No. 13-1125

In the Supreme Court of the United States

TAREK MEHANNA, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's conduct as a translator was sufficiently coordinated with a foreign terrorist organization to make his convictions for providing material support to a foreign terrorist organization, in violation of 18 U.S.C. 2339A and 2339B, consistent with the First Amendment.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 3a-69a) is reported at 735 F.3d 32.

JURISDICTION

The judgment of the court of appeals was entered on November 13, 2013. A petition for rehearing was denied on December 17, 2013 (Pet. App. 1a-2a). The petition for a writ of certiorari was filed on March 17, 2014. 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 District of Massachusetts, petitioner was convicted on one count of conspiring to provide material support to a designated foreign terrorist organization, in violation of 18 U.S.C. 2339B; one count of con-

spiring to provide material support for a conspiracy to kill persons in a foreign country, in violation of 18 U.S.C. 2339A; one count of providing (or attempting to provide) material support for a conspiracy to kill persons in a foreign country, in violation of 18 U.S.C. 2339A; one count of conspiring to kill persons in a foreign country, in violation of 18 U.S.C. 956; one count of conspiring to make material false statements, in violation of 18 U.S.C. 371; and two counts of making material false statements, in violation of 18 U.S.C. 1001(a)(2). Pet. App. 5a; Judgment 1-2. Petitioner was sentenced to 210 months of imprisonment on the Section 956 count, to concurrent terms of 180 months of imprisonment on the three material-support counts, and to concurrent terms of 60 months of imprisonment on the three false-statement counts, all to be followed by seven years of supervised release. Judgment 1-4. The court of appeals affirmed. Pet. App. 3a-69a.

1. Petitioner, a United States citizen who grew up in the suburbs of Boston, embraced radical Islam as a teenager and young adult. Gov't C.A. Br. 7. Petitioner was inspired by Osama bin Laden, the founder of the al-Qaeda terrorist organization, and petitioner rejoiced when al-Qaeda terrorists killed thousands of Americans on September 11, 2001. Pet. App. 17a; Gov't C.A. Br. 8-11.

Petitioner believed that it was his duty as a Muslim to participate in violent jihad. Pet. App. 6a n.3, 12a. After the United States went to war in Iraq, petitioner declared that "America was at war with Islam" and that American soldiers were "valid targets." *Id.* at 12a. Petitioner and a small group of like-minded associates enjoyed watching propaganda videos of United States citizens being killed in Iraq, and they frequent-

ly discussed how best to fulfill their religious obligation to engage in violent struggle against the United States. *Id.* at 17a; Gov't C.A. Br. 10. Petitioner told his friends that he wanted to go to Iraq and fight against United States military forces. Pet. App. 13a.

In 2003, petitioner and two friends, Ahmad Abousamra and Kareem Abuzahra, formed a plan to travel overseas, receive military training at a terrorist training camp in Yemen, join with al-Qaeda, and fight against Americans in Iraq. Pet. App. 12a-13a; Gov't C.A. Br. 12-14. Abousamra met with Jason Pippin, a former resident of Yemen and veteran of a Pakistan terrorist-training camp, who provided contact information for two men in Yemen with al-Qaeda connections. Pet. App. 14a; Gov't C.A. Br. 13-14. Pippin explained how best to enter Yemen and recommended that Abousamra conceal the actual purpose of his travel by saying he intended to visit a moderate Islamic school called Dar al-Mustafa. Gov't C.A. Br. 14-15.

Petitioner, Abousamra, and Abuzahra prepared to go to Yemen and Iraq. The three men obtained visas and airline tickets. Pet. App. 14a; Gov't C.A. Br. 14. They agreed on the moderate-school cover story Pippin recommended. Pet. App. 15a; Gov't C.A. Br. 15. Petitioner suspended his college studies in the middle of the academic year and kept his plans hidden from his parents. Pet. App. 13a; Gov't C.A. Br. 15, 17. Before leaving, petitioner gave his brother a bag of personal belongings, including bomb-making instructions, and asked his brother to dispose of them. Pet. App. 13a-14a.

In February 2004, petitioner, Abousamra, and Abuzahra flew to Abu Dhabi. Gov't C.A. Br. 15-16. Abuzahra received emails from his family that prompted

him to return home. *Id.* at 16. Petitioner and Abousamra continued on to Yemen, where they spent a week trying to find a terrorist training camp. *Id.* at 17. They found one of Pippin's contacts, but the man told them that the training camps in Yemen had closed after the September 11 attacks and it was nearly impossible to get training there. Pet. App. 14a-15a; Gov't C.A. Br. 17. Petitioner and Abousamra left Yemen together. Gov't C.A. Br. 17. Petitioner was disappointed that he was unable to obtain training in Yemen, and he returned home. *Ibid.*; Pet. App. 14a-15a.[1]

After returning from Yemen, petitioner and his associates tried to conceal the purpose of their trip. Pet. App. 15a. When questioned at the airport upon his arrival in the United States, petitioner falsely claimed that he had visited the Dar al-Mustafa school. Gov't C.A. Br. 17. Both before and after the trip, petitioner and his associates repeatedly discussed how to align their stories and mislead investigators, going so far as to use code words when discussing terrorist training and jihad. Pet. App. 15a.

For years after returning home, petitioner continued discussing with Abousamra and others how to train with al-Qaeda and fight against Americans. Pet. App. 16a; Gov't C.A. Br. 18-20. Petitioner's best friend, Daniel Maldonado, went to Somalia and trained in a terrorist training camp. Pet. App. 16a. In December 2006, Maldonado called petitioner from Somalia and, using code words, they discussed logistics for petitioner to join Maldonado in Somalia. *Ibid.* Four days later, when the FBI questioned petitioner, peti-

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[1] Abousamra eventually made his way to Fallujah, Iraq, though he did not manage to join in the heavy fighting there and later returned to the United States. Gov't C.A. Br. 17.

tioner stated falsely that he had last heard from Maldonado two weeks earlier and that Maldonado was in Egypt. *Id.* at 35a; Gov't C.A. Br. 28-29.

After returning from Yemen, petitioner began translating and producing English-language jihadist propaganda and publishing it on a password-protected jihadist website called At-Tibyan Publications. Pet. App. 6a; Gov't C.A. Br. 21-22. At-Tibyan was an important forum for al-Qaeda's media efforts, and al-Qaeda in Iraq asked At-Tibyan to translate its online magazine and other al-Qaeda material. Gov't C.A. Br. 22-23. Petitioner was a member of At-Tibyan's translation team and served as a moderator on the site. *Id.* at 23-24. Petitioner edited and translated a large volume of al-Qaeda books and videos that were published on At-Tibyan and styled as al-Qaeda productions, including videos urging viewers to join al-Qaeda and attack Americans in Iraq. Pet. App. 6a; Gov't C.A. Br. 23-27.

Petitioner knew that At-Tibyan translated material at al-Qaeda's request. Gov't C.A. Br. 25-26. In 2005, an At-Tibyan administrator sent petitioner a private message enclosing a video of al-Qaeda leader Ayman al-Zawahiri and explaining that al-Qaeda had asked At-Tibyan to translate al-Zawahiri's message. *Id.* at 25-26. Petitioner later suggested improvements to the al-Zawahiri video. *Id.* at 26, 71. On another occasion, the administrator sent petitioner an unreleased al-Qaeda video for translation and instructed him not to show it to anyone until it was officially released by At-Tibyan. *Id.* at 26-27. Petitioner translated the video, which exhorted the audience to "come join the Jihad in the land of Iraq" and was titled "At Tibyan Publications presents: The Expedition of Shaykh Umar

Hadid May Allah have Mercy on Him, Released by the Al Quaidah Network in [Iraq]." *Id.* at 25, 27.

Petitioner frequently expressed hope that his propaganda efforts would bring in recruits for al-Qaeda and inspire them to violent action. Gov't C.A. Br. 27. When an At-Tibyan colleague informed petitioner that their group had been described online as the "media wing" of al-Qaeda in Iraq, petitioner responded that he didn't think "we deserve that title," but "maybe if we are lucky we get to clean their toilets." *Id.* at 25, 26.

2. a. Based on the foregoing conduct, petitioner was charged with three counts involving material-support offenses: one count of conspiring to provide material support to a designated foreign terrorist organization, in violation of 18 U.S.C. 2339B; one count of conspiring to provide material support for a conspiracy to kill persons in a foreign country, in violation of 18 U.S.C. 2339A; and one count of providing or attempting to provide material support for a conspiracy to kill persons in a foreign country, in violation of 18 U.S.C. 2339A. Pet. App. 5a. Petitioner was also charged with one count of conspiring to kill persons in a foreign country, in violation of 18 U.S.C. 956; and three additional counts related to making false statements to the FBI about his Yemen trip and about Maldonado's activities. Pet. App. 5a, 7a.

The first four counts—the three material-support counts and the conspiracy-to-kill count—were based on conduct related to the plans of petitioner and his associates to travel overseas, receive terrorist training, and attack United States troops in Iraq. Pet. App. 5a-6a. As an alternative basis for conviction on the three material-support counts, the government also alleged that petitioner violated Sections 2339A and

2339B by conspiring and attempting to provide translation services to al-Qaeda. *Ibid.*

b. At trial, petitioner requested that the district court instruct the jury that in order to convict based on petitioner's translation services, it had to find, among other things, that petitioner had a "direct connection to the [terrorist] group" and that he was "working directly" with it. Pet. App. 26a.

The district court declined to give the requested instruction. Pet. App. 26a-27a. In its instructions to the jury, the court explained the meaning of "material support," in relevant part, as follows:

> Now, this is important. Persons who act independently of a foreign terrorist organization to advance its goals or objectives are not considered to be working under the organization's direction or control. A person cannot be convicted under this statute when he's acting entirely independently of a foreign terrorist organization. That is true even if the person is advancing the organization's goals or objectives. Rather, for a person to be guilty under this count, a person must be acting in coordination with or at the direction of a designated foreign terrorist organization, here as alleged in Count 1, al Qa'ida.
>
> You need not worry about the scope or effect of the guarantee of free speech contained in the First Amendment to our Constitution. According to the Supreme Court, this statute already accommodates that guarantee by punishing only conduct that is done in coordination with or at the direction of a foreign terrorist organization. Advocacy that is done independently of the terrorist organization and not at its direction or in coordination with it does not violate the statute.

> Put another way, activity that is proven to be the furnishing of material support or resources to a designated foreign terrorist organization under the statute is not activity that is protected by the First Amendment; on the other hand, as I've said, independent advocacy on behalf of the organization, not done at its direction or in coordination with it, is not a violation of the statute.

Id. at 21a-22a.

The jury found petitioner guilty on all counts. Pet. App. 7a. Petitioner was sentenced to 210 months of imprisonment on the conspiracy-to-kill-persons-in-a-foriegn-country count, to 180 months on the three material-support counts, and to 60 months on the false-statement counts, all to be served concurrently. Judgment 1-3.

3. The court of appeals affirmed. Pet. App. 3a-69a. As relevant here, the court rejected petitioner's contention that the evidence related to the trip to Yemen was insufficient to support his convictions on the three material-support counts and the conspiracy-to-kill-persons-in-a-foreign-country count. *Id.* at 11a-19a. The court found ample evidence that "[petitioner] and his associates went abroad to enlist in a terrorist training camp." *Id.* at 12a. The court noted that petitioner's own recorded statements, testimony by Abuzahra and other co-conspirators, and circumstantial evidence, including petitioner's subsequent concealment of the trip's purpose, all established that petitioner "traveled to Yemen with the specific intent of providing material support to al-Qa'ida" and that he "conspired with others in a plan to kill persons abroad." *Id.* at 12a-18a.

The court of appeals rejected petitioner's contention that the jury instructions had permitted convictions based on conduct protected by the First Amendment. Pet. App. 21a-27a. The court explained that the jury instructions had "captured the essence" of this Court's decision in *Holder* v. *Humanitarian Law Project*, 561 U.S. 1 (2010), which held that otherwise-protected speech is punishable as material support to a foreign terrorist organization only if it is done "in coordination with foreign groups that the speaker knows to be terrorist organizations." Pet. App. 24a (quoting *Humanitarian Law Project*, 561 U.S. at 26). The court of appeals recognized that "coordination can be a critical integer in the calculus of material support," and it found that the jury instructions adequately defined that term by "explain[ing] to the jury in no fewer than three different ways that independent advocacy for either [a terrorist organization] or [its] goals does not amount to coordination." *Id.* at 23a. The court also rejected petitioner's contention that the instruction should have required a "direct connection" between petitioner and the terrorist organization, because, the court concluded, "a direct link is neither required by statute nor mandated by [*Humanitarian Law Project*]." *Id.* at 26a.

The court of appeals next rejected petitioner's contention that the evidence was insufficient to show that his translation activities were conducted in "coordination" with al-Qaeda as required by the material-support statutes and the First Amendment. Pet. App. 27a-28a. The court noted that, when a defendant claims that one of two alternative grounds for a general verdict is invalid, this Court's decision in *Griffin* v. *United States*, 502 U.S. 46 (1991), requires that the

verdict "must be upheld as long as the evidence is adequate to support one of the government's alternative theories of guilt." Pet. App. 20a-21a. The court of appeals reasoned that the rule of *Griffin* applies even when conviction on the unsupported theory might have resulted in punishment of constitutionally protected conduct, because "*Griffin* was based on the distinct roles of judge and jury in our system of justice, not the presence vel non of constitutional issues." *Id.* at 27a. The court concluded that *Griffin* foreclosed petitioner's challenge to the sufficiency of the evidence that his translation activities had been adequately coordinated, because the "mass of evidence" regarding the "cluster of activities surrounding [petitioner's] Yemen trip supplied an independently sufficient evidentiary predicate for the convictions on the terrorism-related counts." *Id.* at 27a-28a.

The court of appeals also rejected petitioner's "cursory" vagueness challenge to the material-support statutes, noting that, "[t]o the extent that this argument is preserved, it is foreclosed by [*Humanitarian Law Project*]." Pet. App. 31a.[2]

ARGUMENT

Petitioner renews (Pet. 6-23) his contention that his translation and other propagandizing activities were protected by the First Amendment because they were not sufficiently coordinated with al-Qaeda and therefore could not serve as a basis for his convictions on three counts of providing material support in violation of 18 U.S.C. 2339A and 2339B. After finding the jury

[2] The court of appeals also rejected several other contentions that petitioner does not raise in this Court. See Pet. App. 29a-31a, 32a-69a.

instructions adequate on the coordination issue, the court of appeals found it unnecessary to address petitioner's First Amendment contention (that the evidence was inadequate to support the verdict based on petitioner's translation activities) because, it held, the evidence was adequate based on his traveling to seek terrorist training. Pet. App. 27a-28a. No warrant exists to review a constitutional issue not addressed below. Furthermore, petitioner acknowledges (Pet. 9) that no similar First Amendment question has been addressed by any other court. In any event, petitioner's underlying First Amendment claim lacks merit, as does his alternative Due Process vagueness claim. And any constitutional error on the translation theory would have been harmless beyond a reasonable doubt in light of the overwhelming evidence supporting his conviction based on unprotected travel activities in Yemen and the jury's verdicts on other counts relying on the travel theory. Further review is unwarranted.

1. Petitioner asks (Pet. 8) this Court to clarify "the reach and constitutionality of the material support statutes," 18 U.S.C. 2339A and 2339B, "in speech cases." Yet petitioner acknowledges (Pet. 18) that the court of appeals itself "sidestepp[ed] the issue" and "avoided the key legal issue of the case" by resting its decision on the evidence associated with petitioner's trip to Yemen rather than his translation-related activities.

As this Court often observes, it is "a court of final review and not first view," and it therefore does not ordinarily "decide in the first instance issues not decided below." *Zivotofsky* v. *Clinton*, 132 S. Ct. 1421, 1430 (2012) (citations omitted). That practice carries special force in the context of constitutional questions

that have not been addressed by the court of appeals. See, *e.g.*, *id.* at 1430-1431; *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009); *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005). The reasons for exercising restraint have all the more salience when, as petitioner acknowledges is true in this instance, no lower court has yet addressed "the application of the 'coordination' standard to the concrete facts of this or any other case." Pet. 9; see also *id.* at 20 ("The Court of Appeals failed to conduct any analysis at all of the facts surrounding the speech theory."). This Court should not resolve a fact-specific and first-impression constitutional issue that was not addressed below. For that reason alone, review of petitioner's claim that his translation activities were insufficient to support his conviction is not warranted.[3]

2. In any event, petitioner's First Amendment objections (Pet. 7-16) lack merit. He contends (Pet. 8, 15) that the district court permitted a material-support conviction to be based on mere "expressions of *moral* support for" a terrorist organization or on "mere association *with people who were not members of*" the organization. In petitioner's view (Pet. 10), the court erred in "submit[ing] to a jury the question whether [petitioner's] speech was 'coordinated[]' [with a terrorist organization,] without advising the jury that 'coordination' should be found only in the [organization's] logistical direction of, or close collaborative inter-

[3] As discussed below, the judgment in this case is supported by petitioner's separate activities associated with his trip to Yemen, which raise no First Amendment issue, making this case a particularly inapt vehicle for exploring any constitutional issues that may be raised by petitioner's translation-related activities. See pp. 16, 21-23, *infra*.

changes with, the speaker." The court of appeals correctly rejected petitioner's claim of instructional error.

a. As the court of appeals explained, the district court's instructions were entirely consistent with the "text of the material support statute," and they "captured the essence of the controlling decision" in *Holder* v. *Humanitarian Law Project*, 561 U.S. 1 (2010). Pet. App. 23a-24a. In that case, this Court held that the statutory prohibition in Section 2339B on providing material support to designated foreign terrorist organizations in the form of personnel or services did not extend to advocacy undertaken "entirely independently of the foreign terrorist organization." 561 U.S. at 23-24 (quoting 18 U.S.C. 2339B(h)); see also *ibid.* (noting that "service" "refers to concerted activity, not independent advocacy," because the statutory requirement that the service be rendered "to" a foreign terrorist organization "indicates a connection between the service and the foreign group"). The Court accordingly determined that Section 2339B covers "advocacy performed in coordination with, or at the direction of, a foreign terrorist organization," *id.* at 24, and that, because Congress "avoided any restriction on * * * activities not directed to, coordinated with, or controlled by foreign terrorist groups," *id.* at 36, the statute did not violate the First Amendment rights of plaintiffs who sought to engage in nonviolent, political advocacy on behalf of designated foreign terrorist organizations, *id.* at 36-39.

The jury instructions in this case correctly incorporated those principles. They made clear that the statute is violated only by conduct undertaken "in coordination with or at the direction of a foreign terrorist organization." Pet. App. 22a. They expressly stated

that the statute is not violated by "independent advocacy on behalf of the organization," even when "the person is advancing the organization's goals or objectives." *Id.* at 21a-22a. Those instructions ensured that petitioner was not convicted for activity protected by the First Amendment.[4]

b. Petitioner provides no basis for his suggestion (Pet. 16) that knowing "coordination" with a terrorist organization cannot occur in the absence of direct contact between the defendant and the organization's members. That suggestion conflicts with general principles of criminal law, which do not allow a defendant to escape liability by acting through an intermediary. See, *e.g.*, 18 U.S.C. 2(b) (imposing criminal liability for

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[4] Petitioner was convicted under two material-support statutes, 18 U.S.C. 2339A and 2339B. *Humanitarian Law Project* addressed Section 2339B, which prohibits the provision of material support to a designated foreign terrorist organization "even if the supporters meant to promote only the groups' nonviolent ends." 561 U.S. at 36. Section 2339A, by contrast, prohibits the provision of material support or resources "knowing or intending that they are to be used in preparation for, or in carrying out, a violation" of statutes prohibiting violent terrorist acts. 18 U.S.C. 2339A(a); see *Humanitarian Law Project*, 561 U.S. at 17-18 & n.3 (recognizing that the specific-intent requirement in Section 2339A is "markedly different" from the mental state required under Section 2339B). Petitioner does not explain why the statutes should be interpreted similarly despite their different terms. In any event, this case presents no occasion for deciding how the First Amendment may apply to Section 2339A because the district court used the same *Humanitarian-Law-Project*-endorsed definition of material support for the Section 2339A charges as it did for the Section 2339B charge (*i.e.*, requiring "coordination" with a foreign terrorist organization and specifying that independent advocacy that "advance[d] the organization's goals or objectives" would be insufficient). Pet. App. 21a-22a, 23a n.6.

"caus[ing] an act to be" performed which would be a crime "if directly performed"); *United States* v. *Nestor*, 574 F.3d 159, 161-162 (3d Cir. 2009) (holding that using an adult intermediary to attempt to persuade a child to have sex does not provide a defense), cert. denied, 559 U.S. 951 (2010); *United States* v. *Maloney*, 71 F.3d 645, 650 (7th Cir. 1995) (upholding conviction of judge who accepted bribes through "bagman"), cert. denied, 519 U.S. 927 (1996); cf. *Humanitarian Law Project*, 561 U.S. at 30 ("Investigators have revealed how terrorist groups systematically conceal their activities behind charitable, social, and political fronts.") (citation and brackets omitted).

c. Nor is petitioner correct in asserting (Pet. 14-16) that the instructions allowed his conviction to be based on "mere association" with non-al-Qaeda intermediaries. As *Humanitarian Law Project* recognized, in the context of a "service," the term "coordinated" describes "concerted" rather than "independent" activity, 561 U.S. at 23-24—a distinction that comports with the meaning of the verb "coordinate," which requires more than "mere association." See 3 *Oxford English Dictionary* 898 (2d ed. 1989) (defining "co-ordinate" as "[t]o place or arrange (things) in proper position relatively to each other and to the system of which they form parts; to bring into proper combined order as parts of a whole"); *Webster's Third New International Dictionary* 501 (2002) (defining "coordinate" as "to bring into a common action, movement, or condition" or to "regulate and combine in harmonious action"). Thus, the court of appeals correctly found that the jury instructions were "perfectly consistent" with the statement that "[m]ere association with terrorists or a terrorist organization is not sufficient." Pet. App. 26a.

d. The evidence in this case was more than sufficient to establish that petitioner conspired to provide material support to al-Qaeda that was "directed to, coordinated with, or controlled by foreign terrorist groups." *Humanitarian Law Project*, 561 U.S. at 36. The evidence showed that At-Tibyan translated propaganda in direct response to al-Qaeda requests. Gov't C.A. Br. 22-27. It further showed that petitioner knew that At-Tibyan coordinated with al-Qaeda and that, through his own translations, he intended to further At-Tibyan's goal of aiding al-Qaeda. *Id.* at 25-27. For instance, petitioner made suggestions for improving a video by al-Qaeda leader Ayman al-Zawahiri after he was informed that al-Qaeda had asked At-Tibyan to translate it. *Id.* at 25-26, 71. And he translated another video knowing that At-Tibyan had obtained it before its official release by al-Qaeda. *Id.* at 26-27. The evidence therefore permitted the jury to infer that petitioner provided those services knowing that al-Qaeda had requested them.

As in *Humanitarian Law Project* itself, this case presents no occasion to determine the outer limits of the meaning of "coordination," because the term easily extends to translation services rendered to a foreign terrorist organization at the organization's own behest. Regardless of whether translation might constitute political speech in the abstract, translation services performed at the request of a foreign terrorist organization in order to further its mission are not "independent advocacy" immunized from criminal prosecution by the First Amendment.

3. In the alternative, petitioner contends (Pet. 16-17) that his conviction violated the Fifth Amendment's Due Process Clause because a person of ordinary

intelligence would lack notice that communicating a message "linked in aspiration" to that of a terrorist organization constitutes material support for the organization. That contention is not within the scope of the question presented in this Court. See Pet. i; see also *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) ("[T]he fact that petitioner discussed this issue in the text of his petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the *question presented* for our review.") (brackets omitted) (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha* v. *U.S. Philips Corp.*, 510 U.S. 27, 31 n.5 (1993) (per curiam)).

Even if it were within the scope of the question presented, petitioner's vagueness argument would not warrant this Court's review. The court of appeals rejected it "out of hand," after suggesting that it had not been "preserved" by petitioner's "cursory argument" in that court. Pet. App. 31a. Petitioner's still-cursory argument (Pet. 16-17) does not suggest that this aspect of the decision below conflicts with any decision of this Court or another court of appeals.

Not only does petitioner identify no conflict, but his vagueness contention also lacks merit. As this Court has explained, "[a] conviction fails to comport with due process if the statute under which it is obtained fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Humanitarian Law Project*, 561 U.S. at 18 (quoting *United States* v. *Williams*, 553 U.S. 285, 304 (2008)). In *Humanitarian Law Project* itself, the Court held that "a person of ordinary intelligence would understand the term 'service' to cover advocacy

performed in coordination with, or at the direction of, a foreign terrorist organization." *Id.* at 24. The plaintiffs there complained that the Court did not resolve the purportedly "difficult questions" about "exactly how much direction or coordination is necessary," *ibid.*, but the Court gave no suggestion that it regarded its own explanation of what the statute means as unconstitutionally vague. And it buttressed its holding that the statute was sufficiently clear by observing that "the knowledge requirement of the statute further reduces any potential for vagueness," *id.* at 21—which makes it unlikely that a person could be convicted for coordinating with a foreign terrorist organization without realizing he was doing so. Finally, given the well-established principle that a person cannot escape criminal responsibility by acting through intermediaries (see pp. 14-15, *supra*), the statute gave petitioner adequate notice that providing requested translation services to al-Qaeda through At-Tibyan intermediaries was punishable.

4. Although recognizing that the court of appeals did not reach the merits of his translation-services claim, petitioner contends (Pet. 17-23) that this Court should nevertheless do so because, he claims, the court of appeals' decision erroneously applied "the usual sufficiency rule of *Griffin v. United States*, 502 U.S. 46 (1991)." Under *Griffin,* a jury's general verdict of guilt cannot be overturned on the basis of insufficient evidence to support one ground for the conviction if sufficient evidence supports another ground. *Id.* at 59-60.

a. Petitioner does not suggest that the threshold question about *Griffin*'s applicability is independently worthy of this Court's review. Instead, he simply contends (Pet. 19) that *Griffin* is inapplicable when

"the jury may have rested its verdict on a legally unsound theory," including one that infringes the First Amendment.

That contention rests (Pet. 19-20) on *Stromberg* v. *California*, 283 U.S. 359, 367-368 (1931), and subsequent cases vacating convictions that "may have rested on an unconstitutional ground," *Bachellar* v. *Maryland*, 397 U.S. 564, 570-571 (1970); see *Yates* v. *United States*, 354 U.S. 298, 312 (1957). But the court of appeals' analysis of the jury instructions concluded that they accurately captured the constitutional line between proscribable coordination with a foreign terrorist organization and protected independent activities. Pet. App. 24a. By repeatedly advising the jury that "independent" activity was protected and that only coordinated activity could be punished, the jury instructions tracked this Court's decision in *Humanitarian Law Project* and left to the jury the *factual* question of whether petitioner's activities satisfied the constitutional and statutory standard of coordination. If the evidence was insufficient to establish coordinated activity, the jury was fully competent to draw that conclusion and it must be assumed under *Griffin* that it did so. See *Griffin*, 502 U.S. at 59 ("when they have been left with the option of relying upon a factually inadequate theory, * * * jurors are well equipped to analyze the evidence" and to reject such a basis for conviction) (emphasis omitted); see also, *e.g.*, *United States* v. *White*, 670 F.3d 498, 512 (4th Cir. 2012) (when the jury was properly instructed to find a "true threat[]," the question whether the evidence established such a threat "is a jury question," subject to review to "determine whether, viewing the evidence in the light most favorable to the government, there was

sufficient evidence" to support a finding of a true threat); cf. *United States* v. *Turner*, 720 F.3d 411, 419-420 (2d Cir. 2013) (noting that some courts have reviewed sufficiency of the evidence in threats cases independently under the "constitutional facts" doctrine), petition for cert. pending, No. 13-1129 (filed Mar. 14, 2014).

In petitioner's view (Pet. 18-19, 21-22), a legal question remains about whether his particular activities constituted proscribable "coordination" and whether the jury instructions were inadequately tailored to address his particular circumstances. Thus, he contends, *Griffin* does not apply. He provides no sufficient reason, however, why the Court should grant certiorari to review that nuanced *Griffin* question in the absence of any disagreement in the lower courts.

b. Even assuming *Griffin* did not apply, based on petitioner's theory that the instructions should have been more precise in order to avoid penalizing protected independent translation conduct, this Court has made clear that erroneous jury instructions defining an alternative theory of guilt are, like most other constitutional errors, "subject to harmless-error analysis." *Skilling* v. *United States*, 561 U.S. 358, 414 (2010). As explained in *Hedgpeth* v. *Pulido*, 555 U.S. 57 (2008) (per curiam): "An instructional error arising in the context of multiple theories of guilt no more vitiates *all* the jury's findings than does omission or misstatement of an element of the offense when only one theory is submitted," *id.* at 61, such that ordinary harmless-error principles govern in the alternative-theory context.

As with a trial court's failure to instruct a jury on an element of the offense, an instructional error on an

alternative legal theory is harmless if it is "clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *Neder* v. *United States*, 527 U.S. 1, 18 (1999). That standard is satisfied when the evidence of guilt on a valid theory was "overwhelming," *id.* at 17, 19, or when the jury's verdicts on other counts demonstrate that it found facts establishing the defendant's guilt on a valid theory, see, *e.g.*, *United States* v. *Coppola*, 671 F.3d 220, 237-238 (2d Cir. 2012), cert. denied, 133 S. Ct. 843 (2013); *United States* v. *Skilling*, 638 F.3d 480, 482 (5th Cir. 2011), cert. denied, 132 S. Ct. 1905 (2012). Here, any alternative-theory error was harmless beyond a reasonable doubt on the basis of both overwhelming evidence and the jury's other verdicts.

Petitioner does not dispute that his material-support convictions are valid if the jury based them on the activities associated with his trip to Yemen. The evidence that petitioner traveled to Yemen for the purpose of obtaining training in a terrorist camp and fighting in Iraq was overwhelming. See Pet. App. 28a (noting that the "convictions on the [material-support] counts are independently supported by the mass of evidence surrounding the Yemen trip"); *id.* at 19a (noting the "plethora of proof" supporting the jury's rejection of petitioner's "innocent explanation" for his Yemen trip); *id.* at 11a-17a (summarizing evidence about the Yemen trip, including petitioner's own actions, his furtiveness about the trip, his discussions with others, his co-conspirators' statements, his participation in a cover-up, and additional evidence of his desire to engage in jihad). Any rational jury would have found those facts, rendering the asserted error on the alternative theory harmless.

The verdict also demonstrates that the jury did indeed find facts that established petitioner's guilt on the basis of his Yemen-associated conduct. As the court of appeals explained, petitioner did not dispute that he traveled to Yemen with Abousamra; his only defense was that he went to Yemen for the benign purpose of exploring opportunities to study Islam. Pet. App. 18a-19a. But the jury's verdict on two other counts depends upon a rejection of the factual predicate of that defense. First, the jury convicted petitioner of conspiracy to kill persons in a foreign country in violation of 18 U.S.C. 956—a count that was based only on the conduct associated with petitioner's Yemen trip. Pet. App. 5a-6a & n.1, 28a n.7.[5] Second, the jury convicted petitioner of making materially false statements to the FBI about the purpose and ultimate destination of his trip. *Id.* at 34a. A rational jury could not have credited petitioner's innocent account of the trip and simultaneously convicted him of conspiring to kill persons in a foreign country and of making false statements in connection with the trip. As a result, the jury's verdict necessarily indicates that it found beyond a reasonable doubt that petitioner went to Yemen for the purpose of receiving training at a terrorist training camp and fighting against the United States in Iraq—precisely the theory that the court of appeals found adequate to justify his material-support convictions. Indeed, even though the court did not conduct harmless-error review (because it found no constitutional or legal error in the alternative theory), the court recognized that "strong circumstantial evidence"

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[5] Section 956 was identified as one of the object offenses of the material-support counts brought under Section 2339A. See Second Superseding Indictment, D. Ct. Doc. 83, at 11, 19 (June 17, 2010).

made it "highly likely" that petitioner's material-support convictions rested on the Yemen conduct. Pet. App. 28a n.7.[6]

c. The validity of the judgment in this case without regard to the asserted translation-theory error—and the indications that the verdict actually rested on petitioner's Yemen conduct—make this case an exceptionally poor vehicle for addressing petitioner's constitutional objections based on the translation conduct, much less doing so as a matter of first impression. And even the practical effect of further review would be limited. Petitioner does not contest his Section 956 conviction, which resulted in the longest of the concurrent terms of imprisonment to which he was sentenced.[7] Thus, further review would not change peti-

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[6] Petitioner contends (Pet. 22) that submission of the translation-services theory to the jury impermissibly allowed the government "to introduce a massive amount of otherwise protected expression irrelevant to the Yemen questions (almost all of it from 2005-06, long after Petitioner's return from Yemen)." But such evidence was relevant to establishing petitioner's intent with respect to the Yemen trip and to his materially false statements about the trip—both of which involved conduct that continued through 2006. Pet. App. 59a ("For the most part, the evidence of which [petitioner] complains served to discredit his claim that his purpose in Yemen was innocuous."); *id.* at 17a (recognizing that evidence "bear[ing] no direct connection to his Yemen trip" is still "relevant to the issue of his intent"); *id.* at 43a (noting that petitioner "continued to seek opportunities to engage in jihad well after his return from Yemen" and the "conspiracy to provide false information to the government * * * continued long after the Yemen trip"); *id.* at 68a ("[T]he charged conspiracies continued well into 2006.").

[7] Petitioner was sentenced to 210 months of imprisonment on the Section 956 count (Count IV), and he received concurrent sentences of 180 months on the material-support counts he challenges in this Court. Judgment 1, 3; see Pet. 7, 11, 14, 16 (challenging

tioner's overall sentence. That is an additional reason to decline review of petitioner's fact-specific claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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"Counts I-III"). At the sentencing hearing, the district court explained that it had consulted the sentences imposed in other cases involving convictions under Section 956, 2339A, or 2339B. D. Ct. Doc. 439, at 72 (May 16, 2012). The court noted that the average and median sentences in cases involving "convictions under [Section] 956 alone" were longer than those in cases with convictions under both Section 956 and 2339A. *Ibid.*