No. _____

IN THE

Supreme Court of the United States

MARK STEVEN DOMINGO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1. When a defendant raises an entrapment defense, must the government disprove entrapment by establishing predisposition or a lack of inducement as to the particular crimes charged, or just as to similar crimes?
2. Does predisposition for entrapment purposes include only the defendant's willingness to commit the offense prior to being contacted by government agents, or also whether he could or would have committed the crime but for the agents' intervention?
3. Should the Court hold this petition pending disposition of *Jones v. United States*, No. 23-6480, and if certiorari is granted in that case, simultaneously grant this petition so the cases may be considered in concert, or at least hold the petition until an opinion is issued and then grant this petition, vacate the judgment, and remand for reconsideration in light of that decision (GVR)?

Related Proceedings

United States District Court (C.D. Cal.):

United States v. Domingo, Case No. CR-19-00313-SVW (November 5, 2021).

United States Court of Appeals (9th Cir.):

United States v. Domingo, Case No. 21-50249 (November 24, 2023).

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Petition for a Writ of Certiorari

Petitioner Mark Steven Domingo respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

Opinions Below

The decision of the United States Court of Appeals for the Ninth Circuit (App. 1a-4a) is unpublished but is available at 2023 WL 8166774. The district court did not issue any relevant written decisions.

Jurisdiction

The court of appeals entered its judgment on November 24, 2023. App. 1a. It denied a petition for panel rehearing on December 8, 2023. App. 5a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

Constitutional and Statutory Provisions Involved

18 U.S.C. § 2332a(a)(2) provides in relevant part: "A person who, without lawful authority, . . . attempts . . . to use, a weapon of mass destruction . . . against any person or property within the United States, and (A) the mail or any facility of interstate or foreign commerce is used in furtherance of the offense; (B) such property is used in interstate or foreign commerce . . . or (D) the offense, or the results of the offense, . . . would have affected interstate or foreign commerce . . . shall be imprisoned for any term of years or for life[.]"

18 U.S.C. § 2339A(a) provides in relevant part: "Whoever provides material support or resources . . . knowing or intending that they are to be used in preparation for, or in carrying out, a violation of section . . . 2332a . . . of this title . . . shall be fined under this title, imprisoned not more than 15 years, or both[.]"

Statement of the Case

1. Legal Background.

The Court has long recognized the defense of entrapment. *See*, *e.g.*, *Jacobson v. United States*, 503 U.S. 540, 548-54 (1992). To successfully rebut that defense, the government must prove beyond a reasonable doubt either that its agents did not induce the defendant to commit the charged crimes or that the defendant was predisposed to engage in that conduct. *Mathews v. United States*, 485 U.S. 58, 62-63 (1988). Such predisposition must exist before the defendant was first contacted by government agents. *Jacobson*, 503 U.S. at 548-49 & n.2.

2. Factual Background and Proceedings Below.

A jury found Mark Domingo guilty of attempted use of a weapon of mass destruction (a bomb) in violation of 18 U.S.C. § 2332a(a)(2) and providing material support and resources with the intent that they be used in preparation for, or in carrying out, that crime in violation of 18 U.S.C. § 2339A(a). Because Domingo presented an entrapment defense, the jury was informed that, for each count, the

government had to prove beyond a reasonable doubt that he was not entrapped. AOB 2; ARB 5.[1]

At the relevant time, Domingo was a psychologically vulnerable, 26-year-old Army veteran who had served in Afghanistan and had recently converted to Islam. AOB-3-9, 61, 66; ARB 23. He had no criminal history. AOB 66; ARB 23-24. Although his social-media posts expressed some general support for overseas violent jihad and even suggested that he would welcome jihadist violence in this country, there was no evidence whatsoever that he had ever *acted* in accordance with those musings before being targeted by government agents, who exploited Domingo's newfound faith, his despair over recent violence against Muslims, and his loneliness. In particular, they portrayed jihadists as brave Muslims fighting for the faith, who would receive great rewards in the afterlife; and they described those who would not fight for the religion as sheep, unmanly cowards, and false Muslims. AOB 9-17, 61-62, 66; ARB 17-20, 25-26.

After a gunman attacked mosques in Christ Church, New Zealand and killed several Muslims on March 14, 2019, Domingo posted a crying-face emoji on a social-media platform frequented by people who purportedly supported the Islamic State

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[1] The following abbreviations refer to documents filed in the Ninth Circuit: "AOB" refers to the appellant's opening brief (docket no. 22). "GAB" refers to the government's answering brief (docket no. 30). "ARB" refers to the appellant's reply brief (docket no. 41). "PFR" refers to the appellant's petition for rehearing (docket no. 54).

in Iraq and Syria (ISIS). AOB 10, 17. An online covert employee (OCE) of the FBI, who monitored that platform using the persona of a devout young Muslim woman, and who was concerned about Domingo's posting two weeks earlier asserting that America needed "another Vegas event" to "kick off the civil unrest," began encouraging him to take jihadist action in revenge for the Christ Church attack. AOB 9-11, 16-21.

As OCE continued to do that, an FBI confidential human source (CHS), who portrayed himself as an experienced jihadist fighter from Iraq, simultaneously reached out to Domingo on the social-media platform to also stoke a desire for violent revenge. AOB 9, 11-13, 21-25. On March 18, Domingo and CHS began meeting in person, and over the next month, both agents continued to embolden Domingo to commit a terrorist attack. AOB 25-39.

Eventually, on April 23, CHS arranged a meeting with an FBI undercover employee (UCE) posing as a jihadist bombmaker because Domingo did not have the ability to manufacture bombs himself. AOB 9-10, 13, 38-40, 47, 71-72; ARB 35-36; PFR 3. The three men discussed a plan to attack a Nazi rally scheduled for April 28. During that meeting, Domingo waffled and expressed doubts about proceeding with that plan, complaining of personal troubles and a crisis of faith, but UCE and CHS discouraged such equivocation. AOB 40-42, 66-67; ARB 31. Domingo continued to hesitate the next day as both UCE and CHS strongly encouraged him to follow through on the plan. AOB 42-46, 66-67; ARB 32. In particular, CHS told

Domingo that they could not wait any longer and that Allah would provide great rewards if they bombed the rally, and he suggested that it would be cowardly for Domingo to back out. AOB 43-46; ARB 32. After Domingo lost his job the next day, he succumbed to this pressure and agreed to go forward with the attack. AOB 46-47, 67; ARB 32. On April 26, Domingo met with CHS and OCE, who brought inert improvised explosive devices (IEDs) manufactured by the FBI, and the three men scouted the location of the rally. AOB 47-48. The FBI arrested Domingo as he and UCE carried the bombs to UCE's car at the end of that meeting. AOB 48.

As particularly relevant to this petition, Domingo repeatedly expressed a preference for using guns—not bombs—in any attack, and CHS deliberately steered Domingo to a bombing plan, purportedly so the FBI could maintain control of the situation and prevent Domingo from shooting anyone before their sting operation concluded. AOB 62, 66; ARB 20-21, 27; PFR 1. For example, on March 16, CHS noted the destructive power of IEDs, but Domingo (who owned an AK assault rifle) responded, "I'd rather run up and blast enemies with my AK." CHS nevertheless pushed the government's bombing agenda: "yes, you can run up and do that, but if you want to do more damage, IEDs will do the work." AOB 20, 24-25; ARB 27-28. At a meeting two days later, Domingo criticized jihadists who "plant IEDs" but "won't fight," and when he brought up his guns, CHS suggested that IEDs would be better. AOB 25-27; ARB 28. Domingo again mentioned guns at a meeting on March 22, and in the days that followed, he encouraged CHS to buy an assault rifle

so they "could raid together." AOB 28-30, 34-35. At another meeting on April 3, CHS was the first to bring up IEDs, but to the extent Domingo talked about any plan, it was only to use his guns to possibly shoot a couple of police officers, or maybe assault his neighbor with a knife. AOB 33. Domingo then showed up for a meeting with CHS on April 19 with his AK rifle and other gear, and he again mentioned the gun he wanted CHS to buy, even offering to pay half the price and to make the purchase himself. CHS instead brought up IEDs, but when CHS asked Domingo what his plan was, he responded: "We drive by, we empty a magazine or two, an AK, and we book it." The CHS diverted him back to the government's bombing plan, saying, "the IED will do more damage." Domingo agreed, making clear he was following the CHS's lead: "if you want to do the IED route, which is sounding like a better idea." AOB 36-38; ARB 28-29; PFR 2. At the subsequent meeting on April 23, Domingo told UCE, "I mean, my first operation that I had thought of wasn't even this. It was just to raid police. . . . You know, it just takes a dude like me with an AK[.]" AOB 41-42. And the next day, Domingo reminded CHS that he was the one who "wanted to go raiding" while CHS was "the one who said, no we should be more safe and we should just IED." AOB 44; ARB 29. Even at the meeting immediately preceding his arrest on April 26, Domingo noted that the bombing "was [CHS's] idea" because he wanted to ambush police officers with his AK. AOB 48; ARB 29.

On appeal, Domingo argued that the government failed to disprove entrapment as a matter of law as to any crimes but especially as to the particular bombing crimes for which he was convicted. AOB 49-72; ARB 5-36. In response, the government argued (among other things) that Domingo's claim that he was induced to carry out his plot with a bomb is irrelevant because "a defendant cannot claim entrapment if he plotted a course of *similar* conduct or designed to commit *similar* crimes." GAB 74-75 (cleaned up) (emphasis in original). "Not only is it unnecessary for the government to prove that the defendant was predisposed to commit the precise crime for which he was convicted," the government argued, "but when a defendant argues that he was not predisposed to commit a *particular* crime, the only relevant response from the government is one that bears on his propensity to engage in *that kind* of criminal activity." GAB 75 (cleaned up) (emphasis in original). According to the government, "an aspiring terrorist cannot claim inducement merely because the government offered him a means . . . to accomplish his terrorist design." GAB 75-76.

The Ninth Circuit affirmed Domingo's convictions in a memorandum disposition. Although its cursory decision referred generally to "the crimes" and "his crimes," the Ninth Circuit did not specifically address the issues of whether the government induced the particular bombing crimes of conviction and whether Domingo was predisposed to commit those particular crimes. App. 1a-4a. Its only reference to the kind of attack was this: "He testified that he 'wanted to commit mass murder

with a bomb.'" App. 4a. But the testimony to which it referred concerned Domingo's mindset at the end of the meeting on April 19, after OCE and CHS had subjected him to considerable inducement for more than a month. PFR 2.

Domingo filed a petition for panel rehearing pointing out that the Ninth Circuit failed to evaluate entrapment with regard to the particular crimes charged, thereby implicitly adopting the government's argument that they do not matter because a general "terrorist design" is enough. PFR 1-3. Domingo also noted that the Ninth Circuit failed to address his separate claim that he could not have been predisposed to commit the bombing crimes because he did not have the wherewithal to manufacture a bomb. AOB 71-72; ARB 34-36; PFR 3. The Ninth Circuit summarily denied the petition. App. 5a.

Reasons for Granting the Writ

The Court's entrapment precedent establishes that, when the defense is raised, the government must prove beyond a reasonable doubt either that its agents did not induce the particular crimes charged or that the defendant was predisposed to commit those particular crimes. Although most courts of appeals have followed that precedent, the Second Circuit allows predisposition of a general terrorist design to suffice, and the government successfully urged the Ninth Circuit to adopt that position in this case. Another circuit conflict, also relevant here, concerns whether predisposition includes not only the defendant's willingness to commit the offense prior to being contacted by government agents but also his wherewithal to do so.

This case is an excellent vehicle for the Court to address these circuit conflicts. Moreover, because there is another pending certiorari petition raising similar issues, considering both cases in concert would be of value as the Court provides much-needed guidance on the entrapment defense; at a minimum, the Court should hold this petition until that other case is resolved.

1. The Court has long recognized the defense of entrapment based on the principle that the government may utilize undercover operations to *reveal* crimes but not to *create* them; its agents therefore should not go beyond merely offering an opportunity to commit a crime. *See Jacobson*, 503 U.S. at 548-54; *Mathews*, 485 U.S. at 62-66; *United States v. Russell*, 411 U.S. 423, 428-36 (1973); *Sherman v. United States*, 356 U.S. 369, 372-78 (1958); *Sorrells v. United States*, 287 U.S. 435, 441-52 (1932). From the beginning, the Court has found the defense to be implicit in each criminal statute.

Sorrells addressed "when the criminal design originates with the officials of the government, and they implant in the mind of an innocent person the disposition to commit *the alleged offense* and induce its commission in order that they may prosecute." 287 U.S. at 442 (emphasis added). The Court applied the principle that "literal interpretation of statutes at the expense of the reason of the law and producing absurd consequences or flagrant injustice has frequently been condemned." *Id*. at 446 (cleaned up). It was "unable to conclude that it was the intention of the Congress in enacting [the charged criminal] statute that its

processes of detection and enforcement should be abused by the instigation by government officials of an act on the part of persons otherwise innocent in order to lure them to its commission and to punish them." *Id.* at 448. To hold otherwise would "do violence to the spirit and purpose of the statute." *Id.* The Court adopted this statutory-construction foundation for the entrapment defense instead of the public-policy rationale proffered by the dissent. *See id.* at 455-59 (Roberts, J. dissenting in part); *see also id.* at 455-56 (describing majority opinion as "constru[ing] the act creating the offense by reading in a condition or proviso that if the offender shall have been entrapped into crime the law shall not apply to him. So, it is said, the true intent of the legislature will be effectuated.").

In *Sherman*, the Court declined to reconsider the public-policy rationale and instead reaffirmed that "Congress could not have intended that its statutes were to be enforced by tempting innocent persons into violations." 356 U.S. at 372, 376. It did the same again in *Russell*, maintaining that entrapment is rooted "in the notion that Congress could not have intended criminal punishment for a defendant who has committed all the elements of a proscribed offense but was induced to commit them by the Government." 411 U.S. at 435; *cf. Osborn v. United States*, 385 U.S. 323, 332 n.11 (1966) ("[W]hen the defense of entrapment is raised, evidence of prior conduct tending to show the defendant's *predisposition to commit the offense charged* is admissible.") (emphasis added). Given the statute-rooted nature of the defense, the Court held in *Mathews* that "a valid entrapment defense has two

related elements: government inducement of *the crime*, and a lack of predisposition on the part of the defendant to engage in *the criminal conduct*." 485 U.S. at 62-63 (emphasis added). Thus, the Court has focused on whether the defendant was entrapped *as to the particular crime charged* because, if he was, he should not be punished *for that crime*.

The Court's most recent entrapment case, *Jacobson*, confirms that the defense is crime-specific. *See* 503 U.S. at 642 (government "as a matter of law failed to establish that petitioner was independently predisposed to commit *the crime for which he was arrested*[.]") (emphasis added). "In their zeal to enforce the law," the Court held, "Government agents may not originate a criminal design, implant in an innocent person's mind the disposition to commit a criminal act, and then induce commission of the crime so that the Government may prosecute." *Id*. at 548. "Where the Government has induced an individual to break the law and the defense of entrapment is at issue, . . . 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." *Id*. at 548-49. The Court acknowledged that Jacobson exhibited "certain personal inclinations, including a predisposition to view photographs of preteen sex[,]" but the evidence did not "support an inference that he would commit the [charged] crime of receiving child pornography through the mails." *Id*. at 551; *see also id*. at 553 ("Petitioner's ready response to [the government's] solicitations cannot be enough to establish beyond reasonable doubt

that he was predisposed, prior to the Government acts intended to create predisposition, to commit the crime of receiving child pornography through the mails."). "[P]roof that petitioner engaged in legal conduct and possessed certain generalized personal inclinations [was] not sufficient evidence to prove beyond a reasonable doubt that he would have been predisposed to commit *the crime charged* independent of the Government's coaxing." *Id.* at 551 n.3 (emphasis added); *see also id.* at 553 ("Law enforcement officials go too far when they 'implant in the mind of an innocent person the disposition to commit *the alleged offense* and induce its commission in order that they may prosecute.'") (quoting *Sorrells*, 287 U.S. at 442) (emphasis added).

2. Consistent with this Court's precedent, most courts of appeals have recognized that to rebut an entrapment defense, the government must prove predisposition or lack of inducement as to the particular crimes charged. *See*, *e.g.*, *United States v. Jones*, 79 F.4th 844, 851 (7th Cir. 2023) ("Entrapment is a defense to criminal liability when the defendant was not predisposed to commit *the charged crime* before the intervention of the government's agents and the government's conduct induced him to commit *it*.") (cleaned up) (emphasis added);[2] *United States v. Davis*, 985 F.3d 298, 307 (3d Cir. 2021) ("Entrapment occurs when a defendant who was not predisposed to commit *the crime* does so as a result of the government's inducement. We have loosely defined predisposition as the defendant's inclination

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[2] As discussed below, there is a pending petition for a writ of certiorari in *Jones*.

to engage in *the crime for which he was charged*, measured before his initial exposure to government agents.") (cleaned up) (emphasis added). That included the Ninth Circuit, at least before this case. *See United States v. Mohamud*, 843 F.3d 420, 432 (9th Cir. 2016) (issue whether "reasonable jury could have concluded that the defendant was predisposed to commit *the charged offenses*.") (cleaned up) (emphasis added); *United States v. Poehlman*, 217 F.3d 692, 697-98 (9th Cir. 2000) (inducement "can consist of anything that materially alters the balance of risks and rewards bearing on defendant's decision whether to commit *the offense*, so as to increase the likelihood that he will engage in *the particular criminal conduct*.") (emphasis added); AOB 61, 65; ARB 5-6, 13-14; PFR 1. In fact, Domingo's jury was instructed that the government had the burden to prove beyond a reasonable doubt that he "was not entrapped" by proving as to each count "either: One, [he] was predisposed to commit *the crime* before being contacted by government agents; or two, [he] was not induced by the government agents to commit *the crime*." ARB 5.

On appeal, however, the government argued that "a defendant cannot claim entrapment if he plotted a course of *similar* conduct or designed to commit *similar* crimes," so it is "unnecessary for the government to prove that the defendant was predisposed to commit the precise crime for which he was convicted" as long as it

proves his general "terrorist design." GAB 74-76 (cleaned up) (emphasis in original).[3] It relied on *United States v. Cromitie*, 727 F.3d 194 (2d Cir. 2013).

Like in this case, *Cromitie* involved "an elaborate sting operation conducted by the FBI using an undercover informant" that ended with terrorism-related charges concerning attempts to use weapons of mass destruction at two synagogues and a National Guard base. 727 F.3d at 199. The Second Circuit began with its precedent on "the accepted means . . . of establishing a defendant's predisposition: an existing course of similar criminal conduct; the accused's already formed *design* to commit the crime or similar crimes; his willingness to do so, as evinced by ready complaisance." *Id*. at 205 (cleaned up) (italics in original, underline added). Calling the "pre-existing 'design'" category "problematic," the court considered its scope. *Id*. at 206-08. "Despite the repeated use of 'design' to describe the second means of proving predisposition," the Second Circuit observed, "no court has discussed the

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[3] The government did not make that argument in the district court. Rather, consistent with the jury instructions, the government conceded in its closing argument that it had "to prove either one of two things: First, [Domingo] was predisposed to commit *the crime*; or second, he was not induced by government agents to commit *the crime*." ARB 8-9. Therefore, in addition to its other errors related to the entrapment defense, the Ninth Circuit also erred in upholding Domingo's convictions on a theory that was not presented to the jury. *See Ciminelli v. United States*, 598 U.S. 306, 316-17 (2023); *McCormick v. United States*, 500 U.S. 257, 270 n.8 (1991); *Chiarella v. United States*, 445 U.S. 222, 236 (1980); ARB 8-10.

meaning of the word in the context of the entrapment defense." *Id.* at 206 (citing *Sherman*, *Russell*, and *Jacobson*). "In the context of predisposition," at least, "the word 'design' is ambiguous. It can comprehend a continuum of mental states from a generalized idea of committing criminal activity, to an intent to commit a particular crime or crimes, to a precise plan for committing such a crime or crimes." *Id.* "When used as one of the three means of showing predisposition," the Second Circuit thought that "'design' must take its meaning from the context of the type of criminal activity comprising the specific offenses a defendant has committed." *Id.* at 207. But it then explained that predisposition need not exist as to the particular crimes charged, at least in terrorism cases:

> With respect to a category as varied as terrorist activity, the requisite design in the mind of a defendant may be broader than the design for other narrower forms of criminal activity. In view of the broad range of activities that can constitute terrorism, especially with respect to terrorist activities directed against the interests of the United States, the relevant prior design need be only a rather generalized idea or intent to inflict harm on such interests. A person with such an idea or intent can readily be found to be ready and willing to commit the offence charged, whenever the opportunity offered.

Id. (cleaned up). "If the accused has a preexisting purpose to commit offenses such

as, or similar to, the charged offenses, then he has the requisite preparedness. That is enough to have the requisite 'design.'" *Id.* (cleaned up). The Second Circuit continued:

> We doubt that the potential terrorists who are available to be recruited by Al Qaeda or similar groups have already 'formed' a 'design' to bomb specific targets . . . . Their predisposition is to have a state of mind that inclines them to inflict harm on the United States, be willing to die like a martyr, be receptive to a recruiter's presentation, whether over the course of a week or several months, of the specifics on an operational plan, and welcome an invitation to participate.

Id. at 207-08.

Judge Jacobs dissented in *Cromitie*. 727 F.3d at 227-30. He explained where the majority went wrong:

> The term "already formed design" is defined away by the majority: it is "only a rather generalized idea or intent to inflict harm on" the interests of the United States. Maj. Op. at 207. That definition of the term is more its converse because an idea or intent does not amount to a design, and one that is "generalized" is unformed; the "generalized idea" of an act is not a disposition to do it; and entrapment is the very process of mobilizing a generalized idea that otherwise would remain

> an idle thought. *Thus the majority opinion renders entrapment untenable as a defense*.

Id. at 228 (emphasis added). Judge Jacobs went on to address flaws in the majority's opinion as to terrorism cases in particular:

> So an "already formed design" is one sufficiently advanced that (before government solicitation) the defendant had already "prepared" to do the crime. Entertaining a "generalized idea" of a crime is several critical steps removed from preparing to commit it. A design that is "already formed" has taken shape, and assumed parameters even if particulars remain open. A design already formed is not (as here) inchoate, undirected, and open to suggestion and revision in every respect. . . . It therefore is not enough to infer a formed design to commit an act of terror from a sense of grievance or an impulse to lash out. These disquiets are common, and in most people will never combust. . . . Wanting to "die like a martyr" and "do something to America" is not a formed design, and certainly not "preparation." These are wishes, not designs. One amounts to no more than the boastful piety of a foolish man; the other could be banter in any faculty lounge.

Id. at 228-30 (cleaned up).

Judge Jacobs' complaints in *Cromitie* are well-founded. Allowing the government to meet its predisposition burden without proving that the defendant was predisposed to commit *the particular crimes charged* severely weakens, if not eviscerates, the entrapment defense. By the same token, if government induced *the particular crimes charged*, it should not matter whether the defendant might have committed *similar uncharged crimes* absent any inducement. The circuit conflict on this matter deserves the Court's attention.

3. So does another circuit conflict. The Seventh Circuit has "described the concept of predisposition this way: 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." *United States v. Mayfield*, 771 F.3d 417, 436 (7th Cir. 2014) (en banc) (cleaned up) (emphasis in original) (citing *United States v. Hollingsworth*, 27 F.3d 1196, 1200 (7th Cir. 1994) (en banc)). Thus, "a predisposed person is *not* one who on his own might, under some conceivable set of circumstances, commit the crime. Rather, a predisposed person is one who is presently *ready and willing* to commit the crime." *Id*. (emphasis in original).

The Second Circuit has "reject[ed] the Seventh Circuit's expansion of the entrapment defense to permit an induced defendant, predisposed under existing standards to commit a crime, to establish the defense of entrapment simply

because, prior to the unfolding of a government sting, he was not in a position where it was likely that he would have figured out how to commit the offense and how to acquire necessary devices." *Cromitie*, 727 F.3d at 216-17 (asserting that the "principal dissent in *Hollingsworth* has forcefully set forth the shortcomings of this ill-advised expansion"). The Ninth Circuit's opinions on the matter are inconsistent. In one case, it rejected the Seventh Circuit's requirement of positional readiness. *United States v. Thickson*, 110 F.3d 1394, 1397-98 (9th Cir. 1997) ("our reading conflicts with that of the Seventh Circuit in *Hollingsworth*"). But then it subsequently held that predisposition "is the defendant's willingness to commit the offense prior to being contacted by government agents, coupled with the wherewithal to do so." *Poehlman*, 217 F.3d at 698 (citing *Hollingsworth*). Other circuits, citing the first case, have put the Ninth Circuit on the side against the Seventh Circuit in this ongoing conflict. *See Cromitie*, 727 F.3d at 217; *United States v. Pillado*, 656 F.3d 754, 763 (7th Cir. 2011); *United States v. Ogle*, 328 F.3d 182, 188-89 (5th Cir. 2003) (noting conflict but not taking a side); *United States v. Squillacote*, 221 F.3d 542, 567 (4th Cir. 2000) (same).

4. This case presents an excellent vehicle to address and resolve both circuit conflicts. First, the government failed to disprove entrapment generally, but especially as to the crimes of conviction in particular given the government agents' deliberate efforts to divert Domingo from gun crimes to bomb crimes, which required considerable inducement given his lack of predisposition as to bombing.

AOB 58-71; ARB 5-34. Second, there was also an independent reason for finding insufficient evidence of disposition given that Domingo did not have the wherewithal to manufacture a bomb; the undercover informant had to bring in an undercover FBI agent to do that. AOB 71-72; ARB 34-36. The Ninth Circuit implicitly answered the government's call to adopt the Second Circuit's terrorist-design standard with regard to the first issue, and it completely ignored the second issue. App. 1a-4a. And when Domingo pointed out those things in a petition for rehearing, the Ninth Circuit summarily denied it. App. 5a; PFR 1-4.

The Court's guidance is needed on these issues, particularly in the context of terrorism-sting cases. For example, one reoccurring idea in the courts of appeals is that the government can prove predisposition by showing that someone else could have induced the defendant to commit the crimes if government agents had not done so. *See*, *e.g.*, *Mayfield*, 771 F.3d at 436 ("The defendant must be so situated by reason of previous training or experience or occupation or acquaintances that it is *likely* that <u>if the government had not induced him to commit the crime some criminal would have done so</u>[.]") (cleaned up) (italics in original, underline added); *Cromitie*, 727 F.3d at 205 n.5 ("[W]e rely on the jury, as the conscience of the community, to convict those it believes, based on all the evidence, <u>would (or at least are likely to) commit the crime if solicited by someone other than a government agent</u> and acquit those it believes would not (or at least are not likely to) commit the crime if so solicited.") (emphasis added); *id.* at 207-08 ("We doubt that <u>the potential</u>

terrorists who are available to be recruited by Al Qaeda or similar groups have already 'formed' a 'design' to bomb specific targets . . . . Their predisposition is to have a state of mind that inclines them to inflict harm on the United States, be willing to die like a martyr, be receptive to a recruiter's presentation, whether over the course of a week or several months, of the specifics on an operational plan, and welcome an invitation to participate.") (emphasis added). *This theory effectively eliminates the entrapment defense.* In every case of entrapment, government agents necessarily induced the defendant to commit a crime even though he had no predisposition to do so. It follows that every defendant who was so entrapped by government agents could have been induced to commit the same crime by some other non-government actors applying the same pressure. The whole point of this Court's entrapment precedent (discussed above) is that *the government* cannot do that, even if a defendant would have no entrapment defense if private actors had done so. This extremely-important perversion of entrapment law merits review.

5. Also pending at this time is a petition for a writ of certiorari in *Jones v. United States*, Case No. 23-6480, a Seventh Circuit terrorism-sting case where the petitioner asks the Court to provide clarification on the entrapment defense, including the proper way to evaluate predisposition. Granting certiorari in both that case and this one and considering them in concert would allow the Court to consider similar questions in different contexts, thereby facilitating its legal analysis. *See*, *e.g.*, *Students for Fair Admissions, Inc. v. President and Fellows of*

Harvard College, 600 U.S. 181, 197-98 (2023) (jointly considering equal-protection challenges to admissions policies of Harvard and University of North Carolina).

At a minimum, if the Court grants review in *Jones*, or if it is considering doing so, it should hold this petition pending disposition of that case and then grant the petition, vacate the judgment, and remand for reconsideration in light of that decision. "A GVR is appropriate when intervening developments"—like a new opinion from this Court—"reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the matter." *Wellons v. Hall*, 558 U.S. 220, 225 (2010) (per curiam) (cleaned up) (citing *Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (per curiam)). "This practice has some virtues. In an appropriate case, a GVR order conserves the scarce resources of this Court that might otherwise be expended on plenary consideration, assists the court below by flagging a particular issue that it does not appear to have fully considered, assists this Court by procuring the benefit of the lower court's insight before [it] rules on the merits, and alleviates the potential for unequal treatment that is inherent in [its] inability to grant plenary review of all pending cases raising similar issues." *Lawrence*, 516 U.S. at 167 (cleaned up). This flexible approach "can improve the fairness and accuracy of judicial outcomes while at the same time serving as a cautious and deferential alternative to summary reversal in cases whose precedential

significance does not merit [the Court's] plenary review." *Id.* at 168. Here, "the equities of the case" support a GVR order if the Court reconsiders the entrapment defense in any context. *Id.* at 167-68. Once that happens, a GVR would "assist" the Ninth Circuit by "flagging" entrapment issues that it has not "fully considered." *Id.* at 167 (cleaned up).

Conclusion

For the foregoing reasons, the petitioner respectfully requests that this Court grant his petition for a writ of certiorari.

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Respectfully submitted,

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