No. 19-361

IN THE
Supreme Court of the United States

RENADO SMITH AND RICHARD DELANCY,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

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

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

The Government fails to contest most of the case for certiorari. It does not dispute that the Circuits are deeply split on all three questions presented. *See* Opp. 18-26. It makes little effort to reconcile the Eleventh Circuit's resolution of those questions with either this Court's precedents or the "strict rule[s] of unavailability" that prevailed at the Founding. *United States* v. *Shayota*, 934 F.3d 1049, 1053 (9th Cir. 2019) (O'Scannlain, J., specially concurring) (quoting *Crawford* v. *Washington*, 541 U.S. 36, 44-45 (2004)); *see* Amicus Br. of Constitution Project 5-6. And it cannot dispute that each question presented is of surpassing importance to the accused, whose rights to confront the witnesses against them vitally depend upon the good faith and reasonable efforts of the Government to procure those witnesses for trial.

See Amicus Br. of Criminal Defense Organizations 18-23; Amicus Br. of Florida Ass'n for Criminal Defense Lawyers 7-13.

Instead, the Government stakes most of its case against certiorari on a single, late-breaking claim: that the Government's constitutional obligation to search for Vanessa Vixama was diminished—and that this case is accordingly "atypical"—because petitioners ostensibly "agreed that the government could *intentionally* make Vixama unavailable for trial by deporting her." Opp. 16. This argument is misguided on every dimension. The Government never made this argument below. Its premise is false. And, even if this newfound claim were accurate and properly preserved, it would not offer a basis for distinguishing any of the circuit splits, justify any of the Eleventh Circuit's manifestly incorrect holdings, or provide reason to leave in place a ruling that will inevitably spawn abuses by prosecutors until it is corrected.

The Confrontation Clause "promises every person accused of a crime the right to confront his accusers." *Stuart* v. *Alabama*, 139 S. Ct. 36, 36 (2018) (Gorsuch, J., dissenting from denial of certiorari). "That promise was broken here," *id.*, as for years it has been broken by courts that have hollowed out the "unavailability" requirement to a degree that would have been unrecognizable to the Framers. The petition should be granted, and the Eleventh Circuit's judgment should be reversed.

ARGUMENT

I. THE CENTRAL PREMISE OF THE OPPOSITION BRIEF IS INCORRECT.

The centerpiece of the Government's opposition brief is its claim that the parties "agreed that the government could *intentionally* make Vixama unavailable for trial by deporting her." Opp. 16. According to the Government, this alleged fact justifies the Government's lackluster efforts to find Vixama, *id.* at 16-18, distinguishes this case from all three circuit splits, *id.* at 19-20, 22-23, 24-25, and renders this case an "atypical" vehicle for review, *id.* at 11, 16, 20, 23. This argument, however, is thoroughly incorrect—procedurally, factually, and legally. And once it is discarded, the remainder of the Government's case against certiorari collapses.

To start, the Government's argument is not properly before the Court. Agent Nowicki never once cited the Government's agreement with petitioners or the possibility of Vixama's deportation when explaining his reasons for failing to make greater efforts to find Vixama. *See* Pet. App. 158a, 161a (Nowicki listing his reasons for curtailing his search); *id.* at 51a (Eleventh Circuit listing Nowicki's reasons). The Government's attorneys also failed to make this argument at any stage of the proceedings below. *See* CA11 U.S. Br. 23-33; 4/20/2017 Trial Tr. 90-93, 99-101. And neither the District Court nor the Eleventh Circuit relied on this justification in nearly 70 pages of opinions. *See* Pet. App. 1a-63a, 107a-112a. Simply put, the Government's central argument is waived.

What is more, the factual premise of this argument is incorrect. Petitioners did agree that the Government could deport Vixama after taking her material

witness deposition. *See* Pet. App. 18a-19a & n.5; Smith Mot. to Exclude Dep. 1 (Apr. 18, 2017). But petitioners did not agree that Vixama's deportation would automatically render her "unavailable." On the contrary, petitioners repeatedly stated that when the Government deports a material witness, it must make good faith, reasonable efforts to ensure her return for trial, such as by keeping track of her location or purchasing tickets for her return. *See* CA11 Br. of Appellant Delancy 41-42, 47-48; Smith Mot. to Exclude Dep. 3-5; *see also United States* v. *Burden*, 934 F.3d 675, 687-689 (D.C. Cir. 2019) (holding same, and citing cases). The video deposition of Vixama served as a precaution in case the Government's efforts to ensure her return failed, not as an implicit waiver of petitioners' confrontation rights. *Cf. Barber* v. *Page*, 390 U.S. 719, 725 (1968) (waiver of a defendant's right to confrontation must be "intentional" (internal quotation marks omitted)).

In any event, even if petitioners had agreed that the Government could render Vixama unavailable by deporting her, the Government did not do so; it "mistakenly released her" into the United States. Opp. 14. That meant that the Government once again bore (at minimum) its ordinary constitutional obligation to make reasonable, good faith efforts to procure Vixama for trial—as one of the prosecutors herself acknowledged when searching for Vixama. *See* Delancy CA11 App. 159 ("Since [Vixama] hasn't been deported yet, we are working to determine if she can be located to testify at trial or if she is unavailable to testify."); *see also* Opp. 7-8 (discussing the Government's efforts to bring Vixama to trial). The Government now suggests that searching for Vixama would have been futile because it would have been

required to deport Vixama as soon as it found her. Opp. 17-18. But nothing in the Government's immigration detainer required it to deport Vixama immediately. *See* Delancy CA11 App. 156 (immigration detainer). Furthermore, the Government had many tools at its disposal to hold Vixama for trial, including obtaining a trial subpoena or a bench warrant (both of which it belatedly did, *see* Pet. App. 12a, 15a), or arresting Vixama for unlawful entry, *see* 8 U.S.C. § 1325(a). The Government cites no case to support the disturbing suggestion that once it fails to deport a material witness, it is exempt from the obligation to make reasonable, good-faith efforts otherwise compelled by the Constitution to produce her for trial.

In short, the central consideration on which the Government stakes its opposition brief is a non-factor: It is not properly before the Court, rests on an erroneous factual premise, and—even if it were accurate—would not have altered the Government's obligation to conduct a good faith, reasonable search for Vixama. It follows that the Government's remaining arguments fail as well.

II. THE DECISION BELOW DEEPENS THREE UNDISPUTED CIRCUIT SPLITS.

As the petition explains, the Eleventh Circuit's decision deepens three severe splits on the scope of the Confrontation Clause. *See* Pet. 13-25. The Government does not deny the existence of any of these splits or contest their importance. *See* Opp. 18-20, 22-23, 25. And its efforts to show that the splits are not implicated here—nearly all of which turn on the same false premise that pervades its brief—are wholly unconvincing.

1. The Eleventh Circuit held—in direct conflict with five Circuits and three state high courts—that the Government could intentionally curtail its search for a witness because it had "already taken" her deposition testimony. Pet. App. 50a-52a; *see* Pet. 13-17. This case presents an especially clean vehicle to resolve this split: Not only did the Eleventh Circuit issue a square holding on this point, but the Government's agent "candidly admitted," repeatedly and under oath, that he had forgone steps to find Vixama because he had her deposition testimony in hand. Pet. App. 51a; *see id.* at 150a, 152a-153a, 158a, 161a. Even the Government does not dispute that this was "one factor" the agent relied on. Opp. 18.

The Government nonetheless suggests that the split is not implicated here because Agent Nowicki ostensibly had an additional reason for failing to search more diligently for Vixama: that her apprehension "would have simply resulted in her prompt removal from the United States." *Id.* at 19. As the absence of any accompanying citation suggests, that assertion is groundless. Agent Nowicki never once cited the possibility of Vixama's removal as a reason for failing to look more thoroughly for her. *See supra* p. 3. On the contrary, Nowicki indicated that his expectation was that, if Vixama were apprehended, she would be transferred from "an immigration facility in Delaware to * * * Miami," where petitioners' trial was set to take place. Pet. App. 158a.

Furthermore, even if (contrary to fact) Agent Nowicki had considered the possibility of removal as *one* reason for curtailing his search, that would not alter the fact that he *also* admitted that his decision rested, in part, on the fact that Vixama had already

been deposed. In eight jurisdictions, the Government bears the "burden" of establishing that its efforts were "as vigorous as that which the government would undertake *** if it ha[d] no [prior] testimony to rely upon." *Burden*, 934 F.3d at 686 (internal quotation marks omitted); *see* Pet. 13-15. Agent Nowicki's express admission would have made it impossible for the Government to carry that burden, irrespective of what other factors he may have considered. *See, e.g.*, *Brooks* v. *United States*, 39 A.3d 873, 888 (D.C. 2012) ("infer[ring]" from the "*pro forma*" nature of the Government's efforts that its search was not "equally as vigorous" (internal quotation marks omitted)). The circuit split is thus squarely implicated here even on the Government's counterfactual understanding of the case.

2. The Eleventh Circuit also split from three of its sister Circuits in holding that the Government could forgo a low-cost investigative step that it had reason to believe would lead to an absent witness. Pet. 17-21. Again, the court's holding on this point was clear; indeed, it was the crux of the majority's disagreement with the dissent. Pet. App. 42a-44a; *cf. id.* at 70a-71a (Rosenbaum, J., dissenting).

The Government vaguely suggests that this split is not implicated here because of the "atypical" and "unusual" facts of this case. Opp. 21, 23. But the particular facts here do not alter what legal standard the Court should have applied in assessing those facts. And, as noted above, the Government agreed—and the Eleventh Circuit held—that the Government was required to make reasonable, good-faith efforts to find Vixama, irrespective of what the parties may have agreed at the time she was de-

posed. *See supra* pp. 4-5. This case thus straightforwardly presents the question of what efforts are sufficient to constitute a reasonable, good-faith search.

The Government also suggests that its efforts sufficed under any standard, because the Eleventh Circuit supposedly found that it was "unlikel[y]" that running a database search for Vixama's boyfriend would have led it to Vixama. Opp. 21-22. That is a mischaracterization of the opinion below, which merely found that it was "unclear" whether a database search would succeed. Pet. App. 46a. Further, courts on the other side of the split have repeatedly held—in line with this Court's precedents—that a step that has even a "remote" possibility of success must be taken if it entails little cost. *United States* v. *Tirado-Tirado*, 563 F.3d 117, 123-125 (5th Cir. 2009) (quoting *Ohio* v. *Roberts*, 448 U.S. 56, 74 (1980)). The panel did not dispute that conducting a database search for Vixama's boyfriend would have satisfied that legal standard; it simply rejected the standard altogether. *See* Pet. App. 42a-44a.

3. Finally, this case implicates a 7-2 split over whether the Government may release a witness from its custody without first making arrangements to secure her attendance at trial. Pet. 22-24. The Government again does not dispute that this split exists, Opp. 25, nor that it "mistakenly released" Vixama from its custody, *id.* at 14.

Still, the Government contends that this split is not implicated here because the parties supposedly "agreed that the government could intentionally make Vixama unavailable for trial (by deporting her)." *Id.* at 25. Again, the parties did not agree to

that; had the Government deported Vixama as the parties agreed, it would have been compelled to make reasonable efforts to bring her back to the United States to testify. *See supra* pp. 3-4. Instead, the Government negligently released Vixama from its custody without making arrangements for her return, creating the very challenges that it now claims prevent it from locating Vixama at all. *See* Opp. 14. In seven jurisdictions, that conduct would have precluded any finding that Vixama is "unavailable."

The Government claims that petitioners failed to preserve the argument that Vixama's mistaken release should be taken into account in assessing the Government's efforts. Opp. 25. That is just wrong. In the Eleventh Circuit, petitioners expressly argued that the Government's efforts to locate Vixama were inadequate in part because "her continued presence *resulted from its own mistake*" and because she was "erroneously released" from federal custody. CA11 Br. of Appellant Delancy 48 (emphasis added); *see* Pet. App. 113a. That was more than sufficient to preserve this argument.

III. THE ELEVENTH CIRCUIT'S DECISION IS WRONG.

The Government also offers no plausible defense of the Eleventh Circuit's decision on the merits.

1. The Government makes no effort to defend the Eleventh Circuit's holding that Agent Nowicki could "consider[ ] the fact that Vixama's videotaped deposition was already taken" in assessing the scope of his search. Pet. App. 51a-52a. Instead, the Government reimagines both Agent Nowicki's justification and the court's holding. Opp. 19. But that reimagining

is baseless, *see supra* p. 6, and the Government's conspicuous refusal to defend a rule that it now benefits from in three Circuits amply confirms that the rule is as indefensible as it appears. *See* Pet. 25-28.

2. The Government also gives no legitimate reason why it was free to forgo the "minimal steps" necessary to locate Vixama's boyfriend after learning that Vixama was staying with him. *See* Pet. 28-30. The Government, like the Eleventh Circuit, observes simply that it took "other steps" to find Vixama that failed. Opp. 21. But this Court's decisions make clear that undertaking some efforts—particularly efforts as belated and cursory as the ones the Government undertook here—does not exempt the Government from pursuing additional low-cost steps that it had reason to believe would lead to Vixama. Pet. 28-29. That rule is reinforced by the original understanding of the confrontation right, under which a witness was deemed "unavailable" only when he could not be procured for trial due to "circumstances outside the prosecution's control." *Shayota*, 934 F.3d at 1055 (O'Scannlain, J., specially concurring).

3. Finally, the Government fails to distinguish this case from *Motes* v. *United States*, 178 U.S. 458 (1900), and its progeny. In *Motes*, this Court held that a witness is not unavailable for purposes of the Confrontation Clause if "his absence was due to the negligence of the prosecution"—exactly what the Government admits occurred here. *Id.* at 474; *see* Opp. 14. The Government suggests that *Motes* turned on the fact that the government's agent permitted the witness to leave jail "in violation of

law." Opp. 23-24 (quoting *Motes*, 178 U.S. at 471). But nothing in the Court's holding rested on that detail, which the Court noted only once and in passing. And in *California* v. *Green*, 399 U.S. 149 (1970), the Court reaffirmed that *Motes* stands for the proposition that a witness is unavailable only "as long as the declarant's inability to give live testimony is *in no way the fault of the State*." *Id.* at 166 (emphasis added); *see Shayota*, 934 F.3d at 1053-55 (O'Scannlain, J., specially concurring) (explaining that the same rule prevailed at common law).

IV. THIS CASE PRESENTS A CLEAN VEHICLE TO RESOLVE THE QUESTIONS PRESENTED.

This Court's review is urgently warranted. The decision below sanctions three alarming departures from the Government's obligations of good faith, any one of which would merit certiorari in its own right. And this case presents an uncommonly good vehicle in which the critical factual predicates for each question presented are unequivocally present. *See supra* pp. 6, 8.

The Government contends that "any error in admitting Vixama's testimony was harmless." Opp. 26. Even the court below did not accept this argument, *see* Pet. App. 103a (Rosenbaum, J., dissenting), and it is not hard to see why. To establish harmless error, the Government must demonstrate "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Neder* v. *United States*, 527 U.S. 1, 15 (1999) (internal quotation marks omitted). Vixama was, by the Government's own admission, an "essential witness." Pet. App. 152a-153a. She was the only witness who unquali-

fiedly testified that petitioners were headed to the United States, rather than the Bahamas. *Id.* at 6a-7a. Indeed, the prosecution relied extensively on Vixama's testimony in its closing argument, repeatedly invoking Vixama's assertion that she had paid $5,000 to travel to the United States as clear evidence of the conspiracy the Government alleged. *See* Smith CA11 App. 128, 132, 134, 137, 148-151.

The Government claims that Vixama's testimony was merely "cumulative" of the testimony of Davidson Francois and other circumstantial evidence of petitioners' guilt. Opp. 26-27. But Francois repeatedly testified that he did not know the boat's destination, Francois Dep. Tr. 21-22, 31-32, 35-36, and at one point expressly stated that he believed the boat was headed to Bimini, Bahamas, *id.* at 41-42. Even the Government's counsel conceded below that Francois gave "conflicting" testimony, and that Vixama was a "better witness." CA11 Oral Argument Recording at 21:04-21:46. Furthermore, contrary to the Government's suggestion (at 26), Coast Guard officers testified that they could *not* infer the ultimate destination of petitioners' boat from the currents, given how long the boat had been adrift. Pet. App. 3a. And the fact that petitioners told the Coast Guard that they wished to continue on to the Bahamas, Opp. 2, 26, is entirely consistent with petitioners' defense that the Bahamas was their intended destination. Without Vixama's deposition—admitted on the strength of the Government's belated, perfunctory, and constitutionally inadequate efforts—it is impossible to say beyond a reasonable doubt that the Government would have secured petitioners' convictions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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