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No. 03-1294

IN THE
Supreme Court of the United States

Haywood Eudon Hall,
Petitioner,

v.

United States of America.

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

There is no dispute that this case is an ideal vehicle to resolve the circuit conflict over whether an overt act is an element of the offense of conspiracy to commit money laundering under 18 U.S.C. 1956(h). Not only did the Eleventh Circuit recognize that the "circuits are split on the issue," Pet. App. 5a, but the government candidly acknowledged the conflict in its brief below, see Gov't C.A. Br. 44 (conceding that "[t]hose circuits that have addressed the issue are split" and that "some circuits have concluded that section 1956(h) requires proof of an overt act"). Four circuits provide in no uncertain terms that an overt act must be charged and proved, see Pet. 5-6, a rule squarely in conflict with the Eleventh Circuit's holding in this case and decisions of two other circuits, see *id.* at 7. Critically, the case law in each circuit postdates this Court's decision a decade ago in *United States* v. *Shabani*, 513 U.S. 10 (1994), construing the elements of drug trafficking conspiracy under 21 U.S.C. 846.

Having frankly acknowledged the conflict below, the government in this Court does not even attempt to contest that the question presented arises frequently in its charging decisions (see Pet. 9-10), that the circuits' irreconcilable constructions produce widely varying results among similarly situated defendants around the country (see *id.* at 9-12), or that this is an appropriate case in which to decide the issue (see *id.* at 9). Its arguments for nonetheless denying certiorari lack merit.

1. The government concedes, as it must, that four circuits explicitly provide that proof of an overt act is required by section 1956(h). BIO 6. But it suggests that the conflict is illusory because, post-*Shabani*, none of these courts has invalidated a section 1956(h) conviction on the basis of the government's failure to allege an overt act. BIO 7. Relatedly, the government contends that all four of these courts of appeals will, given the opportunity, reverse themselves. *Id.* at

8. Petitioner[1] has already refuted these assertions, both of which rely on sleight of hand, in the petition.

The reason why none of the four courts of appeals that requires proof of an overt act has invalidated a section 1956(h) conviction post-*Shabani* is simple: the government's charging obligations mean that these courts are never presented with that question. Precedent in those circuits is firmly entrenched.[2] The government, in turn, rightly deems itself bound by that precedent (which it acknowledged in its brief below but conveniently disparages in this Court as "dicta," BIO 8) to charge a violation of section 1956(h) in those circuits only when it can prove an overt act in furtherance of the conspiracy. Accordingly, in those four circuits, neither a defendant nor the government ever has cause to raise the question presented. See Pet. 8-9. The government denies none of this. Indeed, the government fails to identify a *single* case in the Third, Sixth, Seventh, or Eighth Circuit in which it has charged a violation of section 1956(h) without charging an overt act. For these reasons, the courts of appeals that hold that an overt act is an element of the section 1956(h) offense will not have an opportunity to reconsider the question.

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[1] Petitioner is the pastor and not the "president" of Greater Ministries International. See BIO 3.

[2] In the Third Circuit, see *United States* v. *Brown*, 44 Fed. Appx. 573, 577-78 (2002); *United States* v. *Navarro*, 145 F.3d 580, 593 (1998); *United States* v. *Conley*, 37 F.3d 970, 976-77 (1994). In the Sixth Circuit, see *United States* v. *Robertson*, No. 01-5111, 2003 U.S. App. LEXIS 8656, at *31 (May 5, 2003); *United States* v. *Ross*, 190 F.3d 446, 450 (1999); *United States* v. *Lee*, 991 F.2d 343, 347-48 (1993). In the Seventh Circuit, see *United States* v. *Emerson*, 128 F.3d 557, 561 (1997). In the Eighth Circuit, see *United States* v. *Evans*, 272 F.3d 1069, 1082 (2001); *United States* v. *Covey*, 232 F.3d 641, 644-46 (2000); *United States* v. *Hildebrand*, 152 F.3d 756, 762 (1998).

Nor does the government provide any basis for its prediction that each of those four circuits will reverse its settled precedent. See BIO 8. It is essentially unheard of for a circuit conflict that is so wide (in number of courts of appeals) and so deep (in number of decisions within each circuit) to resolve itself without this Court's intervention. This circuit split has persisted for the *ten years* since this Court's decision in *Shabani* without a single circuit's reversing its position.[3]

The foregoing underscores the importance of resolving the circuit conflict. As the petition demonstrated and the government does not dispute, defendants in those circuits in which the government is not required to charge and prove an overt act are treated differently than are defendants elsewhere in the country because prosecutions under section 1956(h) in those circuits face a higher bar. Indeed, this disparate treatment affects every aspect of criminal proceedings, from charging through sentencing. See Pet. 10-12.

The divergent treatment of identically situated defendants and the implausibility of the government's claim that the conflict will naturally resolve itself are perfectly illustrated by *United States* v. *Cline*, No. 00-40024-03/06-SAC, 2002 U.S. Dist. LEXIS 10001, at *11-*15 (D. Kan. Apr. 5, 2002), which the petition discusses, see Pet. 7 n.2, 11, but the government ignores. In *Cline*, which like this case arose in one of the few circuits that had not yet taken a firm position on the conflict,

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[3] Moreover, even were the question somehow to present itself, the four circuits that have reaffirmed the overt act requirement after *Shabani*, see *supra* note 1, would all have to grant en banc review in order to resolve the conflict. A future panel would not be free to conclude that the panels in those cases ignored or misread *Shabani*, as the government predicts. Only an *intervening* Supreme Court decision, and not a past panel's supposed failure to follow a *prior* Supreme Court decision, would permit a panel to overrule circuit precedent. See, *e.g.*, *Young* v. *Hayes*, 218 F.3d 850 (CA8 2000); *Hamlin* v. *Flint*, 165 F.3d 426, 430 (CA6 1999).

the government did not charge an overt act in a section 1956(h) prosecution. The district court dismissed the indictment for failure to allege an overt act. Relying on two unpublished Tenth Circuit opinions, it concluded that the court of appeals would hold, "consistent with the approach taken by the majority of circuits," that an overt act is an element of the section 1956(h) offense. 2002 U.S. Dist. LEXIS 10001, at *14. The defendant in *Cline*, like defendants in the four circuits that require the government to charge and prove an overt act, was thus subject to a manifestly different legal regime from the one governing petitioner.

2. The government's attempt to equate section 1956(h) and section 846 is unpersuasive. Although *Shabani* explained that courts should not require proof of an overt act "absent contrary indications," 513 U.S. at 13-14, there are several such indications here. See Pet. 12-16.

First, Congress's intent in enacting section 1956(h) was to increase the punishment for the offense, not to eliminate the pre-existing overt act element. See Pet. 13-14. There is no reference in the legislative history to overt acts, a point the government does not dispute. The silence in the legislative record is telling because there was a statutory overt act requirement for money laundering conspiracy prior to the enactment of section 1956(h). See *id.* Nothing suggests that Congress intended to change the elements of the offense. By contrast, Congress enacted section 846, the statute at issue in *Shabani*, against the backdrop of prior drug-trafficking offenses that omitted any overt act requirement. See *id.*[4]

[4] The government suggests that this Court could infer a congressional intent to abandon the overt act requirement from the fact that section 1956(h) was modeled after section 846. BIO 9. But at the time that section 1956(h) was passed, the circuits disagreed over whether section 846 required an overt act. See Pet. 12-13. Therefore, Congress would not have chosen this language if it intended to dispense with the overt act requirement. Instead, Con-

Second, the venue provision in section 1956 explicitly refers to overt acts; there is no such provision in section 846. See Pet. 14-15. The government claims that the venue provision is irrelevant because it merely "clarified" where venue lies without presupposing the existence of an overt act. BIO 10. However, the government does not respond to petitioner's argument that under its interpretation, venue will lie *nowhere* without an overt act in some cases. See Pet. 14. Congress did not intend this absurd result, but understood that an overt act remained a required element of the offense.

Third, the inchoate nature of a conspiracy to launder money makes an overt act necessary to avoid a double-counting that Congress would not have intended. See Pet. 15-16. Without an overt act requirement, money laundering conspiracy may function as a lesser-included offense of conspiracy to commit the predicate offense – while adding twenty years to the sentence – or its requirements may be satisfied even when there is no conspiracy to commit the predicate offense. As explained in the petition (see *id.*) and ignored by the government, an overt act requirement is necessary to avoid these anomalous and unfair results.

The government's prediction that four courts will disregard these distinctions, refuse to apply the rule of lenity, and overrule long-held circuit precedent is too implausible a basis for this Court to ignore the clearly recognized circuit split.

CONCLUSION

For the foregoing reasons, as well as those set forth in the petition, certiorari should be granted.

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gress could easily have cited conspiracy provisions that this Court had authoritatively construed, *e.g.*, *Nash* v. *United States*, 229 U.S. 373 (1913) (Sherman Act), or *Singer* v. *United States*, 323 U.S. 338 (1945) (Selective Training and Service Act).

Respectfully Submitted,

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[5] Counsel for petitioner were principally assisted by the following students in the Stanford Law School Supreme Court Litigation Clinic: Michael P. Abate, David M. Cooper, Eric J. Feigin, and Nicola J. Mrazek. Clinic members William B. Adams, Daniel S. Goldman, and Jennifer J. Thomas also contributed.