No. 22-7065

IN THE
SUPREME COURT OF THE UNITED STATES

Ahmed Abu Khatallah,

Petitioner,

v.

United States of America,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the District of Columbia Circuit

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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This petition presents two questions, both of which merit this Court's review.

I. On the first question—whether 18 U.S.C. § 924(c) has extraterritorial effect—the government's principal argument is that the decision below is correct. But it has no response to the petition's lengthy discussion of the text and historical background of § 924(c), which show that Congress was concerned with regulating firearms domestically, not internationally. Instead, the government simply parrots the reasoning of the court below: Because someone can commit a § 924(c) offense by possessing a firearm in connection with *either* a "crime of violence" or a "drug trafficking crime," and because Congress defined "drug trafficking crime" to include an offense that by its terms applies extraterritorially, the statute must apply extraterritorially insofar as the predicate crime does so. The petition already explained the error in that reasoning (Pet. 9-10), and the government offers no rebuttal.

The government makes the alternative argument that certain "crime[s] of violence" reach extraterritorially and, "under *RJR Nabisco*, Section 924(c)'s incorporation of those extraterritorial predicates indicates that it applies extraterritorially to the extent the applicable predicate does." BIO 10. That is the opposite of what *RJR Nabisco* holds, as even the court of appeals recognized: "The Court made clear that for RICO to apply to conduct overseas, an *absolute minimum* is that 'the predicates alleged in a particular case themselves apply extraterritorially'…. But *RJR* insisted on more: affirmative evidence of congressional intention that the umbrella crime itself (RICO there, 924(c) here) should apply overseas." *United States v. Garcia Sota*, 948 F.3d 356, 361 (D.C. Cir. 2020) (quoting *RJR Nabisco, Inc. v. European Community*, 579 U.S. 325, 339 (2016)) (emphasis added). In *RJR Nabisco*, RICO defined racketeering activity to include *specifically enumerated offenses* that applied extraterritorially. 18 U.S.C. § 1961(1). That "textual clue"

comprised the affirmative evidence of extraterritorial application this Court was looking for. *RJR Nabisco*, 579 U.S. at 338-39. In contrast, § 924(c) defines "crime of violence" by the elements they contain (and the now-invalidated residual clause), which means that an enormous number of crimes can be predicates. *See* 18 U.S.C § 924(c)(3)(C). That some of those predicates may happen to apply extraterritorially is a far cry from the affirmative evidence demanded by this Court's precedents. *See RJR Nabisco*, 579 U.S. at 339.

Finally, the government says there is no basis for this Court's review because other courts have agreed with the court below. The basis for review is that those courts have incorrectly resolved the question presented, in direct conflict with numerous precedents of this Court. The courts to address the issue either have provided reasoning inconsistent with this Court's precedents or have given no reasoning at all, instead citing without analysis similarly unreasoned opinions of other courts. *See, e.g.*, *United States v. Siddiqui*, 699 F.3d 690, 701 (2d Cir. 2012), *as amended* (Nov. 15, 2012) ("As for § 924, which criminalizes the use of a firearm during commission of a crime of violence, every federal court that has considered the issue has given the statute extraterritorial application where, as here, the underlying substantive criminal statutes apply extraterritorially. We see no reason to quarrel with their conclusions." (citations omitted)); *United States v. Belfast*, 611 F.3d 783, 813 (11th Cir. 2010) (reasoning that, because "the plain language of § 924(c) demonstrates that Congress intended the provision to apply to *any* acts that, under other legislation, may be prosecuted in federal courts," the statute has extraterritorial effect (emphasis in original)); *but see Kiobel v. Royal Dutch Petroleum Co.*, 569 U.S. 108, 118 (2013) ("it is well established that generic terms like 'any' or 'every' do not rebut the presumption against extraterritoriality"). Absent this Court's intervention, this country's domestic gun legislation will continue to be a tool for international prosecutions, fueling possibilities for "international discord

that can result when U.S. law is applied to conduct in foreign countries." *RJR Nabisco*, 579 U.S. at 335. And though Mr. Khatallah obviously cannot predict particular "examples of actual discord" that will result from future aggressive charging decisions, as the government insists he do (BIO 11), that is not required of him. The possibility for discord is obvious, and this Court has already made clear that it is not the province of "the government in its charging decisions" to navigate these waters for itself (*contra id.*).

II. On the second question presented—whether a criminal defendant's sentence may be based on acquitted conduct—the government's central argument is that the question is not implicated here because Mr. Khatallah's sentence was not based on acquitted conduct. That is incorrect. While the *district court*'s sentence was not based on acquitted conduct, the *court of appeals* refused to treat the bulk of that conduct as acquitted conduct and, on that basis, reversed Mr. Khatallah's sentence as unreasonably low. The court of appeals then instructed the district court to consider much of Mr. Khatallah's acquitted conduct on remand and impose a new, higher sentence. It reasoned that, while a district court may be permitted to disregard certain "acquitted conduct" at sentencing, any such "acquitted conduct" is confined to facts that the "jury *necessarily* determined … were not proved beyond a reasonable doubt." App. 62a (emphasis added). Where a district court determines that the jury *actually* acquitted the defendant of certain conduct, the district court nonetheless *must* base its sentence upon that conduct.

That issue matters here because, as discussed in Mr. Khatallah's petition, there is not perfect alignment between the counts of which he was acquitted and the factual findings underpinning the district court's guidelines calculations. At sentencing, the district court determined the guidelines range after making three key factual findings: (1) that Mr. Khatallah's conduct resulted in death, A262-A273; (2) that his offense involved or was intended to promote

terrorism, A274-A279; and (3) that he was an organizer or leader, A279-A283. The district court made these factual findings by a preponderance of the evidence based on its own assessment of the trial record, on the express understanding that its findings need not be consistent with the jury's findings. The court's findings had the result of increasing Mr. Khatallah's guidelines range from 171-183 months to life imprisonment plus ten years.

The jury's verdicts reveal that it "necessarily" acquitted Mr. Khatallah of causing death. That is because there is alignment between the acquitted counts and that particular guidelines finding: Causing death is an element of two counts against Mr. Khatallah, and the jury acquitted him of those counts, instead convicting him of lesser offenses that did *not* result in death. *See* A163 (Counts One and Two). In contrast, the jury's verdicts do not "necessarily" establish that it acquitted Mr. Khatallah of the facts underlying the district court's remaining two guidelines determinations, because there is no alignment between the acquitted counts and those factual findings. None of the charges against Mr. Khatallah includes the element of being a leader/organizer or being motivated by terrorism. And as discussed in the petition, rather than allege a discrete set of acts that can be neatly divided into acquitted and convicted conduct, the indictment charges a sprawling and complex conspiracy involving numerous acts and actors. As a result, it is impossible to determine with *logical certainty* whether the jury's numerous acquittals stemmed from its rejection of the allegations that Mr. Khatallah was a leader/organizer or was motivated by terrorism.

Nonetheless, after carefully parsing the record and verdicts, and after personally hearing all the evidence presented during the seven-week trial, the district court determined the conduct of which the jury had *actually* acquitted Mr. Khatallah: "[I]t's clear enough to me in this case that the jury explicitly found that the defendant's conduct did not result in death, that it rejected many of

the facts that tied him to direct participation in the first wave of the attacks and to the attack on the Annex, and that *what it convicted him of was essentially a property crime*." SA953:12-18 (emphasis added). The district court thus varied downward from its calculated guidelines range to impose a 22-year sentence that reflected Mr. Khatallah's "criminal conduct and culpability *as it was determined by the jury*." SA953:23-954:1 (emphasis added). In other words, it treated the jury as having acquitted Mr. Khatallah of the three key factual findings underlying its guidelines calculation of life imprisonment plus ten years.

The court of appeals reversed Mr. Khatallah's sentence as unreasonably low because it refused to credit the district court's determination of the scope of Mr. Khatallah's acquitted conduct. It assumed arguendo that the district court had properly varied downward from the guidelines range based on the jury's finding that Mr. Khatallah did not cause death. But the court of appeals concluded that that, even though (according to the district court) the jury's acquittals *also* rested upon its findings that Mr. Khatallah did not act from terroristic motives or act as a leader/organizer, the jury did not "necessarily" acquit Mr. Khatallah of that conduct. App. 62a. Therefore, the court of appeals reasoned, the district court had no discretion to vary downward to disregard that acquitted conduct, and indeed was *required* to give a higher sentence to account for that conduct. App. 61a-63a. In short, the question presented is plainly implicated in this case, and this Court should grant or, alternatively, hold the petition for the reasons discussed in the petition.

The government's remaining argument is that this Court should deny the petition because Mr. Khatallah will be resentenced at some undetermined point in the future. This Court's intervention is appropriate now, before the district court is forced to conduct an unnecessary and protracted resentencing—all based upon the court of appeals' unconstitutional ruling that a district court *must* base its sentence upon acquitted conduct, as long as there is any logical possibility that

the jury's acquittals were independent of the failure of proof of that conduct. Moreover, as the government notes, and as the petition further describes, a host of currently pending petitions raise the question presented and explain why it is timely and important. If the Court grants any of those petitions, it should also grant (or hold) this petition rather than send it back to the district court for a time-consuming round of litigation when the Court's resolution of the question presented may well require a complete do-over. Because this case also presents the additional important issue of how to handle imperfect alignment between acquitted counts and guidelines findings in assessing "acquitted conduct," it should be considered alongside any other granted petition as the Court addresses the Fifth and Sixth Amendment limits on sentencing a defendant for acquitted conduct.

CONCLUSION

For the reasons set forth above, this Court should grant or, alternatively, hold the petition.

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