No. 23-6797

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

REPLY BRIEF FOR PETITIONER

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The questions presented in the petition merit the Court's review because the circuits are in conflict about the entrapment defense, especially as applied in terrorism cases.

1. To rebut an entrapment 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 before he was first contacted by government agents. *See Jacobson v. United States*, 503 U.S. 540, 548-54 (1992); *Mathews v. United States*, 485 U.S. 58, 62-63 (1988); Pet. 2, 9-12; BIO 10. Despite the focus on agents' conduct, the government's factual statement recounts certain things that Mark Domingo said and did while mostly ignoring the prior words and actions of its own agents. BIO 2-7; *see also* BIO 11, 15-16; *compare* Pet. 3-6; AOB 9-49.

For example, the government suggests that Domingo made certain inflammatory posts following the Christ Church shooting "before anyone from law enforcement had made contact with" him. BIO 3-4. In truth, Domingo only acknowledged the shooting with a crying-face emoji, but then the FBI agent acting as an online covert employee (OCE) used provocative language like "if these brothers couldn't fight back we can" before he made the comments quoted by the government. Pet. 3-4; AOB 17-18; ER 1308-11. Similarly, the government's contention that Domingo demonstrated no reluctance is belied by the record, especially regarding the April 23

meeting where Domingo waffled and expressed doubts about proceeding with the plan, but the FBI's undercover employee (UCE) and confidential human source (CHS) discouraged such equivocation then and in further communications the next day such that Domingo succumbed to their pressure and agreed to go forward. Pet. 4-5; BIO 12.

To the limited extent the government does discuss its agents' conduct, it claims that they "gave petitioner an out" by telling him that he didn't have to follow through with an attack. BIO 5. Such assertions were generally accompanied by comments suggesting that Domingo would be an unmanly coward if he backed out, however. AOB 33-34; ARB 19-20. The government's refusal to acknowledge what its agents were doing stands in stark contrast to the admissions made by the agents themselves at trial. OCE, for example, insisted that her encouragement of a large future attack during her early exchanges with Domingo was necessary to "slow him down" and thereby prevent an immediate attack. AOB 21; ARB 20. And the case agent who ran the operation claimed that it was important for the undercover agents to maintain credibility with Domingo by acting consistent with their violent-jihadist personas. AOB 13-14; ARB 20. Thus, the agents basically conceded that they actively promoted the jihadist agenda, even if they thought they had good reasons to do so.

2. The first question presented is whether the government must disprove entrapment by establishing predisposition or a lack of inducement as to the

particular crimes charged (as most courts of appeals have recognized), or just as to similar crimes (as held by the Second Circuit in *United States v. Cromitie*, 727 F.3d 194 (2d Cir. 2013), and implicitly adopted by the Ninth Circuit in this case). Pet. ii, 7-8, 12-18. The government concedes that it has the burden to disprove entrapment as to the particular crimes charged but insists that there is no circuit conflict on the matter. BIO 12-16. Contrary to what the government suggests, *Cromitie* was not limited to what *evidence* could meet the government burden. BIO 13. Rather, the Second Circuit defined the *standard* for entrapment in terms of the defendant's "design" such that for "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," so "if the accused has a preexisting purpose to commit offenses such as, *or similar to*, the charged offenses," that "is enough to have the requisite 'design.'" 727 F.3d at 205-08 (cleaned up) (emphasis added); *see* Pet. 14-17.

According to the government, even if "the Second Circuit were out of step with other courts," the Ninth Circuit's decision "is consistent with" the majority approach. BIO 14; *see also* BIO 15. No, it is not. The evidence establishes that, eventually, Domingo expressed interest in an attack with knives or firearms, but the agents repeatedly and deliberately diverted him to the bombing crimes. AOB 17-48, 61-62, 66-67; ARB 18-19, 27-29. Because the Ninth Circuit affirmed Domingo's convictions despite that evidence, he filed a petition for panel rehearing pointing out that it 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; *see* Pet. 8. That petition was summarily denied. Pet. App. 5a. The Ninth Circuit's failure to explain itself cannot change the fact that it must have adopted the invalid theory given the evidence.

Next, the government contends that, despite relying on *Cromitie*, it never advocated for the Second Circuit's approach in its Ninth Circuit answering brief because, "read in context, that discussion simply explained that the entrapment defense does not protect criminals merely because they propose to commit their crimes using a different weapon; predisposition turns on the intended harm, not the means by which the harm is accomplished" and "the brief elsewhere makes clear" that the evidence proved that Domingo "was predisposed to commit his crimes." BIO 14-15 (cleaned up). That argument implicitly acknowledges the problem. Bombs and guns are not merely "different weapons" to commit the charged *bombing* crimes, which cannot be committed with firearms. Thus, even if Domingo would not have been entrapped if he had committed gun crimes, the government agents did entrap him into committing bombing crimes. By arguing the contrary, the government's brief in opposition basically advocates for the theory it elsewhere claims is improper—that a general "terrorist design" is enough to defeat an entrapment claim, even if the defendant was induced by government agents to

commit a particular crime and he was not predisposed to engage in that particular conduct before he was first contacted by the agents.

To justify Domingo's convictions, the government claims that the evidence established that he was predisposed to commit the bombing crimes. BIO 15-16. It asserts that Domingo "testified at trial that he 'wanted to commit mass murder with a bomb.'" BIO 15 (quoting Pet. App. 4a). But that testimony concerned Domingo's mindset at the end of the meeting on April 19, *after* both OCE and CHS had subjected him to considerable inducement for more than a month. ER 550; AOB 17-35; PFR 2. The government also relies on other things Domingo purportedly said and did *after* the agents began working on him. BIO 15-16. The relevant question, however, is whether he was disposed to commit the crimes *before* first being approached by those agents. *Jacobson*, 503 U.S. at 548-49 & n.2; *see* Pet. 2. The evidence showed that Domingo repeatedly expressed a preference for using guns—not bombs—in any attack, and CHS deliberately steered Domingo to a bombing plan. *See* Pet. 5-6. In fact, even during the April 19 meeting, where Domingo showed up with his rifle, CHS chastised him when he equivocated about any attack and then brought up IEDs, eventually getting Domingo to the point where he told the CHS, "But if you want to do the IED route, which is sounding like a better idea." ER 1048; AOB 36-38; ARB 21, 28-29; *see* Pet. 6. The government itself comes close to conceding that its agents, not Domingo, proposed a bombing. *See* BIO 5 ("Although petitioner had initially proposed a mass shooting at the rally,

he was also *supportive* about the possibility of setting off a bomb.") (emphasis added); *see also* Pet. 5-6.

3. The second question asks the Court to resolve a circuit conflict concerning whether predisposition for entrapment purposes includes 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. Pet. ii, 18-19. The government does not, and cannot, dispute that numerous cases have recognized that ongoing conflict. Pet. 18-19; BIO 16-17. It merely claims that it is "far from clear that the Seventh Circuit would reach a different result from the decision below on the facts of this case," despite its opinion in *United States v. Mayfield*, 771 F.3d 417 (7th Cir. 2014) (en banc). BIO 16-17 (cleaned up). That lack of clarity is a reason to grant review, not deny it. In any event, the government wrongly asserts that Domingo "posted messages and communicated with likeminded individuals about committing terrorist attacks on U.S. soil before any FBI contact." BIO 16. In truth, Domingo expressed no intent to personally engage in violent jihad before being targeted by the government. AOB 15-17. The government's claim that Domingo had the wherewithal to build a bomb also does not withstand scrutiny. BIO 16-17. His Army training concerned how to avoid, not make, IEDs; and even UCE testified that Domingo did not have the ability to produce IEDs himself. AOB 47, 71-72; ARB 35-36.

4. The government asserts that this case would be a poor vehicle in which to consider the two circuit conflicts because, purportedly, they pertain only to the predisposition element and Domingo has not challenged the Ninth Circuit's determination that there was sufficient evidence that he was not induced. BIO 17-18. That is not true. The first question presented concerns whether the government must "disprove entrapment by establishing predisposition *or a lack of inducement* as to the particular crimes charged, or just as to similar crimes[.]" Pet. ii (emphasis added); *see also id.* 12-18. Indeed, the government's answering brief in the Ninth Circuit relied on *Cromitie* to argue that Domingo's "claim that he was *induced* to carry out his plot with a bomb is irrelevant and inaccurate[.]" GAB 74-75 (emphasis added); *see* Pet. 7, 13-14. And Domingo argued this in his petition: "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." Pet. 18 (italics in original; underlines added). He also argued that "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." Pet. 19 (emphasis added). Thus, Domingo's petition raises questions pertaining to both inducement and predisposition, and he challenges the Ninth Circuit's decision as to both.

5. Finally, Domingo argued that, at a minimum, the Court should hold his petition pending disposition of *Jones v. United States*, No. 23-6480, and if certiorari is granted in that case, 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). Pet. 21-23. The government acknowledges that *Jones* presents a "similar question" (BIO 17 n.*) but does not contest that Domingo's petition should be held—if not granted—if the Court grants review in *Jones*. Its failure to respond effectively concedes the point. *See Shinn v. Ramirez*, 596 U.S. 366, 375 (2022) ("Respondents do not dispute, and therefore concede, that their habeas petitions fail on the state-court record alone.").

May 28, 2024

Respectfully submitted,

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