

No. 23-6480

In The
Supreme Court of the United States

JOSEPH JONES,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY IN SUPPORT OF PETITION FOR CERTIORARI

Joseph Jones respectfully submits this reply in support of his petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

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Table of Contents

Table of Contents	i
Questions Presented.....	ii
Table of Authorities.....	iii
Reasons for Granting the Petition	1
1. This Court should grant certiorari to resolve the circuit-split regarding the appropriate test lower courts should apply when a defendant raises an entrapment defense.....	1
2. The recent application of the entrapment defense by the circuit courts has emptied it of the intended goal of preventing the Government from manufacturing crime.....	4
3. The question of how to balance the demands of the First Amendment with the defense of entrapment is one that cannot be resolved without this Court’s review, and is one of first impression, both for this Court, and the one below.	6
4. Conclusion	8

Questions Presented

Whether this Court’s review of the entrapment doctrine is necessary to:

(1) resolve the circuit split that has created no less than four disparate tests in the federal courts of appeals to evaluate an essential element of the entrapment defense: the accused’s predisposition to commit the offense;

(2) restore the essential, original purpose of the entrapment defense—to prevent the Government from manufacturing criminals—which has been frustrated by the disparate and unguided approaches by the United States courts of appeals; and

(3) determine an issue of exceptional national importance, that is, if the First Amendment places any limitations on the Government’s ability to rely on the accused’s wholly protected speech as evidence of their predisposition to commit the charged offense.

Table of Authorities

18 U.S.C. § 2339	9-10
<i>Citizens United v. Federal Election Comm'n</i> , 558 U.S. 310 (2010)	11
<i>Hamptan v. United States</i> , 425 U. S. 484 (1976)	8
<i>Hill v. Colorado</i> , 530 U.S. 703 (2000)	11
<i>Jacobson v. United States</i> , 503 U.S. 540 (1992)	5, 10, 11
<i>Mathews v. United States</i> , 485 U.S. 58	8
<i>R. A. V. v. St. Paul</i> , 505 U.S. 377 (1992)	11
Sahar F. Aziz, <i>Race, Entrapment, and Manufacturing “Homegrown Terrorism”</i> , 111 Georgetown L. J. 381, 433 (2023)	7
<i>Sherman v. United States</i> , 356 U. S. 369, 376-378 (1958)	8, 9
<i>United States v. Brown</i> , 43 F.3d 618 (11th Cir. 1995)	6
<i>United States v. Cromitie</i> , 727 F.3d 194 (2d Cir. 2013)	6
<i>United States v. Hollingsworth</i> , 27 F.3d 1196 (7th Cir. 1994)	6
<i>United States v. Jones</i> , 79 F.4th 844 (7th Cir. 2023)	5, 7, 9
<i>United States v. Mayfield</i> , 771 F.3d 417 (7th Cir. 2014)	8
<i>United States v. Russell</i> , 411 U. S. 423, 435-436 (1973)	8
<i>United States v. Thickstun</i> , 110 F.3d 1394 (9th Cir. 1997)	6

Reasons for Granting the Petition

The seriousness of the First Amendment concerns raised by Mr. Joseph Jones' case, and others like his, cannot be overstated. The Government alleges that Mr. Jones was neither prosecuted nor convicted for his speech. However, both the path to Mr. Jones' prosecution and the evidence used at trial raise concerns regarding the First Amendment and equal protection rights of Mr. Jones -- and every citizen espousing their beliefs on the internet. Mr. Jones' protected internet speech was the *sole* reason Mr. Jones was targeted for Government surveillance and, when *no criminal activity* was found, the Government then launched "a full-scale investigation using undercover agents a confidential human source," *United States v. Jones*, 79 F.4th 844, 848 (7th Cir. 2023). Further, at trial and on appeal, Mr. Jones' pure political speech was used as evidence of his guilt, in that the Government relied on First Amendment protected activities to show Mr. Jones was not entrapped. This Court's review is necessary to resolve the intertwined issues of the entrapment doctrine and the First Amendment which are presented in the instant case.

- 1. This Court should grant certiorari to resolve the circuit-split regarding the appropriate test lower courts should apply when a defendant raises an entrapment defense.**

Contrary to the government's assertion, the circuit courts' various approaches to predisposition are not "different linguistic formulations" of the same test, but a genuine circuit split involving meaningful distinctions. *See* Gov. Br. at 14. As just one example, the government does not explain how the Seventh Circuit's holding that *Jacobson v. United States*, 503 U.S. 540 (1992), requires a "positionality"

analysis¹ is merely a linguistic difference from the Ninth Circuit’s complete disagreement on this point. *See United States v. Thickstun*, 110 F.3d 1394, 1398 (9th Cir. 1997) (expressly holding, after lengthy reasoning, that “our reading conflicts with that of the Seventh Circuit in *Hollingsworth*,” but concluding that “*Jacobson* does not require ‘positional’ predisposition”); *see also U.S. v. Hollingsworth*, 27 F.3d 1196, 1199-1201 (7th Cir. 1994). The government also makes no attempt to answer whether Courts should use any “factor test,” or whether, according to the Eleventh Circuit, such tests are insufficient. *See U.S. v. Brown*, 43 F.3d 618, 625 (11th Cir. 1995).

Despite the government’s effort to downplay these distinctions, the federal circuit courts themselves have explicitly acknowledged, and analyzed the disagreements regarding the predisposition tests that petitioner described. *See e.g., Thickstun*, 110 F.3d at 1398; *United States v. Cromitie*, 727 F.3d 194, 217 (2d Cir. 2013) (expressly rejecting the 7th Circuit’s positionality factor); *United States v. Brown*, 43 F.3d 618, 624 (11th Cir. 1995) (rejecting any factor-based test for predisposition). Moreover, the fact that it took even the government nearly three pages to articulate the disagreements between the circuits, in itself, shows that this Court’s review is required to untangle the legal morass. *See Gov. Br. at 14-16.*

Though the government contends that these differences would not lead “to different substantive outcomes in actual cases – let alone in this case,” the distinctions laid out by the petitioner show that different approaches could lead to different outcomes in many cases, including this one. *See Gov. Br. at 16.* For instance, had the Seventh Circuit applied a case-by-case analysis in the manner of

¹ Under the “positionality” requirement, the predisposition element of the entrapment defense considers the actual ability of the defendant to commit the offense. *United States v. Hollingsworth*, 27 F.3d 1196, 1200 (7th Cir. 1994) (“The defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is likely that if the government had not induced him to commit the crime some criminal would have done so; only then does a sting or other arranged crime take a dangerous person out of circulation.”)

the Fourth, Fifth, Eighth and Eleventh Circuits in Mr. Jones’ case, it may well have concluded that no reasonable jury could find that Mr. Jones was predisposed to provide material support, prior to contact with government agents. Indeed, the Seventh Circuit held that, in this case, it was “equally possible to view the trial evidence another way,” exhibiting just how close the evidence regarding entrapment was in the instant case. *Jones*, 79 F.4th at 855, 857 (“What makes a case like this challenging is that it is easy to see a jury going either way on entrapment”). Given this acknowledgement, substituting a “factor based” test for a more holistic “totality of the evidence” test may well have broken the tie in Mr. Jones’ favor.

Moreover, one top scholar in this area noted that, if the jury had applied Judge Posner’s positionality test, the jury would have had to consider whether Mr. Jones likely would have provided material support to ISIS absent the sting operation. See Sahar F. Aziz, *Race, Entrapment, and Manufacturing “Homegrown Terrorism”*, 111 Georgetown L. J. 381, 433 (2023). Thus, even a modest clarification as to whether Judge Posner’s holding that *Jacobson* requires consideration of the defendant’s “positionality,” very well could break the tie in Mr. Jones’ favor.² Even a modest clarification of the applicable standard for predisposition could break the tie in Mr. Jones’ favor where the appeals Court conceded that the evidence was in equipoise. *See Jones*, 79 F.4th at 855, 857.

² Indeed, an application of the Seventh Circuit’s “positionality” analysis may also have changed the outcome for Mark Steven Domingo. *See* No. 23-6797. It appears, based on Domingo’s petition for certiorari, that the key issue in his case was whether he was predisposed to set off an explosive device, as opposed to his preferred method - mass shooting. Based the *Domingo* petition, it appears that he likely was in a position to commit a mass shooting, but, like most people, did not possess the technical skills, resources, or desire to set off an explosive. Thus, an application of the positionality test may well have broken the tie in Domingo’s favor as well.

2. The recent application of the entrapment defense by the circuit courts has emptied it of the intended goal of preventing the Government from manufacturing crime.

The Government also argues that even if this Court were to grant review of the instant petition, Mr. Jones has not challenged the lower courts' determination that he was not induced to commit the offense, and thus, he is unlikely to be afforded practical relief. *See* Gov. Br. at 17. Mr. Jones does not dispute that the Seventh Circuit held in *United States v. Mayfield*, that to overcome an entrapment defense, the government must establish either the defendant's predisposition or that there was no government inducement. *United States v. Mayfield*, 771 F.3d 417 (7th Cir. 2014). However, Mr. Jones is explicitly seeking review of the lower court's decision regarding his entrapment defense in the instant case, which involved an analysis of both inducement and predisposition.

This Court, and the Seventh Circuit, have also repeatedly held that the two elements are related. *See Mathews v. United States*, 485 U.S. 58, 63 (a valid entrapment defense has two related elements); *Sherman v. United States*, 356 U. S. 369, 376-378 (1958); *United States v. Russell*, 411 U. S. 423, 435-436 (1973); *Hamptan v. United States*, 425 U. S. 484, 489 (1976); *see also Mayfield*, 771 F.3d at 430 ("the elements are conceptually related"). Inducement and predisposition are two sides of the same coin. If a jury finds that the government induced a person to commit a crime, that necessarily implies that the person was not predisposed to commit the offense prior to contact with agents of the government. Furthermore, the trial court and the Government acknowledged this conceptual overlap at Mr. Jones' trial. *See* [Trial Transcript at 2105:6-7], ("The Court: You just pointed out that predisposition is kind of a sliding scale, you know, how predisposed you have to be is kind of related to the amount of inducement, or I guess really the amount of the inducement that's related to the predisposition, which sort of acknowledges

that your predisposition can also change over time...Government: It's a fair point").

Given the relation between the two elements, and the overlap of the evidence used at trial between the two elements, this Court's input regarding the predisposition test, or the related issues raised in the petition, could substantially affect the outcome of the instant case. *See Jones*, 79 F.4th at 854 (citing, as evidence that Mr. Jones was not induced, that Mr. Jones shared pro-ISIS propaganda with informants, and was willing to take an ISIS flag). Whether or not Mr. Jones was an "otherwise innocent," and "lured" to the commission of the offense, are issues that inextricably linked, as evidenced by this Court's own precedent. *See Sherman*, 356 U.S. at 376 (determining that defendant was entrapped where the Government "play[ed] on the weaknesses of an innocent party and beguile[d] him into committing crimes which he otherwise would not have attempted."). This case remains a proper vehicle with which to consider the standard for determining predisposition.

Moreover, the fact that this Court continues to receive petitions for certiorari seeking review of the entrapment doctrine, despite recent denials, counsels in favor of granting certiorari. The government cites to a list of eight petitions for certiorari this Court has denied between 1995 and 2019. *See Gov. Br.* at 16. Nonetheless, the Court now has two petitions for certiorari, both ripe for review, asking this Court to provide some clarity as to what is meant by the term "predisposition." Thus, this Court has not provided the clarity, certainty, and finality on this issue, which counsels in favor of hearing both *Jones* and *Domingo* on their merits.³ Moreover, the fact that this issue continues to appear specifically in prosecutions under 18

³ The parties agree that *Domingo v. United States*, petition for cert. pending, No. 23-6797 (filed Feb. 15, 2024), presents related questions for this Court's review to those in the instant case. *Gov. Br.* at 17, fn. 2.

U.S.C. § 2339 (the material support statute) also counsels in favor of review here. The government actions in orchestrating sting operations which result in invocation of the entrapment defense, specifically in § 2339 prosecutions, calls for review of the doctrine in this context specifically.

3. The question of how to balance the demands of the First Amendment with the defense of entrapment is one that cannot be resolved without this Court's review, and is one of first impression, both for this Court, and the one below.

The government's response attempts to construe Mr. Jones' cumulative reasons for this Court's review as a mere request to reverse the lower court's decision on the sufficiency of the evidence. While Mr. Jones maintains that the lower court's decision is inconsistent with this Court's precedent in *Jacobson v. United States*, 503 U.S. 540 (1992), the Government ignores the fact that the instant case presents this Court with a ripe opportunity to weigh in and protect significant Constitutional rights, and at the same time, resolve a circuit split regarding the application of the entrapment doctrine.

The Government's attempts to show that the Seventh Circuit's decision was consistent with *Jacobson* instead exposes the very First Amendment concerns that Mr. Jones highlighted in his petition. In arguing that Mr. Jones was not an "unwary innocent," the Government goes on to cite a list of protected First Amendment activities Mr. Jones engaged in: his social media posts supporting ISIS, *thinking* about moving to Syria or Iraq, disseminating ISIS propaganda, and attempting to form relationships with other ISIS supporters. *See* Gov. Br. at 13; *Jacobson*, 503 U.S. at 542. The Government's determination that Mr. Jones is guilty, like the Seventh Circuit's, is based entirely on his protected speech. *See* Jones' Pet. at 25-26. This not only runs contrary to this Court's directive in *Jacobson*, which held that evidence of lawful activity, by itself, cannot establish a defendant's predisposition, but also was violative of Mr. Jones' First Amendment

rights. *See Jacobson*, 503 U.S. at 551 (“there is a common understanding that most people obey the law even when they disapprove of it”).

As to Mr. Jones’ contention that his First Amendment rights were unduly burdened, the Government argues that the First Amendment does not prohibit the evidentiary use of protected speech. Gov. Resp. at 12. This contention is a distraction from the issue Mr. Jones presented for review.

Speech and association for political purposes is the kind of activity to which the First Amendment offers its strongest protection. *See R. A. V. v. St. Paul*, 505 U.S. 377, 422 (1992) (Stevens, J., concurring in judgment) (“Our First Amendment decisions have created a rough hierarchy in the constitutional protection of speech” in which “[c]ore political speech occupies the highest, most protected position”); *Hill v. Colorado*, 530 U.S. 703, 787 (2000) (Kennedy, J., dissenting) (“Laws punishing speech which protests the lawfulness or morality of the government’s own policy are the essence of the tyrannical power the First Amendment guards against”); *Citizens United v. Federal Election Comm’n*, 558 U.S. 310, 349 (2010) (“If the First Amendment has any force, it prohibits Congress from fining or jailing citizens, or associations of citizens, for simply engaging in political speech”).

Given the venerated position the constitution affords to the type of speech the Government used as a reason to investigate, to prosecute, and then establish Mr. Jones’ guilt at trial, the First Amendment requires, or should require, that such speech be subjected to a higher standard. This Court’s review of the issue is particularly needed given the importance of maintaining First Amendment freedoms, and preventing the chilling of speech, especially given that this Court has held that evidence to do what is lawful is not sufficient to show predisposition. *See Jacobson*, 503 U.S. at 551.

4. Conclusion

It has been over thirty years since this Court last heard an entrapment case. In the intervening period, confusion has reigned in the lower Courts as to how to evaluate a crucial element of the defense, and meanwhile, the Government has created a sweeping domestic counterterrorism apparatus that regularly seizes upon the content of defendants' fully protected speech as justification to initiate highly coercive sting operations. Litigants, scholars and even former FBI agents have consistently sounded the alarm about these cases, arguing that this Court's current entrapment jurisprudence is inadequate.

This Court has two petitions for certiorari alleging entrapment, both in highly coercive counterterror sting operations. The time has come for this Court to say, clearly, whether these are lawful sting operations, or unlawful entrapment schemes. For all the reasons articulated herein, and addressed more thoroughly in Mr. Jones' petition, the petitioner respectfully requests that the Court grant the petition for certiorari. Alternatively, Mr. Jones request that this Court consolidate this case with Mr. Domingo's, No. 23-6797, grant both petitions, and jointly hear arguments on the merits; or should Mr. Domingo's petition be granted, hold Mr. Jones' petition pending its outcome.

Respectfully Submitted,

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