No. 19-572

In The

Supreme Court of the United States

RAVNEET SINGH,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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ARGUMENT

1. Split in Circuits in Alternative-Theory Error Cases

In opposition to Singh's petition for certiorari, the government does not dispute (Opp. at 9) that there is a split in the circuits with respect to application of the harmless error doctrine required by *Hedgpeth v. Pulido*, 555 U.S. 57 (2008), in alternative-theory error cases. Yet, the government argues (Opp. at 8-9) that certiorari is not warranted given that only one theory of liability was presented to the jury in this case. Its argument is specious, and the split in the circuits has only deepened since Singh's petition was filed.

The government's opposition ignores that the prosecution below first argued that Singh, by failing to disclose to the campaigns that Azano paid for social media services, violated 18 U.S.C. § 1519. The prosecution then argued, as an alternative, that Singh's misleading statements to the campaigns caused the incorrect disclosures. Pursuant to the first theory, the actus reus was an omission; pursuant to the second theory, the actus reus was the allegedly misleading comments intended to hide the payments from the campaigns.

The jury instructions allowed for conviction on either theory. The trial judge was clear: "In order for a defendant to be found guilty of any one or more of these counts (i.e., Counts 5 through 37), the government

must prove each of the following elements beyond a reasonable doubt: First, the defendant concealed an entry, covered up an entry, falsified an entry, or made a false entry, in a record or document." In a separate paragraph, the trial court then proceeded to the 18 U.S.C. § 2(b) theory: "A defendant does not have to personally conceal an entry, cover up an entry, falsify an entry, in a record or document. To prove a defendant guilty of falsification of records related to campaign finance . . . 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." Singh in fact objected to the jury instruction on the ground that he had no duty to make an accurate record and that the jury should be cautioned that he was not obliged to "voluntarily" ensure that the recordkeeping was accurate. SER 5366, 5379. The prosecution opposed, and the trial court rejected the proposed modification.

On appeal, Singh challenged both theories separately, arguing that the failure to disclose theory failed as a matter of law (Br. at 35-39), and that the Section 2(b) theory, in contrast, failed due to insufficiency of evidence (and due to an improper mens rea instruction). Br. at 45-49. The prosecution responded by arguing (Br. at 70) that Singh's omission violated Section 1519 directly: "Congress intended Section 1519 to have broad application to reach obstructive conduct . . . [r]eaching omissions would fulfill those aims." And, the prosecution continued (72 n.23) that "[c]ourts have

premised Section 1519 liability on defendants who have no duty to create or retain records at all." Singh in his reply addressed the theories separately, stressing after addressing the omission issue (at 9 n.3) that "[o]n this basis alone, retrial of the Section 1519 counts is required, for it is impossible to determine the basis on which the verdict rested."[1]

Not surprisingly, the Ninth Circuit viewed the alternative theories in the same light as the parties. The Court agreed that Singh's argument that he had no duty to volunteer the payment information to the campaigns "has merit. In most of the cases where courts affirmed Section 1519 convictions based on omissions, the defendants either prepared the record or document, or were responsible for doing so." Pet. App. I-24. Accordingly, the court proceeded to the second theory: "However, Singh was not simply convicted under Section 1519. Instead the jury instructions and the indictment disclosed that the government proceeded under 18 U.S.C. § 2(b) in conjunction with Section 1519." Pet. App. I-25. The Ninth Circuit found that causation theory sufficient. Thus, based on the Ninth Circuit's reasoning, one of the prosecution's theories was valid and the other was not. In short, the government's statement that there were no alternative theories presented to the jury is belied by the record: The jury may have voted to convict based on Singh's failure to report Azano's alleged payment for the social media services

[1] The government's assertion (Opp. at 9) that "petitioner did not raise any argument concerning alternative-theory error" is difficult to understand.

provided or may have voted based on the distinct causation theory that Singh affirmatively tried to mislead the campaigns and thereby caused them to file incomplete forms.

The government acknowledges (Opp. at 9) the split in the circuits in applying *Pulido*. The Tenth and the Fourth Circuits have held that, where one ground for conviction is invalid, the only way that a verdict may be sustained is if "it is possible to determine that the jury relied on the valid ground or necessarily made the findings required to support a conviction on the valid ground." *United States v. McKye*, 734 F.3d 1104 (10th Cir. 2013). *See also Bereano v. United States*, 706 F.3d 568, 578 (4th Cir. 2013) (conviction can be affirmed only if "the evidence that the jury necessarily credited in order to convict the defendant under the instructions given . . . is such that the jury must have convicted the defendant on the legally adequate ground in addition to or instead of the legally inadequate ground").

But, in *United States v. Duruisseau*, No. 18-30815 (5th Cir. Dec. 13, 2019), the Fifth Circuit recently joined ranks with the Ninth Circuit in finding harmless error if convinced that the evidence presented to the jury supporting the valid theory "was sufficient." The Court reasoned that "we will not 'negate a verdict' simply because there is a chance 'that the jury convicted on a ground that was not supported by adequate evidence when there existed alternative grounds for which the evidence was sufficient.'" In that case, the question was whether to uphold a conspiracy charge

when the trial court agreed with the appellants that one of two possible felony charges underlying the conspiracy had to be dismissed. As in the instant case, the reviewing court did not determine whether it was clear beyond a reasonable doubt that the jury in fact voted to convict on the valid theory (as the Tenth and Fourth Circuits would require) or whether the evidence was so overwhelming on the valid charge that it was clear beyond a reasonable doubt that the jury would have voted to convict, as the Third Circuit would require. *United States v. Andrews*, 681 F.3d 509, 521 (3d Cir. 2012). Rather, the Ninth and Fifth Circuits upheld the valid count merely because there was "sufficient" evidence presented to the jury on the valid theory.

Harmless error review as in the Ninth Circuit invites judges to reweigh the evidence, robbing defendants of their critical Sixth Amendment right – "ensur[ing] that the government must prove to a jury every criminal charge beyond a reasonable doubt." *United States v. Raymond*, 139 S. Ct. 2369, 2376 (2019). As this Court stated in *Sullivan v. Louisiana*, 508 U.S. 275, 279 (1993), the proper inquiry is not whether "in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in *this* trial was surely unattributable to the error." Only when there is no "reasonable doubt" that the jury voted to convict on the remaining theory should the verdict be upheld. Accordingly, this Court should grant certiorari to consider whether such an open-ended test as used by the Ninth and now Fifth Circuit is consistent with *Pulido*.

2. States' Ability to Define Their Own Political Communities

Certiorari also is warranted because the Ninth Circuit's decision on the Section 30121 counts threatens to undermine the federalism principles long enshrined in our Constitution. The government must recognize that eleven states have authorized resident foreigners to vote in municipal elections such as the election in this case, http://www.ncsl.org/research/elections-and-campaigns/non-resident-and-non-citizen-voting.aspx, and resident foreigners vote in addition in public school elections in Maryland, Illinois, and California. https://bppj.berkeley.edu/2019/03/04/spring-2019-journal-noncitizen-voting-rights-in-the-united-states/. These jurisdictions have authorized noncitizen participation in light of the fact that such individuals live in their jurisdictions, pay taxes, and send their children to the public schools. But if their noncitizen residents contribute to the very same elections in which they vote, they face a felony charge under federal law.

The government (Opp. at 11-13) urges this Court to ignore the Ninth Circuit intrusion into states' control over their own election machinery based principally on the Court's prior affirmance of the three-judge court in *Bluman v. FEC*, 565 U.S. 1104 (2012), *aff'g.* 800 F. Supp. 2d 281 (D.C. Cir. 2011). Singh agrees with the government that the three-judge court upheld the same campaign finance law challenged here on the ground that "[i]t 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 (emphasis added). But, the government conveniently ignores that a state's historical power to *include* resident aliens in "participation in democratic political institution is [also] part of the sovereign's obligation to preserve the basic conception of political community."

Indeed, at the time of our Founding, noncitizens voted in state and local elections, and a number of states protected that right in their constitutions. As this Court observed, states traditionally "provide[d] that persons of foreign birth could vote without being naturalized for the conditions under which that right is to be exercised are matters for the states alone to prescribe." *Pope v. Williams*, 193 U.S. 621, 633 (1904), *overruled on other grounds by Dunn v. Blumstein*, 405 U.S. 330 (1972). As this Court further noted, it is "the State's broad power," not that of the federal government, "to define its political community." *Sugarman v. Dougall*, 413 U.S. 634, 642 (1973).

The *Bluman* court never addressed the federalism issues for a simple reason. The parties did not address the federalism issues in their briefs before the three-judge court, https://transition.fec.gov/law/litigation/bluman_bluman_MSJ_and_Memo.pdf or in their subsequent brief in this Court. http://sblog.s3.amazonaws.com/wp-content/uploads/2011/12/11-275-Bluman-Opp-to-Motion-to-Dismiss-or-Affirm.pdf. The federalism issue was not briefed; not argued; and not decided.

Accordingly, this Court should grant certiorari to consider whether Congress, pursuant to its authority over immigration and national security, may dictate to states who can participate in state and local governmental elections.

3. Interlocutory Posture

Finally, the government curiously argues (Opp. at 15) that review is premature because Singh has yet to be resentenced on remand from the Ninth Circuit. Any rule that defendants must await resentencing before filing for certiorari would cause needless waste. After resentencing on remand, defendants would have to file a duplicative appeal after resentencing to preserve the chance for certiorari. Moreover, if the defendant were successful in this Court, the resentencing would have been for naught. And, the resentencing would in no way change the legal questions presented to this Court.

In support of this novel proposition, the government cited no cases in a remotely similar posture. Instead, it cited *Hamilton-Brown Shoe Co. v. Wolf Bros & Co.*, 240 U.S. 251 (1916), which in fact reached the merits in a trademark case; *Brotherhood of Locomotive Firemen & Enginemen v. Bangor*, 389 U.S. 327 (1967), a case in which the court of appeals had remanded part of a civil contempt order back to the district court, and *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993), in which this Court denied certiorari in an

equal protection case over a dissent by Justice Scalia. The inaptness of the citations is clear.

Accordingly, this case presents an appropriate vehicle for this Court to resolve the split over application of the harmless error doctrine in the alternative-theory context and to determine whether states are free to define their own political communities.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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