No. 24-550

In the Supreme Court of the United States

TAHAWWUR HUSSAIN RANA, PETITIONER

v.

W.Z. JENKINS, II

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the lower courts erred in finding that petitioner's extradition to India is consistent with the applicable extradition treaty's *non bis in idem* clause, which prohibits extradition when the person sought has been convicted or acquitted for the offense for which extradition is requested.

ADDITIONAL RELATED PROCEEDING

United States District Court (N.D. Ill.):

United States v. *Rana*, No. 09-cr-830 (Jan. 17, 2013, judgment; June 9, 2020, am. judgment)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is reported at 113 F.4th 1058. The order of the district court (Pet. App. 33a-38a) is unreported. The opinion of the magistrate judge certifying petitioner's extraditability to India (Pet. App. 39a-98a) is reported at 673 F. Supp. 3d 1109.

JURISDICTION

The judgment of the court of appeals was entered on August 15, 2024. A petition for rehearing en banc was denied on September 23, 2024 (Pet. App. 99a-100a). The petition for a writ of certiorari was filed on November 13, 2024. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

A federal magistrate judge in the Central District of California certified that petitioner was extraditable to India on charges related to the November 2008 terrorist attacks in Mumbai, India. Pet. App. 39a-98a. The United States District Court for the Central District of California denied petitioner's petition for a writ of habeas corpus. *Id.* at 33a-38a. The court of appeals affirmed. *Id.* at 1a-27a.

1. Petitioner is a Canadian citizen who grew up in Pakistan, then later moved to Chicago, where he established an immigration business. Pet. App. 5a, 46a. In 2005, petitioner met up in Chicago with his childhood friend from Pakistan, David Coleman Headley. *Id.* at 5a. During a series of meetings between 2005 and 2008, petitioner and Headley plotted to assist Lashkar-e-Tayyiba (Lashkar), a jihadist group designated as a foreign terrorist organization by the United States, in carrying out terrorist attacks. *Id.* at 5a, 41a n.1.

At one of those meetings, petitioner and Headley discussed plans for Headley to surveil public places and government facilities in India for a possible Lashkar attack. Pet. App. 5a. To create a cover story for Headley's surveillance in Mumbai, petitioner agreed to open a Mumbai branch of his immigration business and to fraudulently designate Headley as "Regional Manager" of that office. *Id.* at 6a, 48a. Petitioner helped Headley complete an inaccurate, but successful, application for a business visa that permitted Headley to travel to India under the pretense of opening petitioner's Mumbai office. *Id.* at 6a.

Petitioner and Headley then continued to conspire about a Lashkar attack. In July 2007, while staying at petitioner's home in Chicago, Headley told petitioner

about his surveillance in India and showed petitioner videos that he had taken of the Taj Mahal Palace Hotel in Mumbai. *Id.* at 6a, 51a. Petitioner then helped Headley secure a five-year multi-entry Indian visa, which Headley used for multiple trips to conduct surveillance of potential targets. *Id.* at 6a. In May 2008, Headley updated petitioner on his surveillance efforts, including his boat trips around the Mumbai harbor to identify possible landing sites. *Id.* at 6a, 52a. Petitioner smiled and laughed when Headley told petitioner about a potential plan for attackers to land by boat at the Taj Mahal Palace Hotel and described Lashkar's model of the hotel. *Id.* at 6a, 52a-53a.

Between November 26 and 29, 2008, Lashkar terrorists carried out massive, coordinated attacks in Mumbai. Pet. App. 6a, 41a-42a. The attackers arrived by sea and dispersed in teams to multiple locations throughout the city, including a train station, restaurants, a Jewish community center, and the Taj Mahal Palace Hotel. During four days of terror, the attackers fired guns, threw grenades, and detonated explosives, killing 166 people, including six Americans, and injuring hundreds more. *Id.* at 6a, 42a, 54a; C.A. E.R. 274-275, 786. Afterward, petitioner commended the attacks, praised the attackers, and opined that the people of India "deserved it." Pet. App. 7a, 55a.

Petitioner, Headley, and their Lashkar coconspirators soon planned more attacks. Pet. App. 7a, 55a. In 2009, Headley again used petitioner's immigration business as a cover to surveil potential targets, this time in Denmark. *Ibid.* The plan was for attackers to storm a newspaper facility in Copenhagen, behead employees, throw their heads to the street below, and then fight Danish forces to the death. *Id.* at 55a-56a; C.A. E.R.

2456. The Denmark plan was ultimately foiled, and in October 2009, Headley and petitioner were arrested in the United States. Pet. App. 7a.

2. A federal grand jury in the Northern District of Illinois charged petitioner with conspiring to provide material support to terrorism in India, in violation of 18 U.S.C. 2339A; conspiring to provide material support to terrorism in Denmark, in violation of 18 U.S.C. 2339A; and providing material support to Lashkar, a foreign terrorist organization, in violation of 18 U.S.C. 2339B. Second Superseding Indictment 16-17, 30-33.

Following a jury trial, petitioner was convicted of providing material support to terrorism in Denmark, in violation of 18 U.S.C. 2339A, and providing material support to Lashkar, in violation of 18 U.S.C. 2339B. Judgment 1. On the latter count, the jury returned a special verdict finding that death had not resulted from the conduct charged. Pet. App. 62a. Petitioner was acquitted of providing material support to terrorism in India. Judgment 1.

In January 2013, the district court sentenced petitioner to 168 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. In June 2020, the court granted petitioner's motion for a sentence reduction under 18 U.S.C. 3582(c)(1)(A), reduced his term of imprisonment to time served, and ordered his immediate release. Am. Judgment 1.

3. While petitioner was in custody serving his term of imprisonment, India requested petitioner's extradition under the Extradition Treaty Between the Government of the United States of America and the Government of the Republic of India (Treaty), *done* June 25, 1997, S. Treaty Doc. No. 30, 105th Cong., 1st Sess. (1997), T.I.A.S. No. 12,873. See C.A. E.R. 253-298.

India sought petitioner's extradition on charges of (1) conspiracy, (2) waging war against the government of India; (3) conspiring to wage war against the government of India; (4) forgery for the purpose of cheating; (5) using as genuine a forged document or electronic record; (6) murder; (7) committing a terrorist act; (8) conspiring to commit a terrorist act; and (9) membership in a terrorist gang. *Id.* at 263-266.

On June 10, 2020, the day after petitioner was granted release, the government filed a complaint for petitioner's provisional arrest for purposes of extraditing him to India. Pet. App. 40a. A magistrate judge in the Central District of California, where petitioner had been serving his sentence, issued a warrant. *Ibid.* On September 28, 2020, the government filed a memorandum in that district seeking a certification that petitioner was subject to extradition on certain charges requested by India. *Id.* at 8a, 40a; C.A. E.R. 235; see 18 U.S.C. 3184, 3186 (conferring jurisdiction on the district where the fugitive is arrested and establishing procedures for extradition). The government declined to proceed on three of the eight objects underlying India's conspiracy charge and the charge alleging membership in a terrorist gang. Gov't C.A. Br. 22 & n.2.

The magistrate judge certified that petitioner was extraditable to India on the submitted charges. Pet. App. 39a-98a. The magistrate judge rejected petitioner's contention that the Treaty's *non bis in idem* clause barred his extradition.[1] *Id.* at 68a-84a. That clause provides that "[e]xtradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the offense for which

[1] "*[N]on bis in idem*" means "[n]ot twice for the same thing." *Black's Law Dictionary* 1259 (12th ed. 2024).

extradition is requested." Treaty art. 6(1). Petitioner had argued that his convictions and acquittal on the U.S. charges meant that he had been "convicted or acquitted" for the "offense[s]" for which India sought extradition. *Ibid.*; see Pet. App. 69a. The magistrate judge rejected that argument, explaining that the test to determine whether two offenses are the same for purposes of the *non bis in idem* provision in this Treaty is the one that governs the inquiry under the Fifth Amendment's Double Jeopardy Clause: "whether each [offense] requires proof of a fact which the other does not," *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). Pet. App. 74a.

The magistrate judge looked to the text of the Treaty, observing that the *non bis in idem* provision in Article 6(1) uses the word "offense," while the subsequent paragraph, Article 6(2), uses different language in referring to uncharged "acts for which extradition is requested." Pet. App. 74a (emphasis omitted). The magistrate judge reasoned that the difference in wording within the same Article strongly indicates that the word "offense" refers to the crime itself and its specific elements, rather than the underlying conduct. *Id.* at 74a-75a. The magistrate judge also cited the technical analysis prepared by the treaty negotiators as an interpretive "'aid[]'" that provided "further support" for the elements-focused interpretation of the *non bis in idem* clause. *Id.* at 76a-77a (citation omitted); see *id.* at 76a-79a.

4. Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the United States District

Court for the Central District of California.[2] C.A. E.R. 82-88. The district court denied the petition, holding that petitioner's extradition was not barred by the Treaty's *non bis in idem* clause. Pet. App. 34a-36a. The court agreed with the magistrate judge that the proper mode of comparison for offenses under that clause is *Blockburger's* same-elements test. *Id.* at 35a-36a. The district court examined the text of Article 6, explaining that the language in that Article "strongly suggests" that "offense" as used in the *non bis in idem* provision was "intended to mean the same crime as analyzed under something akin to the *Blockburger* test." *Ibid.* The court additionally noted that the technical analysis, which is entitled to "'great weight,'" "directly states" that the *non bis in idem* provision applies only if the person has been convicted or acquitted "'of exactly the same crime that is charged.'" *Id.* at 36a (citations omitted).

The court of appeals affirmed, agreeing with the district court that petitioner's extradition was consistent with the *non bis in idem* clause because "the crimes charged in India have elements independent from those under which [petitioner] was prosecuted in the United States." Pet. App. 23a; see *id.* at 1a-27a.

Like the magistrate judge and the district court, the court of appeals focused on the distinction between the

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[2] A certification of extraditability is not subject to direct appeal, but this Court has permitted habeas review of extradition certifications, limited to determining whether the judge "had jurisdiction, whether the offence charged is within the treaty and, * * * whether there was any evidence warranting the finding that there was reasonable ground to believe the accused guilty." *Fernandez* v. *Phillips*, 268 U.S. 311, 312 (1925). Petitioner filed a petition for a writ of habeas corpus under 28 U.S.C. 2241 in the district where he had been detained. Pet. App. 8a.

word "offense" in the first section of the *non bis in idem* provision and the reference to uncharged "acts" in the subsequent paragraph and reasoned that Article 6, "when read as a whole, compels a reading of 'offense' that requires comparing the elements of each country's crimes." Pet. App. 11a. The court of appeals also observed that the "plain meaning of the Treaty is supported by the Executive's understanding of its terms at the time of drafting," as expressed in the technical analysis. *Id.* at 17a. And the court took note that the government's technical analysis is "further supported by India's similar reading of the Treaty." *Id.* at 15a n.5.

The court of appeals found additional support in precedents taking a similar view of a *non bis in idem* provision. The court cited the Fourth Circuit's decision in *Ye Gon* v. *Holt*, 774 F.3d 207 (2014), cert. denied, 576 U.S. 1035 (2015), which had recognized the "most natural reading" of "offense[]" in "a similar Treaty provision" to be "the definition of the crime, supporting the double jeopardy approach outlined in *Blockburger*." Pet. App. 18a. And it noted that in *United States* v. *Duarte-Acero*, 208 F.3d 1282 (2000), which was not an extradition case, the Eleventh Circuit had "read the word 'offense' in a Non Bis in Idem provision to refer narrowly to criminal elements," rather than conduct. Pet. App. 19a.

The court of appeals rejected petitioner's request to apply the broader same-conduct test used by the Second Circuit in *Sindona* v. *Grant*, 619 F.2d 167 (1980), explaining that the Second Circuit's analysis was based in part on an understanding of the Fifth Amendment's Double Jeopardy Clause that this Court later rejected as "wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding

of double jeopardy." Pet. App. 19a (quoting *United States* v. *Dixon*, 509 U.S. 688, 704 (1993)); see *Ye Gon*, 774 F.3d at 216 (noting that *Sindona's* legal foundation was "eroded by later Supreme Court rulings").

ARGUMENT

Petitioner renews his claim (Pet. 19-26) that the Treaty's *non bis in idem* provision bars his extradition to India on charges relating to the terrorist attacks in Mumbai in November 2008. The lower courts all correctly rejected that claim, and the court of appeals' decision does not implicate any disagreement warranting this Court's review. This Court has previously denied certiorari on a similar claim. See *Ye Gon* v. *Aylor*, 576 U.S. 1035 (2015) (No. 14-1131). It should do the same here.

1. The lower courts correctly rejected petitioner's interpretation of the *non bis in idem* clause.

"The interpretation of a treaty, like the interpretation of a statute, begins with its text." *Medellin* v. *Texas*, 552 U.S. 591, 506 (2008). The *non bis in idem* clause provides that "[e]xtradition shall not be granted when the person sought has been convicted or acquitted in the Requested State for the *offense* for which extradition is requested." Treaty art. 6(1) (emphasis added). The subsequent paragraph in the same article, in contrast, refers to uncharged conduct as "acts." Treaty art. 6(2). As the court of appeals explained, the differing language in these parallel provisions indicates that the drafters understood "offense" in the *non bis in idem* clause to mean "a charged crime, with elements, as distinct from uncharged 'acts' or conduct." Pet. App. 11a-12a; see *Air France* v. *Saks*, 470 U.S. 392, 398 (1985) (explaining that when treaties use differing language in parallel provisions, it "implies that the drafters of the

[Treaty] understood the word[s] * * * to mean something different").

The same-elements interpretation is confirmed by the technical analysis prepared by the agencies charged with negotiating and enforcing the Treaty in advance of ratification. "It is well settled that the Executive Branch's interpretation of a treaty 'is entitled to great weight.'" *Abbott* v. *Abbott*, 560 U.S. 1, 15 (2010) (quoting *Sumitomo Shoji America, Inc.* v. *Avagliano*, 457 U.S. 176, 185 (1982)). The technical analysis prepared by the State Department and the Department of Justice makes clear that Article 6(1) applies only when the person has been convicted or acquitted "of exactly the same crime" that is charged; "[i]t is not enough that the same facts were involved." C.A. E.R. 2311. India, the other party to the Treaty, has stated that it interprets Article 6(1) the same way. See *id.* at 429-431. Accordingly, to the extent that the text of the *non bis in idem* clause left any ambiguity, it would be resolved by the "great weight" accorded to the Executive Branch's interpretation of its Treaty. *Abbott*, 560 U.S. at 15.

Petitioner asserts (Pet. 4-5) that the court of appeals should have adopted the same-conduct standard that the Second Circuit applied to a then-operative *non bis in idem* clause in an extradition treaty between the United States and Italy in *Sindona* v. *Grant*, 619 F.2d 167, 169 (1980). That clause, similar to the one at issue here, barred extradition if the person sought already had been prosecuted "for the offense for which his extradition is requested." *Id.* at 176. The Second Circuit stated that the clause called for an inquiry modeled on Justice Brennan's interpretation of the Double Jeopardy Clause in his concurring opinion in *Ashe* v. *Swenson*, 397 U.S. 436 (1970), or on the Justice Department's

Petite policy addressing successive federal and state prosecutions. *Sindona*, 619 F.2d at 178; see *Petite* v. *United States*, 361 U.S. 529, 530-531 (1960) (per curiam). Both of those standards focused on the underlying conduct rather than the elements of the charged offenses. *Sindona*, 619 F.2d at 178. But the court of appeals correctly recognized that no sound justification exists for applying such a same-conduct standard here.

As the decision below recognized, Justice Brennan's concurrence in *Ashe*, on which *Sindona* relied, was subsequently "eroded in *United States* v. *Dixon*, 509 U.S. 688, 704 (1993)," which struck down the "'same conduct'" rule for double jeopardy analysis as "'wholly inconsistent with earlier Supreme Court precedent and with the clear common-law understanding of double jeopardy.'" Pet. App. 19a (citations omitted). Moreover, *Sindona* asserted that "[f]oreign countries could hardly be expected to be aware of *Blockburger* [v. *United States*, 284 U.S. 299 (1932)]." 619 F.2d at 178. But *Blockburger*'s same-elements test is not merely a feature of U.S. double-jeopardy law; it is also the most natural understanding of the word "offense" in the *non bis in idem* clause—and the one that India in fact has with respect to this treaty, see C.A. E.R. 429-431. And as this Court explained in *United States* v. *Dixon*, 509 U.S. 688 (1993), *Blockburger*'s "definition of what prevents two crimes from being the 'same offence' has deep historical roots" in the "common-law understanding of double jeopardy." *Id.* at 704 (citation omitted).

2. Petitioner repeats four arguments that he made in the court of appeals (Pet. 8-17) in support of his reading of the clause, but none has merit.

First, petitioner highlights (Pet. 8) a different provision of the Treaty, Article 2(1), which provides that an

"offense shall be an extraditable offense if it is punishable under the laws in both Contracting States" by at least one year of imprisonment. Treaty art. 2(1). Petitioner asserts (Pet. 8) that Article 2(1)'s dual-criminality provision uses the word "offense" to refer solely to conduct, and that it necessarily follows that the word "offense" in Article 6(1) cannot take elements into account. But to the extent that Article 2(1) looks to conduct, that is specific to Article 2, and does not carry over to Article 6(1).

Article 2 explicitly instructs that "[f]or the purposes of this Article, an offense shall be an extraditable offense * * * *whether or not the laws in the Contracting States place the offense within the same category of offenses or describe the offense by the same terminology*." Treaty art. 2(3)(a) (emphasis added). Consistent with that act-specific definition, it further provides that "[e]xtradition shall be granted for an extraditable offense regardless of where the act or acts constituting the offense were committed." Treaty art. 2(4). No such language appears in Article 6, which should accordingly be presumed to carry the elements-focused definition. Indeed, if the Treaty's drafters in fact intended a solely act-focused definition of the word throughout the Treaty, then the article-specific definition in Article 2 would be counterproductive.

Petitioner never explains why Article 2's definition should carry weight for Article 6. Moreover, even if the Treaty did not explicitly assign Article 2 that context-specific meaning to "offense," Article 2(1)'s usage of the word would not control its application in Article 6(1). The "presumption of consistent usage 'readily yields' to context." *Utility Air Regulatory Grp.* v. *EPA*, 573 U.S. 302, 320 (2014) (citation omitted). And asking whether

particular conduct might violate the law of two sovereigns, as Article 2(1)'s dual-criminality provision does, is different from asking whether someone would in fact be punished twice for the same offense, as Article 6(1)'s *non bis in idem* provision does. See, *e.g.*, *Gamble* v. *United States*, 587 U.S. 678, 681-682 (2019) (reaffirming longstanding dual-sovereignty doctrine under the Double Jeopardy Clause's "same offence" inquiry).

Second, petitioner argues (Pet. 9-10) that the same-elements test would effectively nullify *non bis in idem* provisions because offenses in different countries almost always have different jurisdictional elements. While petitioner views differentiating offenses based on such provisions as unthinkable, the court of appeals correctly recognized that other language in the Treaty in fact "suggests that this may be the intended result." Pet. App. 20a n.7. Article 2, Section 3(b) states that for purposes of the dual-criminality provision, an offense is extraditable "whether or not the offense is one for which United States federal law requires the showing of such matters of interstate transportation, or use of the mails or of other facilities affecting interstate or foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States federal court." Treaty art. 2(3)(b). No such exception exists in Article 6. That suggests that the drafters were "aware of difficulties in comparing United States and Indian law but chose not to" provide an exception in the *non bis in idem* context. Pet. App. 20a n.7.[3]

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[3] Even if petitioner's argument based on jurisdictional elements had merit, it would not support the same-conduct test he seeks. At most, it would justify disregarding jurisdictional elements in conducting the *Blockburger* analysis in this context. Cf. *Lewis* v. *United*

Third, petitioner contends (Pet. 11-14) that the government's position during Headley's plea proceedings judicially estops the government from arguing here that the Treaty permits petitioner's extradition. Petitioner's reliance (Pet. 11-12) on Headley's plea agreement, in which the government had agreed not to extradite Headley for his "offenses, including conduct within the scope of those offenses," C.A. E.R. 2462, is misplaced. Petitioner suggests that the agreement used the word "offense" in a manner inconsistent with the government's current interpretation of Article 6(1). But as the court of appeals correctly recognized, "[t]aking the plea agreement by itself, the language does not obviously suggest that 'offense' means 'conduct.'" Pet. App. 21a. The plea agreement simply indicates that the parties negotiated a stricter limit than what the Treaty's *non bis in idem* provision would have provided if Headley had gone to trial. Indeed, there would have been no reason to include that provision in the plea agreement if it simply repeated a protection already afforded by the Treaty.

Petitioner is also mistaken in contending (Pet. 12-13) that the government is estopped from extraditing him by the U.S. Attorney's statement during Headley's plea hearing. At that hearing, the U.S. Attorney described

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States, 523 U.S. 155, 182-183 (1998) (Kennedy, J., dissenting) (advocating the application of the *Blockburger* methodology under the Assimilative Crimes Act, 18 U.S.C. 13, and explaining that courts should ignore jurisdictional elements in applying the same-elements test to laws adopted by different sovereigns). Such an approach would be consistent with the Supreme Court's conclusion that "jurisdictional" elements are not part of the equation when evaluating whether state and federal offenses match; a match is determined based on the "substantive elements" only. *Torres* v. *Lynch*, 578 U.S. 452, 454, 473 (2016).

a provision in Headley's plea agreement as "say[ing] if the conduct is conduct within the scope of those offenses for which he has been convicted in accordance with the plea, then according to the treaty, he would not be extradited." C.A. E.R. 165. The U.S. Attorney was describing the plea agreement, not the Treaty itself. And although the U.S. Attorney made an inartful reference to the Treaty, his statement nevertheless distinguished "offense" from "conduct." The government obtained no benefit from any immaterial misstatement, and as the court of appeals correctly recognized, nothing about Headley's plea agreement or proceedings warrants judicial estoppel. Pet. App. 21a-23a (noting, *inter alia*, that estoppel requires that the positions be "clearly inconsistent" to the "unfair advantage" of the party against which estoppel is sought) (citation omitted); see *New Hampshire* v. *Maine*, 532 U.S. 742, 749-751 (2001).

Finally, petitioner asserts (Pet. 14-17) that this Court's recent decision in *Loper Bright Enterprises* v. *Raimondo*, 144 S. Ct. 2244 (2024), implicitly foreclosed any reliance on the technical analysis of the Treaty by the State Department and the Department of Justice. But *Loper Bright*, which ended the deference previously afforded to agency interpretations of ambiguous statutes under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), does not bear on the interpretation of treaties. As the court of appeals correctly recognized, "the logic underpinning *Chevron* deference is entirely distinct from the logic underpinning a deference to the Executive in matters of foreign affairs." Pet. App. 15a. The technical analysis is not drafted by agencies purporting to interpret an ambiguous statute passed by Congress.

Instead, the technical analysis reflects the Treaty drafters' explanation of the words they wrote. That is a useful tool in treaty interpretation, the object of which is "to give the specific words of the treaty a meaning consistent with the shared expectations of the contracting parties," who often have different national languages into which the treaty must be translated. *Air France*, 470 U.S. at 399. In any event, even if petitioner were correct about *Loper Bright* and deference, that would not resolve the question presented in his favor. The technical analysis was not a standalone basis for the court of appeals' decision; the court relied on the technical analysis only to "confirm[]" what the Treaty's "plain terms" already made clear. Pet. App. 14a; see *id.* at 17a n.6.

3. Petitioner asserts (Pet. 19-21) that the Court should grant review in light of a conflict between the decision below and the Second Circuit's decision in *Sindona*. Although the court of appeals expressed its disagreement with *Sindona*'s analysis, any tension between the two decisions does not warrant this Court's intervention.

First, no square conflict exists. This case involves the United States' extradition treaty with India, and the court of appeals rested its interpretation on "the Treaty's plain terms"—in particular, the contrasting uses of "offense[s]" in the *non bis in idem* clause and "acts" in the adjacent provision in the same Article. Pet. App. 10a, 14a. *Sindona* involved a different treaty, the then-operative extradition treaty between the United States and Italy, 619 F.2d at 169, and the language of that treaty did not contain the same contrast between "offense[s]" and "acts" in adjacent provisions of the same article. See Treaty on Extradition Between the United

States of America and Italy, art. 6, *done* Jan. 18, 1973, 26 U.S.T. 493, 499, T.I.A.S. No. 8052.[4] It is thus far from clear that the Second Circuit would bar extradition based on a treaty worded like the one at issue in this case.

Second, the Second Circuit has not revisited this issue since *Sindona* was decided in 1980. Contrary to petitioner's assertion (Pet. 19), it is not obvious that the Second Circuit would adhere to the same-conduct rule if it confronted the same issue today. As noted above, see p. 11, *supra*, this Court's intervening decision in *Dixon* made clear that the interpretation of the Double Jeopardy Clause that formed part of the rationale in *Sindona*, see 619 F.2d at 178, was mistaken. In addition, technical analyses since *Sindona* confirm that the State Department has developed a consistent interpretation of *non bis in idem* clauses like the one at issue here.[5] That interpretation "is entitled to great weight."

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[4] Since the decision in *Sindona*, the U.S.-Italy Extradition Treaty has been amended and its *non bis in idem* provision now uses the word "acts." See Instrument Amending the Treaty of October 13, 1983 Between the United States of America and Italy, *done* May 3, 2006, S. Treaty Doc. No. 14, 109th Cong., 2d Sess. (2006), T.I.A.S. No. 10-201.13; see also Extradition Treaty Between the Government of the United States of America and the Government of the Republic of Italy, *done* Oct. 13, 1983, 35 U.S.T. 3023, T.I.A.S. No. 10,837.

[5] See, *e.g.*, Extradition Treaty with the Philippines, S. Exec. Rep. No. 29, 104th Cong., 2d Sess. 11 (1996) (explaining that the treaty's offense-based *non bis in idem* clause applied only where the crimes in the two countries are "exactly the same" and that "[i]t is not enough that the same facts were involved"); Extradition Treaty with Thailand, S. Exec. Rep. No. 29, 98th Cong., 2d Sess. 4 (1984) (explaining that the treaty's offense-based *non bis in idem* clause "was drafted narrowly to ensure that extradition is barred by this

Abbott, 560 U.S. at 15 (citation omitted); see p. 10, *supra*. *Sindona* did not consider that "well-established canon of deference," *Abbott*, 560 U.S. at 15, but the Second Circuit would be required to do so if the issue arose again.

Third, this Court's intervention is unnecessary because the issue arises only infrequently. Notwithstanding petitioner's assertions (Pet. 19), in the nearly 45 years since *Sindona* was decided, it appears that—including the decision below—this issue has been considered by a court of appeals on fewer than five occasions, each with respect to a different treaty. See Pet. App. 23a; *Ye Gon* v. *Holt*, 774 F.3d 207, 215 (4th Cir. 2014), cert. denied, 576 U.S. 1035 (2015); *Sindona*, 619 F.2d at 179; see also *United States* v. *Duarte-Acero*, 208 F.3d 1282, 1286 (11th Cir. 2000) (interpreting *non bis in idem* provision to determine whether a treaty barred the defendant's federal prosecution). That reflects the fact that extradition is not routinely requested in cases involving prosecutions in both the requesting and requested countries, as it is rare to be prosecuted for committing crimes involving overlapping conduct in two different nations. For similar reasons, the issue is unlikely to recur with greater frequency in the future.

Moreover, although the issue has arisen infrequently, the courts of appeals to have opined on this issue have properly viewed *Sindona* as an outlier with limited persuasive force in light of subsequent legal developments. See Pet. App. 19a; *Ye Gon*, 774 F.3d at 216-

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provision only in cases where the offense charged in each country is the same"); Extradition Treaty with Costa Rica, S. Exec. Rep. No. 30, 98th Cong., 2d Sess. 5 (1984) (noting that prosecution would be permissible for "different offenses * * * arising out of the same basic transaction").

217. No other court of appeals has adopted the same-conduct test described in *Sindona*, and at least one district court in the Second Circuit declined to follow *Sindona* and instead applied *Blockburger*'s same-elements test in part because of the "deference [due] to executive branch interpretations" of treaty provisions. *Elcock* v. *United States*, 80 F. Supp. 2d 70, 83 (E.D.N.Y. 2000).

4. Even if the question presented otherwise warranted this Court's review, this case would be a poor vehicle in which to consider it, because it is not clear that petitioner would be entitled to relief from extradition even if this Court resolved that question in his favor. See *Supervisors* v. *Stanley*, 105 U.S. 305, 311 (1882) (explaining that this Court does not grant a writ of certiorari to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties). The government does not concede that all of the conduct on which India seeks extradition was covered by the government's prosecution in this case. See Gov't C.A. Br. 58 n.5. For example, India's forgery charges are based in part on conduct that was not charged in the United States: petitioner's use of false information in an application to formally open a branch office of the Immigration Law Center submitted to the Reserve Bank of India. See C.A. E.R. 276. And it is not clear that the jury's verdict in this case—which involves conspiracy charges and was somewhat difficult to parse—means that he has been "convicted or acquitted" on all of the specific conduct that India has charged. Treaty art. 6(1). Rather than decide a question of law that may not affect the outcome of this case, the Court should deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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