No. 14-534

IN THE

Supreme Court of the United States

RAJAT K. GUPTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

GARY P. NAFTALIS
DAVID S. FRANKEL
ALAN R. FRIEDMAN
ROBIN M. WILCOX
KRAMER LEVIN NAFTALIS & FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036

PETER G. NEIMAN
ALAN E. SCHOENFELD
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DANIEL AGUILAR
MATTHEW GUARNIERI
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

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The petition presents two questions worthy of this Court's review. The government devotes much of its brief not to addressing those questions—other than conceding the existence of a circuit split on one—but rather to restating its own view of the trial record and the supposedly "overwhelming" evidence of guilt. Opp. 2-10.

But this was an exceptionally close case. The government had no witness to testify to Gupta tipping Rajaratnam and no convincing theory of Gupta's motive for such a tip. The government's case was entirely circumstantial, based on inferences from the timing of telephone calls and the assumption that, when Rajaratnam bragged to others about an unnamed Goldman

source (Opp. 5), he must have been both telling the truth (though there was evidence he sometimes claimed to have sources he did not have (C.A.J.A. 529-530)) and referring to Gupta. The testimony that the district court excluded would have both rebutted the notion that Gupta had a motive to tip Rajaratnam at the relevant time *and* provided an alternative explanation for the telephone calls in question. Pet. 9.[1] Indeed, the jury acquitted Gupta of a later alleged tip, which, on the evidence the jury actually heard, postdated the time that Gupta expressed the belief that Rajaratnam had swindled him. Pet. 7-9.

The jury should have been permitted to hear the testimony about Gupta's state of mind at the critical time to decide for itself whether it established reasonable doubt of guilt. Similarly, the jury's consideration of Gupta's character evidence was improperly constrained by the district court's refusal to provide the full instruction to which Gupta was entitled. Neither of the substantial legal questions presented in the petition can be dismissed as harmless in such a close case.

I. THE ENTRENCHED CIRCUIT SPLIT ON JURY INSTRUCTIONS FOR CHARACTER EVIDENCE MERITS REVIEW

The government concedes (Opp. 17) that the circuits are divided on the first question presented—whether a jury should be instructed that evidence of a

[1] The district court also excluded evidence of a plausible alternative source at Goldman for the tips, in the form of a senior Goldman executive with a direct financial motive to tip Rajaratnam, a documented past record of doing so, and calls to Rajaratnam's fund on the very date of both tips for which the jury convicted Gupta. Pet. 6 n.1. Although the court of appeals affirmed exclusion of that evidence (Pet. App. 46a-50a), the issue would be open for reconsideration at any retrial.

defendant's good character, properly admitted under Federal Rule of Evidence 404(a)(2)(A), may alone be sufficient "to raise a reasonable doubt of guilt." *Michelson* v. *United States*, 335 U.S. 469, 476 (1948). As the government explained when it previously sought review of the same question, "[c]haracter evidence is frequently presented in criminal trials, and it is important that the courts and the parties know what rules apply to instructions on character evidence." Pet. 8, *United States* v. *Daily*, No. 90-1828 (U.S. May 28, 1991). The government provides no persuasive explanation for its about-face.

1. Even while acknowledging that the D.C. Circuit requires a "standing alone" instruction and thus that courts of appeals are in conflict on this issue, the government contends that the D.C. Circuit has not "cited the relevant holding" since issuing it. Opp. 20. There is no reason to expect that court to revisit and confirm its holding; presumably, the instruction is given upon request and is not at issue on appeal. *See* Bergman, *Criminal Jury Instructions for the District of Columbia* Intsr. 2.213 (5th ed. 2014) ("[E]vidence of good character alone may create a reasonable doubt as to a defendant's guilt, although without it the other evidence would be convincing.").

The D.C. Circuit is not an outlier in this respect. Pet. 16-17. The Fifth Circuit observed in *United States* v. *Hewitt* that "evidence of good character may of itself create a reasonable doubt as to guilt, and the jury must be appropriately instructed." 634 F.2d 277, 278 (5th Cir. Unit A Jan. 1981). The government would read "appropriately instructed" to mean simply that the jury be "instructed as to character evidence" (Opp. 18), but that is inconsistent with the law of the circuit both before and after *Hewitt*.

For example, in *United States* v. *Ruppel*, the court explained—immediately after the single sentence taken out of context by the government (Opp. 19)—that "[t]he rule in this circuit is that, when presented, evidence of 'good character should be considered together with all other evidence in a case and *may itself give rise to a reasonable doubt*.'" 666 F.2d 261, 273 (5th Cir. 1982) (emphasis added) (quoting *United States* v. *Callahan*, 588 F.2d 1078 (5th Cir. 1979)); *see also United States* v. *Cashio*, 420 F.2d 1132, 1135 (5th Cir. 1969) (jury was properly instructed that character evidence "may be sufficient in itself to create a reasonable doubt"). And in *United States* v. *John*, the court reaffirmed those decisions by reversing and remanding for a new trial after the district court refused to give the instruction. 309 F.3d 298, 305 (5th Cir. 2002) ("character evidence might create a reasonable doubt" and "the outcome may well have been different" had the jury been so instructed).

The same rule applies in the Eleventh Circuit by virtue of its adoption of Fifth Circuit precedent, including *Hewitt*.[2] When the Eleventh Circuit has addressed the issue, it has never expressed any disagreement with the Fifth Circuit's view and has, to the contrary, recited the instruction as proposed or as given in essentially the same terms. *See United States* v. *Thomas*, 676 F.2d 531, 536 (11th Cir. 1982) ("evidence of good

[2] That is presumably why the model jury instructions in the two circuits are consistent. Pet. 17 n.5. The government would dismiss those model instructions—evidence of actual practice in the federal district courts—as not "binding," or as irrelevant because they do not use the precise term "standing alone." Opp. 19 n.8. The fact that circuits favoring the instruction phrase it in a number of different ways does not lessen the substantial disagreement between those courts and the circuits that flatly prohibit the instruction or strongly disapprove of it.

character … may of itself give rise to a reasonable doubt" (citing the Fifth Circuit's decision in *Callahan*, 588 F.2d at 1085)); *United States* v. *Borders*, 693 F.2d 1318, 1328-1330 (11th Cir. 1982) ("evidence of a defendant's good character may give rise to a reasonable doubt").

In addition, the government obscures (Opp. 20 n.9) the substantial disagreement and uncertainty among *other* courts of appeals, which have suggested a variety of conflicting middle positions—for example, that the instruction should not be given unless "circumstances" or "special reasons" require it. Pet. 18-19. There is "considerable disagreement" and "longstanding division in the courts on this point." *Spangler* v. *United States*, 487 U.S. 1224, 1224 (1988) (White, J., dissenting from denial of certiorari) (collecting cases). That disagreement—on a question of federal law that the government itself has described as important and recurring—merits review. The instructions given to the jury on a potentially outcome-determinative issue for many criminal defendants should not vary with the happenstance of geography.

2. The government's defense of the Second Circuit's position in the circuit split is equally unpersuasive. Opp. 14-17. The government does not claim that Gupta's proposed instruction was inaccurate as a proposition of law. *See Michelson*, 335 U.S. at 476; *Edgington* v. *United States*, 164 U.S. 361, 366 (1896); Pet. App. 67a.[3] Nor does the government—or the Second Circuit,

[3] The government argues at length that neither *Edgington* nor *Michelson* directly holds that such an instruction is required. Opp. 16-17. As explained in the petition (at 15-16), both cases confirm the importance of evidence of good character and counsel in favor of the instruction Gupta proposed.

for that matter—identify weighty countervailing considerations that would justify refusing to give a full and accurate instruction on the law of character evidence. Pet. 20-22.

The government contends that the instruction "singles out character evidence" for undeserved special treatment and poses a risk of juror confusion. Opp. 14-15. But the defendant's opportunity to present evidence of good character is a hallmark of a fair trial, and it is entirely appropriate to draw the jury's attention to such evidence and to explain its function and importance. Pet. 15; *see, e.g.*, Fed. R. Evid. 404 advisory committee note (opportunity to introduce good character evidence has "almost constitutional proportions"). As the Fifth Circuit explained, "[w]ithout the benefit of being told that character evidence could raise a reasonable doubt as to the defendant's guilt," the jury may wrongly "disregard character evidence" as a form of excuse "elicited mainly from witnesses close to" the defendant. *John*, 309 F.3d at 304 n.12.[4]

Nor is there any risk that the instruction will cause jurors to feel compelled to acquit "even though they find the defendant guilty beyond a reasonable doubt." Opp. 15. Jurors need only be reminded to consider all the evidence. That appears to be the practice of the circuits favoring the instruction, including the D.C. Circuit. Bergman, *supra* p.3, Instr. 2.213. Moreover, the government cannot explain why the supposed risks of "singling out" a category of evidence disappear when

[4] Contrary to the government's "the less said, the better" approach (Opp. 14), failure to give a character evidence instruction when warranted by the evidence is reversible error. *E.g.*, *United States* v. *Logan*, 717 F.2d 84, 88-91 (3d Cir. 1983) (plain error). The debate is over *how* to instruct the jury, not *whether* to do so.

the instruction concerns accomplice or informant testimony, for which the government routinely requests and receives an instruction that the evidence "alone" or "by itself" is sufficient to *convict*. Pet. 22. The government asserts that that language is appropriate to "balance" other parts of instructions about such testimony that are harmful to the government (for example, instructing the jury that cooperator testimony should be viewed with caution). Opp. 15 n.7. But this situation is just the opposite side of the same coin; here, the court instructed the jury that Gupta's character witnesses had "no personal knowledge of the transactions at issue" and could not offer an opinion whether Gupta was "guilty or not guilty of the crimes charged" (Pet. App. 70a). If the "standing alone" language can temper instructions in the defendant's favor without confusing the jury, it can do the same for an instruction that otherwise significantly favors the government.

3. This case presents an ideal vehicle to resolve an entrenched circuit split. Pet. 22-23.[5] The government's suggestion that "character evidence played only a minor role in petitioner's defense" is unfounded. Opp. 21. Six defense witnesses—out of eleven total—were re-

[5] The Court's denial of certiorari in prior cases (Opp. 13 n.4) may have reflected vehicle problems. *See, e.g.*, Opp. 9-10, *Morrow* v. *United States*, No. 09-9539 (U.S. June 7, 2010) (defendant's law-abiding character evidence did not explain her recorded statement to informant that she received $200 for her role in drug conspiracy); Cert. Pet. 8-10 & n.13, *Burke* v. *United States*, No. 94-694 (U.S. Oct. 18, 1994) (defendant's evidence of peaceful character was contradicted by his murder confession). The Court has intervened to resolve other "longstanding division[s] in authority," *DePierre* v. *United States*, 131 S. Ct. 2225, 2231 (2011), despite previous denials of certiorari, *e.g.*, *Shannon* v. *United States*, 512 U.S. 573, 576, 578 & n.3 (1994) (resolving circuit split on jury instructions dating to decades-old D.C. Circuit decision).

nowned leaders in public health and philanthropy, and each attested to Gupta's impeccable character. *See* Pet. 10-11. All of Gupta's character witnesses testified to his honesty—testimony that was directly contrary to the government's theory that Gupta, after a lifetime safeguarding the sensitive business information entrusted to him as an adviser to the world's leading companies, would have acted markedly out of character and disclosed material nonpublic information to Rajaratnam for no apparent personal benefit.

The government dismisses this extensive evidence in a single sentence and points instead to the defense summation (Opp. 8, 21), but that is legerdemain. The summation—in which defense counsel described Gupta's good character as a "badge of innocence" (C.A.J.A. 1033)—occurred *after* the district court had denied Gupta's proposed instruction, thus substantially limiting the benefit of dwelling on the evidence in closing.

The government also wrongly suggests that any error was harmless. Opp. 21. If the instruction was error, a new trial would be required unless "it is clear beyond a reasonable doubt that a rational jury would have found the defendant guilty absent the error." *United States* v. *Goldstein*, 442 F.3d 777, 781 (2d Cir. 2006); *cf. Neder* v. *United States*, 527 U.S. 1, 9-10 (1999). The government could not make that showing here; character evidence might well have made a difference in such a close case, had the jury been properly instructed. *See supra* pp.1-2. In any event, the court of appeals did not consider the question of prejudice (Pet. App. 53a-54a), and the government's speculation about it provides no basis for denying review.

II. THE GOVERNMENT OBSCURES THE GRAVITY OF THE RULE 403 ERROR BELOW AND CONFIRMS THE NEED FOR REVIEW

The government concedes, as it must, that a criminal defendant must be able "to present a complete defense" free from an "'arbitrary' or 'disproportionate'" application of an evidentiary rule. Opp. 22; *Holmes* v. *South Carolina*, 547 U.S. 319, 324 (2006). Although a district court's application of Federal Rule of Evidence 403 is due considerable deference, the mere invocation of the Rule does not immunize its decision from review when that application has the effect of severely curtailing the defendant's opportunity to present the central theory of his case. When a court prohibits the jury from considering vital defense evidence under the auspices of Rule 403, that exclusion can only be affirmed if there is a substantial basis in the record to support the court's decision. *See* Pet. 23-25.

The district court's decision to abridge Geetanjali's testimony on the crux of petitioner's defense is not faithful to those principles. That testimony would have shown—and was the only testimony that would have directly shown—that *before* Rajaratnam's trades on September 23, 2008 and October 24, 2008, Gupta lacked any motive to help the man he believed had effectively robbed him and betrayed his trust. That evidence could not possibly have been unfairly prejudicial to the government, because the government's own evidence had already established that Rajaratnam surreptitiously withdrew funds from his joint investment with Gupta. Pet. 26, 30. The critical question was *when* Gupta came to believe he had been cheated. Without Geetanjali's testimony, the evidence showed only that Gupta formed that belief months later, by January 12, 2009. Pet. 8. And the jury acquitted Gupta of the alleged

January 2009 tip, which took place after he undisputedly formed his belief that Rajaratnam had swindled him.

The government properly does not defend the court of appeals' theory that Geetanjali's testimony was cumulative. Opp. 28-29. No other piece of evidence established the critical timing that Gupta first formed the belief that Rajaratnam swindled him *before* the September 23 and October 24 trades—the trades that formed the only basis for his conviction. *Contra* Opp. 25 & n.11.

Rather than defend the rationale of the court of appeals, the government (Opp. 24-25) revives the district court's theory that Geentanjali's testimony could be permissibly excluded because the jury would be unable to follow an instruction to consider the testimony only as bearing on Gupta's state of mind (that he believed he had been cheated) and not for the truth of what he believed (that he had in fact been cheated). But as explained above, the government's own evidence had already established the same underlying facts, *except* the time that Gupta formed his belief. The court had also instructed the jury on several other occasions to consider evidence not for its truth but for other admissible reasons, such as state of mind—including similar testimony by Ajit Jain that Gupta four months later expressed the belief that Rajaratnam had cheated him—without any fear of confusion or inability to follow the court's instructions. Pet. 8, 28-29 & nn.10-11. The government offers no reason why the district court could not have provided a similar instruction for Geetanjali's testimony.

The government also errs in arguing (Opp. 24) that the district court rightly excluded Geetanjali's testimony about Gupta's *state of mind* because she could not

testify about the underlying transaction—*i.e.*, whether it was true that Rajaratnam swindled Gupa. The court had ample tools to make the limitations of Geetanjali's testimony clear to the jury, and used them; it admonished the jury that she lacked personal knowledge of the transactions (Pet. App. 84a). Furthermore, the prosecution cross-examined her on that basis. Pet. 30. In any event, this issue went to Geetanjali's credibility, not her testimony's admissibility. Pet. 29.

As curtailed by the court's exclusionary ruling, Geetanjali's limited testimony may have done Gupta more harm than good. Although Geetanjali testified that her father was "upset … because of how Mr. Rajaratnam was treating the investment," that gave the jury no basis to believe that Rajaratnam had wronged or defrauded Gupta. Indeed, the prosecution seized on Geetanjali's curtailed testimony to explain to the jury why it actually supported conviction: Gupta was motivated to help Rajaratnam, the government argued, because Rajaratnam had mishandled their joint investment, which lost money in the market's collapse. Pet. 31 n.12 ("[A]t that point Gupta wanted to do whatever he could to recoup the $10 million." (prosecution's rebuttal summation)). Defense counsel tried in closing argument to link the threads of the entire story together (Opp. 31), but attorney argument is no substitute for evidence.

If the jury had considered Geetanjali's complete testimony, there is a substantial probability that the jury would have reached a different verdict. The Second Circuit's decision to affirm the exclusion of that evidence, without any basis in the record substantiating its exclusion, warrants this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

GARY P. NAFTALIS
DAVID S. FRANKEL
ALAN R. FRIEDMAN
ROBIN M. WILCOX
KRAMER LEVIN NAFTALIS
& FRANKEL LLP
1177 Avenue of the Americas
New York, NY 10036

PETER G. NEIMAN
ALAN E. SCHOENFELD
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich Street
New York, NY 10007

SETH P. WAXMAN
Counsel of Record
PAUL R.Q. WOLFSON
DANIEL AGUILAR
MATTHEW GUARNIERI
WILMER CUTLER PICKERING
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1875 Pennsylvania Ave., NW
Washington, DC 20006
(202) 663-6000
seth.waxman@wilmerhale.com

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