Nos. 11-1390 and 11-10437

In the Supreme Court of the United States

GHASSAN ELASHI, SHUKRI ABU BAKER, MUFID ABDULQADER, AND ABDULRAHMAN ODEH, PETITIONERS

v.

UNITED STATES OF AMERICA

MOHAMMAD EL-MEZAIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Confrontation Clause was violated when two government witnesses testified under pseudonyms, based on the district court's conclusion that safety and national-security concerns outweighed petitioners' asserted need to know the witnesses' identities.

2. Whether out-of-court statements by joint venturers that were made before the object of petitioners' conspiracy became illegal were properly admitted under the co-conspirator exception to the hearsay rule, Federal Rule of Evidence 801(d)(2)(E).

3. Whether petitioner El-Mezain's acquittal on certain charges at his first trial necessarily determined certain facts in his favor that would be necessary for the government to prove in order to establish certain counts on which the first jury hung, thus protecting El-Mezain from retrial under the collateral-estoppel component of the Double Jeopardy Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-233) is reported at 664 F.3d 467.[1] The orders of the district court (Pet. App. 234-246, 247-249, 250-260) are unreported.

[1] Unless otherwise indicated, citations to the petition or the petition appendix refer to the petition and appendix in No. 11-1390.

JURISDICTION

The judgment of the court of appeals was entered as revised on December 27, 2011. A petition for rehearing was denied on February 17, 2012 (Pet. App. 261). The petitions for writs of certiorari were filed on May 17, 2012. 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 Northern District of Texas, petitioners Elashi and Baker were convicted on one count of conspiring to provide material support to a designated foreign terrorist organization, in violation of 18 U.S.C. 2339B(a)(1); nine counts of providing material support to a foreign terrorist organization, in violation of 18 U.S.C. 2339B(a)(1); one count of conspiring to provide funds, goods, and services to a specially designated terrorist group, in violation of 50 U.S.C. 1701-1706; ten counts of providing funds, goods, and services to a specially designated terrorist group, in violation of 50 U.S.C. 1701-1706; one count of conspiring to launder money, in violation of 18 U.S.C. 1956(h); ten counts of money laundering, in violation of 18 U.S.C. 1956(a)(2)(A); one count of conspiring to file false tax returns, in violation of 18 U.S.C. 371; and three counts of filing false tax returns, in violation of 26 U.S.C. 7206(1). Pet. App. 7-8; Gov't C.A. Br. 5-6. Petitioners Abdulqader and Odeh were convicted on one count of conspiring to provide material support to a foreign terrorist organization, in violation of 18 U.S.C. 2339B(a)(1); one count of conspiring to provide funds, goods, and services to a specially designated terrorist, in violation of 50 U.S.C. 1701-1706; and one count of conspiring to launder money, in violation of 18 U.S.C. 1956(h). Gov't C.A. Br. 5-6. Petitioner El-Mezain

was convicted on one count of conspiring to provide material support to a foreign terrorist organization, in violation of 18 U.S.C. 2339B(a)(1). *Ibid.*

Petitioners Elashi and Baker were sentenced to 65 years of imprisonment, to be followed by three years of supervised release; petitioner Abdulqader was sentenced to 20 years of imprisonment, to be followed by three years of supervised release; and petitioners Odeh and El-Mezain were sentenced to 15 years of imprisonment, to be followed by three years of supervised release. Gov't C.A. Br. 6. The court of appeals affirmed. Pet. App. 1-233.

1. Petitioners were directors, officers, and affiliates of the Holy Land Foundation for Relief and Development (HLF), a pro-Palestinian charitable organization based in Texas. Pet. App. 8. Until 2001 (when the government shut it down), HLF raised money for and funneled money to Hamas, a terrorist group dedicated to the violent destruction of Israel. *Id.* at 4-5. HLF sent the money to "zakat" committees in the West Bank and Gaza that are part of the "social wing" of Hamas. *Id.* at 4, 9. That social wing of Hamas is "crucial to Hamas's success" because, among other things, it "helps win the 'hearts and minds' of Palestinians while promoting its anti-Israel agenda and indoctrinating the populace in [Hamas's] ideology"; "supports the families of Hamas prisoners and suicide bombers, thereby providing incentives for bombing"; and "launders money for all of Hamas's activities." *Id.* at 9-10. For these reasons, "aid to Hamas's social wing critically assists Hamas's goals while also freeing resources for Hamas to devote to its military and political activities." *Id.* at 10.

Although raising money for Hamas was not illegal when petitioners first commenced their operations in the

late 1980s, it became so in early 1995, when the President issued an Executive Order specially designating Hamas as a terrorist organization. Pet. App. 4, 14, 17; see Prohibiting Transactions With Terrorists Who Threaten To Disrupt the Middle East Peace Process, Exec. Order No. 12,947, 60 Fed. Reg. 5079 (Jan. 25, 1995) (Executive Order); see also 50 U.S.C. 1702(b)(3) and (4), 1705. The President determined that "grave acts of violence committed by foreign terrorists that disrupt the Middle East peace process constitute[d] an unusual and extraordinary threat to the national security, foreign policy, and economy of the United States," and he "declare[d] a national emergency to deal with that threat." 60 Fed. Reg. at 5079. The Executive Order prohibited financial transactions with or for the benefit of Hamas and prohibited United States persons from making donations to Hamas. Executive Order §§ 1(b) and 3, 60 Fed. Reg. 5079-5080. In 1997, the Department of State similarly designated Hamas as a foreign terrorist organization. Pet. App. 14.

Petitioners persisted in their fundraising operations notwithstanding the Executive Order and Hamas's multiple designations as a terrorist group. See, *e.g.*, Pet. App. 17-18, 113-118. Although petitioners became less outspoken in their support of Hamas, they carried on their "close association" with Hamas and "continued to support the same zakat committees that Hamas controlled." *Id.* at 11-12, 17-18, 113-118. All told, petitioners channeled millions of dollars through HLF to support Hamas's activities in the Middle East. *Id.* at 4.

2. In 2004, a federal grand jury in the Northern District of Texas indicted petitioners on over 30 counts, including conspiracy, material support of a terrorist organization, and money laundering. Pet. App. 7-8. Be-

fore trial, the district court granted the government's motion to permit certain security measures, including the use of pseudonyms, to protect the identities of two government witnesses. *Id.* at 247-260. The first witness, "Avi," was a legal advisor for the Israeli Security Agency (ISA) who would testify as an expert witness about Hamas financing and control of the zakat committees. *Id.* at 20. The second witness, "Major Lior," was an employee of the Israeli Defense Forces who would authenticate certain documents seized during Israeli military raids. *Ibid.* The names of these witnesses were classified under both Israeli and U.S. law. *Id.* at 248, 256. The court reasoned that the proposed security measures were justified by national-security and personal-safety concerns and were "narrowly tailored to intrude as little as possible on [petitioners'] rights to a public trial and to confront witnesses against them while protecting national security." *Id.* at 248; see *id.* at 257.

Following trial, a jury acquitted El-Mezain on all counts except the charge of conspiracy to provide material support to a foreign terrorist organization (18 U.S.C. 2339B(a)(1)), on which it hung. Gov't C.A. Br. 6. The jury hung on all counts against all the other petitioners. *Ibid.*

3. The government subsequently retried El-Mezain on the remaining conspiracy count; Abdulqader and Odeh on three conspiracy counts; and Elashi and Baker on all counts. Gov't C.A. Br. 6. Before the retrial, El-Mezain moved for dismissal of the remaining charge against him on the ground that retrial was barred by the collateral-estoppel doctrine embodied in the Fifth Amendment's Double Jeopardy Clause. 11-10437 Pet. App. A179. His primary argument was that one of the conspiracy counts on which he was acquitted—

conspiracy to provide funds, goods, and services to a specially designated terrorist (count 11)—was "functionally identical" to the remaining conspiracy count (count 1), such that the retrial would impermissibly put at issue one or more dispositive facts that had necessarily already been resolved in his favor. *Id.* at A183-A186. The district court denied the motion. *Id.* at A179. It reasoned (among other things) that the jury instructions at the first trial had required a finding of willfulness for count 11 but not count 1; that the jury's acquittal on count 11 could have been based on the absence of that heightened mental state; and that such a finding by the first jury would not preclude a retrial on count 1. *Id.* at A183-A186.

Petitioners also filed a pretrial motion for discovery of the names of the government witnesses testifying under pseudonyms. Pet. App. 234-244. The district court (a different district judge from the first trial) denied the motion. *Id.* at 244. After "careful[] review[]" of the government's sealed submissions and briefing, the district court concluded that the government had "established a reasonable danger that disclosure would jeopardize national security and pose a danger to the safety of the witnesses and their families." *Id.* at 240. The court observed that anyone disclosing the witnesses' identities would potentially be subject to prosecution in both the United States and Israel; that requiring their disclosure might "jeopardize the sharing of critical national security information between the two countries" in the future; and that the Israeli government had "expressed serious concerns about the personal safety of their personnel and the safety of their families in Israel" if the witnesses' identities were disclosed. *Id.* at 242-243. The court also observed that petitioners already "had access to

significant information regarding these witnesses to make them aware of the witnesses' employment, their nationalities, and their backgrounds" and that this information had enabled petitioners to conduct "thorough inquiries into the witnesses' credibilities" in cross-examination during the first trial. *Id.* at 243.

The jury convicted petitioners on all counts. Pet. App. 19. The district court imposed sentences of imprisonment ranging from 15 years to 65 years. *Ibid.*

4. The court of appeals affirmed. Pet. App. 1-233.

As relevant here, the court of appeals first rejected petitioners' Confrontation Clause challenge to the use of pseudonyms by the two Israeli government officials. Pet. App. 20-29. The court of appeals found "'no fixed rule with respect to disclosure'" and held that a court should balance "'the public interest in protecting the flow of information against the individual's right to prepare his defense,' which depends on 'the particular circumstances of each case.'" *Id.* at 23 (quoting *Roviaro* v. *United States*, 353 U.S. 53, 62 (1957)). The court observed that the one decision of this Court requiring disclosure of a witness's name, *Smith* v. *Illinois*, 390 U.S. 129 (1968), had involved the principal witness at trial and "did not involve classified information or issues of witness safety." Pet. App. 23. It determined that the different circumstances of this case warranted a different conclusion about disclosure. *Id.* at 23-29.

The court of appeals agreed with the district court that "there was a serious and clear need to protect the true identities of Avi and Major Lior because of concerns for their safety," noting that the classification of their names under both U.S. and Israeli law was necessary because "Hamas and other terrorist organizations seek out the true identities of [Israeli Security Agency]

agents and their families and publish descriptions of [such] officers on websites so that they can be targeted." Pet. App. 24. The court also agreed that petitioners already "had access to significant information regarding the witnesses' employment, nationalities and backgrounds," as well as "substantial material that formed the basis for Avi's expert opinion," that allowed petitioners "to conduct meaningful cross-examination." *Id.* at 27. The court additionally reasoned that "disclosure of the witnesses' true names to defense counsel for a limited investigation was unlikely to yield useful information," because the classified nature of the names made it "unlikely that anyone who knew the witnesses' true names could or would discuss them with defense counsel." *Id.* at 28.

The court of appeals next rejected petitioners' claim that certain documents seized from the homes of unindicted co-conspirators should have been excluded as hearsay. Pet. App. 45-61. The court of appeals agreed with the district court that the documents were admissible pursuant to Federal Rule of Evidence 801(d)(2)(E), which excludes from the definition of hearsay a statement that is "offered against an opposing party and[] * * * was made by the party's coconspirator during and in furtherance of the conspiracy." See Pet. App. 45-61. Although the documents were created before support for Hamas became illegal, the court of appeals observed that under its own precedents as well as those of its sister circuits, "admissibility under Rule 801(d)(2)(E) does not turn on the criminal nature of the endeavor." *Id.* at 48; see *id.* at 48-52 (citing, *inter alia*, 4 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 8:59 (3d ed. 2007)). "[C]onspiracy as an evidentiary rule," the court explained, "differs from conspiracy

as a crime." *Id.* at 51 (quoting *United States* v. *Coe*, 718 F.2d 830, 835 (7th Cir. 1983)).

Finally, the court of appeals rejected El-Mezain's claim that the collateral-estoppel doctrine barred his retrial. Pet. App. 166-180. The court determined that "the record and the jury charge demonstrate that a rational jury" at the first trial "could have based its verdict of acquittal on count 11 on a fact that was not an essential element of the count 1 conspiracy." *Id.* at 173 (citing *Yeager* v. *United States*, 129 S. Ct. 2360, 2367 (2009)). The court observed that the jury charge at the first trial had required willfulness as an element for a conviction on count 11 but not count 1 and that petitioners had presented specific evidence rebutting willfulness. Pet. App. 169-180. "[I]n light of El-Mezain's defense and how the jury was instructed," the court reasoned, "the jury could have rationally acquitted El-Mezain on count 11 because it thought he participated in an agreement to support Hamas but did not do so willfully because he was under the belief that donations to the zakat committees were not prohibited, and thus he did not act with the specific intent to willfully disregard the law." *Id.* at 174.

ARGUMENT

Petitioners collectively renew their arguments that the district court erred in permitting two government witnesses to testify under pseudonyms (Elashi Pet. 14-31; El-Mezain Pet. 18) and in admitting certain documents as non-hearsay statements of co-conspirators (Elashi Pet. 31-38; El-Mezain Pet. 18). El-Mezain additionally renews his argument (El-Mezain Pet. 10-18) that collateral-estoppel principles barred his retrial. Petitioners' arguments lack merit, and the decision below does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. a. The court of appeals correctly concluded that the pseudonymous testimony in this case did not violate petitioners' rights under the Sixth Amendment's Confrontation Clause. This Court has recognized that, while "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination," *Davis* v. *Alaska*, 415 U.S. 308, 316-317 (1974), "[i]t does not follow, of course, that the Confrontation Clause * * * prevents a trial judge from imposing any limits on defense counsel's inquiry into the potential bias of a prosecution witness." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 679 (1986). Rather, the Court has noted that "the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware* v. *Fensterer*, 474 U.S. 15, 20 (1985) (per curiam). A trial court is permitted to restrict the scope of a defendant's cross-examination of a witness, provided that the restrictions do not "effectively . . . emasculate the right of cross-examination itself." *Id.* at 19 (quoting *Smith* v. *Illinois*, 390 U.S. 129, 131 (1968)). In particular, trial judges "retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, * * * the witness' safety." *Van Arsdall*, 475 U.S. at 679.

The district court in this case reasonably determined that witness-safety and national-security concerns warranted preventing petitioners from learning the true names of Avi and Major Lior. Both the district court and the court of appeals recognized the "serious and clear need" to protect the witnesses' identities in order to safeguard not only the witnesses themselves, but also

their families. Pet. App. 24; see *id.* at 240. As the government submissions examined by the district court explained, "the identities and identifying characteristics and features of ISA personnel are sought out and publicized by their adversaries in an effort to personally compromise them, their families (by proximity) and their ability to effectively carry ou[t] their sensitive national security duties." *Id.* at 243; see *id.* at 24 (noting that Hamas and other terrorist organizations publish ISA agents' names on websites "so that they can be targeted"). The names of these Israeli government employees are accordingly classified under both Israeli and U.S. law. *Id.* at 24. The names of the witnesses in this case were provided to the United States government "with the expectation that they would be closely guarded and kept secret" (*ibid.*), and disclosure "would likely injure the national securities of Israel and the United States because such disclosure would jeopardize the sharing of critical national security information between the two countries" (*id.* at 243).

At the same time, petitioners "had a more than adequate 'opportunity to place the witness[es] in [their] proper setting and put the weight of [their] testimony and [their] credibility to a test.'" Pet. App. 28 (quoting *Smith*, 390 U.S. at 132). As the district court observed, petitioners "had access to significant information regarding these witnesses to make them aware of the witnesses' employment, their nationalities, and their backgrounds." *Id.* at 243; see *id.* at 27 (court of appeals' agreement with that assessment). In particular, the government "disclosed to the defense over twenty volumes of material that Avi used to formulate his expert opinion about Hamas financing," and the defense was "permitted to ask Avi about his background, his training

and experience with the ISA, his legal education, and his potential bias in favor of Israelis in the West Bank." *Id.* at 25; see also *id.* at 243 (noting that petitioners had cross-examined both witnesses during the first trial and Avi in a *Daubert* hearing). Petitioners were "therefore well-armed with information upon which to confront and cross-examine both Avi and Major Lior," and the court of appeals' review of the trial record showed that petitioners were, in fact, "able to conduct effective cross-examination." *Id.* at 25. They were able, among other things, to suggest Major Lior's "lack of knowledge and familiarity with the subject matter"; to suggest that "exculpatory evidence may have been overlooked"; to cast doubt on the basis for Avi's knowledge of zakat committees; and to challenge Avi's credibility (including by pointing out that he was using a pseudonym). *Id.* at 25-27; see *id.* at 29 (noting district court's instruction that jury could consider use of pseudonyms in evaluating weight and credibility of witnesses' testimony).

The court of appeals moreover found it "unlike[ly] that the jury would have assessed credibility any differently" had the government been required to disclose the witnesses' true names. Pet. App. 28. Petitioners were unable to demonstrate to the district court that the witnesses' real names would likely lead to any additional evidence helpful to their case (*id.* at 241), and as the court of appeals pointed out, the classified status of those names made it "unlikely that anyone who knew the witnesses' true names could or would discuss them with defense counsel." *Id.* at 28. Under the circumstances, therefore, the district court's rulings did not "effectively emasculate" petitioners' cross-examination

rights. *Fensterer*, 474 U.S. at 19 (internal quotation marks, alteration, and citation omitted).[2]

b. Petitioners err in contending (Pet. 27-31) that the court of appeals' decision conflicts with this Court's decision in *Smith* v. *Illinois*, *supra*. In that case, the Court reversed a state drug conviction in light of the trial court's refusal to allow the defendant "to ask the principal prosecution witness either his name or where he lived, although the witness admitted that the name he had first given was false." 390 U.S. at 129-133. The Court observed that the "only real question at the trial * * * was the relative credibility of the [defendant] and this prosecution witness," because only those two "testified to the crucial events inside the restaurant" where the drug sale allegedly occurred and their "version[s] of those events [were] entirely different." *Id.* at 130. The Court concluded that prohibiting even the "most rudimentary inquiry" into that critical witness's name and address, which would "open countless avenues of in-court examination and out-of-court investigation," was "effectively to emasculate the right of cross-examination itself." *Id.* at 131.

As the court of appeals correctly recognized (Pet. App. 23), the circumstances of this case differ materially from *Smith*. First, neither Avi (who testified about Ha-

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[2] Petitioners argue in particular (Pet. 30) that it was error to let Avi testify pseudonymously because the government gave notice of a possible alternative expert who might have testified about the same topics. As the government argued below (Gov't C.A. Br. 51), however, Avi's expertise was broader. Cf. Pet. App. 253-254 (denying pretrial motion from first trial to exclude Avi's testimony as cumulative). In any event, whether or not an alternative witness existed, petitioners' Confrontation Clause rights were not violated because they were able to meaningfully cross-examine Avi.

mas's relationship with the zakat committees) nor Major Lior (who authenticated documents) occupied the same sort of central position in this case that the "principal prosecution witness" (who was the sole eyewitness to the crime) occupied in *Smith*. The Court in *Smith* had no occasion to consider or address whether, or under what circumstances, it might be permissible to withhold the name of a less critical prosecution witness (or, for that matter, the name of an expert witness like Avi as opposed to a fact witness). Second, the State in *Smith* "gave no reasons justifying the refusal to answer a quite usual and proper question." 390 U.S. at 134 (White, J., concurring). The Court therefore did not confront the sort of national-security and witness-safety concerns that justified the district court's order in this case.

Indeed, this Court has expressly recognized since *Smith* that a "witness' safety" is among the factors a trial court may consider in "impos[ing] reasonable limits on * * * cross-examination." *Van Arsdall*, 475 U.S. at 679.[3] Whether the limits in a particular case are "reasonable" will depend on the circumstances, and the court of appeals' determination that the particular circumstances here supported a different answer from the one the Court reached in *Smith* does not warrant further review. See Sup. Ct. R. 10 ("A petition for a writ of cer-

[3] One of petitioners' amici contends that "the historical record from which [the Sixth Amendment] emerged" demonstrates that "the Sixth Amendment right to confront one's accusers includes the right to know their identities." NACDL Amicus Br. 2. Amicus, however, fails to identify any evidence that the Framers were specifically concerned (or even thought) about the possibility that a court might, for reasons of physical safety and national security, keep confidential the name of a witness who appears in person and is subject to live and otherwise materially unrestricted cross-examination.

tiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

c. Petitioners also err in contending (Pet. 14-22) that other courts of appeals or state courts of last resort would disagree with the court of appeals' conclusion in this case. Although the formulations of the test vary in some respects, each published decision that petitioners cite from such a court specifically rejects a bright-line rule about the disclosure of witness identities in favor of a case-by-case approach. *United States* v. *Ramos-Cruz*, 667 F.3d 487, 500 (4th Cir. 2012) (permitting a district court to withhold a witness's identity based on an "actual threat" after "review[ing] relevant information and determin[ing] whether disclosure of the witness's identifying information is necessary to allow effective cross-examination"); *United States* v. *Celis*, 608 F.3d 818, 830-831 (D.C. Cir.) ("The Supreme Court has addressed such disclosure issues on a case-by-case basis" and "cautioned * * * that no fixed rule with respect to disclosure is justifiable."), cert. denied, 131 S. Ct. 620 (2010) (internal quotation marks and citation omitted); *Siegfriedt* v. *Fair*, 982 F.2d 14, 19 (1st Cir. 1992) (applying "the totality-of-the-circumstances test that proper application of the *Smith* principle requires"); *Clark* v. *Ricketts*, 958 F.2d 851, 855 (9th Cir. 1991) ("*Smith v. Illinois* does not establish a rigid rule of disclosure, but rather discusses disclosure against a background of factors weighing conversely, such as personal safety of the witness."), cert. denied, 506 U.S. 838 (1992) (internal quotation marks and citation omitted); *Alvarado* v. *Superior Ct.*, 5 P.3d 203, 219 (Cal. 2000) ("[T]he confrontation clause does not establish an *absolute* rule that a witness's true identity always must be disclosed."), cert. denied, 532

U.S. 990 (2001); see also *United States* v. *Fuentes*, 988 F. Supp. 861, 864 (E.D. Pa. 1997) (applying "a case-specific analysis which takes into account the array of factual circumstances").

None of those decisions reached a result that suggests that the deciding court would have disagreed with the court of appeals in the particular circumstances of this case. None addressed a similar set of circumstances; in particular, none involved national-security concerns, let alone a witness whose name was classified under both domestic and foreign law and had been provided to the federal government pursuant to an understanding that it would not be disclosed. Moreover, only one of the cases actually found a Confrontation Clause violation, and it did so in circumstances far more similar to *Smith* than the circumstances here. See *Alvarado*, 5 P.3d at 220 (noting that pseudonymous witnesses "were in close proximity to the murder and witnessed events related to the charged offenses" and concluding that "should the witnesses provide such crucial testimony at trial, the confrontation clause would prohibit the prosecution from relying upon this testimony while refusing to disclose the identities of the witnesses under circumstances in which such nondisclosure would significantly impair the defense's ability to investigate or effectively cross-examine them").

d. Finally, this case would be a poor vehicle for reviewing the question of witness-name disclosure because any error here was harmless. See *Van Arsdall*, 475 U.S. at 684 ("[T]he constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis."). The government argued harmless error in the court of appeals (see Gov't

Br. 54-56), and although that court did not need to reach the question (because it found no error at all), it did note both "the unlikelihood that the jury would have assessed credibility any differently" had the witnesses' names been disclosed (Pet. App. 28) and the "plethora of evidence" (*id.* at 107) on issues to which Avi's and Major Lior's testimony was directed (namely, that "HLF financed Hamas and that Hamas controlled the West Bank zakat committees to which HLF provided funds," *ibid.*; see *id.* at 105-127).

Petitioners nevertheless assert (Pet. 25) that a determination of harmlessness would be "inconceivable," because the court of appeals (in a portion of its opinion not at issue here) found certain other trial errors to be harmless. But they provide no meaningful support for their assertion that a determination of Confrontation Clause error would necessarily have tipped the scales in favor of reversal, and no review is warranted in this Court of an issue that is unlikely to be outcome-determinative.

2. Review is likewise not warranted to address petitioners' contention (Pet. 31-38) that Federal Rule of Evidence 801(d)(2)(E) is categorically inapplicable to statements made in furtherance of a non-illegal joint venture. The court of appeals' decision on that issue was correct; petitioners do not dispute that the decision accords with the uniform view of the courts of appeals; and this case would in any event be an unsuitable vehicle for addressing the question petitioners present.

The admissibility of co-conspirator statements as the admissions of a party opponent is rooted in agency-law principles that do not depend upon the illegality of the scheme. This Court has explained that Rule 801(d)(2)(E)'s common-law precursor "depend[ed] upon

the principle that when any number of persons associate themselves together in the prosecution of a common plan or enterprise, *lawful or unlawful*, from the very act of association there arises a kind of partnership, each member being constituted as the agent of all, so that the act or declaration of one, in furtherance of the common object, is the act of all, and is admissible as primary and original evidence against them." *Hitchman Coal & Coke Co.* v. *Mitchell*, 245 U.S. 229, 249 (1917) (emphasis added) (*Hitchman Coal*);[4] see, *e.g.*, *Lutwak* v. *United States*, 344 U.S. 604, 617 (1953) ("Declarations of one conspirator may be used against the other conspirator not present on the theory that the declarant is the agent of the other, and the admissions of one are admissible against both under a standard exception to the hearsay rule applicable to the statements of a party."); *United States* v. *Olweiss*, 138 F.2d 798, 800 (2d Cir. 1943) (co-conspirator

[4] The Court in *Hitchman Coal* also explained that "[i]n order that the declarations and conduct of third parties may be admissible in such a case, it is necessary to show by independent evidence that there was a combination between them and defendants, but it is not necessary to show by independent evidence that the combination was criminal or otherwise unlawful. The element of illegality may be shown by the declarations themselves." 245 U.S. at 249 (emphasis added). Petitioners' amici would read this passage to require "that a proponent of conspirator hearsay must establish the 'element of illegality' to win admission of the evidence." Professors of Evidence Amicus Br. 14-15. But the "element of illegality" to which the Court referred was not a prerequisite to admissibility, but instead the substantive illegality necessary to prove liability for the conspiracy alleged in that case. The amicus brief's contrary reading cannot be squared with the Court's explicit acknowledgment, later in the same paragraph, that statements by one member of a "lawful or unlawful" enterprise "in furtherance of the common object" are "admissible as primary and original evidence" against other members. *Hitchman Coal*, 245 U.S. at 249.

rule "is merely an incident of the general principle of agency that the acts of any agent, within the scope of their authority, are competent against his principal.") (Hand, J.), cert. denied, 321 U.S. 744 (1944).[5]

The Senate Report accompanying the 1974 adoption of Rule 801(d)(2)(E) expressly set forth the Judiciary Committee's "understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator for the purposes of this rule even though no conspiracy has been charged." S. Rep. No. 1277, 93d Cong., 2d Sess. 26 (1974); see Rule 801 advisory committee's note (1974). Petitioners and their amici contend that Congress could not have had lawful conduct in mind when it made that statement, because the only two circuit decisions cited as examples of the "universally accepted doctrine" happened to involve illegal (although uncharged) conduct. Pet. 35; Professors of Evidence Amicus Br. 10-11. But it is unreasonable to think that Congress was unaware of other decisions, such as those cited above, or that it in-

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[5] Petitioners cite a statement by the original Advisory Committee in 1972 that "the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established." Pet. 34 (quoting Rule 801 advisory committee's note (1972)). But even assuming the Advisory Committee's statement accurately reflects the view of Congress when it enacted the Rules two years later, the statement does not support petitioners' interpretation of the co-conspirator rule. First, the statement comes in the context of a discussion about the Rule's limitation to statements "in furtherance of the conspiracy" and thus does not purport to address whether the rule encompasses lawful joint ventures. Second, the statement takes no issue with the "already established" contours of the co-conspirator rule, which, as discussed in the text, permitted the admission of statements made in support of a "lawful or unlawful" scheme. *Hitchman Coal*, 245 U.S. at 249 (1917).

tended the scope of the Rule to be limited to the precise fact patterns of the two circuit cases it happened to cite. Cf. *Cannon* v. *University of Chi.*, 441 U.S. 677, 696-697 (1979) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law.").

Accordingly, as petitioners and their amici acknowledge, multiple circuit decisions following the co-conspirator rule's enactment have stated that the Rule could apply even in circumstances where the object of a joint venture is lawful. See Pet. 32 & n.12; Professors of Evidence Amicus Br. 13-14; see also Pet. App. 50-51 (citing cases and a treatise). Neither the Advisory Committee nor Congress has expressed any disagreement with those circuit decisions on any of the occasions on which Rule 801 has been amended. See Fed. R. Evid. 801 advisory committee's note (1987, 1997, 2011) (amendments); cf., *e.g.*, *Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change."). And petitioners do not contend that the court of appeals' decision in this case conflicts with the decision of any other court of appeals. See Pet. 32 & n.12 (citing only a state-court decision interpreting a state-law analogue of Federal Rule of Evidence 801(d)(2)(E)).[6]

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[6] Contrary to the contention of petitioners and their amici (Pet. 34-35; Professors of Evidence Amicus Br. 20-25), the courts of appeals' interpretation of the co-conspirator rule does not threaten to supersede the rules on the admissibility of statements by an agent (Fed. R. Evid. 801(d)(2)(D)), statements contained in business records (Fed. R. Evid. 803(6)), or statements contained in public records (Fed. R. Evid. 803(8)). Although the co-conspirator rule will allow for the admission of some statements that those other rules will not, the re-

Petitioners' amici assert (Professors of Evidence Amicus Br. 16-18) that the court of appeals' decision in this case conflicts with the Seventh Circuit's decision in *Smith* v. *Bray*, 681 F.3d 888 (2012). That assertion is mistaken. The Seventh Circuit in that case expressly acknowledged that "Rule 801(d)(2)(E) encompasses a broad definition that goes well beyond the more confined concept of criminal conspiracy" and cited cases (including two that the court of appeals here also cited) recognizing that the Rule can apply in the context of joint ventures. *Id.* at 904 (citing, *inter alia*, *United States* v. *Coe*, 718 F.2d 830, 835 (7th Cir. 1983), and *United States* v. *Gewin*, 471 F.3d 197, 201 (D.C. Cir. 2006)); see Pet. App. 50-51 (citing *Coe* and *Gewin*). The "decisive question" in the Seventh Circuit case was simply whether the plaintiff had "identified any admissible evidence," outside of the statements themselves, substantiating the specific conspiracy he had alleged—namely, that people had "acted in concert toward the goal of getting him fired." *Bray*, 681 F.3d at 905; see Fed. R. Evid. 801(d)(2) (co-conspirator's statement "must be considered but does not by itself establish * * * the existence of the conspiracy or participation in it"). The Seventh Circuit's conclusion that the plaintiff in that case had not sufficiently proven that particular conspiracy in no way conflicts with the court of appeals' decision in this case.

In any event, this case does not squarely present the issue of statements made during wholly lawful joint ventures. Petitioners schemed to fund Hamas both before and after it was unlawful to do so. See pp. 3-4, *supra*. The evidentiary question in this case therefore raises a

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verse is also true. Statements by agents need not be "in furtherance of the conspiracy" to be admitted, and business and public records can be admitted against anyone, not just a party opponent.

narrower issue: do co-conspirator statements in support of petitioners' scheme fall outside Rule 801(d)(2)(E) when they pre-date the 1995 Executive Order designating Hamas as a terrorist organization? Even petitioners' own suggested rationale for admitting co-conspirator statements—that "conspiracies are difficult to prosecute because they operate in secret to conceal criminal conduct," Pet. 34—encompasses the circumstance where a continuous venture becomes unlawful, since the newly illegal nature of the operation may cause participants to guard both prospective and past communications more closely. The Rule should thus clearly apply to a scheme that became illegal midstream, without regard to the broader question petitioners purport to present. Given that the broader question appears not to have been outcome-determinative in more than a handful of lower-court cases, see Professors of Evidence Amicus Br. 18-19 (arguing that the issue has almost always been addressed only in dictum), the narrower basis on which this case could be resolved provides an additional reason why petitioner's claim does not warrant further review in this Court.

3. El-Mezain's fact-bound collateral-estoppel claim (El-Mezain Pet. 10-18) likewise warrants no further review. El-Mezain identifies no conflict in the circuits, and the legal test applied by the court of appeals is materially identical to the legal test he advocates. Compare Pet. App. 169 ("[C]ollateral estoppel would bar El-Mezain's conviction [on count 1] if, when the jury acquitted him in the first trial [of the other offenses], the jury *necessarily* decided a fact that was also a required element of [count 1]."), with El-Mezain Pet. 13 ("[T]he defendant must prove that the jury's previous verdict of acquittal necessarily determined a fact that is an essential ele-

ment of the estopped charge."). This Court "rarely" grants certiorari "when the asserted error consists of * * * the misapplication of a properly stated rule of law," Sup. Ct. R. 10, and it should not do so here.

In any event, the court of appeals' resolution of the collateral-estoppel issue was correct and contains none of the fact-bound errors asserted in El-Mezain's petition. El-Mezain first contends (El-Mezain Pet. 11, 13-16) that the court of appeals simply compared the legal elements of the acquitted and non-acquitted counts and failed to conduct a "case-specific factual analysis" of what the jury in the first trial necessarily decided. But the court of appeals looked not only at the elements of the offenses, but also at the specific jury instructions along with the evidence presented at trial, to conclude that the first jury did not necessarily make any factual findings that would bar a retrial. Pet. App. 170-180. As the court of appeals explained (*id.* at 176-177), an examination of the elements of different counts is a permissible (indeed, a necessary) part of the inquiry into whether an acquittal on one count necessarily decided a fact required for conviction under another.

El-Mezain next contends (El-Mezain Pet. 11, 16-17) that the court of appeals improperly required him "to establish that the acquitted counts and the remaining count be identical in *all* respects, rather than requiring that he establish simply that the acquittals necessarily decided *any* of the facts constituting an essential element of the remaining count." The court of appeals imposed no such heightened requirement. Rather, the court concluded that retrial was permissible in this case "because El-Mezain has not met his burden to show that the jury necessarily decided *any* of the issues related to the" remaining count. Pet. App. 177 (emphasis altered);

see, *e.g.*, *id.* at 169 ("[C]ollateral estoppel would bar El-Mezain's conviction [on count 1] if, when the jury acquitted him in the first trial [of the other offenses], the jury necessarily decided *a* fact that was also a required element of [count 1].") (emphasis altered).

El-Mezain finally contends (El-Mezain Pet. 11, 17-18) that the court of appeals erred in interpreting the particular jury instructions in this case to include willfulness as an element of only the count 11 conspiracy and not the count 1 conspiracy. That fact-specific argument was correctly rejected by both the district court (El-Mezain Pet. App. A186) and the court of appeals (Pet. App. 178), and does not warrant further review in this Court. Cf. *Exxon Co.* v. *Sofec, Inc.*, 517 U.S. 830, 841 (1996) (explaining that this Court ordinarily does not review factual findings on which two courts agree).

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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