No. 18-1443

In the Supreme Court of the United States

NICHOLAS YOUNG, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the district court abused its discretion in determining that certain evidence of petitioner's "interest in radical, anti-Semitic, terrorist causes," offered by the government to rebut an affirmative defense of entrapment by showing predisposition to materially support terrorist causes, was admissible under Federal Rules of Evidence 401 and 403.

2. Whether the evidence was sufficient to support the jury's finding that petitioner was not entrapped.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Va.):

United States v. *Young*, No. 16-cr-265 (Feb. 23, 2018; June 21, 2019)

United States Court of Appeals (4th Cir.):

United States v. *Young*, No. 18-4138 (Feb. 21, 2019)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-38a) is reported at 916 F.3d 368. The orders of the district court are unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 21, 2019. The petition for a writ of certiorari was filed on May 16, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Virginia, petitioner was convicted on one count of attempting to provide material support to the Islamic State of Iraq and the Levant (ISIL), a designated foreign terrorist organization, in violation of 18 U.S.C. 2339B (2012 & Supp. V 2017), as well as two counts of attempting to obstruct justice,

in violation of 18 U.S.C. 1512(c)(2). Judgment 1. The district court sentenced petitioner to 180 months of imprisonment, to be followed by 15 years of supervised release. Judgment 2-3. The court of appeals affirmed the material-support conviction, vacated the obstruction convictions, and remanded the case for resentencing. Pet. App. 2a.

1. In 2010, the Federal Bureau of Investigation (FBI) opened a counterterrorism investigation into petitioner, a police officer with the Washington Metropolitan Area Transit Authority, after someone with connections to petitioner had been arrested for attempting to provide material support to a foreign terrorist organization. Pet. App. 3a. During that investigation, petitioner told an undercover agent that he was wary of FBI surveillance, that he had taken steps to thwart that surveillance, and that he had "the skills needed * * * to attack an FBI or a federal office." *Ibid.* Investigators also observed petitioner travel to and from Libya. *Ibid.* The investigators could not determine the purpose of petitioner's trips, and the undercover agent's contact with petitioner ceased in April 2012. *Ibid.*

In 2014, the FBI again began observing petitioner after petitioner met an FBI informant. Pet. App. 3a. The informant expressed interest in traveling to Syria to join ISIL, and petitioner in turn offered advice about how to evade government authorities while doing so. *Ibid.* For example, petitioner volunteered to send the informant a text message that would falsely suggest that the purpose of the informant's trip was vacation rather than joining ISIL. *Id.* at 3a-4a. Later that year, after the trip, petitioner sent the prearranged text message: "Hope you had a good vacation. If you want to grab lunch . . . hit me up." *Id.* at 4a (citation omitted).

At that point, the informant's participation in the investigation ended, and two FBI agents began impersonating the informant through his email account. Pet. App. 4a. In emails to that account, petitioner made it clear that he believed that the informant had joined ISIL. *Ibid.* Petitioner asked the informant to mention petitioner to Libyan ISIL members, and petitioner said that he "had been in Libya with the Abu Salem Martyrs' Brigade, a militia group with connections to al Qaeda." *Ibid.* Petitioner also sent emails to his contacts in the Abu Salem Martyrs' Brigade. *Ibid.*

In December 2015, FBI agents interviewed petitioner. Pet. App. 4a-5a. During those interviews, petitioner falsely denied that he had the informant's contact information, that he had recently been in contact with the informant, and that he knew anyone who had given the informant travel advice. *Id.* at 5a. After the interview, petitioner emailed the informant to tell him about the FBI's questions. *Ibid.*

In 2016, petitioner began communicating with the informant through encrypted messages. Pet. App. 5a. In those encrypted messages, the informant explained that petitioner could help ISIL by sending "Google gift cards," so that the terrorist group could buy encrypted-messaging services through which they could communicate with recruits. *Ibid.* Petitioner accordingly sent $245 in Google gift cards to the informant. *Ibid.* When the informant confirmed that he had received the gift cards, petitioner stated that he was "glad" and that he would dispose of the device that he had been using to communicate with the informant. *Ibid.*

In August 2016, petitioner was arrested. Pet. App. 5a. Agents executing a search warrant found "militant

Islamist, Nazi, and white supremacist paraphernalia as well as weapons" in his home. *Ibid.*

2. A grand jury indicted petitioner on one count of attempting to provide material support to ISIL, in violation of 18 U.S.C. 2339B (2012 & Supp. V. 2017), on account of the gift cards, and two counts of obstruction of justice, in violation of 18 U.S.C. 1512(c)(2). Pet. App. 5a-6a.

In response to the material-support charge, petitioner asserted an affirmative defense of entrapment. Pet. App. 7a. That defense required him first to demonstrate that the government induced him to engage in the criminal activity, see *United States* v. *McLaurin*, 764 F.3d 372, 379-380 (4th Cir. 2014), cert. denied, 135 S. Ct. 1842, and 135 S. Ct. 1843 (2015), after which the burden would shift to the government to prove beyond a reasonable doubt that he was predisposed to engage in the criminal conduct, see *United States* v. *Jones*, 976 F.2d 176, 179 (4th Cir. 1992), cert. denied, 508 U.S. 914 (1993). To prove petitioner's predisposition to provide material support to a designated foreign terrorist organization, the government moved to admit evidence of petitioner's "interest in radical, anti-Semitic terrorist causes." Pet. App. 7a. That evidence included "Nazi and white supremacist paraphernalia seized from [petitioner's] home, expert testimony regarding the 'convergence' of Nazism and militant Islamism, and testimony about [petitioner's] prior support for such causes." *Id.* at 7a-8a.

Before trial, petitioner moved to exclude the Nazi and white supremacist paraphernalia, contending that the evidence was irrelevant (in violation of Federal Rule of Evidence 401) and unfairly prejudicial (in violation of Federal Rule of Evidence 403). D. Ct. Doc. 117 (Sept.

24, 2017). The district court denied the motion in relevant part. D. Ct. Doc. 131 (Oct. 27, 2017). The court found that the evidence was relevant to petitioner's predisposition to support ISIL because Nazism and militant Islamism share the common aim of anti-Semitism. C.A. App. 134-140. The court also found that the probative value of the evidence was not substantially outweighed by the prejudice to petitioner. To minimize the risk of prejudice, however, the court required the government "to appropriately reduce the amount of cumulative evidence." *Id.* at 139.

Before the submission of the case to the jury, petitioner moved for a judgment of acquittal. Pet. App. 41a-42a. The district court denied that motion, finding "more than enough evidence at th[at] point, drawing all inferences in favor of the government, * * * that the defendant attempted to provide material support to a designated foreign terrorist organization." *Ibid.*

The jury found petitioner guilty on all three counts. Pet. App. 6a. The district court sentenced petitioner to 180 months of imprisonment. *Ibid.*

3. The court of appeals affirmed the material-support convictions, reversed the obstruction convictions, and remanded for resentencing. Pet. App. 1a-38a.

As relevant here, the court of appeals determined that the district court did not abuse its discretion by admitting petitioner's Nazi and white supremacist paraphernalia. Pet. App. 12a. In rejecting petitioner's contention that the evidence was not relevant under Rule 401, the court of appeals explained that the assertion of an entrapment defense "increase[s] the scope of the relevant evidence," because "'a broad swath of evidence, including aspects of the defendant's character and criminal past, [is] relevant to proving predisposition." *Id.* at

12a-13a (citation omitted). The court found that petitioner's Nazi and white supremacist paraphernalia were probative of both his "predisposition to support" ISIL and "the length of such a predisposition," because "Nazism and militant Islamism share common ground—specifically, radical, anti-Semitic viewpoints." *Id.* at 13a. And in rejecting petitioner's contention that the evidence was unfairly prejudicial under Rule 403, the court found that the high probative value of the evidence "meant that any prejudicial effect was not unfair." *Id.* at 14a-15a. The court also determined that "any prejudicial effect was blunted by the district court's limiting instructions to the jury, which specifically cautioned" that the jury could not convict petitioner for his views or for possessing Nazi and anti-Semitic literature. *Id.* at 15a.

The court of appeals also rejected petitioner's remaining challenges to the material-support conviction. Pet. App. 12a-16a. But the court found the evidence insufficient to sustain the obstruction convictions. *Id.* at 26a-37a. The court accordingly remanded the case for resentencing. *Id.* at 37a-38a.

4. On remand, the district court resentenced petitioner to 180 months of imprisonment. Resentencing Judgment 2.

ARGUMENT

Petitioner contends (Pet. 11-20) that the district court abused its discretion by admitting evidence of his Nazi and white supremacist paraphernalia, arguing that the possession of such materials is lawful and constitutionally protected. Petitioner also contends (Pet. 20-29) that the government presented insufficient evidence to support the jury's finding of entrapment. The petition is interlocutory and should be denied on that basis. In

any event, petitioner did not present either of his contentions in the court of appeals, and the court did not address them. Nor does the decision below conflict with any decision of this Court or of any other court of appeals. Further review is unwarranted.

1. As a threshold matter, the decision below is interlocutory, a fact that by itself "furnishe[s] sufficient ground for the denial" of the petition, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); see *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostock R.R.*, 389 U.S. 327, 328 (1967) (per curiam). Although the court of appeals affirmed petitioner's conviction on the material-support count, it reversed his convictions on the obstruction counts, and remanded the case to the district court for resentencing. Pet. App. 26a-37a. The district court resentenced petitioner and issued a revised judgment, from which petitioner has appealed. See Resentencing Judgment; D. Ct. Doc. 257. After the court of appeals resolves petitioner's pending appeal from the district court's revised judgment, petitioner will have an opportunity to raise the claims pressed here, in addition to any claims arising from the disposition of his second appeal, in a single petition for a writ of certiorari. See *Major League Baseball Players Ass'n* v. *Garvey*, 532 U.S. 504, 508 n.1 (2001) (per curiam) (noting this Court's "authority to consider questions determined in earlier stages of the litigation where certiorari is sought from" the most recent judgment). No justification exists in this case to depart form this Court's usual practice of declining to review interlocutory petitions.

2. Even if this case were not interlocutory, a writ of certiorari would not be warranted to review petitioner's contention that the district court abused its discretion

by determining that petitioner's Nazi and white supremacist paraphernalia were admissible under Federal Rules of Evidence 401 and 403.

a. Petitioner's contention is not properly before this Court, because it was "not pressed or passed upon below." *United States* v. *Williams*, 504 U.S. 36, 41 (1992) (citation omitted). Petitioner contends in this Court that his Nazi and white supremacist paraphernalia were inadmissible because they were "lawful" and "protected by the First Amendment." Pet. 14, 16 (citation omitted) In the district court, however, petitioner argued only that the material was "irrelevant," asserting "differences between Nazism and radical Islamism," and "unfairly prejudicial," asserting that it was "likely to inflame and upset a jury." D. Ct. Doc. 117-1, at 10, 18 (Sept. 24, 2017). Petitioner repeated (Pet. C.A. Br. 38-43) those arguments in the court of appeals. In neither court did petitioner contend that the material was inadmissible under Rules 401 and 403 because it was lawful or protected by the First Amendment. Cf. *id.* at 38 (relying on the First Amendment only in the context of a different argument regarding the validity of the search and seizure). Neither court, therefore, addressed that contention. Petitioner identifies no sound reason for this Court—which is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)—to address that contention in the first instance.

b. In any event, as the court of appeals correctly recognized, petitioner's challenges to the district court's evidentiary rulings are without merit.

Relevant evidence is generally admissible in a federal case. Fed. R. Evid. 402. Evidence is relevant when "it has any tendency to make a fact [of consequence]

more or less probable than it would be without the evidence." Fed. R. Evid. 401. The relevance of physical evidence does not turn on whether the possession of that evidence was lawful. For example, a defendant's clothes would be relevant evidence—even though the possession of clothes is legal—if matching fibers were found at the crime scene.

The scope of relevant evidence depends on the charges and affirmative defenses at issue in the case. The affirmative defense of entrapment has two components: government inducement of the crime and a lack of predisposition on the part of the defendant. See *Mathews* v. *United States*, 485 U.S. 58, 62-63 (1988). Once a defendant shows that the government induced him to engage in criminal activity, the burden shifts to the government to prove beyond a reasonable doubt that the defendant was predisposed to commit the offense conduct. *Jacobson* v. *United States*, 503 U.S. 540, 549 (1992). Predisposition—which refers to the intent of the defendant to commit the crime, see *United States* v. *Russell*, 411 U.S. 423, 429 (1973)—"focuses upon whether the defendant was an 'unwary innocent' or, instead, an 'unwary criminal' who readily availed himself of the opportunity to perpetrate the crime." *Mathews*, 485 U.S. at 63 (quoting *Sherman* v. *United States*, 356 U.S. 369, 372 (1958)). Thus, as the court of appeals correctly recognized, "a broad swath of evidence, including aspects of the defendant's character and criminal past, [may be] relevant to proving predisposition." Pet. App. 13a (citation omitted). For that reason, "advancement of the entrapment defense increase[s] the scope of the relevant evidence." *Id.* at 12a.

On the facts of this case, both courts below correctly determined that petitioner's possession of Nazi and

white supremacist paraphernalia and his interest in radical, anti-Semitic causes were relevant to proving predisposition. See Pet. App. 13a-14a; C.A. App. 134-140. As the court of appeals explained, that evidence tends to make it more probable that petitioner was predisposed to support terrorist activity, because "Nazism and militant Islamism share common ground—specifically, radical, anti-Semitic viewpoints." Pet. App. 13a. That evidence was also "probative of * * * the length of such a predisposition." *Ibid.* That factbound determination does not warrant further review.

Both courts below also correctly determined that evidence of petitioner's interest in radical, anti-Semitic causes was admissible under Federal Rule of Evidence 403. That rule provides that a "court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. As the court of appeals explained, "the evidence was highly probative of [petitioner's] particular predisposition to support ISIL," and "[t]his highly probative value meant that any prejudicial effect was not unfair." Pet. App. 14a-15a. In addition, the court observed that "any prejudicial effect was blunted by the district court's limiting instructions to the jury," which cautioned the jury to consider the evidence for predisposition purposes only, and not to convict petitioner simply "'for possessing Nazi or anti-Semitic literature.'" *Id.* at 15a (citation omitted). At a minimum, it was not an abuse of discretion for the district court to determine that, in these circumstances, the probative value of the evidence was not "*substantially* outweighed" by the danger of unfair

prejudice. Fed. R. Evid. 403 (emphasis added); see, *e.g.*, *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 384 (2008) ("[C]ourts of appeals should uphold Rule 403 rulings unless the district court abused its discretion."). Again, the court of appeals' factbound determination does not warrant further review.

c. Petitioner errs in contending (Pet. 13-20) that the decision below conflicts with this Court's decision in *Jacobson*, *supra*. Petitioner suggests that, under *Jacobson*, evidence of lawful activity is inadmissible to prove predisposition to commit a crime. But *Jacobson* involved the *sufficiency* rather than the *admissibility* of evidence. In that case, a defendant raised an entrapment defense against a charge of knowingly receiving child pornography, and the government offered proof that the defendant had previously received pornography at a time when it was lawful to do so. *Jacobson*, 503 U.S. at 550-551. The Court concluded that the government had failed to satisfy its burden of proof, explaining that "[e]vidence of predisposition to do what once was lawful is not, by itself, sufficient to show predisposition to do what is now illegal." *Id.* at 551. The Court did not address the admissibility of such evidence at trial, only the sufficiency of such evidence to "prove [predisposition] beyond a reasonable doubt." *Id.* at 551 n.3. In this case, the government did not rely solely on evidence of petitioner's interest in anti-Semitic causes to establish predisposition. The government also relied on evidence that petitioner traveled to Libya where he fought with a militia group that had connections to al Qaeda and that had been fighting Muammar al Qaddafi's regime; that petitioner provided advice to an informant about joining ISIL; and that petitioner attempted to evade and then to mislead law-enforcement

officers about his contacts with the informant. See Pet. App. 3a-5a.

Petitioner also suggests (Pet. 15-20) that, under *Jacobson*, evidence offered for the purpose of showing a defendant's generally bad character is inadmissible. Even if that reading of *Jacobson* were correct, the decision below would not conflict with it. The government offered evidence of petitioner's interest in anti-Semitic causes to show that petitioner was predisposed to provide support to ISIL, not to show bad character. See Pet. App. 13a-14a. And, as the court of appeals determined, that evidence was "highly probative" of petitioner's predisposition to support ISIL because the terrorist group shares an anti-Semitic viewpoint. *Id.* at 13a-15a. In any event, petitioner's factbound claim that the court misapplied *Jacobson* would not warrant this Court's review. See Sup. Ct. R. 10.

d. Finally, petitioner also errs in contending (Pet. 14-15) that the decision below conflicts with the decisions of other courts of appeals. In none of the five cases that petitioner cites (*ibid.*) did the court determine that evidence of lawful activity is inadmissible to prove predisposition.

In *United States* v. *Harvey*, 991 F.2d 981 (1993), the Second Circuit reversed a conviction for the knowing receipt of child pornography, where the prosecutor had "gratuitously presented" X-rated videotapes that depicted "gross acts involving human waste, and people engaging in bestiality and sadomasochism." *Id.* at 996-997. That decision rested on the Second Circuit's conclusion that the videotapes "did not bear on the disputed trial issues" in that particular case; the decision did not rest on a categorical rule precluding admission of evidence of lawful activity in all circumstances. *Id.* at 996.

Indeed, the court of appeals recognized that the district court had properly admitted evidence of "simulated child pornography" that was relevant to issues at trial, even though possession of such materials was lawful. *Id.* at 995. And in the other Second Circuit case petitioner cites (Pet. 15), *United States* v. *Cromitie*, 727 F.3d 194 (2013), cert. denied, 135 S. Ct. 53, and 135 S. Ct. 54, and 135 S. Ct. 56 (2014), the court determined that the defendant's (lawful) statements—that he wanted to die like a martyr and "do something to America"—revealed a preexisting design to commit terrorist acts against U.S. interests and thus were relevant to establish predisposition. *Id.* at 212-215.

In *United States* v. *LaChapelle*, 969 F.2d 632 (1992), the Eighth Circuit concluded that evidence of a lawfully received videotape of a "sexually active" minor should have been excluded. *Id.* at 638. The court's decision rested on its conclusion that, in the "situation" at issue there, which was factually similar to *Jacobson*, the video's probative value was "greatly diminished" and "the video's prejudicial effects * * * outweigh[ed] its probative value." *Ibid.* In contrast, in this case, the court of appeals found that the probative value of the evidence was high, and that the district court had diminished the risk of undue prejudice by giving a limiting instruction. Pet. App. 14a-15a.

Finally, *United States* v. *Blankenship*, 775 F.2d 735 (6th Cir. 1985), and *United States* v. *Bramble*, 641 F.2d 681, 683 (9th Cir. 1981), reflect the principle that the government must show that the defendant was predisposed to commit the crime that was charged, not that he was predisposed to commit "criminal acts generally." *Blankenship*, 775 F.2d at 739. The Sixth and Ninth Circuits applied that principle to conclude that evidence of

a previous crime ordinarily shows a defendant's predisposition to commit the charged offense only if the crime and charged offense are "similar," *Bramble*, 641 F.2d at 682, or "substantially similar," *Blankenship*, 775 F.2d at 739. Neither *Blankenship* nor *Bramble* held that evidence of a similar previous crime is a prerequisite to finding criminal predisposition in the context of an entrapment defense. And in this case, the evidence *did* show that petitioner was predisposed to commit the specific crime that was charged, because, as the court of appeals explained, Nazism and militant Islamism share "radical, anti-Semitic viewpoints." Pet. App. 13a.

3. A writ of certiorari also is not warranted to review petitioner's contention (Pet. i) that the government presented insufficient evidence to convict him on the theory that a defendant can be considered predisposed to commit a crime only if, without the government's help, he would have had the resources or expertise necessary to carry out that crime.

a. As with his evidentiary contention, petitioner's sufficiency contention is not properly before this Court, because it was "not pressed or passed upon below." *Williams*, 504 U.S. at 41 (citation omitted). Petitioner did not argue in the court of appeals that the predisposition element of entrapment contains both an "objective" and a "subjective" component. See Pet. C.A. Br. 36-58. And the court did not address that issue. Petitioner identifies no sound reason for this Court to address that contention in the first instance.

b. Petitioner argues (Pet. 20-29) that the Court should grant a writ of certiorari to resolve a conflict among the courts of appeals about whether a defendant can be considered "predisposed" to commit a crime if, without the government's help, he would have lacked

the resources or expertise necessary to carry out his scheme. This case, however, does not implicate the conflict that petitioner asserts. For one thing, the court of appeals' opinion does not address the issue involved in that conflict; as just explained, petitioner did not raise the issue below. Indeed, petitioner himself describes the conflict as a disagreement between the "Seventh, First, and Fifth Circuits" on the one hand, Pet. 20 (emphasis omitted), and the "Second and Ninth Circuits" on the other, Pet. 23—omitting the Fourth Circuit, from which this case arises.

For another, petitioner would not be entitled to any relief even under the rule he proposes. Petitioner principally relies (Pet. 21-23) on *United States* v. *Hollingsworth*, 27 F.3d 1196 (1994) (en banc), in which the Seventh Circuit concluded that proving predisposition requires proving that the defendant was "'ready and willing'" to commit the crime, not only in the traditional sense of having been amenable to doing so, but also in the sense of having been "in a position without the government's help to become involved in illegal activity." *Id.* at 1200, 1206 (citation omitted). The prosecution here introduced sufficient evidence to satisfy even that requirement. Independent of any government inducement, and long before a government agent mentioned Google gift cards to petitioner, petitioner traveled to Libya where he fought with a militia group with connections to al Qaeda. Pet. App. 3a-4a. Petitioner maintained contact with members of the militia group. *Id.* at 4a. Petitioner also claimed to possess the skills needed "to attack an FBI or a federal office." *Id.* at 3a. Petitioner was thus "in a position without the government's

help to become involved in illegal activity," *Hollingsworth*, 27 F.3d at 1200, which means that his conviction should stand even under petitioner's own rule.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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