No. 23-6480

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH D. JONES, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

MATTHEW G. OLSEN
Assistant Attorney General

VIRGINIA M. VANDER JAGT
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether sufficient evidence supported the jury's finding that petitioner was not entrapped.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A31) is reported at 79 F.4th 844. The opinion of the district court (Pet. App. B1-B32) is not published in the Federal Supplement but is available at 2021 WL 633372.

JURISDICTION

The judgment of the court of appeals was entered on August 18, 2023. A petition for rehearing was denied on October 16, 2023. The petition for a writ of certiorari was filed on January 8, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(a).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on one count of conspiring to provide material support to ISIS, a designated foreign terrorist organization, in violation of 18 U.S.C. 2339B. Judgment 1. The district court sentenced petitioner to 144 months of imprisonment, to be followed by a five-year term of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. A31.

1. In 2015, the Federal Bureau of Investigation (FBI) learned of social media posts authored by petitioner and his childhood friend Edward Schimenti that promoted violence, expressed support for ISIS, threatened nonbelievers, and speculated about ISIS's plans to attack different cities. Pet. App. A2, A20, B3. Petitioner and Schimenti also posted ISIS propaganda, including a violent ISIS recruitment video and an ISIS execution video. Id. at A2, A20, B16. And petitioner interacted online "with videos depicting violent beheadings and fatal stabbings." Id. at A2.

Concerned "about the pro-ISIS content in [petitioner's] and Schimenti's ongoing posts," the FBI launched an investigation. Pet. App. A3. After several months of physical and online surveillance, the FBI arranged for an undercover agent called "Omar" to meet petitioner at a police station, where Omar posed as a suspect frustrated at being "profiled because he was a Black Muslim." Ibid. Following the meeting at the police station,

petitioner "pursued a relationship with Omar and then with other undercover agents that unfolded over the next 18 months." Ibid. "Although the government kept in contact with [petitioner] over that period using its multiple agents, it was [petitioner] -- and not the agents -- who drove the relationship forward." Id. at A3-A4.

Specifically, "[a]t [petitioner's] initiation," his text messages with Omar "eventually turned to radical Islam." Pet. App. A4. Petitioner shared ISIS propaganda and recruitment videos with Omar, telling Omar that he thought about traveling to Syria "[e]very night and day." Ibid. Petitioner also asked if Omar "knew other 'brothers' that he could 'learn and build with' -- a request to meet other ISIS supporters." Ibid. In response, Omar introduced a second FBI undercover agent, "Bilal," to petitioner, explaining that Bilal could help people travel to Syria. Ibid. Petitioner stayed in touch with the undercover agents, exchanging pro-ISIS messages with them, and he "readily accepted" an ISIS flag from Omar, which he displayed inside his home. Id. at A5-A6.

In 2016, Omar told petitioner that he was traveling to Syria, with Bilal's assistance. Pet. App. A5. When petitioner sought out additional ISIS connections, he met another undercover FBI agent on a pro-ISIS website who also used the name Omar ("Omar 2"). Id. at A6. Petitioner introduced Omar 2 to Bilal as an ISIS

travel facilitator, to assist Omar 2 in traveling to join ISIS. Ibid.

Meanwhile, the FBI sent a confidential human source, Muhamed, to get a job at Schimenti's workplace. Pet. App. A6, A16. Muhamed and Schimenti developed a friendship. Id. at A7. Muhamed told Schimenti that his brother was fighting for ISIS, and eventually told Schimenti that he wanted to join his brother and do the same. Ibid. Muhamed also said that his brother needed cell phones that ISIS fighters could use to avoid drone strikes and to create improvised explosive devices. Ibid.

Schimenti introduced Muhamed to petitioner in 2017. Pet. App. A7. Although Muhamed "followed the FBI's instruction not to directly ask [petitioner] to do anything," petitioner in turn introduced Muhamed to the FBI undercover agent Bilal to assist Muhamed in traveling to join ISIS. Id. at A8, A16.

Petitioner and Schimenti then worked together to supply Muhamed with nine cell phones. Pet. App. A7-A8. Petitioner and Schimenti understood that the phones would be used for bombs and to evade drone strikes. Id. at A7. And petitioner later testified that he gave the phones of his own "free will," with the "hope [the phones] kill[] many" people. Ibid.

In 2017, Muhamed told petitioner that he had booked a flight to Syria to support ISIS; petitioner and Schimenti gave Muhamed a ride to the airport, where they believed he would be flying to Syria with the nine cell phones. Pet. App. A8. Schimenti asked

Muhamed to send Schimenti a video of Muhamed killing someone when he arrived. Ibid.

2. A grand jury charged petitioner with one count of conspiring to provide material support to ISIS, in violation of 18 U.S.C. 2339B, based on his providing cell phones for use by ISIS fighters in constructing improvised explosive devices. Pet. App. A8.

Petitioner asserted an entrapment defense, claiming that the government induced him to commit a crime for which he lacked any predisposition. Pet. App. A8, A11. The district court allowed the defense to go to the jury, meaning that, under circuit law, "it became the government's burden to show beyond a reasonable doubt that the elements of the defense were not met." Id. at A8. The jury ultimately rejected the defense and found petitioner guilty of conspiring to provide material support to a terrorist organization. Id. at A9.

The district court denied petitioner's post-trial motion for a judgment of acquittal, which was premised on his entrapment defense. Pet. App. B1. The court observed that the government can refute an entrapment defense by proving "that the defendant was predisposed to commit the criminal act before he was approached by government agents, or that the defendant was not induced to commit the crime." Id. at B15.

The district court determined that here, "a reasonable jury could have found that [petitioner] was predisposed to provide

material support for terrorism." Pet. App. B18. The court highlighted petitioner's "displaying of an ISIS flag and sharing of ISIS propaganda," as well as petitioner's independent attempts to interact with other ISIS supporters online and to connect with people who he believed were supporting ISIS. Id. at B18, B21.

The district court also determined that "a reasonable jury could have found that [petitioner] was not induced to commit the crime," explaining that "the FBI agents did not persuade [petitioner] to commit a crime but instead 'mirrored' his communications." Pet. App. B21 (citations omitted). The court emphasized that "the FBI agents were careful not to directly ask [petitioner] to do anything," and that petitioner "testified before the grand jury that he chose to provide cell phones to Muhamed and to introduce Muhamed to Bilal, and was not pressured or forced to do so." Ibid.

The district court sentenced petitioner to 144 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3.

3. The court of appeals affirmed, agreeing with the district court that the record evidence "supports the jury's conclusion that [petitioner] was not entrapped." Pet. App. A23-A24.

The court of appeals found sufficient evidence for "the jury's finding that the government agents did not induce [petitioner] to provide material support to Muhamed on behalf of ISIS." Pet. App. A15. The court explained that a reasonable jury could have found

that petitioner "had a desire to materially support ISIS that arose untainted by the government's involvement," that it was petitioner who "shape[d] and advance[d] his relationships and next steps with the government agents," and that petitioner "took many acts on his own, without undue influence or pressure from government agents." Id. at A15, A16.

The court of appeals also found sufficient evidence "for a jury to conclude that [petitioner] was independently predisposed to provide material support to ISIS," "untainted by government involvement." Pet. App. A21, A23. The court observed that, based on petitioner's "consistent statements and actions across time," the "jury did not have to reach far" to find that petitioner "was likely to take affirmative steps to support ISIS if given the opportunity." Id. at A20-A21.

ARGUMENT

Petitioner contends (Pet. 17-19, 20-30) that the court of appeals erred in rejecting his entrapment defense. The court correctly found the trial evidence sufficient to permit the jury to determine that petitioner was not entrapped, and the decision below does not conflict with any decision of this Court or another court of appeals. No further review is warranted.

1. The court of appeals correctly found that the record evidence "supports the jury's conclusion that [petitioner] was not entrapped," Pet. App. A23-A24, and the decision below does not

conflict with this Court's decision in Jacobson v. United States, 503 U.S. 540 (1992).

a. The defense of entrapment involves two related elements: "government inducement of the crime, and a lack of predisposition on the part of the defendant." See Mathews v. United States, 485 U.S. 58, 62-63 (1988). When a defendant alleges entrapment and the first element is satisfied, "the prosecution must prove beyond reasonable doubt that the defendant was disposed to commit the criminal act prior to first being approached by Government agents." Jacobson, 503 U.S. at 548-549. The predisposition element "focuses upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime." Mathews, 485 U.S. at 63 (quoting Sherman v. United States, 356 U.S. 369, 372 (1958)). And here, the court of appeals correctly determined, after its "own fresh look at the trial evidence," "that the district court was right to reject [petitioner's] motion for acquittal," which was premised on his entrapment defense. Pet. App. A15.

To begin with, as the court of appeals explained, a reasonable jury could have found that petitioner was not induced by the government to provide material support to ISIS. Pet. App. A15-A19. Among other things, "[t]he jury had ample evidence showing that the government agents did not do anything other than offer [petitioner] a chance to provide support to ISIS in response to [petitioner's] own representations to that effect." Id. at A17.

And as the court observed, the FBI undercover agents and the confidential source never directly asked petitioner for any support until petitioner had expressed an interest in providing support to ISIS; the agents took "care to maintain a responsive, and not affirmative, stance in their interactions with [petitioner]"; and petitioner "took many acts on his own, without undue influence or pressure from government agents." Id. at A15-A16.

Furthermore, the court of appeals also correctly determined that a reasonable jury could have found, based on the extensive trial evidence, that petitioner was predisposed to provide material support to ISIS. Pet. App. A19-A24. As the court explained, the evidence established that petitioner independently shared ISIS propaganda and recruitment materials, threatened nonbelievers of Islam, and "affirmatively [sought] interactions with members of the ISIS community online." Id. at A2, A20, A23. In petitioner's own "sworn, counseled testimony" to the grand jury, he "told the grand jurors that he gave Muhamed the cell phones of his own 'free will' in hopes that 'it kills many of them' or 'eight people'" and that he declined reimbursement because "he was instead excited to receive the 'ajr,' or heavenly reward * * * for his acts." Id. at A22. And at trial, petitioner told the jury "that he had thought about moving to Syria to live under the Islamic state before he met any government informants" and that he "was excited" to display the ISIS flag. Id. at A21-A23.

b. Petitioner contends (Pet. 17-19) that the court of appeals' decision conflicts with this Court's decision in Jacobson v. United States. The court of appeals correctly rejected that argument, explaining that Jacobson does not "lend[] much support to [petitioner]." Pet. App. A19.

In Jacobson, the Court made clear that a defendant's ready commission of an offense will often be sufficient to establish predisposition. 503 U.S. at 549-550. But in that case, the defendant was "the target of 26 months of repeated mailings and communications from Government agents" that "excited [his] interest in sexually explicit materials banned by law"; the government "exerted substantial pressure" on the defendant to obtain child pornography, and the "evidence that [the defendant] was ready and willing to commit the offense came only after the Government had devoted 2½ years to convincing him that he had or should have the right to engage in the very behavior proscribed by law." Id. at 550, 552, 553.

In this case, in contrast, the FBI's conduct was "much less intrusive" and "[a] jury could conclude that [petitioner] made willing and voluntary decisions to accept the government's overtures," rather than capitulating to "repeated persuasion or undue pressure." Pet. App. A15, A19. As the court of appeals explained, "[a] reasonable jury could have interpreted the dynamic" as one where the agents "followed [petitioner's] lead" -- "mirroring" petitioner's behavior -- "not the other way around."

Id. at A15-A16. "The jury's ability to see the recorded conversations and text messages" enabled it to determine that petitioner "shape[d] and advance[d] his relationships and next steps with the government agents" -- making it unlikely "that their interactions amounted to repeated persuasion and undue pressure." Id. at A15.

Petitioner nonetheless asserts (Pet. 19) that the decision below "contradicts this Court's essential holding in Jacobson that prevents evidence of lawful activity, by itself, from showing predisposition." But Jacobson's statement that "[e]vidence 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," 503 U.S. at 551, does not support his claim that he was entrapped as a matter of law on the facts here. Unlike in Jacobson, where the government's predisposition evidence relied on conduct undertaken before state and federal law were amended to prohibit it, see ibid., the evidence at petitioner's trial showed his predisposition to provide material support to ISIS when such support was (and continues to be) unlawful. See pp. 9, 10-11, supra.

Contrary to petitioner's contention (Pet. 18-19), nothing in Jacobson suggests that a defendant must have independently engaged in prior criminal activity in order to support a jury finding that he was predisposed to commit the charged offense. See United

States v. Osborne, 935 F.2d 32, 37-38 (4th Cir. 1991) ("[T]he fact that a defendant has not previously committed any related crime is not proof of lack of predisposition."). "Otherwise, a first offender, disposed to commit the crime for which he is charged, would find sanctuary in the entrapment defense merely because the government would be unable to prove prior nonexistent activities." United States v. Rodrigues, 433 F.2d 760, 762 (1st Cir. 1970), cert. denied, 401 U.S. 943 (1971).

c. Petitioner also contends (Pet. 25-30) that the evidence presented at trial "unconstitutional[ly] burden[ed]" his First Amendment rights. Pet. 12; see Pet. 25-30. The court of appeals correctly rejected that contention as well. It is well settled that "[t]he First Amendment * * * does not prohibit the evidentiary use of speech to establish the elements of a crime or to prove motive or intent"; "[e]vidence of a defendant's previous declarations or statements is commonly admitted in criminal trials subject to evidentiary rules dealing with relevancy, reliability, and the like." Wisconsin v. Mitchell, 508 U.S. 476, 489 (1993).

Here, petitioner was neither prosecuted nor convicted for his speech; to the contrary, the district court specifically instructed the jury that it could not find petitioner guilty based upon his beliefs, expressions of belief, or associations. Pet. App. B18 n.5. But the fact that "the First Amendment allowed [petitioner] to express agreement with ISIS's messaging, mission, and means of accomplishing its objectives does not mean the speech

was off limits for what it reveals about his predisposition to commit crime." Id. at A20. There is "no authority" supporting petitioner's view that "the First Amendment shields from consideration statements he made that shine substantial light on his intent and predisposition to commit the crime, especially given the other evidence giving import to that intent." Id. at A21.

d. Petitioner likewise errs in asserting (Pet. 20-24) that, notwithstanding the government having disproved the elements of the entrapment defense, his conviction is nonetheless inconsistent with the defense's purpose. This is not a case where "the Government's quest for convictions leads to the apprehension of an otherwise law-abiding citizen who, if left to his own devices, likely would have never run afoul of the law, the courts should intervene." Jacobson, 503 U.S. at 553-554. The FBI first became aware of petitioner because of his social media posts, which promoted violence in the name of ISIS, threatened "non-believers," and expressed support for ISIS. Pet. App. A2. Petitioner himself testified that, before any undercover agent mentioned joining ISIS, he had thought about moving to Syria or Iraq to live in the Islamic State. Id. at A21. And his dissemination of violent ISIS recruitment and propaganda videos and independent attempts to form relationships with other ISIS supporters further refute the notion that petitioner was an "unwary innocent." Jacobson, 503 U.S. at 542 (citation omitted).

2. Petitioner suggests (Pet. 13-17) that the courts of appeals consider divergent sets of factors to determine a defendant's predisposition. But although they may label and group the considerations relevant to predisposition somewhat differently, the lower courts broadly agree on what they are.

Several circuits, including the First, Fifth, Sixth, Seventh, and Ninth Circuits, consider five broad factors: (1) the defendant's character or reputation including any prior criminal record; (2) whether the government initially suggested the criminal activity; (3) whether the defendant engaged in the criminal activity for profit; (4) whether the defendant showed a reluctance to commit the offense that was overcome by repeated government persuasion; and (5) the nature of the inducement or persuasion by the government. See Pet. App. A12; United States v. Gamache, 156 F.3d 1, 9, 10 (1st Cir. 1998); United States v. Reyes, 239 F.3d 722, 739 (5th Cir.), cert. denied, 533 U.S. 961 and 534 U.S. 868 (2001); United States v. Silva, 846 F.2d 352, 355 (6th Cir. 1988); United States v. Busby, 780 F.2d 804, 807 (9th Cir. 1986) (same). And the Tenth Circuit, as petitioner concedes (Pet. 16), applies a "similar" five-factor test. See United States v. Duran, 133 F.3d 1324, 1335 (10th Cir. 1998).

Other circuits have articulated different linguistic formulations or groupings, but in substance and practice followed a similar approach. For example, as petitioner notes, the Second and Third Circuits look for evidence of: "(1) an existing course

of criminal conduct similar to the crime for which the defendant is charged, (2) an already formed design on the part of the accused to commit the crime for which he is charged, or (3) a willingness to commit the crime for which he is charged as evidenced by the accused's ready response to the inducement." United States v. Lakhani, 480 F.3d 171, 179 (3d Cir. 2007) (citation omitted); see United States v. Brunshtein, 344 F.3d 91, 101-102 (2d Cir. 2003), cert. denied, 543 U.S. 823 (2004). But both circuits have expressly recognized that the other factors discussed above are likewise "helpful in determining a defendant's predisposition." United States v. Cromitie, 727 F.3d 194, 206 n.9 (2d Cir. 2013), cert. denied, 574 U.S. 829 (2014); see Lakhani, 480 F.3d at 179.

Finally, some circuits conduct a contextual analysis that looks to similar considerations, without identifying a fixed number of relevant factors. See, e.g., United States v. Brown, 43 F.3d 618, 624 (11th Cir.) (explaining that the predisposition inquiry considers "the defendant's readiness and willingness to engage in the charged crime absent any contact with the government's officers or agents," "evidence that the defendant was given opportunities to back out of illegal transactions but failed to do so," and the "[e]xistence of prior related offenses"), cert. denied, 516 U.S. 917 (1995); United States v. McLaurin, 764 F.3d 372, 379, 381 (4th Cir. 2014) (explaining that "a broad swath of evidence, including aspects of the defendant's character and criminal past, is relevant to proving predisposition," including

"the character of the defendant, including past criminal history," "similar acts," and "readiness and willingness to break the law"), cert. denied, 575 U.S. 962 (2015); United States v. Ramsey, 165 F.3d 980, 985 n.6 (D.C. Cir.) (explaining that "[r]elevant considerations" include the defendant's "level of interest in the transaction, the pressure applied by the Government, any reluctance displayed by [the defendant] and [the defendant's] past illegal conduct"), cert. denied, 528 U.S. 894 (1999); United States v. Warren, 788 F.3d 805, 811 (8th Cir.) (similar), cert. denied, 577 U.S. 935 (2015).

Petitioner makes no attempt to show how any differences in articulation lead, or even might lead, to different substantive outcomes in actual cases -- let alone in this case. And this Court has recently and repeatedly denied certiorari in cases seeking review of the standard for determining predisposition. See, e.g., Young v. United States, 140 S. Ct. 113 (2019) (No. 18-1443); Rutgerson v. United States, 581 U.S. 992 (2017) (No. 16-759); McLaurin v. United States, 575 U.S. 962 (2015) (No. 14-798); Lowery v. United States, 575 U.S. 962 (2015) (No. 14-7954); Dang v. United States, 552 U.S. 1210 (2008) (No. 07-8404); Weiner v. United States, 547 U.S. 1162 (2006) (No. 05-884); Price v. United States, 518 U.S. 1017 (1996) (No. 95-1579); Zaia v. United States, 513 U.S. 1190 (1995) (No. 94-1002).[1]

[1] Petitioner also asserts that the decision below conflicts with prior Seventh Circuit precedent requiring a showing that the defendant was in a position to commit the crime prior to the

3. At all events, this case would be a poor vehicle in which to consider the standard for determining predisposition because petitioner has not challenged the lower courts' determination that a reasonable jury could have found beyond a reasonable doubt that petitioner was not induced to commit his crime. See Pet. App. A15 (finding "a sufficient basis to support the jury's finding that the government agents did not induce [petitioner] to provide material support to Muhamed on behalf of ISIS"). To meet its burden of proving that the defendant was not entrapped, the government must establish beyond a reasonable doubt "either that the defendant was predisposed to commit the crime or that there was no government inducement." United States v. Mayfield, 771 F.3d 417, 440 (7th Cir. 2014) (en banc). Resolution of the question presented would thus be unlikely to afford petitioner practical relief.[2]

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government's involvement. See Pet. 14, 19 (citing United States v. Hollingsworth, 27 F.3d 1196, 1200 (7th Cir. 1994) (en banc)). Any such intracircuit conflict would not warrant this Court's review. See Wisniewski v. United States, 353 U.S. 901, 902 (1957) (per curiam). In any event, no intracircuit conflict exists. As the court of appeals explained, the trial evidence showed that petitioner regularly disseminated ISIS propaganda well before any contact by government informants; that petitioner had thought about moving to Syria to live under the Islamic state before he met any government informants; and that he affirmatively and independently sought interactions with members of the ISIS community online. Pet. App. A21-A23.

[2] A similar question is presented in Domingo v. United States, petition for cert. pending, No. 23-6797 (filed Feb. 15, 2024).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

MATTHEW G. OLSEN
Assistant Attorney General

VIRGINIA M. VANDER JAGT
Attorney

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