No. 13-1125

IN THE
Supreme Court of the United States

TAREK MEHANNA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY TO BRIEF IN OPPOSITION

J. W. CARNEY, JR.
J.W. CARNEY, JR. & ASSOCIATES
20 Park Plaza
Boston, MA 02116
(617) 933-0350

STEVEN R. MORRISON
1526 Robertson Court
Grand Forks, ND 58203
(617) 479-7817

SABIN WILLETT
Counsel of Record
SUSAN BAKER MANNING
JULIE S. PALMER
BINGHAM MCCUTCHEN LLP
One Federal Street
Boston, MA 02110
(617) 951-8000
sabin.willett@bingham.com

Counsel for Petitioner
(Additional Counsel Listed on Inside Cover)

CALEB J. SCHILLINGER
JARED A. CRAFT
AMANDA V. MCGEE
RHONDA J. YACAWYCH
LIZA G. HAYS
BINGHAM MCCUTCHEN, LLP
One Federal Street
Boston, MA 02110
(617) 951-8000

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Rules

Constitutional Provisions

PETITIONER'S REPLY

This petition is about political and religious Internet speech. The question is whether "coordination" under *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) ("*HLP*"), may woodenly be applied, without further constitutional analysis, to criminalize the speech of citizens who use the Internet to express themselves.

This Court will often grant *certiorari* to resolve a question left open by its previous decision. *See Federal Election Com'n v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431, 440 (2001). *HLP* forecast that "adjudication of the reach and constitutionality of the statute must await a concrete fact situation." 561 U.S. at 25. This case presents that concrete fact situation. It would be a curious irony if speech cases were reviewable in the proscriptive, *in terrorem* context of pre-enforcement review, but not when an actual verdict has sent an American to prison for seventeen years.

The government argues that the courts below routinely applied precedent. *See* Opp.13-14. If it is routine to prosecute "coordination" whenever political sympathizers and unknown adherents to FTOs touch the same website, *see* Opp.16, the *HLP* dissent's concern—that the "coordination" gloss would embolden speech prosecutions—has been realized. *See id.* at 51-52 (Breyer, J., dissenting).[1]

---

[1] This summer, armed conflict escalated in Gaza and southern Israel. Passionate views were expressed on the Internet concerning the protagonists, one of which, Hamas, is an

(footnote continued on next page)

The government posits glancing website touches, some unknown to Petitioner, as evidence of his provision of material support. Opp.5-6, 16. That the government makes this argument shows why the case *is* cert-worthy; the government has the power to prosecute millions of Internet users. Yet Congress never criminalized "coordination," and while the term helps construe the statute, this Court never suggested that wholesale criminalization of such allegedly "coordinated" speech is constitutional, nor that speakers who choose and post translations online have provided "material support." Blind application of the "coordination" gloss to political and religious speech is wrong under both *HLP* and the Constitution, and this case is the proper vehicle to consider the point.

I. CERTIORARI IS WARRANTED TO CORRECT THE LOWER COURTS' MISAPPLICATION OF "COORDINATION."

Plaintiffs in *HLP*, an "as-applied," pre-enforcement challenge to §2339B, wanted to provide "direct training" and "teach[ing]" to FTOs and to engage in "political advocacy" on their behalf. *HLP*, 561 U.S. at 14-15, 36-37. The Court analyzed the

---

FTO. According to the government's theory, an American who never communicated with Hamas or spoke at its request, and who translates Arabic materials sympathetic to Hamas on a website visited by its sympathizers, has provided material support to an FTO. *See also* C.A. Scholars' Br.1-17 (scholars' work chilled under government's theory).

case in two steps: (1) whether §2339B applied to plaintiffs' proposed conduct (or was unconstitutionally vague as so applied); and (2) whether the First Amendment permitted that application. *Id.* at 18-40.

The Court began with training and teaching. *Id.* at 21-22. In the first step, it concluded that those activities "readily fall within the scope" of the statute. *Id.* at 21. In the second step, it held that Congress could proscribe "direct training" and teaching without violating the First Amendment. *Id.* at 36-37.[2]

"Political advocacy" presented a more difficult problem. In the first, statutory-construction step, reasoning that the "ordinary meaning" of "service" and the "use of the word 'to' indicate[] a connection between the service and the foreign group," the Court concluded that the statute permits "independent advocacy" and proscribes "coordination." *Id.* at 23-24. The Court acknowledged that "this construction of the statute" presented potential vagueness problems, but that "activities described at such a level of generality" were unripe for review. *Id.* at 24-25; *see Al Haramain Islamic Foundation, Inc. v. United States Dept. of Treas.*, 686 F.3d 965, 995-96 (9th Cir. 2012) (*HLP* "held that those [vagueness] challenges were unripe in the context of a pre-enforcement challenge").

---

[2] Petitioner never taught or trained anyone.

In the second step, the Court held that it was impossible to say, on the record before it, whether the "political advocacy" sought could be criminalized under the First Amendment. *HLP*, 561 U.S. at 37-38.

The Court thus did not hold that the term "coordination" accommodates constitutional guarantees in all fact scenarios, or even that all "coordination" is "material support" in the form of "service."[3] *See id.* at 24-25, 37-38. It reached no conclusion at all as to the constitutionality of a prohibition on coordinated advocacy. It "simply h[eld] that, in prohibiting the *particular*[4] forms of support that plaintiffs seek to provide...§2339B does not violate the freedom of speech" and is not unconstitutionally vague. *HLP*, 561 U.S. at 22-23, 39 (emphasis added). Thus, *HLP* passed on neither the Fifth nor the First Amendment problems raised by Petitioner's prosecution.

The courts below and the government here confused *HLP*'s holding and conflated its two-step approach. The trial court instructed that conduct meeting any definition of "coordination," in any context, is criminal. Opp.7; *contra Al Haramain*, 686 F.3d at 998, 1001 (holding that under *HLP*, posited "coordinated press release" and "coordinated press conference" were protected by the First Amendment). It told the jury that it "need not worry

---

[3] *Compare HLP*, 561 U.S. at 23-24 (definitions of "service"); *with* Opp.15 (broader definitions of "coordination").

[4] *I.e.*, "direct training" and "teach[ing]." *Id.* at 36-37.

about...the First Amendment...According to the Supreme Court, this statute already accommodates [its] guarantee[.]" Opp.7. The trial court oversimplified the first step and ignored the second, crucial step altogether.

The court of appeals affirmed the error, holding that the trial court "appropriately treated the question of whether enough coordination existed to criminalize the defendant's translations as *factbound* and left that question to the jury." Pet.App.24a (emphasis added). But whether Petitioner's speech may constitutionally be prohibited at all, and if so, "whether enough coordination exist[s] to criminalize" that speech, *id.*, is the heart of the constitutional inquiry. This Court has not answered these questions, and they may not be delegated to a jury. *HLP*, 561 U.S. at 24-25, 38-39.

A. The Government's "Coordination" Theory Cannot Constitutionally Support Conviction.

The flimsiness of the allegations on which the government's "coordination" theory is based highlight that the "coordination" instruction did not "accommodate" constitutional guarantees, Opp.7, and criminalized protected speech.

1. "[A]l-Qaeda...asked At-Tibyan to translate...al-Qaeda material." Opp.5.

The statement characterizes a *single* instant message, not sent on At-Tibyan, from Tsouli to Mughal. The government offered no evidence that Petitioner ever saw it, knew of it, or translated any-

thing under the request, direction, or control of Tsouli or al Qa'ida. *See* Pet.C.A.Reply 8-9.

2. "Petitioner knew that At-Tibyan translated material at al-Qaeda's request." Opp.5.

Muraabit, a Tibyan user, emailed Petitioner that "the ikhwaan from the cloud people are asking us if we can translate this msg from the al doctor." Pet.C.A.Reply 9-10. There was no evidence that Petitioner opened this email. He neither replied to it nor translated the "msg." Six months and thousands of Internet communications later, Muraabit sent another message: "was wondering/u got any ideas/for an intro to the msg to the [Pakistanis]." This exchange ensued:

Mehanna: what do u mean

Muraabit: an intro

Mehanna: isn't it a document?

Muraabit: no its a video by the dr

Mehanna: oh/hmm.../how about/some footage/of tribesmen

Id. at 10. The second message shows that Petitioner was unaware of the first. It contains no suggestion that al Qa'ida made the request.

The government says Petitioner "made suggestions for improving a video by al-Qaeda leader Ayman al-Zawahiri[.]" Opp.16. These "suggestions" consist *entirely* of this line: "oh/hmm.../how about/some footage/of tribesmen."

The government also points to the "Umar Hadid" video, which Petitioner received in October 2005. No one requested that Petitioner translate it. When he did so, it had been publicly available for months. Pet.C.A.Reply.15-16.

3. "Petitioner edited and translated a large volume of al-Qaeda books and videos[.]" Opp.5.

Petitioner emailed the *only* translation he completed at *anyone's* request on April 7, 2005—six months *before* the date of the "doctor" message that the government posited as the first notice of an At-Tibyan/al Qa'ida connection. Pet.C.A.Reply.13. The government offered no evidence that the remaining "large volume" of materials Petitioner translated were requested by anyone: he chose to translate them on his own. Pet. C.A.Reply.12-17.

B. The Lower Courts Did Not Apply the First Amendment to Petitioner's Activities.

"Because the Supreme Court did not reach the issue of 'coordinated advocacy' we do not know its view on whether this rationale would apply to pure-speech activities[.]" *Al Haramain*, 686 F.3d at 1000. "The Court specifically declined to decide whether Congress permissibly could ban coordinated advocacy[.]" *Id.* at 1001.

Below, blind application of *HLP's* statutory construction, and neglect of the constitutional questions

it left open, criminalized protected speech. Petitioner "coordinated with"[5] al Qa'ida, the government argues, because he "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." Opp.16. But this "aiding" was his Internet speech. Counseled only by the dictionary definition of "coordination," the jury was permitted to base conviction on Petitioner's "common action" of posting his chosen translations on a website used by adherents to al Qa'ida's philosophy. *See* Opp.15. This common action was protected under, *inter alia*, *Brandenburg v. Ohio*, 395 U.S. 444, 447-48 (1969). The government, which argued below that "*HLP*, not *Brandenburg*, provides the specific standard for how the First Amendment applies to speech that knowingly provides material support to an FTO," Gov.C.A.Br.67 n.29, does not cite the case here.

The First Circuit's holding sets disturbing precedent for future government attacks on speech, with the extreme sanction of criminal conviction. This Court has granted *certiorari* to address "important First Amendment questions." *Harris v. Quinn*, 134 S. Ct. 2618, 2627 (2014); *see NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 896 (1982) (demonstrating the Court's increased willingness to accept First Amendment cases).

---

[5] The government does not allege that Petitioner translated *anything* at al-Qa'ida's request and conceded "the defendant was not instructed by al-Qaeda to engage in all these activities[.]" Tr. Dkt. 165 at 39:5-6.

C. The Lower Courts Did Not Conduct a Vagueness Analysis.

A statute is unconstitutionally vague if it "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." *HLP*, 561 U.S. at 18. The gloss "coordination," like the statutory term "service," is dangerously ambiguous in the context of Internet activities, because all such activities by nature are *inter*dependent. A jury could never find Internet usage to be entirely "independent" unless instructed that it must not confuse the Internet's interactive nature with "coordination." Congress did not intend, as the government suggests, to criminalize, as *material support to terrorist groups*, self-expression, or offhand comments like "Oh/hmmm/ how about some footage of tribesmen." The government's theory "grants too much enforcement discretion[.]" *HLP*, 561 U.S. at 20.

Abdicating their duties under the Fifth Amendment, the lower courts never considered the confusion that boundless application of "coordination" to Internet speech would cause a person of ordinary intelligence.[6]

---

[6] The question presented adequately preserves the vagueness argument, notwithstanding the government's challenge. *See* Opp.16-17. It asks whether Petitioner's speech "may" be criminalized by the application of "the 'coordination' rubric of *Humanitarian Law Project*," and *HLP* involves the application of the First and Fifth Amendments to "coordination." In *Wood*

(footnote continued on next page)

II. THIS CASE IS AN APPROPRIATE VEHICLE FOR REVIEW

A. The Sufficiency Doctrine Does Not Bar Review.

No "nuanced *Griffin* question," *see* Opp.20, bars review. *Griffin v. United States*, 502 U.S. 46 (1991) is about a failure of proof. When the prosecution was unable to muster facts necessary to prove one theory, the jury was presumed to have convicted on the alternative ground.

There was no such failure of proof below. The jury was permitted to convict based on an unconstitutional legal theory, and, as *Griffin* pointed out, earlier precedents held that "where a provision of the Constitution forbids conviction on a particular ground, the constitutional guarantee is violated by a general verdict that may have rested on that ground." *Id.* at 53. The Constitution forbids a conviction based on Petitioner's translations, and here the general verdict may have rested on that ground.

This case is like *Stromberg v. California*, 283 U.S. 359 (1931); *see* Pet.20. Because raising a red

---

v. Allen, 558 U.S. 290, 304 (2010), petitioner raised an issue for the first time in its merits briefing. *Id.* Here, the petition "provides the respondent with notice of the grounds upon which the petitioner is seeking certiorari[.]" *Yee v. City of Escondido*, 503 U.S. 519, 535 (1992); Pet.7-11, 16-17. The question was "set out in the petition, or fairly included therein," *see* Sup. Ct. R. 14.1(a), and the government, fairly apprised, responded at Opp.17-18.

flag to oppose "organized government" cannot be criminal under the First Amendment, there was no valid jury question on one theory underlying a general verdict, requiring reversal. Even if the government had proved that "through his translations, [Petitioner] intended to further At-Tibyan's goal of aiding al-Qaeda," Gov.16, the First Amendment would protect that activity. The theory did not present a valid jury question.

In *Bachellar v. Maryland*, 397 U.S. 564 (1970), a jury was instructed that it could convict war protesters if they 1) engaged in "doing or saying...of that which offends, disturbs, [or] incites"; or 2) "refus[ed] to obey a policeman's command." *Id.* at 565. The jury returned a general verdict. While the conviction may have rested on failure to obey a policeman's command, it could also have rested on the protest itself. "Since conviction on this ground would violate the Constitution, it is our duty to set aside petitioners' convictions." *Id.* at 570.

So too here. The jury was permitted to base its verdict on the government's theory that Petitioner's translations—not commissioned by any FTO—were "coordinated" because of his common viewpoint and his "common action," *see* Opp.15, in posting them on the same website where the government alleged al Qa'ida instructed others to post translations. Because conviction on the latter ground would violate the Constitution, the verdict must be set aside, regardless of whether there was sufficient evidence on the Yemen theory.

The court of appeals applied the sufficiency doctrine only after it "eliminated the defendant's claims of legal error" associated with the "coordination" instruction. Pet.App.27a. Because that "elimination" was incorrect, the court's application of the sufficiency doctrine was also incorrect. The court of appeals also erred in failing to "make an independent analysis of the whole record" as is required "when a claim of constitutionally protected right is involved." *Bachellar*, 397 U.S. at 566. This too allowed for the potential that the verdict was based on protected speech. Had it correctly applied *HLP, Stromberg,* and *Bachellar*, the court of appeals would have concluded that Petitioner's claims of legal error could not be avoided under *Griffin.*

B. The Harmless Error Doctrine Does Not Counsel Against Review

The court of appeals "readily agree[d] that the record contains some evidence supporting the defendant's alternative narrative." Pet.App.19a. A constitutional error is harmless only if the reviewing court finds "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). The government cherry-picks comments regarding the Yemen facts, but ignores that they were made in the context of a *sufficiency* analysis, *i.e.,* one that "eschews credibility judgments and requires us to take the facts and all reasonable inferences therefrom in the light most favorable to the jury's verdict." Pet.App.8a.

The government asserts that Petitioner's convictions on other charges prove that the jury based its material support verdicts on the Yemen theory, and therefore the constitutional error was harmless. But a cascade of errors flowing from the "coordination" error renders the convictions on the other charges unreliable. The trial court improperly admitted "expert" opinions as to whether a conspiracy existed and hearsay in an attempt to prove both a link between At-Tibyan and al-Qa'ida and Petitioner's knowledge of that link. *See* Pet.2-3, 13-14. The court of appeals declined to reach these objections because the sufficiency doctrine "render[s] that theory of guilt academic." Pet.App.44a. The improper admission of this evidence (the *only* link to al Qa'ida in this entire case), plainly prejudiced a jury sitting in Boston. *See United States v. Al-Moayad*, 545 F.3d 139, 159-60 (2d. Cir. 2008); Pet.C.A.Reply 35-39. Where core rights are at issue and trial errors were ignored, this Court should not assume the constitutional error was harmless.

In any event, where the lower court has not passed on the harmlessness of an error, it is the "normal practice" of this Court to vacate and remand. *Neder*, 527 U.S. at 25.

C. Legal Errors Do Not Counsel Against Review.

Remarkably, the government argues that the lower court's erroneous application of *HLP* to speech counsels *against* review, relying on *Zivotovsky v. Clinton*, 132 S.Ct. 1421 (2012). Opp.11-12. *Zivotovsky* raised a separation-of-powers question, which

the lower courts, citing the political question doctrine, declined to address. When this Court reversed, it announced that it would not be the first Court in the case to pass on its merits. *But then it remanded for review.* It did not foreclose review altogether.

That disputes about protected speech might further percolate in other cases[7] is a factor that weighs lightly here, because the government is the protagonist in all cases that present the issue, and its position will continue to be, as the court of appeals put it, "breathtaking in its scope: the government labeled the defendant's crimes 'ideological.'" Pet.App.49a. Any benefit of development is offset by the exceptional public importance of prosecutions of ideological speech and by the confusion demonstrated by the government and the lower courts in applying *HLP*'s precedent.

CONCLUSION

Petitioner's petition for writ of *certiorari* should be granted.

---

[7] The "coordination" construction announced in *HLP* has been applied by other courts. *See e.g.*, *Al Haramain*, 686 F.3d 995-1001 (Ninth Circuit's interpretation of *HLP*).

Respectfully submitted,

J. W. CARNEY, JR.
J.W. CARNEY, JR. &
ASSOCIATES
20 Park Plaza
Boston, MA 02116
(617) 933-0350

STEVEN MORRISON
1526 Robertson Court
Grand Forks, ND 58203
(617) 479-7817

SABIN WILLETT
Counsel of Record
SUSAN BAKER MANNING
JULIE S. PALMER
CALEB J. SCHILLINGER
JARED A. CRAFT
AMANDA V. MCGEE
RHONDA J. YACAWYCH
LIZA G. HAYS
BINGHAM MCCUTCHEN LLP
One Federal Street
Boston, MA 02110
(617) 951-8000

Counsel for Petitioner

August 12, 2014