No. 11-1198

IN THE

Supreme Court of the United States

ADHAM AMIN HASSOUN,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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As the Petition explains, Federal Rule of Evidence 701 narrowly permits lay opinion only where, based on the witness's "first-hand knowledge or observation," it would be "helpful" to the jury. Fed. R. Evid. 701, advisory committee's note (1972 proposed rule). In an alarming recent trend, the Government has convinced several circuits to deem a *post hoc* review of the *evidence* an adequate substitute for the first-hand perception of the *event* that Rule 701 requires. The Government extended that trend when it convinced the panel majority to uphold Agent John Kavanaugh's "opinion" as to the purported meaning of words used by Petitioners Adham Hassoun, Kifah Jayyousi, and Jose Padilla, even though Kavanaugh "did not personally observe or participate in [Petitioners'] conversations," did not understand the Arabic language in which most of those conversations were conducted, and based his non-expert testimony on what "he learned through his examination" of the Government's evidence and translations years after the fact. Pet. App. 30a-31a.

The implications of the Government's overreaching extend far beyond its improper devastation of Mr. Hassoun's defense. The Government's overreaching has allowed it to bolster its version of events through the imprimatur of law enforcement "opinion" and to secure convictions in several major prosecutions that could well have failed on the unembellished evidence. And it has opened a gaping detour around Rule 702's exacting requirements in both criminal and civil cases because it affords litigants the *benefit* of presenting opinions "not based on firsthand knowledge or observation" without satisfying the *burden* of grounding

those opinions in "reliable [expert] knowledge and experience." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993).

The Government's single brief in opposition—which collapses Petitioners' separate circumstances, arguments, and questions presented—does not address, much less deny, these far-reaching consequences. The Government instead seeks refuge in its preferred version of the facts, asserting that Mr. Hassoun "recruited mujahideen to fight overseas[,] represented six different mujahideen groups[,] belonged to a violent Lebanese affiliate of al-Qaeda[,] had ties to another al-Qaeda affiliate [and] spoke expressly about [his] desire to impose Sharia." Opp. at 3. The Government cites its brief below as support for those assertions (*see id.*), but fails to disclose that the evidence identified in its brief was predominantly Kavanaugh's opinion testimony (*see* Gov. C.A. Br. at 5-6). Thus, Kavanaugh's flawed opinion testimony occupies front-and-center position even in the Government's own statement of facts.

On the substance of the Rule 701 issue, the Government blithely admits that the majority held that Kavanaugh's "firsthand knowledge of the records and recordings he reviewed" provided him a sufficient foundation to opine regarding the underlying events. Opp. at 11. The Government thus would permit *any* agent—or by logical extension any other literate person—to offer lay "opinion" bolstering one side's version of events simply because he had read the record. This unbounded evisceration of Rule 701's percipience and helpfulness requirements is untenable and requires this Court's review.

Moreover, the Government's denial of a "square conflict" regarding Rule 701's application is irreconcilable with its recognition that other circuits exclude lay agent opinion interpreting conversations unless the agent "'participa[ted] in the conversation, has personal knowledge of the facts being related[,] or observed the conversations as they occurred.'" *Id.* at 15, 16 n.2 (quoting *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001)). And its newfound harmless-error argument has been waived, was not accepted below, and rests on revisionist history of the record.

Finally, the Government's defense of the imposition of the terrorism enhancement reflects a fundamental misunderstanding of this Court's jurisprudence and the record.

I. THE GOVERNMENT'S MISCONSTRUCTION OF RULE 701 MERITS REVIEW

This Court should grant certiorari because the panel majority misconstrued Rule 701 and ripened a deep circuit split on an important, recurring issue. *See* Pet. at 16-28.

A. The Government Fails To Salvage The Majority's Misapplication Of Rule 701

The Government's arguments regarding Rule 701's application fail at every turn, and underscore the need for this Court's review.

First, the Government's contention that Kavanaugh's testimony was "based on his own perception" because he "possessed firsthand knowledge of the records and recordings he reviewed" and testified "about th[ose] materials" (Opp. at 11) is disingenuous and wrong. Kavanaugh did *not* testify regarding the

records or recordings *themselves* (such as their accuracy or authenticity, *see id.* at 12), but instead gave his "*interpretation* and *opinion* about the meaning of the [] conversations" *captured in* them. Pet. App. 73a (emphases in original). The Government thus bootstrapped Kavanaugh's opinion regarding the underlying *events* upon his years-later review of the investigative *records*.

This bootstrapping confirms the central premise of Mr. Hassoun's petition. If Kavanaugh could create the foundation for his "opinions" through after-the-fact review of documents and recordings of conversations conducted mostly in a foreign language, then *any* agent or literate person can offer lay opinion on disputed issues simply by reading the (translated) record at any time. Pet. at 23-27.

This erosion of Rule 701 not only sanctions the Government's use of non-percipient agent testimony to bolster its version of events in criminal cases, but also usurps the jury's fact-finding role (*see* Pet. at 18-24), particularly where, as here, "the jury may well [be] inclined to give [a witness's] conclusions undue weight because of her status as a[] [federal] agent." *Peoples*, 250 F.3d at 642. And it creates a way around Rule 702's gatekeeping requirements in both criminal and civil cases. *See* Pet. at 24-27. The Government does not even *attempt* to contest these plain—and disconcerting—implications of its approach.

Second, the *only* caselaw supporting the Government's argument that requiring percipient knowledge of the event "would impose a limitation that is nowhere to be found in the text of Rule 701" (Opp. at 11) occupies the same flawed side of the circuit split

as the panel majority. *See, e.g.*, *United States v. Rollins*, 544 F.3d 820 (7th Cir. 2008) (cited at Pet. at 22 and Opp. at 11). The Government ignores the obvious indicators that Rule 701 codifies "the familiar requirement of first-hand knowledge or observation" and operates to put "the trier of fact in possession of an accurate reproduction of the *event*." Fed. R. Evid. 701 advisory committee's note (1972 Proposed Rules) (emphasis added). And the Government disregards the directive that "[a] witness may testify as to a *matter* only if" the witness "has personal knowledge of the *matter*." Fed. R. Evid. 602 (emphases added).

The Government's fall-back position that a personal observation requirement provides "no practical reason for distinguishing between, say, an agent in a surveillance van who listens to a wiretap in real time and an agent in that same van who listens on tape delay" (Opp. at 13) fares no better. Regardless of where the line between percipience and non-percipience might fall in a marginal case, this hypothetical has *nothing* to do with Kavanaugh. Unlike agents who have been permitted to offer lay opinions based on their own surveillance, Kavanaugh conducted no surveillance and had no prior experience with the surveilled individuals or criminal enterprise. *See, e.g.*, *United States v. Awan*, 966 F.2d 1415, 1417-22 (11th Cir. 1992). Kavanaugh also had *no* opportunity to observe the speakers' patterns, "body language," or "nuances" that someone "listening to the tape[] might miss." *United States v. Tom*, 330 F.3d 83, 94 (1st Cir. 2003). And Kavanaugh did not even understand the language being spoken. Thus, Kavanaugh did not "experience[] the conversations in materially the same way that he would have had he listened in real time" (Opp. at 13) because, in real

time, he would *not* have understood the Arabic conversations or known of the Government's later-acquired other evidence.

Third, the Government's contention that Kavanaugh's testimony was "helpful" rests only on the reality that Kavanaugh convinced the jury of its version of events. *Id.* But Rule 701 is meant to exclude such "closing argument in disguise" (Pet. App. 67a) and "meaningless assertions which amount to little more than choosing up sides," Fed. R. Evid. 701 advisory committee's note (1972 Proposed Rules). Indeed, because Kavanaugh was not a participant in Petitioners' conversations or an expert, he was "no better suited than the jury to make the judgment at issue"—and, in fact, his years-later, cold review of the record was *exactly* the task that the jury could—and should—have performed itself. *United States v. Meises*, 645 F.3d 5, 16 (1st Cir. 2011).

Finally, the Government's position that Kavanaugh's testimony was not based on "specialized knowledge within the scope of Rule 702" (Opp. at 14) only confirms the majority's error in upholding it. There are only two exceptions to the exclusion of opinion testimony: Rule 701 permits non-expert, percipient opinion; Rule 702 permits non-percipient, expert opinion. *See Daubert*, 509 U.S. at 592; Fed. R. Evid. 701 advisory committee note (2000 Amendments) (noting "the risk that the reliability requirements [of] Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing"). The Government, however, seeks to create a new breed of opinion testimony, neither fish nor fowl, that is non-percipient *and* non-expert. *See* Opp.

at 14-15. The panel majority's approval of this new construct was legal error.

B. The Government Fails To Undermine The Ripe Circuit Split

The Government's attempt to rewrite Rule 701 has created a 5-4 circuit split on the admissibility of non-percipient agent testimony interpreting conversations, and exacerbated a split as large as 7-5 regarding whether Rule 701 requires personal perception of the event. *See* Pet. at 16-23. The Government nonetheless contends that there is "no square conflict" and "[t]he cases cited by petitioners" do not "demonstrate that another court of appeals would necessarily have reached a different result [in] this case." Opp. at 15. This effort to cast doubt on the mature circuit split fails.

First, the Government recognizes that the Eighth Circuit excludes lay agent opinion interpreting conversations unless the agent "'participa[ted] in the conversation, has personal knowledge of the facts being related[,] or observed the conversations as they occurred.'" *Id.* at 16 n.2 (quoting *Peoples*, 250 F.3d at 641). It nonetheless attempts to distinguish *Peoples* because the agent there purportedly went further than Kavanaugh and opined "'about what the defendants were thinking.'" *Id.* (quoting *Peoples*, 250 F.3d at 640). Yet the testimony in *Peoples* was "materially indistinguishable" from Kavanaugh's testimony (Pet. App. 77a) because the agent, relying only on an "investigation after the fact, not on [any] perception of the facts," opined regarding the defendant's state of mind in the form of "a narrative gloss that consisted almost entirely of . . . personal opinions of what [defendants'] conversations meant" while recordings

were played to the jury, 250 F.3d at 640-41. Kavanaugh did precisely the same thing when he offered running interpretations of after-the-fact translations of Petitioners' conversations in order to "mak[e] inferences" about "what was going on in the mind of Adham Hassoun." Pet. App. 118a.

Second, the Government attempts to distinguish *United States v. Grinage*, 390 F.3d 746 (2d Cir. 2004), because the agent's testimony did not address purported code and rested "not only on his case-specific investigations, but also on his experience as a drug investigator." Opp. at 17. But the exclusion of opinion formed by "review . . . of the recorded telephone conversations," 390 F.3d at 750, even though the agent was more experienced than Kavanaugh, only accentuates the panel majority's error. And that the testimony was not helpful to the jury because it "not only [told] them what was in the evidence but [also] what inferences to draw" only demonstrates that the Second Circuit would have excluded Kavanaugh's testimony on multiple grounds. *Id.*[1]

Third, the Government tells only half of the story of *United States v. Johnson*, 617 F.3d 286 (4th Cir. 2010) (Opp. at 18)—and even that half confirms that the panel majority's holding conflicts with the Fourth Circuit's faithful application of the rules of evidence. The Government is correct that *Johnson* held that

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[1] The Government's attempt to distinguish *United States v. Garcia* (Opp. at 17 n.4) is similarly flawed because it never comes to terms with *Garcia*'s statement that "Rule 701 limits the admissibility of lay opinions at trial to those based only on personal perceptions" of the event, 413 F.3d 201, 213 (2d Cir. 2005).

opinion based on "credentials and training" was inadmissible where "the government never proffered [the agent] as an expert." 617 F.3d at 290, 293. But *Johnson also* held the testimony inadmissible as lay opinion because the agent did not participate in the calls or "in the surveillance during the investigation" and, thus, lacked "the personal knowledge and perception required under Rule 701." *Id.* at 293. The Government's suggestion that Kavanaugh's opinions satisfied *Johnson* because he purportedly could "offer testimony regarding what the surveillance [in the case had] uncovered" (Opp. at 18) is odd because Kavanaugh likewise conducted no surveillance.

Notwithstanding the Government's rhetoric, the plain reality is that Kavanaugh's testimony would have been excluded by the First, Second, Fourth, and Eighth Circuits.

Finally, the Government urges the Court to sidestep this circuit split because the "additional cases cited by petitioners" do not "directly present the question whether a law-enforcement officer may offer lay-opinion testimony about the meaning of code words." *Id.* at 18-19. The Government thus overlooks those cases' unanimous holdings that Rule 701 requires first-hand knowledge of the *event* and, thus, the irreconcilability with them of the panel majority's contrary holding. *See* Pet. at 16-23.

C. Kavanaugh's Testimony Dictated The Outcome Of This Case

This case provides an ideal vehicle to resolve the circuit split because Kavanaugh's testimony was the mechanism through which the Government transformed the record evidence of Mr. Hassoun's humanitarian aid to Muslims facing government-sponsored,

internationally recognized ethnic cleansing into purported proof of aggressive terrorist activities. *See* Pet. at 27-28. The Government's assertion that this case "is an unsuitable vehicle" because "[a]ny error in admitting Agent Kavanaugh's testimony" is "harmless in light of Dr. Gunaratna's overlapping . . . expert-code testimony" (Opp. at 19) is wrong.

First, the Government "made no substantial argument or showing" below that the erroneous admission of Kavanaugh's testimony was "harmless" (Pet. App. 67a n.1) and therefore waived this argument, *see Stolt-Nielsen SA v. AnimalFeeds Int'l Corp.*, 130 S. Ct. 1758, 1767 n.2 (2010).

The Government attempts to escape its waiver by pointing to a single page of its brief below. *See* Opp. at 20. Yet that page contains only three sentences arguing that any error in admitting Kavanaugh's testimony was harmless because he was prohibited from using the phrase "violent jihad." Gov't C.A. Br. at 40. It does not make, much less preserve, *any* argument regarding the purported effect of Gunaratna's testimony on the harmfulness of Kavanaugh's testimony. *See id.*

Second, *no* judge below concluded that admission of Kavanaugh's testimony was harmless. *See* Pet. App. 67a n.1. And with good reason: the Government's opposition grossly mischaracterizes Gunaratna's testimony. The district court accepted Gunaratna, who does not speak Arabic, as an expert "in the areas of al-Qaeda and its associated groups and international terrorism," and he devoted the lion's share of his testimony to discussion of international events. *See id.* at 38a-41a. Gunaratna reviewed only a small subset of the Government's intercepts and testified regard-

ing Petitioners' alleged use of "double talk" in only 6 calls—compared to the 120 calls Kavanaugh testified about over several days based on his review of thousands of intercepts and the Government's other evidence. Pet. App. 73a. Gunaratna's distinct testimony provides no basis to conclude that the erroneous admission of Kavanaugh's linchpin testimony was harmless.

Finally, even if the Government's harmless-error argument had any credibility, this Court routinely grants certiorari in criminal cases where the Government asserts harmless error. *See, e.g.*, *Neder v. United States*, 527 U.S. 1, 25 (1999) ("normal practice where the court below has not yet passed on the harmlessness of any error" is to decide the merits and "remand th[e] case" for the Court of Appeals "to consider [harmlessness] in the first instance").

II. THE APPLICATION OF THE TERRORISM ENHANCEMENT WAS ERRONEOUS

The Court also should grant review because the district court, relying on Kavanaugh's flawed testimony, imposed the terrorism enhancement on Mr. Hassoun's sentence without making the statutorily required motivational finding. Pet. at 28-32.

The Government rests its opposition to review on this question on three unpersuasive arguments. *First*, the Government contends that this issue is "factbound." Opp. at 21. But the Government ignores that it presents a straightforward question of statutory application for a large and growing number of cases. *See* Pet. at 28-32.

Second, the Government goes to great lengths in an attempt to show that the district court actually made the required finding. *See* Opp. at 21-23. Yet

although the panel and the district court paid lip service to the statutory requirement, the district court *never* made the finding. *See* Pet. at 29-30. Instead, the district court inferred from the jury's verdict that Mr. Hassoun "oppos[ed]" and "rail[ed] against" governments. Opp. at 22. Such speech, however, does not amount to the conduct "calculated to influence or affect[,] by intimidation or coercion, or to retaliate against government conduct" required to trigger the enhancement. 18 U.S.C. § 2332b(g)(5).

Finally, the Government argues that there is not really a circuit split and that, even if there were, this Court should leave the issue to "the Sentencing Commission." Opp. at 23. This overlooks both that other circuits require faithful adherence to the statutory requirement (*see* Pet. at 28-32), and that this Court routinely decides "Guidelines-application issues," particularly where, as here, the Sentencing Commission has not formally undertaken to address them. *See, e.g.*, *Nelson v. United States*, 555 U.S. 350 (2009); *Spears v. United States*, 555 U.S. 261 (2009); *Kimbrough v. United States*, 552 U.S. 85 (2007); *cf. Braxton v. United States*, 500 U.S. 344, 347-49 (1991) (declining to answer question because Sentencing Commission had "already undertaken a proceeding that will eliminate circuit conflict") (cited at Opp. at 23).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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