No. 24-125

IN THE

Supreme Court of the United States

AHMED ALAHMEDALABDALOKLAH

Petitioner,

v.

UNITED STATES

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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INTRODUCTION

The government takes the sweeping position that the presumption against extraterritoriality is categorically "inapplicable or rebutted" (Opp. 13 n.2) in the case of criminal statutes that protect the government. In the decision below, the Ninth Circuit adopted that view — even though it is irreconcilable with *RJR Nabisco* v. *European Community*, 579 U.S. 325 (2016), and *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247 (2010), which establish that only the "rare" statute "lacking an express statement of extraterritoriality" will have extraterritorial effect. *RJR*, 579 U.S. at 340. The government tacitly concedes that inconsistency, grounding its far-reaching position in an overreading of a century-old decision, *United States* v. *Bowman*, 260 U.S. 94 (1922). But *Bowman* cannot bear the weight the government places on it.

The Ninth Circuit's decision squarely conflicts with decisions of the D.C. and Eleventh Circuits. The government's efforts to distinguish those decisions fails, as the conflict concerns not how to construe 18 U.S.C. 844(f) in particular, but whether and how the presumption against extraterritoriality applies to criminal statutes in the first place. This Court's review is urgently needed.

The Ninth Circuit also excused the government from its *Brady* obligation to search for a narrow category of documents held by CENTCOM — even though CENTCOM had already assisted the prosecution in searching for and producing inculpatory evidence. Given that fact, the government's protestation that its practice of commingling Defense Department records would have required a broad search should have been

no excuse. That holding, too, conflicts with the decisions of other courts of appeals. This Court's review is warranted.

ARGUMENT

I. The Ninth Circuit's holding that section 844 applies extraterritorially warrants review.

The government's opposition brief confirms the pressing need for this Court's review. The government takes the far-reaching position that the presumption against extraterritoriality does not apply to criminal statutes that protect the government. The Ninth Circuit adopted that position, and the circuits are divided on that question.

A. The government does not dispute that the Ninth Circuit held that any criminal statute that describes offenses that "directly harm[] the U.S. Government" and that has "foreseeable overseas applications" applies extraterritorially. App. 20a. Nor does the government dispute that, in practice, the Ninth Circuit's decision means that any criminal statute "prohibiting conduct that victimizes the government" will apply extraterritorially. Opp. 14; accord Pet. 14. The government does not attempt to reconcile that sweeping proposition with *RJR*'s clear instruction that, "[a]bsent clearly expressed congressional intent to the contrary, federal laws will be construed to have only domestic application," 579 U.S. at 335, or its holding that it is the "rare statute that clearly evidences extraterritorial effect despite lacking an express statement of extraterritoriality," *id*. at 340. Instead, the government contends that criminal laws are different and that the presumption against extraterritoriality is *categorically* "inapplicable or rebutted," Opp. 13 n.2, for any

criminal statute that implicates the "right of the government to defend itself" because such statutes are not "logically dependent" on domestic activity, Opp. 12.

Under that view, a broad swath of criminal statutes would have extraterritorial reach, despite the absence of *any* reason to think Congress so intended, much less the "clear indication" required by *Morrison*. Pet. 15, 22 (citing examples); 18 U.S.C. 201; 18 U.S.C. 1001. The government's position therefore contradicts *Morrison*, which held that the presumption applies in "all cases," 561 U.S. at 261, and *RJR*, which applied the presumption against extraterritoriality to criminal RICO predicates without suggesting that the analysis would be different if the statutes concerned offenses against the government, 579 U.S. at 338, 345.

The government premises its rule on a vast overreading of *United States* v. *Bowman*, 260 U.S. 94 (1922). The government, like the Ninth Circuit, reads *Bowman* to hold that criminal statutes that are "enacted because of the right of the government to defend itself" are *necessarily* extraterritorial because such statutes are, "as a class, not logically dependent" on "domestic activity." Opp. 12. But, as the D.C. Circuit observed in rejecting precisely that argument, such a rule would treat "almost all the discussion in *Bowman* * * * as surplusage and would purport to rebut the presumption against extraterritoriality in broad swaths of the U.S. Code." *United States* v. *Garcia Sota*, 948 F.3d 356, 360 (D.C. Cir. 2020).

Properly understood, *Bowman* holds only that Congress's extraterritorial intent can be inferred when a criminal statute prohibits conduct that inherently or overwhelmingly occurs abroad. *Bowman* focused on statutes whose "scope and usefulness" would be "greatly * * * curtail[ed]" if limited to domestic application — pointing exclusively to exemplar statutes

that had *overwhelming* extraterritorial applications. *Bowman*, 260 U.S. at 98-99 (describing offenses including enticing desertion from the naval service, which must apply "on the high seas or in a foreign port, where it would be most likely to be done"). That makes sense: when Congress defines offenses to capture inherently or overwhelmingly extraterritorial conduct, it may be reasonably understood to intend extraterritorial application. *Bowman* stands for nothing more — and it does not support according section 844(f) extraterritorial scope, as that provision's prohibition on destruction of government property has extensive domestic application and no other indication that Congress intended extraterritorial scope.[1]

The government's remaining defense of its sweeping position is even less persuasive. It suggests (Opp. 14) that there is no need for the presumption against extraterritoriality in the criminal context because the Executive Branch possesses discretion to enforce criminal statutes, including extraterritorially. That misunderstands the presumption. It does not apply only when there is risk of international discord; it applies "across the board, regardless of whether there is a risk of conflict between the American statute and a foreign law." *RJR*, 579 U.S. at 336 (quotation omitted). And

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[1] The government's argument that Congress must have legislated with *Bowman* in mind therefore does not help it. *Bowman* is narrow, and Congress would have legislated with that understanding in mind. Moreover, Congress's frequent provision of *express* extraterritorial application in criminal statutes that protect the United States undermines any suggestion that Congress understood *Bowman* as the government does. See, *e.g.*, 18 U.S.C. 351(i), 832(b), 2332a(a)(3). Congress knows how to legislate extraterritorially when it wants to, and it has for decades. There is no indication Congress used that power when enacting section 844.

the Court should reject the government's attempt to transfer the power to apply United States law abroad from Congress to the Executive. That decision is fundamentally legislative, not executive. If Congress wishes to legislate extraterritorially, it can do so; the presumption requires that it does so clearly.

B. The government's attempt to downplay the square conflict among the courts of appeals lacks merit. The government primarily argues that no other court has addressed section 844(f)'s extraterritoriality. That misses the point. The courts disagree on the *legal framework* used to determine whether criminal statutes that protect the government — of which section 844(f) is one — are extraterritorial. Pet. 17-20.

In *Garcia Sota*, the D.C. Circuit rejected the government's invitation to read *Bowman* to give extraterritorial effect to "criminal statutes that protect the United States government from harm," 948 F.3d at 360 — *i.e.*, the same rule the Government champions in this case (Opp. 14). Instead, the D.C. Circuit read *Bowman* as petitioner does — and concluded that 18 U.S.C. 1114's prohibition of murdering government officials, without more, did not clearly evince extraterritorial intent. As the government acknowledges (Opp. 17), the Ninth Circuit adopted the *opposite* construction of section 1114 using the same approach that it reaffirmed in the decision below. App. 21a-22a. Indeed, the Ninth Circuit recognized that it "had taken a different approach" and held that *Garcia Sota* "does not persuade us to change course." App. 21a-22a. That is incontrovertible proof that the two approaches lead to opposite constructions of the same statute — a particularly harmful outcome in the criminal context.

The government responds weakly that Congress amended section 1114 to give it express extraterritorial application. But that does not resolve the circuit

conflict: *Garcia Sota*'s approach to *Bowman* and extraterritoriality are binding precedent in the D.C. Circuit. And under that approach, section 844(f)'s government-property-protecting nature, without more, does not justify according the statute extraterritorial application.

The government also cannot distinguish the Eleventh Circuit's decision in *United States* v. *Rolle*, 65 F.4th 1273 (11th Cir. 2023). Like the D.C. Circuit, the Eleventh Circuit understands *Bowman* to endorse extraterritorial application of criminal laws that proscribe "fundamentally international" conduct such that their scope and usefulness would be "greatly limited" were they restricted to purely domestic application. *Id.* at 1277-1278 (quoting *United States* v. *Delgado-Garcia*, 374 F.3d 1337, 1345 (D.C. Cir. 2004)). Applying that understanding of *Bowman* to 18 U.S.C. 1324, which criminalizes inducing aliens to enter the United States, the Eleventh Circuit concluded that the statute applied abroad — but only because "[t]he very nature of alien smuggling involves foreign countries, and accomplishing the crime[] almost always requires action abroad." *Id.* at 1279. That analysis comes out the other way for section 844(f). The "very nature" of section 844(f) — protecting against destruction of U.S. property — does not involve foreign countries or require action abroad; the United States holds extensive — indeed, primarily — domestic property.

The government's only response (Opp. 18) is that the court below, like the Eleventh Circuit, quoted *Bowman*'s reference to laws whose "scope and usefulness" would be "greatly" "curtail[ed]" by purely domestic application. But the court below viewed that language as encompassing *any* government-protecting statute with foreseeable extraterritorial applications, while

the Eleventh Circuit correctly understood that language to refer only to statutes describing inherently extraterritorial offenses.

The D.C. and Eleventh Circuits have thus squarely disagreed with the Ninth Circuit — and the Second, Fourth, and Seventh Circuits, which share the Ninth's view. Pet. 19-20. Because the government continues to press its sweeping reading of *Bowman*, the conflict will persist. This Court should grant certiorari to reaffirm that the presumption against extraterritoriality applies in "all" cases. *Morrison*, 561 U.S. at 261.

C. The question presented is exceptionally important. The government does not dispute that a "broad swath[]" of criminal statutes would be extraterritorial under the government's and the Ninth Circuit's view. *Garcia Sota*, 948 F.3d at 360; Pet. 22-23. Whether those statutes apply to non-U.S. persons who commit entirely extraterritorial conduct (such as bribery or lying to the government) is a question of pressing importance, squarely implicating concerns about the uniformity and predictability of the criminal law, and concerns about notice to potential defendants (and the foreign states in which they commit the relevant conduct). Yet the courts of appeals have been unable to reach consensus on how — or even whether — the presumption against extraterritoriality applies to criminal statutes.

This case is an ideal vehicle to resolve that disagreement. The government's rote argument (Opp. 10) that the case is interlocutory is insubstantial. This Court routinely reviews interlocutory criminal cases. *E.g.*, *Fischer* v. *United States*, 603 U.S. 480 (2024); *Bates* v. *United States*, 522 U.S. 23 (1997); *Solorio* v. *United States*, 483 U.S. 435 (1987). And the case is interlocutory only because petitioner must be resen-

tenced in view of the vacatur of his Section 924(c) convictions. Therefore, reasons that might otherwise counsel against review of interlocutory cases do not apply here: the sentencing proceedings will not obviate or refine the presentation of the questions presented, which concern the validity of petitioner's convictions. Stephen M. Shapiro et al., *Supreme Court Practice* § 4.18, at 4-55 (11th ed. 2019); see *Land* v. *Dollar*, 330 U.S. 731, 734 n.2 (1947).

The government's contention (Opp. 19) that review of the extraterritoriality issue will have "no practical effect" on petitioner is equally insubstantial. Granting both questions presented and ruling for petitioner would result in further proceedings for both his convictions. Even if this Court reviews only the extraterritoriality issue, the government does not dispute that this Court's vacatur of petitioner's section 844 conviction alone would entitle petitioner to full resentencing. See, *e.g.*, *United States* v. *Jayavarman*, 871 F.3d 1050, 1066 (9th Cir. 2017); see also *Pepper* v. *United States*, 562 U.S. 476, 507 (2011) ("[A]n appellate court when reversing one part of a defendant's sentence 'may vacate the entire sentence * * * so that, on remand, the trial court can reconfigure the sentencing plan.'" (citation omitted)). The possibility that the district court — years later, and with petitioner's convictions under sections 844 and 924(c) vacated — could impose the same sentence is speculative at best and provides no reason to deny certiorari.

II. The Ninth Circuit's *Brady* search holding also warrants review.

The Ninth Circuit held that the government had no *Brady* obligation to perform a limited search of CENTCOM documents — even though it is undisputed (Opp. 21-22) that the prosecution relied on CENTCOM to compile *inculpatory* evidence for the government's

case against petitioner. CENTCOM thus unquestionably "act[ed] on the government's behalf in the case." *Kyles* v. *Whitley*, 514 U.S. 419, 437 (1995). But the court nonetheless held that no search was necessary because the prosecution would have needed to rely on CENTCOM's search assistance, and the government's own record-keeping practices necessitated a DoD-wide search. And the government has never denied that it may have conducted a search of equal breadth for inculpatory evidence.

A. The government mischaracterizes the court of appeals' holding and the record. Petitioner did not "seek[]" a search of the "entire Department of Defense for relevant documents." Opp. 20 (citation omitted). Rather, petitioner "did not object to a limited search of only those DoD components likely to return responsive information." D. Ct. Doc. 836, at 6. But the government represented that its record-keeping practices — over which petitioner has no control — would mean that CENTCOM could not search its records without searching *the entirety* of DoD's holdings. D. Ct. Doc. 833, at 7.[2] That fact, however, did not prevent the prosecution from having CENTCOM search for inculpatory material. The government's record-keeping practices, and the prosecution's reliance on CENTCOM to perform the search, therefore cannot justify treating CENTCOM as though it was not "acting on the government's behalf in the case." *Kyles*, 514 U.S. at 437. Clearly CENTCOM could and did act on the government's behalf in building the prosecution's affirmative case, notwithstanding the logistical details

[2] While petitioner initially agreed that the government's search need not extend to the entire DoD, Opp. 5, it did so before CENTCOM represented that it was unable to locate responsive records without searching all DoD records.

of how its searches had to be performed. In those circumstances, petitioner's *Brady* rights cannot be nullified by the government's one-sided reliance on its seemingly antiquated or disorganized record-keeping practices. See Pet. 31-32.

B. The government's attempt to minimize the circuit conflicts created by the Ninth Circuit's decision fails. Pet. 29-30.

The government quibbles (Opp. 22) about how broadly the Ninth Circuit's conception of the "prosecution team" might extend. But the government cannot and does not dispute that CENTCOM's provision of assistance to the prosecution would have required it to search for exculpatory evidence in the Third and Tenth Circuits. Pet. 27-28. And, contrary to the government's argument (Opp. 23), it is immaterial whether the Ninth Circuit viewed the fact that the prosecution had to request access via CENTCOM as independently sufficient to deny a search or merely weighing against a search — because that fact would have been *entirely* irrelevant in the Third, Fifth, and Seventh Circuits. Pet. 28-29; App. 100a. Finally, the government's contention (Opp. 23) that the Third, Seventh, and D.C. Circuits have treated the scope and burden of the search as relevant is true enough, but beside the point. Pet. 29-30. Petitioner's request *was* specific and narrow, D. Ct. Doc. 836, at 6, and the government itself was responsible for the asserted breadth of any search. That would have weighed in favor of ordering the search in the other circuits.

The question presented is important and recurring. Pet. 32-33. The courts of appeals are uncertain how to determine whether an entity is working on behalf of the prosecution under the *Kyles* standard. Pet. 32-33. The government suggests (Opp. 24) that, because the *Brady* issue here arose as a result of DoD's "record-

keeping practices," this Court's review "may not yield useful guidance for future cases." But similar questions will arise whenever another government agency is involved in the prosecution — and the decision below allows the government to *narrow* its search obligations based on its own practices of compartmentalizing access to other agencies' evidence and commingling records. That makes it likely that these very practices will continue, and similar questions will doubtless recur in future cases.

C. Finally, the government makes the conclusory assertion (Opp. 21) that any evidence turned over by the prosecution would not have been material. But the defendant need not prove the materiality of evidence he does not possess in order to justify a search for that very evidence. See, *e.g.*, *Kyles*, 514 U.S. at 437 (noting prosecution's "duty to learn" of "any favorable evidence" and to produce the subset that rises to the level of materiality); *United States* v. *Brooks*, 966 F.2d 1500, 1503 (D.C. Cir. 1992). The district court held that the evidence sought — evidence showing that the Brigades worked with American troops — would be relevant and exculpatory. App. 98a. That finding should have triggered the government's obligation to search CENTCOM for the reasons stated above.[3]

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[3] Petitioner's post-trial discovery of a previously undisclosed U.S. Army report, Pet. 10, confirms that CENTCOM possessed relevant materials. A key question at trial was whether petitioner was affiliated with portions of the Brigades that cooperated with the United States, which would have negated the government's allegation that petitioner intended to harm the United States. The undisclosed report showed that specific members and factions of the Brigades worked with the United States, though many names remain redacted. Similar undisclosed evidence could well have supported petitioner's case,

(footnote continued)

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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as the district court found. Contrary to the government's suggestion (Opp. 24 n.4), petitioner did not discover the report until after his case was submitted to the Ninth Circuit. C.A. Doc. 83-1, at 7.