, "Don't worry. It's taken care of." Pet. App. 28. Despite this suggestion that petitioner was being paid by a third party, "the campaign failed to note this in [its] reports." *Ibid.*

2. In 2016, a grand jury in the Southern District of California returned a third superseding indictment charging petitioner, Azano, and others with a variety of offenses. In pertinent part, the indictment charged petitioner with one count of conspiring to commit offenses against the United States, in violation of 18 U.S.C. 371; one count of aiding and abetting the making of unlawful campaign contributions by a foreign national, in violation of 18 U.S.C. 2 and 52 U.S.C. 30109(d)(1)(A) and 30121(a)(1)(A); and two counts of causing the falsification of records relating to campaign finance, in violation of 18 U.S.C. 2 and 1519. Third Superseding Indictment 6, 15, 17-21. The indictment further charged that the object of the conspiracy was to make campaign contributions by a foreign national totaling at least $25,000 in a calendar year, in violation of 52 U.S.C. 30109(d)(1)(A) and 30121(a)(1)(A), and to falsify campaign records, in

violation of 18 U.S.C. 1519. Third Superseding Indictment 6-7. The case proceeded to trial, and petitioner was convicted on all of those counts. Pet. App. 6. The district court sentenced him to 15 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3.

3. The court of appeals affirmed in part, reversed in part, and remanded for resentencing. Pet. App. 1-49.

a. The court of appeals first rejected petitioner's constitutional challenge to the federal prohibition on campaign contributions by foreign nationals, 52 U.S.C. 30121(a)(1)(A). Pet. App. 8-11. The court observed that "[t]he federal government has the 'inherent power as sovereign to control and conduct relations with foreign nations,'" *id.* at 8 (quoting *Arizona* v. *United States*, 567 U.S. 387, 395 (2012)), and that the Constitution specifically confers on Congress "power over the subject of immigration and the status of aliens," *id.* at 9 (quoting *Arizona*, 567 U.S. at 394). The court explained that the Constitution thereby gives Congress "broad power to legislate" in these areas, including by passing laws reflecting its judgment that considerations of "foreign affairs and national security" warrant "barring foreign nationals from contributing to our election processes." *Ibid.*; see *ibid.* (describing the federal prohibition on foreign-national campaign contributions as "necessary and proper to the exercise of the immigration and foreign relations powers" granted to Congress). The court therefore determined that "Congress was within its power when it acted to protect the country's political processes after recognizing the susceptibility of the elections process to foreign interference." *Ibid.*

The court of appeals found petitioner's reliance on this Court's decision in *Oregon* v. *Mitchell*, 400 U.S. 112

(1970), to be misplaced. Pet. App. 9-10. In *Mitchell*, this Court held that Congress lacked the authority to "interfere with the age for voters set by the States for state and local elections." 400 U.S. at 118 (opinion of Black, J.); see *id.* at 212-213 (Harlan, J., concurring in part and dissenting in part); *id.* at 293-296 (Stewart, J., concurring in part and dissenting in part). The court of appeals observed that *Mitchell* addressed only "Congress's authority to regulate state elections as they relate to citizens of the United States," not foreign nationals. Pet. App. 10. And it emphasized that regulating foreign nationals' campaign contributions falls "within the ambit of Congress's broad power to regulate foreign affairs and * * * immigration," which was not at issue in *Mitchell*. *Ibid.*

b. Petitioner also challenged the sufficiency of the evidence supporting his convictions under 18 U.S.C. 2 and 1519. Pet. App. 20. Section 1519 makes it a crime to "knowingly * * * falsif[y] * * * any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States," 18 U.S.C. 1519, including the Federal Bureau of Investigation's jurisdiction to investigate violations of the federal election laws at issue here, Pet. App. 30. And Section 2(b) "prohibits a person from 'willfully caus[ing] an act to be done which if directly performed by him or another would be an offense against the United States.'" *Id.* at 25 (brackets in original) (quoting 18 U.S.C. 2(b)).

The court of appeals observed that the omission of information on a report could satisfy Section 1519's "actus reus element" because an "omission is an act of concealment or falsification" in some circumstances. Pet.

App. 22-23 (emphasis omitted). The court agreed with petitioner that he personally "had no duty" to file reports disclosing Azano's payments and therefore that he had not violated Section 1519 by omitting from a report information he was obligated to disclose. *Id.* at 24. It emphasized, however, that petitioner "was not simply convicted under § 1519," but rather also under Section 2(b), as reflected in "the jury instructions and the Indictment." *Id.* at 25.

With respect to his liability under Sections 1519 and 2 for causing false reporting, the court of appeals found "sufficient evidence for a jury to find that [petitioner] willfully caused" one of the two mayoral campaigns "to file falsified reports." Pet. App. 27. As to the count charging that conduct, the court observed that petitioner was an experienced provider of services to political campaigns who knew that any third-party payments for such services would have to be reported, that petitioner concealed Azano's payments, and that petitioner falsely told the campaign that he was "voluntarily help[ing]." *Ibid.* The court reversed as to the count relating to the other mayoral campaign, and accordingly it vacated his sentence and remanded for resentencing. *Id.* at 49; see *id.* at 28.

ARGUMENT

Petitioner requests (Pet. 4-9) that the Court grant review to resolve a putative division of authority within the courts of appeals about applying the harmless-error rule, Fed. R. Crim. P. 52(a), when a reviewing court "invalidat[es] one of alternative theories of liability presented to the jury." Pet. 4 (capitalization and emphasis omitted). That question is not presented in this case. The government presented a single theory of peti-

tioner's criminal liability at trial—namely, that petitioner caused the mayoral campaign to file false reports, in violation of 18 U.S.C. 2 and 1519—not alternative theories. And the court of appeals' rejection of petitioner's facial constitutional challenge (Pet. 10-15) to the federal prohibition on campaign contributions by foreign nationals, 52 U.S.C. 30121(a)(1)(A), which does not conflict with any decision of this Court or another court of appeals, likewise does not warrant this Court's review. The petition for a writ of certiorari should be denied.

1. This case does not present any question concerning the standard for harmless-error review when a reviewing court finds one of two alternative theories of liability to be invalid. The government here proceeded on only a single theory of liability, and the court of appeals found that theory to be valid.

In *Hedgpeth* v. *Pulido*, 555 U.S. 57 (2008) (per curiam), this Court made clear that, when a jury is "instructed on multiple theories of guilt, one of which is improper," such "alternative-theory error" should be reviewed under the same harmless-error standards that apply to other forms of instructional error, *id.* at 61. The Court drew an analogy, in particular, to the established rule, described in *Neder* v. *United States*, 527 U.S. 1 (1999), that a trial court's failure to instruct the jury *at all* on an element of the offense can be harmless error, explaining that the rule should be no different when the jury receives both a "good" and a "bad" charge. *Pulido*, 555 U.S. at 61 (citation omitted); see *id.* at 60. And in *Neder*, the Court had held that a trial court's failure to instruct on an element of the offense is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." 527 U.S. at 18.

Petitioner argues (Pet. 4-8) that, after *Pulido*, the courts of appeals have articulated "disparate tests" for finding alternative-theory error to be harmless. But to the extent that some courts of appeals have continued to characterize the harmless-error standard in this context in terms that appear to be inconsistent with *Neder* and that would arguably impose the kind of heightened burden for a finding of harmlessness that this Court rejected in *Pulido*, see, *e.g.*, *United States* v. *McKye*, 734 F.3d 1104, 1111-1114 (10th Cir. 2013) (Briscoe, C.J., concurring) (stating that the Fourth and Seventh Circuits appear to "continue to hold the government to a higher burden," and urging the Tenth Circuit to revisit its pre-*Pulido* precedent in an appropriate case), this case does not present an opportunity to address that issue.

Before the panel, petitioner did not raise any argument concerning alternative-theory error, and the panel did not address that issue. Petitioner instead recognized that the "prosecution's theory" of the case—consistent with the charge under 18 U.S.C. 2 and 1519—was that his "provision of social media services to the campaigns of [two mayoral candidates], without disclosing that Mr. Azano was the paymaster, violated Section 1519 *by causing the campaigns* to file incomplete San Diego County election disclosures." Pet. C.A. Br. 34-35 (emphasis added); see *id.* at 35-36 (recognizing that the prosecution's "theory" was that petitioner was "responsible for *the campaigns'* failure to make a correct entry") (emphasis added); *id.* at 45 (addressing the government's "Section 2(b) theory" that petitioner "'cause[d]' the campaign to make an incomplete disclosure"). Although petitioner also argued that he could not be held liable under Section 1519 absent evidence that he was under an obligation to file a disclosure report from

which he omitted Azano's contribution, see *id.* at 35-39, and the court of appeals agreed with that argument, see Pet. App. 24, that argument was irrelevant because petitioner "was not simply convicted under § 1519," *id.* at 25. "Instead, the jury instructions and the Indictment disclosed that the government proceeded under 18 U.S.C. § 2(b) in conjunction with § 1519." *Ibid.* And the court found sufficient evidence to support one of his convictions on that basis. See *id.* at 26-28.

Petitioner's own assertion in his appellate brief that he could not be convicted under Section 1519 alone did not provide the court of appeals with any occasion to address the harmless-error question that petitioner seeks to present here. The government did not present multiple theories to the jury, which necessarily rested its verdict on the one for which the court of appeals found sufficient evidence. See Third Superseding Indictment 17 (charging petitioner with violations of 18 U.S.C. 2 and 1519); D. Ct. Doc. 463, at 36-37 (Sept. 9, 2016) (district court's instruction to the jury that, "[t]o prove a defendant guilty of falsification of records related to campaign finance, by causing the falsification of records, the government must prove beyond a reasonable doubt that a defendant willfully caused an act to be done which if directly performed by him or another would constitute the crime of falsification of records related to campaign finance"). This case is therefore an unsuitable vehicle for reviewing the first question presented.

Petitioner briefly suggests (Pet. 8-9) that applying harmless-error review in *any* form violates the Sixth Amendment right to trial by jury. Petitioner did not present that claim to the court of appeals. In any event, petitioner's suggestion (Pet. 8) that the Sixth Amendment forecloses review of the evidence on appeal for

harmless-error purposes is inconsistent with this Court's precedent, which requires a reviewing court to assess the evidence in order to determine whether it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder*, 527 U.S. at 18.

2. The court of appeals' determination "that Congress acted within its constitutional authority in enacting § 30121(a)," Pet. App. 10, likewise does not warrant this Court's review. Section 30121(a)(1)(A) makes it unlawful for a "foreign national" to make "a contribution or donation of money or other thing of value * * * in connection with a Federal, State, or local election." 52 U.S.C. 30121(a)(1)(A). The statute defines a "foreign national" to include "an individual who is not a citizen of the United States" and who is "not lawfully admitted for permanent residence." 52 U.S.C. 30121(b)(2). The court of appeals' rejection of petitioner's challenge to that statute accords with this Court's summary affirmance of a judgment by a three-judge district court in *Bluman* v. *FEC*, 800 F. Supp. 2d 281 (D.D.C. 2011) (Kavanaugh, J.), aff'd, 565 U.S. 1104 (2012), rejecting a First Amendment challenge to the same prohibition as applied to foreign nationals seeking to "donate money to candidates in U.S. federal and state elections," *id.* at 282; see also *id.* at 285 (noting that one of the alien plaintiffs "want[ed] to contribute to * * * a New York state senator"). And petitioner identifies no sound basis for further review.

a. The three-judge district court in *Bluman* explained that, under this Court's precedents, "foreign citizens may be denied certain rights and privileges that U.S. citizens possess" without offending the Constitution. 800 F. Supp. 2d at 287; see, *e.g.*, *Sugarman* v.

Dougall, 413 U.S. 634, 649 (1973) (stating that "implicit in many of this Court's voting rights decisions is the notion that citizenship is a permissible criterion for limiting such rights"); *Perkins* v. *Smith*, 370 F. Supp. 134 (D. Md. 1974) (upholding a state law barring foreign citizens from serving as jurors), aff'd, 426 U.S. 913 (1976). This Court has made clear that the federal government has "inherent power as sovereign to control and conduct relations with foreign nations." *Arizona* v. *United States*, 567 U.S. 387, 395 (2012). It has also emphasized that Congress possesses "undoubted power over the subject of immigration and the status of aliens." *Id.* at 394; see U.S. Const. Art. I, § 8, Cl. 4 (granting Congress the power to "establish an uniform Rule of Naturalization"); see also *Bluman*, 800 F. Supp. 2d at 290 ("It is long established that the government's legislative and regulatory prerogatives are at their apex in matters pertaining to alienage."). And the Court has observed that "any policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government." *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952).

Bluman understood this Court's precedents to "set forth a straightforward principle: It is fundamental to the definition of our national political community that foreign citizens do not have a constitutional right to participate in, and thus may be excluded from, activities of democratic self-government." 800 F. Supp. 2d at 288. Applying that principle, the court determined that contributions to political campaigns "are an integral aspect of the process by which Americans elect officials to federal, state, and local government," and that such contributions are therefore "part of the overall process of

democratic self-government" from which aliens may be excluded. *Ibid.*; see *id.* at 288-289. It observed, in particular, that excluding foreign nationals from the American political process would qualify as "part of the sovereign's obligation to preserve the basic conception of a political community." *Id.* at 288 (quoting *Foley* v. *Connelie*, 435 U.S. 291, 295-296 (1978)).

This Court has recognized in related contexts that "the right to govern is reserved to citizens." *Foley*, 435 U.S. at 297. The Court has also observed that "[s]elf-government * * * begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community." *Cabell* v. *Chavez-Salido*, 454 U.S. 432, 439 (1981). "[T]he distinction between citizens and aliens, though ordinarily irrelevant to private activity, is fundamental to the definition and government of a State." *Ambach* v. *Norwick*, 441 U.S. 68, 75 (1979). Thus, the "exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a necessary consequence of the community's process of political self-definition." *Cabell*, 454 U.S. at 439.

b. Petitioner does not challenge Congress's authority to prohibit foreign nationals from contributing to political campaigns for federal office. Petitioner contends only (Pet. 10) that "Congress lacks the power to dictate to states whether noncitizens living in their jurisdictions can * * * contribute to state and local elections." As explained above, this Court summarily affirmed the judgment in *Bluman*, which rejected a First Amendment challenge to Section 30121(a)(1)(A) as applied to contributions to campaigns for state office. See p. 11, *supra*. Petitioner identifies no sound reason why the constitu-

tional rule should be different for regulating foreign nationals' campaign contributions in local elections, such as the San Diego mayor's race.

Petitioner principally relies (Pet. 10-11) on decisions that the court of appeals found inapposite because they involved American citizens rather than aliens. See Pet. App. 10. In *Oregon* v. *Mitchell*, 400 U.S. 112 (1970), for example, this Court considered only whether the federal government could require States to accept votes from "18-year-old citizens in state and local elections." *Id.* at 118. Similarly, in *James* v. *Bowman*, 190 U.S. 127 (1903), this Court struck down a federal statute criminalizing bribery in state and local elections as exceeding Congress's authority under the Fifteenth Amendment, which addresses the rights of citizens. See *id.* at 135-136. And in *United States* v. *Reese*, 92 U.S. 214 (1876), the Court considered the applicability of a federal statute to municipal inspectors who refused to count the vote of "a citizen of the United States of African descent." *Id.* at 215. Those cases do not speak to Congress's authority to prohibit foreign nationals from donating to domestic political campaigns.

Petitioner suggests (Pet. 14) that his constitutional arguments would not foreclose Congress from prohibiting campaign contributions to local elections by aliens "overseas." But petitioner does not explain why aliens who are temporarily admitted to the United States—such as Azano, a Mexican citizen admitted to the United States only for temporary personal and business purposes, see Gov't C.A. Br. 33 n.7—are constitutionally entitled to contribute to American political campaigns. Petitioner also does not contend that the decision below conflicts with the decision of any other court of appeals. Further review is not warranted.

3. Review is also unwarranted because this case is in an interlocutory posture. The court of appeals reversed one of petitioner's convictions, vacated his sentence, and remanded for resentencing. Pet. App. 49. Petitioner's re-sentencing has not yet been scheduled. The interlocutory posture of the case "alone furnishe[s] sufficient ground for the denial of" the petition. *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (per curiam); *Virginia Military Inst.* v. *United States*, 508 U.S. 946, 946 (1993) (Scalia, J., respecting the denial of the petition for writ of certiorari). Petitioner will have the opportunity to raise his current claims, together with any other claims that may arise during the proceedings on remand, in a single petition for a writ of certiorari after he is resentenced. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (stating that this Court "ha[s] authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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