No. 17-8074

In the Supreme Court of the United States

FRANCIS SCHAEFFER COX,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The lower court's twin decisions reversing the solicitation conviction and affirming the conspiracy conviction turned on the same, purely legal test: whether the underlying agreement "constitute[d] a sufficient threat to the safety of a federal officer so as to give rise to federal jurisdiction." Pet. App. 3a–4a (quoting part of a test from *United States v. Feola*, 420 U.S. 671, 695–96 (1975)). Applying that test to the solicitation conviction, the court found insufficient evidence to support the conviction in a plan for self-defense against a fictitious federal hit team. Pet. App. 4a. Applying the test to the three theories the government offered in support of the conspiracy conviction, *see* Gov't C.A. Br. at 101–10, the court upheld the conviction on a single theory. It found that an agreement to kill government employees ("including federal officers") if they participated in mass arrests and purges of citizens during the unlikely event of "Stalinesque" martial law created a "sufficient threat to the safety of a federal officer" to justify federal jurisdiction. Pet. App. 3a. It also found conspiracy liability extended to an agreement which was contingent on an event the conspirators subjectively thought was likely to occur at some unknown time in the future, even if it was objectively unreasonable to believe that it would occur. *Id.* Both of Cox's Questions Presented are directly based on the legal holdings on which the Ninth Circuit's opinion turned.

Unable to deny the importance of the two central questions, the government recharacterizes the issue as an ordinary sufficiency question and asks this Court to deny certiorari based on fact-laden theories that even the government below

abandoned as potential bases for the conspiracy conviction. The Court should "read the question[s] presented to avoid these tangential and factbound questions, and limit [its] review" to the particular questions on which the circuits have split and which concern the interpretation, consistent with principles of federal jurisdiction, of an important federal criminal statute. *Frye v. Pliler*, 551 U.S. 112, 121 (2007). This Court is not equipped to adjudicate factual alternative bases for the Ninth Circuit's affirmance of the conspiracy conviction, but it can easily remand for further proceedings after determining the correct legal tests to be applied to the already-adjudicated theory. The Court should grant certiorari to answer the question whether a contingent conspiracy can be based on a subjective belief that an objectively unlikely condition will be fulfilled, and whether there is federal jurisdiction under *Feola* and 18 U.S.C §§ 1114 & 1117 to convict based on an agreement where, even if the contingency unfolded precisely as the conspirators feared, may have resulted in the deaths of state as opposed to federal employees.

A. The Circuit Split on Likelihood of Conspiracy Conditions Predated Petitioner's Case and Will Survive It Absent the Court's Intervention.

The government attempts to argue there is no circuit conflict because the Ninth Circuit's unpublished memorandum opinion cannot create a split. BIO at 14. But that memorandum opinion is unnecessary to the split between the First and Seventh Circuits, which predates and will outlast the instant prosecution unless this Court intervenes. The Seventh Circuit's holding in *United States v. Podolsky* rejected a test based on either objective or subjective likelihood that the condition would be fulfilled. *Podolsky*, 798 F.2d 177, 178–79 (7th Cir. 1986). Taking the

opposite position, the First Circuit in *United States v. Palmer* adopted the "suggest[ion]" in *United States v. Dworken*, 855 F.2d 12, 19 (1st Cir. 1988), that "[l]iability should attach if the defendant reasonably believed that the conditions would obtain." *Palmer*, 203 F.3d 55, 64 (1st Cir. 2000). The *Palmer* court held that objectively "reasonable belief" was met where the relevant condition (an "agree[ment] to rob the store if there was only a female clerk on the premises") *was* met in two separate, completed robberies. *Id.* Contrary to the government's arguments, the 1988 *Dworken* court's use of a footnote to provide examples of scenarios falling short of "reasonable belief" in the context of a drug transaction, *Dworken*, 855 F.2d at 19 & n.6, does not limit the definition of the familiar, objective standard of "reasonable belief" and does not resolve the split.

B. The Court Should Grant Certiorari to Address Whether the Ninth Circuit Rested Its Opinion on a Permissible Theory, Disregarding Assertions of Fact the Ninth Circuit Opinion Does Not Discuss.

The Ninth Circuit specifically upheld the conviction on the basis of an agreement "to attack government officials—including federal officers—in the event of certain conditions that they subjectively thought were likely to occur," *i.e.*, the imposition of martial law consisting of mass arrests and purges, which was the only theory besides the fictional-federal-assassins theory that the government argued at closing, and one of three theories argued by the government on appeal. Pet. App. 3a; ER 212–13; *see* Petition at 4–7. Rather than engage with the first Question Presented, the government rehashes evidence relating to *other* government theories that were rejected by the Ninth Circuit or never argued to the Ninth Circuit as a basis for the conspiracy conviction because they lacked federal jurisdiction and/or

any evidence of an agreement to murder. To the extent the Court considers the government's alternative bases for the conspiracy conviction, the following facts proffered by the government do not provide reason to deny the Petition:

1) The "supposed federal assassination team" (BIO at 5, 12–13)

The government again argues that even though the "federal assassination team" that Cox feared was admittedly fictional, evidence about his attempts to defend against the assassins via "security details" can provide the basis for a conspiracy conviction. BIO at 5, 12–13. But the Ninth Circuit correctly vacated the solicitation conviction on that theory, Pet. App. 4a (citing *United States v. Feola*, 420 U.S. at 695–96), a conclusion that applies equally to the conspiracy count.

2) Anderson's "Federal Hit List" field notebook entry containing the name of a federal marshal (BIO at 3, 12)

Government witness Mike Anderson testified that he—without ever consulting Cox—made a single entry in an all-weather field notebook with the heading "federal hit list" and the name of one federal marshal in response to Cox's paranoid and false delusion that a team of federal assassins was trying to kill him. AER 330; ER 620. Anderson did not add the name of the marshal to the separate conditional-mass-arrest database, which Anderson maintained on a computer and which was never referred to as a "federal hit list," contrary to the uncited assertions in the government's Brief in Opposition at pages 3, 4, 12, and 14. AER 272; *see* Petition at 4–5. (It would make no sense for that database to be referred to as a

"federal" list, because it only contained the names of state employees.[1] As the government argued at closing regarding Anderson's database, "Believe he said mostly state. That's fine." ER 205.) Anderson made this notebook entry on his own without being asked to do so; Cox was not told about this entry or given this notebook and he never independently inquired about the marshal. FER 3, 8–9. Anderson did no further research on the marshal. AER 330.

The "federal hit list" field notebook entry did not and cannot support Petitioner's conspiracy conviction. Because Cox never knew about the one-item "list" and never heard the name of the marshal, there is zero evidence of Cox's *agreement* to murder that marshal or to collaborate on a "federal hit list" as that term would be generally understood.

3) Vague testimony by Cox's mother-in-law (BIO at 4)

The government cites testimony by Cox's mother-in-law that it claims made "the plan to kill federal agents . . . no longer contingent exclusively on a declaration of martial law." BIO at 4 (citing Gov't C.A. Br. 12 (citing AER 910)). The Ninth Circuit also did not rely on this claim, which is contradicted by the testimony it is based on: Cox's mother-in-law affirmatively testified that the discussion *was* contingent on some trigger, but she "d[id]n't remember anything specific as far as if." AER 910.

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[1] Anderson described the "database" as a "kind of database," "it wasn't organized in a list," "it was unusable at that," and he testified that it was only maintained on his computer. Tr. 6:63; AER 272. Significantly, the witness's testimony established that the database with addresses only included state officials, not federal government officials. Tr. 6:101, 6:110–11, 6:122–26, 6:171, 6:179–80, 6:189–90; 6:194; AER 310–11, 333–37; FER 3, 5–6, 7–8, 10.

4) Any alleged agreement to kill based on the arrest of Cox (BIO at 4, 13, 15, 17)

Although the government argued to the Court of Appeals that one of the triggers for the conspirators' agreement to murder was "petitioner's arrest," *see, e.g.*, BIO at 13 (citing ER 64–65; Gov't C.A. Br. at 12–13, 113), the Ninth Circuit did not rest its reasoning on this deeply flawed "2-4-1" theory. The preliminary discussions about what to do after Cox was arrested for failing to appear in state court never gave rise to an agreement to kill as opposed to an agreement to participate in First-Amendment-protected protests. *See* Petition at 6–7; ER 409–13; AER 66 (Cox's trial attorney's Rule 29 motion responding to the judge's suggestion at AER 64–65 that the government might argue arrest was the trigger). Accordingly, during closing argument, the government did not argue the conspirators had agreed on arrest as a trigger for murder, asserting instead that the "2-4-1" discussion was generally dangerous: "What do you think Lonnie Vernon's going to do [if Cox is arrested]? What do you think Coleman Barney's going to do? *You can't control what people are going to do when you discuss things of this nature*." ER 199 (emphasis added). The government then urged the jury to find Cox guilty of conspiracy based on only two theories, not including the "2-4-1" discussion. ER 212–13.

C. The Government Does Not Attempt to Defend the Ninth Circuit's Untenable Position that to Sustain a Federal Murder Conspiracy Conviction, It Need Not Be Clear that a Federal Employee Would Have Been Killed Had the Attack Been Carried Out.

Cox's petition should be granted on the second Question Presented because the government refuses to defend the Ninth Circuit's untenable interpretation of *Feola*. BIO at 14. The Ninth Circuit held that a conviction for conspiracy to murder federal

employees may be upheld based on the court's subjective estimate of the "sufficien[cy of the] threat to the safety of a federal officer." Pet. App. 3a. The government, in contrast, agrees with Cox that a defendant must "identif[y] the objects of his intended attack 'with sufficient specificity so as to give rise to the conclusion that had the attack been carried out the victim would have been a federal officer.'" BIO at 14 (quoting *Feola*, 420 U.S. at 695–96). The government asserts that its evidence suffices to support the conviction even under this theory, but that is a merits question or a matter for the lower court on remand; the Court cannot decide on the basis of briefs citing only to appellate briefs. *See also* Section B.2, *supra*.

D. That the Ninth Circuit Remanded for Resentencing Does Not Argue Against Granting Certiorari.

The government asserts that the Ninth Circuit's remand for resentencing places this case in an interlocutory posture. There is nothing further for the lower courts to decide with respect to the conspiracy conviction; the decision of the Ninth Circuit Court of Appeals affirming the conspiracy conviction is final and unreviewable. This Court has not found this posture to be a barrier to review in other cases. *See, e.g., Brady v. Maryland*, 373 U.S. 83, 85 n.1 (1963). In *Brady*, this Court granted the petition for writ of certiorari where the state's highest court had denied a petition for collateral relief from the conviction but had remanded for resentencing. This Court reviewed the question of law that was relevant only to the conviction. *See also, e.g., Skilling v. United States*, 558 U.S. 945 (2009); *Begay v. United States*, 551 U.S. 1191 (2007); *Zedner v. United States*, 546 U.S. 1085 (2006).

Even if the current posture of the case were interlocutory, granting review now is consistent with the settled principle that, where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari, the case may be reviewed despite its interlocutory status." Stephen M. Shapiro, *et al.*, Supreme Court Practice § 4.18, at 283 (10th ed. 2013). Judicial efficiency is aided, rather than hindered, by a determination now whether Cox's conspiracy conviction can be supported by the conditional-mass-arrest theory of liability and federal jurisdiction.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for a Writ of Certiorari.

DATED this 18th day of May, 2018.

Respectfully submitted,

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