No. 11-784

In the Supreme Court of the United States

MONZER AL KASSAR, LUIS FELIPE MORENO GODOY, AND TAREQ MOUSA AL GHAZI, PETITIONERS

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the Due Process Clause of the Fifth Amendment requires a jurisdictional "nexus" between a criminal defendant's conduct and the United States to support extraterritorial jurisdiction over a prosecution against the defendant.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1A-63A) is reported at 660 F.3d 108. The judgment of the district court (Pet. App. 64A-95A) is reported at 582 F. Supp. 2d 488.

JURISDICTION

The judgment of the court of appeals was entered on September 21, 2011. The petition for a writ of certiorari was filed on December 19, 2011. 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 Southern District of New York, petitioners Al Kassar and Moreno Godoy were convicted of conspir-

acy to kill United States nationals, in violation of 18 U.S.C. 2332(b); conspiracy to kill officers and employees of the United States, in violation of 18 U.S.C. 1114 and 1117; conspiracy to acquire and export anti-aircraft missiles, in violation of 18 U.S.C. 2332g; conspiracy to provide material support to a foreign terrorist organization, in violation of 18 U.S.C. 2339B; and money laundering, in violation of 18 U.S.C. 1956. Following a separate jury trial in the same district, petitioner Al Ghazi was convicted of conspiring to kill U.S. officials, to acquire and export anti-aircraft missiles, and to provide material support to a foreign terrorist organization. The district court sentenced Al Kassar to 30 years of imprisonment, and Moreno Godoy and Al Ghazi to 25 years of imprisonment. The court of appeals affirmed. Pet. App. 64A-95A.

1. Since the 1970s, petitioner Al Kassar has been an international weapons trafficker who illegally provided weapons and military equipment to armed factions in violent conflicts in Nicaragua, Brazil, Cyprus, Bosnia, Croatia, Somalia, Iran, and Iraq. Some of those factions included known terrorist organizations, whose aims included attacking the interests and nationals of the United States. Al Kassar Presentence Investigation Report (PSR) ¶ 16. To carry out his trafficking, Al Kassar ran an international network of criminal associates, front companies, and bank accounts. PSR ¶ 17. His associates included petitioner Al Ghazi and petitioner Moreno Godoy. For 30 years, Al Ghazi brokered weapons transactions for Al Kassar and advised others on the logistics of purchasing weapons through Al Kassar. PSR ¶ 18. For ten years, Moreno Godoy managed Al Kassar's financial matters and arranged for var-

ious bank accounts to be used in his weapons transactions. PSR ¶ 19.

In May 2005, as part of its investigation into Al Kassar and his organization, the U.S. Drug Enforcement Administration (DEA) sent a confidential informant to Lebanon to meet with Al Ghazi in an effort to obtain weapons from Al Kassar. PSR ¶¶ 28-30. Al Ghazi agreed to introduce the informant to Al Kassar. PSR ¶ 31. In December 2006, Al Kassar expressed interest in dealing with two of the informant's associates. PSR ¶¶ 32-33.

In February 2007, Al Kassar, Al Ghazi, and Moreno Godoy met with the confidential informant and his two associates (who were in fact confidential sources working undercover for DEA). The two DEA confidential sources posed as members of the Fuerzas Armadas Revolucionarias de Colombia (FARC), an international terrorist group dedicated to the violent overthrow of the democratically elected government of Colombia, which has been designated by the Secretary of State as a foreign terrorist organization since 1997. PSR ¶¶ 20, 34. During the meeting, the confidential sources ordered 4350 AKM assault rifles, 3350 AKMS assault rifles, 200 RPK assault rifles, 50 Dragunov sniper rifles, 500 Makarov pistols, 2,000,000 rounds of ammunition, 120 RPG grenade launchers, 1650 grenade rounds, and 2400 hand grenades from Al Kassar and his associates. PSR ¶ 35. Al Kassar agreed to sell the weapons for €6 to 8 million and also offered to send 1000 of his own men, as well as C-4 explosives, to aid the FARC in its fight against the United States in Colombia. PSR ¶¶ 42-43.

In March 2007, petitioners had another series of meetings with the DEA confidential sources. PSR ¶ 48. During those meetings, the confidential sources paid Al

Ghazi for his assistance in arranging the weapons transaction, and they explained that the weapons would be used to attack U.S. interests in Colombia as a response to U.S. activities to extradite FARC leaders to the United States and to hinder the FARC's cocaine-trafficking activities. PSR ¶ 50. When asked about supplying the FARC with C-4, Al Kassar responded that if the explosives were intended to be used to cause damage to U.S. interests in Colombia, his trainers could train the FARC to make explosives with less expensive materials. PSR ¶ 53. Al Kassar and the confidential sources also began negotiations for an additional transaction involving surface-to-air missile systems. PSR ¶ 54. Moreno Godoy then drove the confidential sources to an Internet café so that they could transfer funds for a down payment to Al Kassar's bank account. PSR ¶¶ 55-56.

Over the next few months, Al Kassar and his co-conspirators worked to effect the weapons sale. Al Kassar provided the DEA confidential sources with additional bank accounts, and he and Moreno Godoy pressured the confidential sources to wire them further payment, which petitioners believed to be the FARC's drug-trafficking proceeds. PSR ¶¶ 57-59, 66, 72-75. Al Kassar and Moreno Godoy also arranged for a boat to transport the weapons from Romania and Bulgaria to Suriname, where petitioners believed the FARC would retrieve them. PSR ¶¶ 38, 62, 71, 76. Al Kassar and Moreno Godoy traveled to Romania to meet with weapons manufacturers about the sale. PSR ¶¶ 72-75.

2. In June 2007, petitioners were arrested by Spanish and Romanian law enforcement agents acting on provisional arrest requests from the United States. PSR ¶ 81. After being extradited to the United States, petitioners were indicted on charges of conspiracy to kill

U.S. nationals, in violation of 18 U.S.C. 2332(b); conspiracy to kill U.S. officers and/or employees, in violation of 18 U.S.C. 1114 and 1117; conspiracy to acquire and export surface-to-air missiles, in violation of 18 U.S.C. 2332g; and conspiracy to provide material support to a foreign terrorist organization, in violation of 18 U.S.C. 2339B. Pet. App. 8A-9A. Al Kassar and Moreno Godoy were also indicted on one count of money laundering, in violation of 18 U.S.C. 1956. Pet. App. 9A.

Petitioners moved to dismiss the indictment on the ground, *inter alia*, that "there was an insufficient nexus between defendants and the United States, such that prosecuting them here violates their Fifth Amendment due process rights." Pet. App. 77A. The district court denied the motion, finding in relevant part that there was a sufficient nexus with the United States. Because petitioners were "charged with conspiring to sell weapons to the FARC in an effort to inflict injury on the United States and its people," the court concluded, it could not "'be argued seriously that [their] conduct was so unrelated to American interests as to render their prosecution in the United States arbitrary or fundamentally unfair.'" *Id.* at 78A (quoting *United States* v. *Yousef*, 327 F.3d 56, 112 (2d Cir.), cert. denied, 540 U.S. 933, and 540 U.S. 993 (2003)).

Following a jury trial, Al Kassar and Moreno Godoy were convicted on all counts. Following a separate jury trial, Al Ghazi was convicted of conspiring to kill U.S. officials, to acquire and export surface-to-air missiles, and to provide material support to a designated terrorist organization. He was acquitted of conspiring to kill U.S. citizens. Al Kassar was sentenced to 30 years of imprisonment, while Moreno Godoy and Al Ghazi were each sentenced to 25 years of imprisonment. Pet. App. 10A.

3. The court of appeals affirmed. Pet. App. 1A-63A. As relevant here, petitioners renewed their claim that the government lacked jurisdiction to prosecute them because the nexus between their actions and the United States was insufficient to satisfy due process. *Id.* at 11A. The court rejected that contention in light of the facts of the case. *Id.* at 12A-24A. It explained that petitioners' "conspiracy was to sell arms to [the] FARC with the understanding that they would be used to kill Americans and destroy U.S. property; the aim therefore was to harm U.S. citizens and interests and to threaten the security of the United States." *Id.* at 16A. Accordingly, the court found a sufficient nexus between petitioners' conspiracy and the United States to satisfy due process. *Id.* at 17A ("If an undercover operation exposes criminal activity that targets U.S. citizens or interests or threatens the security or government functions of the United States, a sufficient jurisdictional nexus exists notwithstanding that the investigation took place abroad and focused only on foreign persons.").[1]

ARGUMENT

In this Court, petitioners renew their contention (Pet. 11-26) that the Due Process Clause of the Fifth Amendment bars their prosecution because they say their conspiracy lacked a sufficient "nexus" to the United States. The courts below correctly rejected that

[1] The court of appeals also rejected petitioners' contention that they lacked "fair warning" that their acts could expose them to prosecution in the United States, Pet. App. 18A-19A; rejected their contentions that any jurisdictional nexus here was invalid because "manufactured" by the government, *id.* at 19A-24A (rejecting three distinct theories of manufactured jurisdiction: "outrageous government conduct," "entrapment," and failure to prove an element of the crime); and rejected several other unrelated claims, *id.* at 24A-63A.

claim. Because the aim of petitioners' conspiracy was to cause harm to U.S. nationals and interests, it easily satisfied any nexus requirement that the Due Process Clause may impose. To the extent that petitioners identify a conflict within the courts of appeals, that conflict involves a narrower question under the Maritime Drug Law Enforcement Act (MDLEA), 46 U.S.C. 70501 *et seq.*, which is not presented here. With respect to the broader question of whether due process requires a nexus between extraterritorial criminal conduct and the United States, petitioners could not expect to prevail in any circuit. Nor at this time is the issue of sufficient practical significance as to merit this Court's review. Accordingly, the petition should be denied.

1. Petitioners contend that the Due Process Clause of the Fifth Amendment imposes "an outer limit, or check, on Congress's power to impose extra-territorial jurisdiction." Pet. 16.[2] The court of appeals agreed with petitioners that, in a case involving extraterritorial application of a criminal statute, due process requires "a sufficient nexus between the defendant and the United

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[2] Petitioners acknowledge (Pet. 14-15) that—as long as a sufficient nexus exists between a defendant's conduct and the United States—Congress's "constitutional authority" to provide for extraterritorial application of its statutes is "well established." Petitioners do not contest that the statutes at issue here apply extraterritorially. Four of the five statutes contain express provisions to that effect. See 18 U.S.C. 2332(b) (conspiracy to kill U.S. nationals); 18 U.S.C. 2332g(b) (acquiring and exporting surface-to-air missiles); 18 U.S.C. 2339B (providing material support to a foreign terrorist organization); 18 U.S.C. 1956(b)(2) (money laundering). And, as the court of appeals explained, the very nature of the fifth offense (conspiracy to kill U.S. officers or employees under 18 U.S.C. 1114 and 1117) "implies an intent that it apply outside of the United States." Pet. App. 15A; accord *United States* v. *Benitez*, 741 F.2d 1312, 1317 (11th Cir. 1984), cert. denied, 471 U.S. 1137 (1985).

States, so that such application would not be arbitrary or fundamentally unfair." Pet. App. 15A-16A (quoting *United States* v. *Yousef*, 327 F.3d 56, 111 (2d Cir.), cert. denied, 540 U.S. 933, and 540 U.S. 993 (2003)). Further review is therefore not warranted to address petitioners' basic due process submission that a nexus is required.

Assuming that due process does require a jurisdictional nexus, the question is whether that nexus was established here. The court of appeals correctly concluded that any nexus requirement was satisfied because the aim of petitioners' conspiracy "was to harm U.S. citizens and interests and to threaten the security of the United States." Pet. App. 16A. As petitioners acknowledge (Pet. 21), the courts of appeals that have applied a "nexus" requirement to prosecutions for extraterritorial conduct have analogized that requirement to the "'minimum contacts' test in personal jurisdiction." *United States* v. *Klimavicius-Viloria*, 144 F.3d 1249, 1257 (9th Cir. 1998), cert. denied, 528 U.S. 842 (1999); see also *United States* v. *Mohammad-Omar*, 323 Fed. Appx. 259, 261 (4th Cir.), cert. denied, 130 S. Ct. 282 (2009). It is thus intended to ensure "that a United States court will assert jurisdiction only over a defendant who should reasonably anticipate being haled into court in this country." *Klimavicius-Viloria*, 144 F.3d at 1257 (citation and internal quotation marks omitted). Here, because petitioners' conspiracy was directed against U.S. citizens and interests in Colombia, such an expectation was reasonable.

Petitioners' criminal conduct is markedly similar to the crimes that courts of appeals have found sufficient to satisfy a due process nexus requirement. In *Yousef*, for example, the Second Circuit noted that the defendant and his co-conspirators had "conspired to attack a dozen

United States-flag aircraft in an effort to inflict injury on this country and its people and influence American foreign policy." 327 F.3d at 112. As a result, the court held that the requisite nexus was present: "Given the substantial intended effect of their attack on the United States and its citizens, it cannot be argued seriously that the defendants' conduct was so unrelated to American interests as to render their prosecution in the United States arbitrary or fundamentally unfair." *Ibid.* Similarly, other circuits have held that "a jurisdictional nexus exists when the aim of [a defendant's] activity is to cause harm inside the United States or to U.S. citizens or interests." Pet. App. 16A; see, *e.g.*, *United States* v. *Vilches-Navarrete*, 523 F.3d 1, 21-22 (1st Cir.), cert. denied, 555 U.S. 897 (2008); *United States* v. *Rendon*, 354 F.3d 1320, 1325 (11th Cir. 2003), cert. denied, 541 U.S. 1035 (2004); *United States* v. *Peterson*, 812 F.2d 486, 493-494 (9th Cir. 1987) (Kennedy, J.) (finding jurisdiction may be appropriate under the "protective principle" even "without any showing of an actual effect on the United States," so long as "the activity threatens the security or governmental functions of the United States"); see generally Restatement (Third) of the Foreign Relations Law of the United States § 402(3) (1987).

Petitioners incorrectly suggest (Pet. 23-24) that this approach is contrary to this Court's decisions. In *Ford* v. *United States*, 273 U.S. 593 (1927), the Court recognized that "[a]cts done outside a jurisdiction, but intended to produce and producing detrimental effects within it, justify a State in punishing the cause of the harm as if he had been present at the effect, if the State should succeed in getting him within its power." *Id.* at 620-621 (quoting *Strassheim* v. *Daily*, 221 U.S. 280, 285 (1911)). Here, although petitioners formed their con-

spiracy and took overt acts to advance it outside the United States, their aim was to harm U.S. interests and U.S. citizens and officers in Colombia, which necessarily would have produced detrimental effects within the United States. Accordingly, petitioners' conspiracy had sufficient connections with the United States to satisfy due process.[3]

2. Petitioners contend (Pet. 17-26) that the circuits disagree about whether "a jurisdictional nexus is required under the Due Process Clause of the Fifth Amendment, before foreign acts can be prosecuted in the United States." Pet. 16-17. But the vast majority of cases that petitioners cite (Pet. 18-20)—and all of the ones finding no case-specific nexus requirement (Pet. 19-20)—actually involve a much narrower question about offenses under the MDLEA committed on foreign-flagged vessels, where the flag nation has consented to

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[3] Petitioners also contend (Pet. 24) that "extra-territorial jurisdiction was premised solely on the words supplied by DEA handlers to their informants" in a "DEA 'cover story' " that was "a complete fiction." But the Constitution permits the government substantial leeway in setting "trap[s] for the unwary criminal." *United States* v. *Russell*, 411 U.S. 423, 428-430 (1973) (citation omitted); *United States* v. *Whoie*, 925 F.2d 1481, 1483 (D.C. Cir. 1991). Here, as the court of appeals found, petitioners' "knowledge of how to procure and smuggle arms suggests experience in the trade; and their positive reaction to the idea that the arms would be * * * used to kill Americans and harm U.S. interests suggests a predisposition to support and participate in that goal." Pet. App. 21A. As a result, petitioners were not entrapped. See *Jacobson* v. *United States*, 503 U.S. 540, 548-549 (1992). Moreover, the court of appeals correctly rejected the claim that DEA "manufactured" extra-territorial jurisdiction over petitioners, because petitioners "responded to [DEA's] request [for weapons to kill Americans] by conspiring among themselves to acquire and sell th[o]se weapons to what they believed was a terrorist organization with knowledge that the weapons would be used to kill Americans." Pet. App. 22A.

a U.S. prosecution. Petitioners are correct that a long-standing conflict exists about that narrow question between the Ninth Circuit and several other circuits. Compare *Klimavicius-Viloria*, 144 F.3d at 1257 (9th Cir.) (reading into the MDLEA a nexus requirement with respect to foreign-registered vessels, as a "judicial gloss" on MDLEA prosecutions, even when the flag government consents to the search, arrest, and prosecution of the crew), with *United States* v. *Cardales*, 168 F.3d 548, 553 (1st Cir.) (rejecting nexus requirement), cert. denied, 528 U.S. 838 (1999); *United States* v. *Martinez-Hidalgo*, 993 F.2d 1052, 1056 & n.6 (3d Cir. 1993) (same), cert. denied, 510 U.S. 1048 (1994); *United States* v. *Suerte*, 291 F.3d 366, 372 (5th Cir. 2002) (same); and *United States* v. *Estupinan*, 453 F.3d 1336, 1338-1339 & n.2 (11th Cir. 2006) (same), cert. denied, 549 U.S. 1267 (2007).[4]

This Court has repeatedly and recently denied review in cases presenting that narrow issue.[5] And even if that issue merited this Court's review, it is not presented by petitioners' case, which does not involve the

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[4] The courts of appeals agree that the United States may exercise jurisdiction "over drug offenders apprehended aboard stateless vessels on the high seas without demonstrating any nexus to the United States." *United States* v. *Caicedo*, 47 F.3d 370, 371-372 (9th Cir. 1995) (citing cases from five other circuits).

[5] See, *e.g.*, *Tam Fuk Yuk* v. *United States*, No. 11-6422 (Feb. 21, 2012); *Brant-Epigmelio* v. *United States*, No. 11-6306 (Feb. 21, 2012); *Sanchez-Salazar* v. *United States*, 129 S. Ct. 1986 (2009) (No. 08-8036); *Aguilar* v. *United States*, 129 S. Ct. 1983 (2009) (No. 08-7048); *Moreno* v. *United States*, 549 U.S. 1343 (2007) (No. 06-8332); *Estupinan* v. *United States*, 549 U.S. 1267 (2007) (No. 06-8104); *Kurdyukov* v. *United States*, 538 U.S. 909 (2003) (No. 02-7936); *Hernandez* v. *United States*, 538 U.S. 909 (2003) (No. 02-7868); *Cardales* v. *United States*, 528 U.S. 838 (1999) (No. 98-9526).

MDLEA—much less a foreign-flagged vessel seized with the consent of the flag nation.

As petitioners note, the Second, Fourth, and Ninth Circuits have addressed the more general question of whether due process requires a "nexus" between criminal conduct and the United States in order to support extraterritorial jurisdiction. But those circuits have uniformly agreed with petitioners that "[i]n order to apply extraterritorially a federal criminal statute to a defendant consistently with due process, there must be a sufficient nexus between the defendant and the United States, so that such application would not be arbitrary or fundamentally unfair." Pet. App. 15A-16A (quoting *Yousef*, 327 F.3d at 111); *United States* v. *Davis*, 905 F.2d 245, 248-249 (9th Cir. 1990), cert. denied, 498 U.S. 1047 (1991); *Mohammad-Omar*, 323 Fed. Appx. at 261 (4th Cir.).

In the absence of any conflict among the circuits on that legal question, petitioners essentially contend that the court below misapplied a legal principle with which they agree. That is not an appropriate basis for this Court's review. See Sup. Ct. R. 10.

3. In any event, further review is also unwarranted because neither the conflict between the circuits regarding the MDLEA nor the Second, Fourth, and Ninth Circuits' imposition of a more general nexus requirement has yet to be of serious practical significance. Petitioners cite—and the government is aware of—only one case in which an appellate court found a due process violation as a result of an insufficient nexus between a defendant's crime and the United States. See *United States* v. *Perlaza*, 439 F.3d 1149, 1168-1169 (9th Cir. 2006) (reversing conviction with respect to one vessel, but remanding with respect to another). But in that case,

which involved a foreign-flagged vessel whose crew was prosecuted under the MDLEA, the district court had concluded that the government was not required to prove any nexus between the defendants' drug-trafficking and the United States. *Id.* at 1168. Accordingly, the government conceded that "it did not present any evidence" demonstrating the facts necessary to establish the relevant nexus. *Id.* at 1169.

In most cases, however, the government will easily meet any burden to demonstrate a "nexus" between a defendant's conduct and the United States. In the MDLEA context, even the Ninth Circuit has found a sufficient "nexus" between defendants' smuggling and the United States where "the plan for shipping the drugs was likely to have effects in the United States," such as when "narcotics were destined for the United States." *Klimavicius-Viloria*, 144 F.3d at 1257 (citation omitted). Outside of the MDLEA context, courts have found that "a jurisdictional nexus exists when the aim of that activity is to cause harm inside the United States or to U.S. citizens or interests." Pet. App. 16A; see also pp. 8-10, *supra*. Thus, although practical considerations stemming from the "nexus" requirement could conceivably impede the enforcement of the MDLEA or other criminal statutes in the future, this Court's review is not warranted at this time, particularly in a case like this one, in which the government was able to demonstrate the existence of any required jurisdictional nexus.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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