No. __-___

IN THE

Supreme Court of the United States

ADHAM AMIN HASSOUN,

Petitioner,

v.

UNITED STATES,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Eleventh Circuit panel majority—deepening a mature circuit split regarding the foundational requirements of Federal Rule of Evidence 701—allowed an inexperienced FBI agent who lacked any percipient knowledge to offer lay "opinions" as to Petitioner Adham Hassoun's supposed intent and meaning in conversations in Arabic translated by someone else into English. This evidence served as the essential vehicle through which the Government transformed Mr. Hassoun's humanitarian efforts to aid Muslims facing ethnic cleansing in conflict zones such as Kosovo and Chechnya into convictions for conspiracy to commit murder and mayhem abroad. The panel also erroneously upheld the imposition of the terrorism enhancement on Mr. Hassoun's sentence despite the district court's failure to find that Mr. Hassoun's activities were "calculated to . . . intimidat[e,] coerc[e,]" or "retaliate against government conduct." Pet. App. 123a–125a.

The questions presented are:

(1) whether Federal Rule of Evidence 701 permits a lay witness with no percipient knowledge of conversations to offer "opinions" as to a speaker's supposed meaning of words used in those conversations; and

(2) whether the terrorism enhancement may be imposed in the absence of the statutorily-required finding that the defendant's motive is to intimidate, coerce, or retaliate against government conduct.

PARTIES TO THE PROCEEDING

Petitioner is Adham Amin Hassoun, defendant-appellant below. Kifah Wael Jayyousi and Jose Padilla also were defendants-appellants below and today are filing petitions for certiorari in this Court. *See* Pet. for Cert., *Jayyousi v. United States*, No. ___ (Apr. 2, 2012); Pet. for Cert., *Padilla v. United States*, No. ___ (Apr. 2, 2012).

Respondent is the United States of America, plaintiff-appellee below.

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PETITION FOR A WRIT OF CERTIORARI

Adham Amin Hassoun respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit panel opinion (Pet. App. 4a) is reported at 657 F.3d 1085. The Eleventh Circuit's order denying panel rehearing and rehearing *en banc* is unreported. *Id.* at 1a.

JURISDICTION

The Eleventh Circuit panel issued an opinion on September 19, 2011. Pet. App. 4a. The Eleventh Circuit's judgment became final when it denied panel rehearing and rehearing *en banc* on November 15, 2011. *Id.* at 1a. On January 31, 2012, Justice Thomas granted a thirty-day extension, up to and including March 14, 2012, to file this petition. On March 5, 2012, Justice Thomas granted a second thirty-day extension, up to and including April 13, 2012, to file the petition. This Court has jurisdiction under 28 U.S.C. § 1254(1).

LEGAL PROVISIONS INVOLVED

Federal Rule of Evidence 701 provides:

> If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is: (a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and (c) not based on scientific, technical, or

other specialized knowledge within the scope of Rule 702.

United States Sentencing Guideline § 3A1.4 provides in relevant part:

> Terrorism.
>
> (a) If the offense is a felony that involved, or was intended to promote, a federal crime of terrorism, increase by 12 levels; but if the resulting offense level is less than 32, increase to level 32.
>
> (b) In each such case, the defendant's criminal history category from Chapter Four (Criminal History and Criminal Livelihood) shall be Category IV.
>
> *Commentary*
>
> *Application Notes*:
>
> 1. *"Federal Crime of Terrorism" Defined*.—For purposes of this guideline, "federal crime of terrorism" has the meaning given that term in 18 U.S.C. § 2332b(g)(5).
>
> . . .

18 U.S.C. § 2332b(g)(5) provides in relevant part:

> [T]he term "Federal crime of terrorism" means an offense that—
>
> (A) is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct; and

(B) is a violation of—

(i) . . . [section] 956(a)(1) (relating to conspiracy to murder, kidnap, or maim persons abroad) . . . [section] 2339A (relating to providing material support to terrorists) . . .

. . .

INTRODUCTION

Federal Rule of Evidence 701 creates a narrow exception to the general rule excluding opinion testimony. It allows lay witnesses to offer opinion testimony only where, based on their "first-hand knowledge or observation," the opinion would be "helpful" to the jury. Fed. R. Evid. 701, advisory committee's note (1972 Proposed Rule). Courts have regularly applied Rule 701 to permit litigants to present lay opinion from a witness who personally observed the event at issue and can offer a first-hand perspective of what occurred. Rule 701 thus "recognizes the common sense behind the saying that, sometimes, 'you had to be there.'" *United States v. Garcia*, 413 F.3d 201, 212 (2d Cir. 2005).

Notwithstanding this well-established meaning of the rule, in recent years the Government, in a significant number of major prosecutions resting on circumstantial evidence, has undertaken to prove its case through the opinion testimony of investigative agents who are concededly neither percipient witnesses to the relevant events nor experts in any sense. Typically, as in this case, these lay agents have undertaken a cold, *post-hoc* review of the record, on which basis they have told the jury how to interpret the evidence before them. In doing so, in this case and others, the testifying agents have gone

so far as to opine on the defendant's supposed incriminating meaning in admittedly ambiguous conversations in which the agent was neither a participant nor an observer.

The Government executed this shortcut around Rule 701's foundational requirements to perfection in this case. The Government made no allegation that Mr. Hassoun ever committed an act of violence, that he ever sought to take any action in the United States, that he ever wished to harm any U.S. citizens, or even that there were ever any actual victims of the conspiracy in which he allegedly participated. Instead, in its attempt to prove that Mr. Hassoun supported violence abroad, the Government principally relied on recorded conversations that on their face reflected humanitarian efforts to support the self-defense of Muslims who were suffering genocide and other atrocities in conflict areas such as Bosnia, Kosovo, Chechnya, Afghanistan, and Somalia.

In an effort to cast Mr. Hassoun's facially innocent conversations in a criminal light, the Government offered the testimony of John Kavanaugh, a junior FBI agent with no Arabic language ability, to provide a running interpretation of many hours of intercepted conversations conducted primarily in Arabic and translated into English by other government agents. The Government did not qualify Kavanaugh as an expert witness under Rule 702. Kavanaugh had no claimed expertise and "did not personally observe or participate in the defendants' conversations." Pet. App. 30a. He instead based his opinion solely on what "he learned through his examination" of the Government's evidence and

translations. *Id.* at 31a. Based strictly on that review of the documentary record, Kavanaugh told the jury to infer that the Hassoun's use of such terms as "work with refugees," "help the wounded," the "importan[ce of] tak[ing] care of [the elderly]," "football," "soccer," and "tourism," showed that he was engaged not in an effort to aid the self-defense of genocide victims, but instead was advocating violent jihad overseas. *Id.* at 14a, 108a, 112a–114a.

The panel majority in this case joins four other circuits—the Fifth, Seventh, Ninth, and Tenth—which, in quite similar cases since 2007, have likewise found dispensable Rule 701's critical limitation requiring firsthand knowledge or observation of the events in issue. In those four criminal prosecutions as well, the courts have condoned the Government's use of a non-percipient, non-expert agent witness to interpret critical intercepted conversations based solely on after-the-fact review of that evidence.

These five decisions are in direct conflict with the decisions of three other circuits—the Second, Fourth, and Eighth—which have flatly rejected the same overreaching prosecutorial practice on closely analogous facts. They also are at odds with the main body of decisions construing Rule 701, which routinely recognize the rule's confinement to lay opinions concerning events that are offered by percipient witnesses to those events. Indeed, at least two additional circuits—the First and Third—likewise have rejected non-percipient, non-expert opinion as violative of Rule 701.

The Government's overreaching in this way allows it to bolster its version of events through the

imprimatur of law enforcement "opinion" and to secure convictions that might fail based on the unvarnished evidence. In this way, it amounts to an important detour around Rule 702's carefully calibrated standards for admission of expert testimony in criminal and civil cases alike. Indeed, Rule 702 extends the benefit of permitting experts to offer opinions "that are not based on firsthand knowledge or observation" only where proponents satisfy the burden of demonstrating that those opinions are "premised on . . . a reliable basis in the knowledge and experience of [the expert's] discipline." *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 592 (1993).

Here, on a record lacking direct evidence, Agent Kavanaugh's running interpretation of ambiguous conversations conducted in a language foreign to him was indispensable in selling the idea that Mr. Hassoun's efforts to defend Muslims against ethnic cleansing were in fact support for aggressive, violent jihad. The Government has made "no substantial argument or showing" that admission of Kavanaugh's testimony was "harmless," Pet. App. 67a n.7, nor could it do so given the circumstantial nature of its proof.

Accordingly, the Court should grant Mr. Hassoun's petition—and the petitions filed today by Mr. Hassoun's codefendants below, Kifah Jayyousi and Jose Padilla, *see* Pet. for Cert., *Jayyousi v. United States*, No. ___ (Apr. 2, 2012); Pet. for Cert., *Padilla v. United States*, No. ___ (Apr. 2012)—and reaffirm reaffirm the longstanding limitation of Rule 701 as confined to opinions of lay witnesses with personal knowledge or involvement in the events at issue.

The Government here compounded its overreach in using lay opinion testimony to spin the meaning of ambiguous Arabic conversations by pursuing imposition of the terrorism enhancement upon Mr. Hassoun's sentence. That enhancement must rest, under the statute, on a finding that Mr. Hassoun's actions were "calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct." 18 U.S.C. § 2332b(g)(5). The Court should grant review on this issue as well because the record shows, contrary to the decision below, that the district court did not make the statutorily required finding.

STATEMENT OF THE CASE

A. Background

Mr. Hassoun was born in Lebanon in 1962, immigrated to the United States in 1989 on a student visa, and remained here on a legal-residence visa. He resided in Sunrise, Florida, for more than a decade with his wife and family, working as a software programmer.

As the district court found at sentencing, Mr. Hassoun lived through a Lebanese civil war and "knew firsthand what happened to a country when internal politics turned violent." Pet. App. 121a. He "knew what it was like to live through armed conflict and religious persecution." *Id.* "The plight of Muslims throughout the world pained and moved him" and caused him to "reach[] out to people in his community and overseas, often giving of himself personally and financially" to assist Muslims facing oppression or armed conflict in foreign countries. *Id.*

Mr. Hassoun was well-known in his community for condemning atrocities against Muslims and for

raising funds for suffering Muslims throughout the world. He knew Mr. Jayyousi through the latter's similar public advocacy and fundraising on behalf of oppressed Muslims. He became acquainted with Mr. Padilla through the Sunrise Mosque, which both attended in the 1990s.

In this case, the Government has made no allegation of any actual or planned terrorist activities in the United States or against any U.S. citizen anywhere, and no allegation that Mr. Hassoun ever committed an act of violence. Instead, all of the Government's evidence demonstrated that, throughout the indictment period of October 1993 until November 2001, Mr. Hassoun was involved in humanitarian efforts to aid Muslims in conflict areas such as Bosnia, Kosovo, Chechnya, Afghanistan, and Somalia where, as the international community at the time recognized, Muslims were facing government-sponsored ethnic cleansing. *See, e.g.*, Dep't of State, *Ethnic Cleansing in Kosovo: An Accounting* (1999), *available at* http://www.state.gov/www/global/human_rights/kosvoii/over.html. Indeed, the United States itself was supportive of these Muslim victims and intervened to alleviate their plight. *See id.*

The Government's theory was that, in attempting to aid these suffering Muslims, Mr. Hassoun provided "support for Islamist violence overseas." Pet. App. 5a. Mr. Hassoun's purported wrongdoing consisted of assisting his fellow Muslims and allegedly recruiting Mr. Padilla to train for and pursue jihad overseas. The Government secured a three-count indictment charging Mr. Hassoun, Mr. Jayyousi, and Mr. Padilla with (i) violating 18 U.S.C. § 956(a)(1) by conspiring to commit acts of murder, maiming, or kidnapping

abroad; (ii) violating 18 U.S.C. § 371 by conspiring to violate 18 U.S.C. § 2339A(a) by providing material support to carry out a conspiracy to murder, maim, or kidnap abroad; and (iii) violating 18 U.S.C. § 2339A(a) by providing material support knowing and intending that it be used to carry out a conspiracy to murder, maim, or kidnap abroad. *Id.* at 5a–6a.

B. The Government's Evidence

The Government's evidentiary presentation against Mr. Hassoun at trial consisted almost entirely of intercepted telephone calls involving Mr. Hassoun and other individuals, including Mr. Jayyousi and Mr. Padilla. Most of these calls were conducted in Mr. Hassoun's native Arabic. Pet. App. 72a. Mr. Padilla was a participant in only seven of the nearly 150,000 calls that the Government intercepted. *Id.* at 11a.

The only other evidence that the Government marshaled to support its allegations against Mr. Hassoun were the undisputed facts that Mr. Hassoun was acquainted with Mr. Padilla through the Sunrise Mosque, helped Mr. Padilla raise $500 from Mosque members to travel to Egypt to study Arabic and Islam, and made financial contributions to humanitarian organizations attempting to assist oppressed Muslims overseas. The Government's evidence demonstrated that Mr. Hassoun spoke to Mr. Padilla only five times during Mr. Padilla's two-year stay in Egypt and that those calls focused on mundane matters rather than any violent activities. *Id.* at 16a–17a.

The Government also had in its possession eyewitness statements against the declarants' penal interests that exonerated Mr. Hassoun of any

wrongdoing. The first came from a known al-Qaeda operative named Uways and "demonstrat[ed] that an al-Qaeda facilitator, Malik, and *not Hassoun*, recruited Padilla to go to Afghanistan" to join jihad. *Id.* at 51a (emphasis added). The other statements came from Mr. Padilla himself, who confirmed that Malik—whom he met in Saudi Arabia in 2000—first sparked his interest in experiencing jihad and invited him to come to Yemen as a prelude to traveling to Afghanistan. *Id.* at 52a–53a. The Government acknowledged at trial that Mr. Hassoun had no connection to Malik and that on their final call in 2000—while Mr. Padilla was still in Egypt and *before* he attended his alleged al-Qaeda training—Mr. Hassoun *discouraged* Mr. Padilla from going to Yemen and *encouraged* him to "come back over here" to the United States. *Id.* at 117a.

C. Kavanaugh's Testimony

Agent John Kavanaugh's testimony was the vehicle through which the Government presented its interpretation of Mr. Hassoun's intercepted communications, which formed the bulk of its evidence against him. Kavanaugh joined the FBI's investigation of the defendants in May 2002, approximately five months *after* the close of the indictment period and up to several years after the communications had taken place. Pet. App. 13a. Kavanaugh was a junior agent with only three years experience at that time. He had no expertise in terrorism crimes or conspiracies, or in code-breaking.

Kavanaugh "did not personally observe or participate in the defendants' conversations" or other alleged activities. *Id.* at 30a. Rather, "[h]is assignment consisted of reviewing pre-collected

information, including phone calls, facsimiles, financial records and interviews; conducting some additional interviews; [and] identifying which phone calls and facsimiles . . . were pertinent to the investigation." *Id.* at 72a. Many of the intercepts "were in Arabic and required translation into English, which was done by someone other than Agent Kavanaugh, who does not speak or read Arabic." *Id.*

The defendants' trial marked Kavanaugh's first time testifying in a case involving terrorism-related allegations. The Government failed in its attempt to introduce Kavanaugh as an expert, so it offered him as a lay witness under Rule 701. Despite "concerns" about his testimony and over the defendants' objections (*id.* at 103a–107a), the district court permitted Kavanaugh to offer lay opinions about the defendants' supposed meaning and intent "based solely on his involvement in the case" (*id.* at 72a). At the same time, the district court excluded the Uways statement and Mr. Padilla's admissions that Malik, not Mr. Hassoun, recruited Mr. Padilla to travel to Afghanistan for jihad. *Id.* at 52a–53a.

During Kavanaugh's testimony, the Government provided the jury with binders containing English translations of 120 intercepts. *Id.* at 73a. Each transcript contained "the date of the phone call, . . . the identity of the participants on the call, and the verbatim transcript of each conversation." *Id.* "After the jurors listened to an individual call that corresponded to a transcript in the binder, . . . Kavanaugh then gave his *interpretation* and *opinion* about the meaning of the . . . conversations." *Id.* (emphases in original). Kavanaugh's avowed purpose

was to "make inferences" about "what was going on in the mind of Adham Hassoun." *Id.* at 118a.

Kavanaugh "pointed out to the jury when he believed the defendants were speaking in code and then gave his opinion of what he thought the conversation and dozens of 'code words' actually meant." *Id.* at 78a. Kavanaugh thus "not only told the jury that a particular conversation meant something other than what the conversation purported to be about, he also supplied the meaning he believed actually should be attributed to the conversation." *Id.*

Kavanaugh opined that Mr. Hassoun's references to victims of "ethnic cleansing," a desire to "work with the displaced and with the humanitarian aid," "work with refugees," "help the wounded," and the "important[ce of] tak[ing] care of [the elderly]" were actually coded advocacy of violent jihad. *Id.* at 108a, 112a–114a. More generally, Kavanaugh also testified that the defendants had used numerous mundane words as coded references advocating violent jihad overseas, including "football," "soccer," "tourism," "tourist," "sneakers," "going on the picnic," "married," "trade," "open up a market," open up a "branch," "the first area," "school over there to teach football," "students," "iron," "joint venture," "full sponsorship," and "open the door." *Id.* at 14a.

"However, other than the one or two instances in which the defendants themselves identified the meaning of a code word, Agent Kavanaugh never explained the source of the words and phrases that he claimed were the 'true meaning' of the defendants' words." *Id.* at 73a. Instead, "[h]e merely testified that his opinions about the meaning of the 'code'

words came from 'everything he learned in this investigation.'" *Id.* Kavanaugh "never explained what knowledge or perception he gained during the investigation that allowed him to interpret the conversations any better than the jury." *Id.* at 74a.

The jury convicted the defendants of all three counts. *Id.* at 6a.

D. Sentencing

At sentencing, the district court recounted Mr. Hassoun's personal experience with civil war and religious persecution, "recognize[d] the defendants were aware and in some areas Muslim communities were in distress," noted that "[t]hese situations were deplored in the international community," and expressly found that Mr. Hassoun's "strong feelings" of humanitarianism "were his motivation" to engage in the acts underlying the conviction. Pet. App. 121a, 125a. The district court did not make the statutorily required finding that Mr. Hassoun's actions were calculated to intimidate, coerce, or retaliate against government conduct. Instead, the district court referred to the indictment's allegation that Mr. Hassoun acted with "the purpose of opposing existing governments" and inferred from the fact of conviction that the jury found that his actions were "intended [to] retaliate against the conduct of government." *Id.* at 124a–125a. The district court made no mention of its specific instruction that the defendants' motive was not before the jury. *See id.* Nonetheless, at the Government's urging, the district court imposed the terrorism enhancement on Mr. Hassoun, and sentenced him to concurrent terms of 188 months on Count 1, 60 months on Count 2, and 180 months on Count 3. *Id.* at 6a.

E. Appeal

In a 2-1 split decision, the panel affirmed Mr. Hassoun's conviction. The panel majority recognized that Rule 701 incorporates the "requirement of first-hand knowledge or observation" and requires lay opinion testimony to be "helpful in resolving issues." Pet. App. 29a. The majority also conceded that Kavanaugh "did not personally observe or participate in the defendants' conversations" and is not an expert, but instead based his testimony on what "he learned through his examination" of the Government's evidence. *Id.* at 30a–31a.

The panel majority, however, upheld the district court's admission of Kavanaugh's testimony. The majority reasoned that Kavanaugh's testimony was "rationally based on his perception" and was helpful to the jury because he read the transcripts of the intercept translations and otherwise reviewed the prosecution's evidence. *Id.* at 30a–32a. The majority did not even cite, much less discuss, any of the decisions from other circuits which held inadmissible testimony that is indistinguishable from Kavanaugh's in this case.

Judge Barkett dissented from the majority's construction of Rule 701. Judge Barkett pointed out that the majority's conclusion that Kavanaugh's opinions were admissible "because they were based on his personal perception of the defendants' pre-recorded conversations as informed by everything he learned in his investigation . . . has no support in the law." *Id.* at 74a–75a. Judge Barkett emphasized that, to the contrary, prior to the panel majority's decision, other circuits had held that an officer "cannot testify about his view of the evidence just

because he spent a lot of time investigating the case." *Id.* at 74a n.11.

Distilling the prior decisions, Judge Barkett concluded that "[a] law enforcement officer's lay opinion about the meaning of a conversation" rests on first-hand knowledge only when the officer is either "(1) a personal participant in a conversation as an undercover agent," or "(2) a listener to a conversation while observing a defendant's behavior in real time to coordinate the conversation with the conduct." *Id.* at 75a. Judge Barkett also concluded that lay opinion testimony is not helpful within the meaning of Rule 701 "when it does nothing more than give one side's understanding of the evidence." *Id.* at 81a. Judge Barkett therefore determined that Kavanaugh's testimony was inadmissible because "it was not based on firsthand observation and . . . was merely the government's closing argument in disguise." *Id.* at 67a.

The panel also affirmed the imposition of the terrorism enhancement on Mr. Hassoun's sentence. *Id.* at 55a–58a. The panel quoted the statutory motivational requirement, but upheld the district court's inference of such motivation from the jury's conviction. *Id.*

The Eleventh Circuit denied Mr. Hassoun's petition for panel rehearing or rehearing *en banc* on November 15, 2011. *Id.* at 4a. This timely petition followed.

REASONS FOR GRANTING THE PETITION

The Court should grant review to resolve the substantial circuit split caused by the Government's recent effort to eviscerate Rule 701's foundational requirements. In a series of major cases resting on

highly circumstantial evidence, the Government has secured convictions by introducing non-percipient, non-expert "opinion" from law enforcement agents that rested on nothing more than the same cold, *post-hoc* review of the record that the jury itself can—and should—conduct. While four other circuits have taken the same view on very similar facts as the panel majority below, three circuits have expressly refused to countenance the Government's approach and faithfully applied Rule 701 to reject interpretive testimony from non-percipient, non-expert law enforcement agents.

The Court also should grant review of the Government's related overreach to impose the terrorism enhancement on Mr. Hassoun's sentence. Such an enhancement was conceivable only because of the error in allowing Kavanaugh's improper testimony. It also is wrong on the separate ground that the district court did not make the statutorily required finding that Mr. Hassoun acted to intimidate, coerce, or retaliate against government conduct.

I. THE GOVERNMENT'S MISCONSTRUCTION OF RULE 701 WARRANTS THIS COURT'S REVIEW

A. The Circuits Are Diametrically Split On The Admissibility Of Non-Percipient, Non-Expert Opinion

1. Rule 701 carves out an exception to the normal rule excluding opinion testimony. It allows lay witnesses to testify in the form of opinions or inferences that are "(a) rationally based on the witness's perception; (b) helpful to clearly understanding the witness's testimony or to

determining a fact in issue; *and* (c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702." Fed. R. Evid. 701 (emphasis added).

Rule 701 thus codifies "the familiar requirement of first-hand knowledge or observation" and permits lay testimony in the form of opinion or conclusion only where helpful to the factfinder "in resolving issues." Fed. R. Evid. 701 advisory committee's note (1972 Proposed Rules); *see also* Fed. R. Evid. 602 ("A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter."); *Daubert*, 509 U.S. at 592 ("[T]he usual requirement of firsthand knowledge . . . represents a most pervasive manifestation of the common law insistence upon the most reliable sources of information.").

These requirements make perfect sense: the entire purpose of Rule 701 is to put "the trier of fact in possession of an accurate reproduction of the event" at issue, and to prohibit "meaningless assertions which amount to little more than choosing up sides." Fed. R. Evid. 701 advisory committee's note (1972 Proposed Rules). Consistent with this purpose, the circuits have upheld lay opinion where the witness personally observed the event at issue and can offer a first-hand perspective of what occurred, including of a speaker's intended meaning in an ambiguous conversation. *See, e.g.*, *United States v. Santiago*, 560 F.3d 62, 66–67 (1st Cir. 2009); *United States v. Simels*, 654 F.3d 161, 168 (2d Cir. 2011); *United States v. Hoffecker*, 530 F.3d 137, 170–71 (3d Cir. 2008); *United States v. Perkins*, 470 F.3d 150 (4th

Cir. 2006); *United States v. Parsee*, 178 F.3d 374 (5th Cir. 1999); *United States v. Elder*, 90 F.3d 1110, 1134 (6th Cir. 1996); *United States v. Saulter*, 60 F.3d 270 (7th Cir. 1995); *United States v. Ali*, 616 F.3d 745, 753–54 (8th Cir. 2010); *United States v. Simas*, 937 F.2d 459, 464–65 (9th Cir. 1991); *United States v. Sneed*, 34 F.3d 1570, 1581–82 (10th Cir. 1994); *United States v. Awan*, 966 F.2d 1415 (11th Cir. 1992); *see also* Fed. R. Evid. 701 advisory committee's note (2000 Amendments) (listing the "prototypical example[s]" of Rule 701 lay opinion, including "the appearance of persons or things, identity, [and] manner of conduct").

2. In a series of recent prosecutions, however, the Government has attempted with some success to subvert Rule 701's foundational requirements. Instead of complying with those requirements or Rule 702's requirements for expert testimony, the Government has bypassed them entirely and offered *non*-percipient, *non*-expert opinion from law enforcement agents in order to interpret highly circumstantial evidence for the jury. Most commonly, those agents have purported to interpret the defendant's alleged meaning in ambiguous conversations in which the agent did not participate and regarding which the agent has no first-hand knowledge. The circuits are irreconcilably split on whether the Government's counter-textual overreaching is permissible under Rule 701.

The Second, Fourth, and Eighth Circuits have rejected the Government's attempts to introduce non-percipient, non-expert law enforcement opinion regarding a speaker's intended meaning. Those courts have held that such testimony is admissible as

lay opinion "only when [the officer] is a participant in the conversation, has personal knowledge of the facts being related in the conversation, or observed the conversations as they occurred." *United States v. Peoples*, 250 F.3d 630, 641 (8th Cir. 2001); *see also United States v. Grinage*, 390 F.3d 746, 750 (2d Cir. 2004); *United States v. Johnson*, 617 F.3d 286, 293 (4th Cir. 2010).

The Eighth Circuit was the first court of appeals to address the Government's recent approach to Rule 701, and reversed convictions that rested on FBI agent testimony "materially indistinguishable" from Kavanaugh's testimony against Mr. Hassoun. Pet. App. 77a. The agent in *Peoples*, like Kavanaugh, "did not personally observe the events and activities discussed in the recordings" involving the defendants, "nor did she hear or observe the conversations as they occurred." 250 F.3d at 640. Instead, like Kavanaugh, she "testified in connection with [] recorded telephone . . . conversations" and, "[d]rawing on her investigation . . . gave her opinion regarding the meaning of words and phrases used by the defendants during those conversations." *Id.* at 639–40. Thus, "as the recordings of the [defendants'] conversations were played for the jury, [the agent] . . . offer[ed] a narrative gloss that consisted almost entirely of her personal opinion of what the conversations meant." *Id.* at 640. The Eighth Circuit held that the agent's testimony should have been excluded because it was "based on her investigation after the fact, not on her perception of the facts." *Id.* at 641. It therefore reversed the convictions and ordered a new trial. *See id.* at 642.

The Second Circuit reached an analogous result three years later in *Grinage*. There, a DEA case agent offered lay "opinions" regarding the defendant's purported meaning based merely on "his review . . . of the recorded telephone conversations." 390 F.3d at 750. Reasoning that the Government "fundamentally misunderstands Rule 701(b)," the Second Circuit held that such testimony was not helpful to the jury because it "not only [told] them what was in the evidence but also . . . what inferences to draw from it." *Id.* Such non-percipient, non-expert testimony thus "usurped the function of the jury" to decide the facts based on the evidence presented. *Id.*; *see also Garcia*, 413 F.3d at 210–13 (rejecting case agent lay opinion that the defendant was guilty "partner" in a cocaine operation that "was not limited to his personal perceptions but drew on the total information developed by all the officials who participated in the investigation" because "Rule 701 limits the admissibility of lay opinions at trial to those based only on personal perceptions").[1]

The Fourth Circuit also recently invoked this rule to reverse the conviction in *Johnson*. There, the district court allowed a DEA agent to testify regarding the intended meaning of intercepted telephone conversations between the defendant and a co-conspirator. *See* 617 F.3d at 289–91. That

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[1] The Second Circuit ultimately concluded in *Garcia* that the district court's error in admitting the agent's testimony was harmless. *See* 413 F.3d at 217–19. Here, by contrast, the Government has made "no substantial argument or showing" that admission of Kavanaugh's testimony was "harmless." Pet. App. 67a n.7.

testimony, however, was "not based on [the agent's] own perception" of those conversations. *Id.* at 292. Indeed, the agent "admitted that he did not participate in the surveillance during the investigation, but rather gleaned information from interviews with suspects and charged members of the conspiracy *after* listening to the phone calls." *Id.* at 293 (emphasis in original). Citing *Peoples*, the Fourth Circuit agreed that admission of this testimony was reversible error because the agent's "post-hoc assessments cannot be credited as a substitute for the personal knowledge and perception required under Rule 701." *Id.*

While the First, Sixth, and D.C. Circuits have not directly addressed the Government's recent efforts to eviscerate Rule 701, their pronouncements suggest that they would join the position of the Second, Fourth, and Eighth Circuits. *See United States v. Vazquez-Rivera*, 665 F.3d 351, 361 (1st Cir. 2011) (finding plain error in admission under Rule 701 of law enforcement agent testimony "not limited to opinion that soundly followed from her perceptions"); *United States v. Ganier*, 468 F.3d 920, 927 (6th Cir. 2006) (citing *Peoples* approvingly and noting that "[e]ven before the [2000] amendment, witnesses who performed after-the-fact investigations were generally not allowed to apply specialized knowledge in giving lay testimony"); *United States v. Wilson*, 605 F.3d 985, 1025–26 (D.C. Cir. 2010) (per curiam) (holding that the basis of an opinion "must come from one of two sources: the firsthand experience of a lay witness or the sort of 'knowledge, skill, experience, training, or education' that would qualify the witness as an expert"). The Third Circuit likewise has rejected attempts by civil litigants to introduce non-

percipient, non-expert opinion under Rule 701, reasoning that such testimony violates Rule 701's percipience and helpfulness requirements. *See, e.g.*, *Hirst v. Inverness Hotel Corp.*, 544 F.3d 221, 224-28 (3d Cir. 2008) (excluding opinion testimony regarding whether accident could have been prevented because it rested on second-hand knowledge).

3. On the other hand, the Fifth and Tenth Circuits have upheld admission of non-percipient, non-expert law enforcement agent "opinion" grounded in nothing more than a cold review of the Government's evidence. *See, e.g.*, *United States v. El-Mezain*, 664 F.3d 467, 513 (5th Cir. 2011) (approving admission of lay "opinion" about meaning of wiretapped conversations and recorded videos based on after-the-fact investigation); *United States v. Zepeda-Lopez*, 478 F.3d 1213, 1217–22 (10th Cir. 2007) (upholding admission of investigating agent's voice and visual identification, as well as interpretation of translated transcripts, based on agent's post hoc review of recordings). The Seventh Circuit has also reluctantly upheld admission of law enforcement lay opinion regarding the meaning of ambiguous words that is grounded in a combination of first-hand and second-hand knowledge, recognizing that such "opinion" "approaches the line dividing lay opinion testimony from expert opinion testimony." *United States v. Rollins*, 544 F.3d 820, 827–33 (7th Cir. 2008). The Ninth Circuit followed the same course in *United States v. Freeman*, 498 F.3d 893 (9th Cir. 2007), where it allowed a police detective to offer lay opinion regarding "ambiguous conversations" in which he "was not a participant" because he had reviewed "several hours of intercepted conversations . . . in some instances

coupled with direct observation" of the defendants. *Id.* at 904–05.

4. Accordingly, there is a clear split in the circuits on the question presented. Considering only cases of law enforcement agent testimony interpreting conversations in which the agent was not a party, the circuits are divided 5-4. Viewed more broadly as whether, in civil and criminal cases alike, Rule 701 continues to be limited to lay witnesses with personal involvement in or perception of the events at issue, the division of the circuits appears to be as large as 7-5.

B. The Government's Attempt To Rewrite Rule 701 Presents An Important And Recurring Issue

The Court should grant review because the Government's counter-textual construction of Rule 701 not only alters the playing field in the numerous recurring cases involving lay opinion testimony, but also threatens to undermine the Court's careful balance controlling admission of expert opinion testimony under Rule 702.

First, the entire "purpose of the foundation requirements of the federal rules governing opinion evidence is to ensure that such testimony does not . . . usurp the fact-finding function of the jury." *Garcia*, 413 F.3d at 210–11; *see also United States v. Meises*, 645 F.3d 5, 16 (1st Cir. 2011) (Rule 701 "exclude[s] testimony where the witness is no better suited than the jury to make the judgment at issue, providing assurance against the admission of opinions which would merely tell the jury what result to reach.") (internal quotation marks omitted). Rule 701 thus excludes "meaningless assertions which amount to

little more than choosing up sides," Fed. R. Evid. 701 advisory committee's note (1972 Proposed Rules), and is intended to prevent a party from presenting "closing argument in [the] disguise" of lay "opinion." Pet. App. 67a.

The Government's systematic overreaching through non-percipient, non-expert agents vouching for the Government's version of events and telling the jury what inferences to draw has resulted in convictions that the evidence otherwise would not support because "the jury may well [be] inclined to give [a witness'] conclusions undue weight because of her status as a[] [federal] agent." *Peoples*, 250 F.3d at 642. But a witness's status or specialized training or experience have no bearing on her competence to offer lay opinion; rather, what matters under Rule 701 is the witness's personal perception of the event at issue and opportunity to make first-hand observations. *See, e.g.*, *Johnson*, 617 F.3d at 293–95; *Garcia*, 413 F.3d at 211–13; *Peoples*, 250 F.3d at 641–42. The Government's erosion of this requirement thus transforms Rule 701 from a narrow exception based on the common-sense recognition that a direct observer of events may have unique insights into a broad invitation for juries in criminal and civil cases to abdicate their independent fact-finding role to a single lay witness, especially one of prominent status, offering "opinions" based solely on a review of the evidence.

Second, "[w]hat is essentially expert testimony . . . may not be admitted under the guise of lay opinions." *Peoples*, 250 F.3d at 641; *see also* Fed. R. Evid. 701 advisory committee's note (2000 Amendments) (Rule 701 should "eliminate the risk that the reliability

requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing"). "Such a substitution subverts the disclosure and discovery requirements of Federal Rules of Criminal Procedure 26 and 16 and the reliability requirements for expert testimony as set forth in *Daubert* . . . and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999)." *Peoples*, 250 F.3d at 641. As this Court has held, Rule 702, unlike Rule 701, permits an expert to offer opinions "that are not based on firsthand knowledge or observation" only where such opinions are "premised on . . . a reliable basis in the knowledge and experience of [the expert's] discipline." *Daubert*, 509 U.S. at 592.

But the Government's recent approach to Rule 701 would leave no incentive for litigants to assume the *burden* of expert testimony—proving that opinions are "reliable"—in order to capture the *benefit* of expert testimony—the ability to offer opinions not based on "firsthand knowledge or observation." *Id.* Thus, while "[l]aw enforcement officers are often qualified as experts to interpret intercepted conversations using slang, street language, and . . . jargon," *Peoples*, 250 F.3d at 641, the Government's erosion of Rule 701 would permit *any* law-enforcement agent to offer such an interpretation based not on expertise and reliable methodology but on a cold review of the record. And there would be nothing to prevent the Government from offering any available law enforcement agent to opine "as to a person's culpable role in a charged crime," the structure and operations of a purported organized crime syndicate, or the respective roles of co-conspirators based merely on a review of "the

'entirety' or 'totality' of information gathered in an investigation." *Garcia*, 413 F.3d at 212.

The risk of supplanting Rule 702's carefully calibrated standards with a lax interpretation of Rule 701 is not limited to criminal cases any more than Rule 701 is limited to such cases. Thus, a party to civil litigation could avoid Rule 702's hurdles and offer lay opinion regarding central disputed issues from a witness who has merely familiarized herself with the evidence. A party alleging corporate fraud could put on a witness who had comprehensively reviewed all the relevant communications to opine that, based on her extensive review, the defendant's executives harbored fraudulent intent in entering into a particular transaction. *Compare, e.g.*, *Okland Oil Co. v. Conoco, Inc.*, 144 F.3d 1308, 1327–28 (10th Cir. 1998) (permitting expert testimony on this topic because the witness relied on "his experience in the specialized field of oil and gas") *with, e.g.*, *Bank of China, New York Branch v. NBM LLC*, 359 F.3d 171, 180–83 (2d Cir. 2004) (holding that testimony regarding banking industry customs and fraud standards was improperly admitted under Rule 701). Or, in an antitrust case, a witness could study the relevant communications and opine that the defendants intended to set prices in concert.

There is no arguable justification, either in general or on the facts of this case, to allow this evisceration of Rule 701's textual requirements. The Government cannot credibly argue that the limitations on lay opinion regarding the meaning of conversations recognized by other circuits hamstring its ability to bring criminal prosecutions. In the first place, the Government continues to bring successful

prosecutions in those circuits, including in cases involving terrorism-related allegations. *See*, *e.g.*, *United States v. Stewart*, 590 F.3d 93, 138 (2d Cir. 2009). The Government also routinely satisfies Rule 701's foundational requirements and presents lay opinion from investigating agents who actually observed the events and conversations at issue. *See, e.g.*, *Santiago*, 560 F.3d at 66–67; *Simels*, 654 F.3d at 168; *Hoffecker*, 530 F.3d at 170–71; *Perkins*, 470 F.3d 150; *Parsee*, 178 F.3d 374; *Elder*, 90 F.3d at 1134; *Saulter*, 60 F.3d 270; *Ali*, 616 F.3d at 753–54; *Simas*, 937 F.2d at 464–65; *Sneed*, 34 F.3d at 1581–82; *Awan*, 966 F.2d 1415. And in an appropriate case, the Government may introduce a properly qualified expert to review the evidence according to expertise and a reliable methodology and to opine on the meaning of conversations under Rule 702. *See, e.g.*, *Peoples*, 250 F.3d at 641; Pet. App. 69a n.9.

C. Kavanaugh's Inadmissible Testimony Determined The Outcome Of This Case

The Government "makes no substantial argument or showing that the[] significant error[] of law" in admitting Kavanaugh's testimony was "harmless." Pet. App. 67a n.7. Nor could it credibly do so because Kavanaugh's testimony was the vehicle through which the Government repackaged its own evidence of Mr. Hassoun's aid to Muslims facing government-sponsored, internationally recognized ethnic cleansing into purported proof of aggressive terrorist activities. Kavanaugh took benign conversations and imbued them with nefarious meaning, opining that the defendants were engaged in veiled advocacy of violent jihad overseas. *Id.* at. 14a, 108a, 112a–114a. That Kavanaugh's "opinions" were bolstered by his

"status as an FBI agent" only underscores their devastating impact on Mr. Hassoun. *Peoples*, 250 F.3d at 642.

Kavanaugh's testimony was particularly harmful because it coincided with the wrongful exclusion of the Uways statement and Mr. Padilla's admissions, which clearly established that Mr. Hassoun played no part in Mr. Padilla's traveling to Afghanistan. The jury thus received a distorted evidentiary record: it heard Kavanaugh's *non*-percipient "opinion" bolstering the Government's version of events, but never heard the *eyewitness* testimony from Uways and Padilla disproving the Government's allegations. This dual ratchet deprived the jury of the complete facts to judge Kavanaugh's credibility and the veracity of the Government's allegations, and made Mr. Hassoun's conviction a foregone conclusion.

Mr. Hassoun thus was convicted of three terrorism-related felonies and sentenced to more than fifteen years in prison based on lay opinion that lacked a proper foundation and would have been excluded in at least five circuits. This Court should grant review to resolve the circuit split—dispositive in this case—regarding the proper interpretation of Rule 701's foundational requirements.

II. THE COURTS BELOW IMPOSED THE TERRORISM ENHANCEMENT WITHOUT MAKING THE STATUTORILY REQUIRED MOTIVATIONAL FINDING

The terrorism enhancement applies only to a sentence for an offense (i) under any designated federal statute that (ii) "is calculated to influence or affect the conduct of government by intimidation or coercion, or to retaliate against government conduct."

18 U.S.C. § 2332b(g)(5); *see also* USSG § 3A1.4. This latter requirement supplies a motivational element and focuses the terrorism enhancement on cases involving "violent terrorist acts." *United States v. Chandia*, 514 F.3d 365, 376 (4th Cir. 2008).

Even though Mr. Hassoun's activities were directed at aiding Muslims suffering government-sponsored, internationally recognized ethnic cleansing in places such as Kosovo and Chechnya, the Government asked the district court to impose the terrorism enhancement on Mr. Hassoun's sentence. The Government asserted that the evidence at trial—which consisted almost exclusively of Kavanaugh's improperly admitted testimony—evinced the statutory requirements to trigger the enhancement. Pet. App. 123a. The Government thus relied on Kavanaugh's testimony not only to secure convictions that the highly circumstantial evidence itself did not support, but also to pile an increased sentence on Mr. Hassoun.

The district court granted the Government's request on flawed reasoning. *Id.* at 123a–125a. The district court recited the statutory requirement that the actions underlying the conviction were "calculated to . . . intimidat[e,] coerc[e], or retaliate against government conduct." *Id.* at 123a. Yet the district court *never* made that required finding. Instead, the district court pointed to the language of the indictment charging the defendants with a "purpose of opposing existing governments," and inferred from the fact of conviction alone that the jury necessarily must have found that Mr. Hassoun acted to "affect [by intimidation or coercion] or retaliate against the conduct of government." *Id.* at

124a–125a. The panel affirmed, deeming the district court's discussion of the indictment and the fact of conviction sufficient to supply the statutorily required motivational element. *Id.* at 55a–58a.

This imposition of the terrorism enhancement based on the indictment and the fact of conviction contravened both the plain terms of the statute and the district court's own jury instructions. In the first place, the statutory requirement that the defendant's actions were "calculated to . . .intimidat[e,] coerc[e,] [or] retaliate against government conduct" contemplates violent, offensive activities, 18 U.S.C. § 2332b(g)(5). Thus, the alleged "purpose of *opposing* existing governments" (Pet. App. 124a (emphasis added)), without more, does not trigger the enhancement. Moreover, the district court expressly instructed the jury that the defendants' motive was not before it—so the jury necessarily made *no* motivational finding, let alone the finding required by the statute. *Id.* at 129a. Indeed, the district court found at sentencing that Mr. Hassoun's "strong feelings" of humanitarianism "were his motivation" to engage in the acts underlying the conviction, Pet. App. 121a, 125a. Consequently, the fact that the jury convicted Mr. Hassoun under the indictment was entirely insufficient to supply the requisite motivational finding, and the courts below erred in imposing the terrorism enhancement. *See, e.g.*, *Stewart*, 590 F.3d at 99–100 (reversing terrorism enhancement in absence of required finding); *Chandia*, 514 F.3d at 376 (reversing "automatic[]" application of enhancement to material support conviction); *United States v. Leahy*, 169 F.3d 433, 446 (7th Cir. 1999) (reversing enhancement where

record did not support the required motivational finding).

The lower courts' sanctioning of the terrorism enhancement on an insufficient factual record has far-reaching consequences. In recent years, the terrorism enhancement has become a favorite tool of prosecutors, who have sought to invoke it in cases far removed from the violent, offensive activities that prompted its adoption. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103–322, § 120004, 108 Stat. 1796, 2022. According to a Westlaw search, the terrorism enhancement has been cited in nearly 100 cases since its adoption in 1994. Since 2007, the Department of Justice has espoused the view that the enhancement may apply in cases of "computer crime." Dep't of Justice, Prosecuting Computer Crimes at 144, *available at* http://www.justice.gov/criminal/cybercrime/docs/ccmanual.pdf (last visited Mar. 22, 2012). And the Government has invoked the enhancement against environmental activists accused of "either thought crimes or property damage crimes" rather than violent activities against persons. Rebecca K. Smith, *"Ecoterrorism?": A Critical Analysis Of The Vilification Of Radical Environmental Activists As Terrorists*, 38 Envtl. L. 537, 566–67 (2008).

The motivational requirement is a crucial bulwark cabining the terrorism enhancement because it prevents the enhancement's "automatic[]" application to convictions for the statutorily enumerated offenses. *Chandia*, 514 F.3d at 376. It therefore effectuates Congress's intent that the enhancement apply only to violent, offensive conduct directed at intimidating, coercing, or retaliating against the

conduct or policies of domestic or foreign governments. *See, e.g.*, *id.*

By convincing the lower courts to impose the enhancement without the statutorily required motivational finding, the Government threatens to remove this critical protection, and to open the door to broad use of the enhancement in the burgeoning number of cases in which the Government seeks to invoke it. The Court therefore should grant review on the important question of the application of the terrorism enhancement's statutory motivational requirement.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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