No. _____

IN THE SUPREME COURT OF THE UNITED STATES

ROBERTO YOQUIGUA LOPEZ,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

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

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## QUESTION PRESENTED

Whether and to what extent the Fifth and Sixth Amendments permit a defendant to keep all of the details of his duress confidential before trial, or whether he can be forced to provide all of the details of his testimony to the government ahead of trial?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes**



**Constitutional Provisions**



**Law Review Articles**

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Petitioner, Roberto Lopez, respectfully prays for a writ of certiorari to issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

On June 17, 2020, the Ninth Circuit affirmed Petitioner's conviction. The court found that the district court did not err in requiring Petitioner to file publicly his pre-trial duress proffer, rather than allowing him to file it ex parte and under seal, as he requested. *See* App. A; *United States v. Lopez*, 818 F. App'x 654, 656 (9th Cir. June 17, 2020) (unpublished). The court also found that if there was any error, it was harmless. *Id.*

## JURISDICTION

Petitioner was convicted of violating of 21 U.S.C. §§ 952 and 960 in the United States District Court for the Southern District of California. The United States Court of Appeals for the Ninth Circuit reviewed his conviction under 28 U.S.C. § 1291, and affirmed on June 17, 2020. This Court has jurisdiction to review the judgment under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS

**The Fifth Amendment** to the Constitution provides:

> No person … shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

U.S. CONST. AMEND. v.

**The Sixth Amendment** to the Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, … to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. CONST. AMEND vi.

## STATEMENT OF THE CASE

### I. The district court prevented Petitioner from filing his duress proffer under seal and ex parte because it wanted to protect the prosecution's right to a fair trial.

In the Ninth Circuit, in order to rely on a duress defense at trial, a defendant must make a prima facie showing of duress in a pretrial offer of proof or in evidence presented later at trial. *See United States v. Ibarra-Pino*, 657 F.3d 1000 (9th Cir. 2011). Since his reason for committing the smuggling offense was that he was kidnapped in Mexico and his family was threatened by what he believed were dangerous drug smugglers, Petitioner wanted to determine before trial whether he would be allowed to present a duress defense.

In order to obtain a ruling from the court so that he could adequately prepare for trial, Petitioner sought to make a pretrial prima facie showing of duress. But because he, like most criminal defendants, did not want to reveal his confidential defense strategy and tip off the prosecution about his potential defense, he tried to keep his duress proffer confidential. He attempted to file an ex parte proffer, under seal, with a detailed description of the kidnapping and threats, and explaining how he would testify at trial if the court allowed the defense.

But the district court rejected his proffer, reasoning that it would be "grossly unfair and prejudicial to the fair trial rights of the United States" for the court to rule on the threshold admissibility issue without allowing the prosecution to argue against it. The court listed the prosecution's fair trial rights that would be infringed:

> the right to be present during all important stages of the proceedings; the right to hear testimony, or as here, to be made aware of proffered evidence; the right to test the truth and accuracy of the proffered evidence by cross-examination; the right to present rebuttal evidence; and the right to be heard in meaningful argument.

Petitioner asked the court to reconsider its ruling, arguing that it had not considered *his* constitutional right to present a defense. He pointed out that the Federal Rules of Criminal Procedure did not require him to disclose a duress defense to the prosecution. And because at this pretrial stage the district court's role was only to determine whether there was sufficient evidence for his duress defense to go to the jury, the district court had to view the evidence in the light most favorable to Petitioner. In other words, it did not yet matter that the prosecution could not cross-examine any witnesses or argue there was insufficient evidence of duress; that could be done later at trial and at the jury instruction conference.

The court declined to consider Petitioner's fair trial rights and balance these against any unfairness to the prosecution in proceeding ex parte. Instead, it rejected Petitioner's proffer "without prejudice to refiling it with proper notice to the United States."

Finding himself without much of a choice if he had any hope of explaining himself at trial and being acquitted, Petitioner filed his duress proffer publicly

before trial and alerted the prosecution to his defense. He presented in detail what he would testify to at trial, including that:

> a few weeks before his arrest, four men kidnapped him in Mexico when he was on his way home from work;
>
> the kidnappers held Petitioner in a house for days;
>
> they had employed the nephew of Petitioner's girlfriend as a drug smuggler and the nephew still owed them money;
>
> the kidnappers demanded Petitioner work off the nephew's debt by smuggling drugs;
>
> they threatened to kill his daughter and her mother if he did not agree; and
>
> the kidnappers appeared to be monitoring Petitioner's movements and following him.

The district court found this proffer sufficient, and at trial, Petitioner testified to these facts. However, because the district court had required Petitioner to give an evidentiary roadmap of his defense to the prosecution, it was able to call a surprise rebuttal witness—one it had not disclosed before trial, and one the defense had not anticipated. The witness was a corrections officer who testified about Petitioner's phone calls while in custody, stating that Petitioner did not use the jail phones to call his family until about two or three months after he was arrested. During closing, the prosecution relied on this witness's testimony to argue that Petitioner had fabricated his duress defense since he had waited months to call his family to check on their safety. The jury convicted Petitioner after two days of deliberations, and he was sentenced to 11 years in custody.

### II. The Ninth Circuit affirmed Petitioner's conviction, holding that defendants may not maintain their detailed duress proffers under seal in order to protect their constitutional rights.

The Ninth Circuit affirmed Petitioner's conviction. It held that the district court did not abuse its discretion in denying Petitioner's motion to file his duress proffer under seal because a defendant's desire to keep his case strategy confidential can never be a compelling justification to seal a duress proffer. 818 F. App'x at 656. The court held in the alternative that any error was harmless since there was other evidence, apart from the prosecution's surprise rebuttal witness who testified about the jail calls, that impeached Petitioner's credibility. *Id.*

## REASONS FOR GRANTING THE PETITION

### I. Forcing a defendant to disclose his duress defense to the prosecution before trial violates several rights protected by the Constitution.

The Ninth Circuit ruled that a defendant's desire to keep his duress defense and all of its details confidential before trial—so as not to incriminate himself and aid the prosecution in meeting its burden of proof—was not a compelling reason to justify sealing a proffer. *See* 818 F. App'x at 656. In other words, as a general rule, if a defendant wants to rely on the affirmative defense of duress, he must disclose before trial the details of his duress to the prosecution; asserting any constitutional rights is not sufficient to justify sealing.

This general rule violates several constitutional rights retained by criminal defendants who proceed to trial. First, it violates the Fifth Amendment right not to incriminate oneself, and to remain silent and hold the prosecution to its burden of

proof. For a duress defense, a defendant must necessarily incriminate himself—a duress defense confesses "Yes, I did it, but I was forced to and had no other option." This is the type of statement that triggers the privilege against compulsory self-incrimination, since it is incriminating, personal to the defendant, obtained by compulsion since the trial court requires it in order to assert a trial defense, and testimonial or communicative. *See*, *e.g.*, *United States v. Nobles*, 422 U.S. 225 (1975).

Yet the Ninth Circuit's rule requires a defendant to make this incriminating admission before trial—before the prosecution has presented any of its evidence, and before the defendant knows whether he will have to testify in order to counter the prosecution's proof. At the very least, the Ninth Circuit's rule cuts down on a defendant's privilege against self-incrimination, which violates the Fifth Amendment. *See Griffin v. California*, 380 U.S. 609 (1965) (noting that making an assertion of Fifth Amendment costly, even if it doesn't compel self-incrimination, cuts down the privilege and violates the Fifth Amendment). And infringing or even cutting down a defendant's right to remain silent alters the balance our founders established for criminal trials. The "essence" of the privilege against self-incrimination—what this Court has called a "basic constitutional principle"—"is the requirement that the [prosecution] … produce the evidence against [the defendant] by the independent labor of its officers, not by the simple, cruel expedient of forcing it from his own lips." *See Estelle v. Smith*, 451 U.S. 454, 462 (1981). So requiring a defendant to disclose to the government his entire defense before trial and

potentially incriminate himself lightens the prosecution's burden of proof by helping the prosecution undo the defendant's case before he has even presented it.

Second, the rule that criminal defendants must provide the prosecution before trial with all of the details of their duress testimony violates a defendant's Sixth Amendment right to present a defense—the right to offer his own version of the facts and present witnesses in his favor. In essence, the rule enforced by the district court here and upheld by the Ninth Circuit is that a defendant may not present his duress defense *unless* he discloses all of the details of the defense to the prosecution before trial. So if a defendant chooses not to comply with the requirement of pretrial disclosure, either because he wishes not to incriminate himself or because he has not yet decided whether he will testify, his right to present a defense is infringed because he will not be allowed to testify about his duress defense. This right should not be infringed by excluding a defense, and the defendant's testimony in support of it, for failure to comply with a district court's pretrial ruling. This is true not just because the right is fundamental, s*ee*, *e.g.*, *Washington v. Texas*, 388 U.S. 14, 19 (1967), but also because this could risk obscuring the truth from the jury. *See generally The Preclusion Sanction – A Violation of the Constitutional Right to Present a Defense*, 81 YALE L.J. 1342, 1361 (1972) (noting that precluding a defense because it was not disclosed pretrial infringes Sixth Amendment rights and "entails the danger … that the outcome of a trial might be changed.").

Third, the general rule requiring a defendant to disclose his duress defense also infringes his Sixth Amendment right to the effective assistance of counsel. Requiring a defendant to expose all of the details of his defense before the prosecution has presented a single witness violates the right to counsel by potentially chilling defense counsel's trial preparation. A defendant's duress proffer—his own personal statement about what he did and what he will testify to—necessarily includes his attorney's work product as reflected by the attorney's investigation into the defense. A defense attorney may be less likely to investigate a defendant's potential duress defense if she knows that her work product will be revealed to the prosecution in order to enable her client to present a defense at trial. *See generally Hickman v. Taylor*, 329 U.S. 495, 510-12 (1947) (noting that protecting attorney work product is "well recognized and [] essential to an orderly working of our system of legal procedure," and that disclosing work product to an adversary would "poorly serve[]" the "cause of justice" and interests of clients).

Moreover, the Ninth Circuit's rule forces defendants to choose among their constitutional rights. If a defendant wishes to assert his Sixth Amendment rights to trial and to present a full defense, he must give up his Fifth Amendment privilege against self-incrimination. If he wishes to remain silent unless and until the prosecution introduces evidence against him at trial, he will have been forced to give up his Sixth Amendment rights because he will not be allowed to present a duress defense, having not disclosed it ahead of trial to the prosecution. *See Simmons v. United States*, 390 U.S. 377, 393-394 (1968) (holding that when an

accused is required to provide testimony in order to exercise a constitutional right, the testimony has been "compelled" within the meaning of the Fifth Amendment, and the prosecution may not force an accused to choose between his constitutional rights).

This Court should grant the Petition to reaffirm that a defendant's Fifth and Sixth Amendment rights are, indeed, fundamental, and that these rights are sufficient to justify a defendant's decision to seal the details of his duress defense. These rights may not be infringed simply to lessen the prosecution's burden and help the prosecution make its case against the defendant.

## II. The Ninth Circuit's rule exacerbates the inherent imbalance of power between the prosecution and criminal defendants, and undermines the fundamental fair trial guarantee.

Criminal procedure gives "an overwhelming advantage to the prosecution." *See* Abraham S. Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 YALE L.J. 1149, 1152 (1960) (discussing imbalance of power between the state and accused). The prosecution obviously possesses enormous law enforcement tools, unavailable to the defendant, to investigate and build its case against the defendant. But the "inherent inequality" between a criminal defendant and the prosecution is not limited to their investigative resources—as one former circuit judge has noted, "[p]rosecutors hold tremendous power," which includes their "unparalleled access to the evidence," their ability to "offer incentives—often highly compelling incentives—for suspects to testify," and even the option to obtain

evidence by "engineering jail-house encounters between the defendant and known informants." Hon. Alex Kozinski, *Preface*, *Criminal Law 2.0*, 44 GEO. L.J. ANN. REV. CRIM. PROC., xxii (2015).

Partly to offset this enormous power differential, criminal defendants presumed to be innocent are allowed to remain silent and require the prosecution to prove their guilt beyond a reasonable doubt. While he may not have vast investigative resources or the power to encourage witnesses to testify, the defendant does have one power the government does not—he can stand silent at trial. He is not required to assist the prosecution in investigating or presenting its case, and he is not required to present any evidence. In our system, if the prosecution cannot meet its burden, the defendant is acquitted.

Part of this right to remain silent and not help the prosecution must extend to the right to keep one's defense confidential until trial. Otherwise, a defendant would assist the government in convicting him by giving a roadmap of his case, pointing out the weaknesses in his defense and allowing the prosecution time to investigate and then counter the weaknesses during its case-in-chief. As this Court has recognized, divulging the secrets of one's case necessarily gives the other side an advantage. Indeed, businesses can keep documents under seal by invoking concerns that their release "might harm a litigant's competitive standing." *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 598 (1978). No one seriously doubts that giving your commercial competitors information about how you run your business could undermine your ability to compete fairly. The same common-sense

idea applies to defendants keeping their trial strategy confidential—requiring a defendant to disclose all of the details of his duress defense gives the prosecution even more of an advantage and exacerbates the power imbalance between the two sides. *See generally Mason v. Arizona*, 504 F.2d 1345, 1352 n.7 (9th Cir. 1974) (a prosecutor's presence at a hearing in which an indigent defendant must explain "defense strategy" to obtain "funds for investigative purposes" is per se prejudicial).

And the disadvantage for the defendant is compounded by the Ninth Circuit's rule that even defendants like Petitioner who are forced to disclose their defenses before trial are not guaranteed any reciprocal discovery in return. *United States v. Buckner*, 610 F.2d 570, 574 (9th Cir. 1979) ("the government is not obliged to disclose [to the defense] the [exact evidentiary] theory under which it will proceed" at trial). As this Court has recognized, requiring defendants to disclose their duress testimony in detail before trial, without getting the same in return, skews the "balance of forces between the accused and the accuser." *Wardius v. Oregon*, 412 U.S. 470, 474 (1973). It is "fundamentally unfair to require a defendant to divulge the details of his own case while at the same time subjecting him to the hazard of surprise concerning refutation of the very pieces of evidence which he disclosed to the State." *Id.* at 476. Yet the Ninth Circuit's rule embraces this "fundamental[] unfair[ness]." *See id.*

Allowing a defendant to keep all of the details of his defense and his testimony confidential until trial helps to even the imbalance of power between the prosecutor and the defendant. And it is important to note that the prosecution is at

no disadvantage— it can still test the defense at trial by cross-examination, introducing a rebuttal case, or arguing that a duress instruction is unwarranted. The government will have lost nothing and no unfairness will have occurred—the only thing sacrificed is the inherent unfairness in allowing the government to gain an advantage the defendant cannot. The Court should grant the writ to ensure that the prosecution does not gain yet another advantage at trial by being privy to all of the details of the defendant's defense and testimony before trial.

## III. This case presents an ideal vehicle to resolve the issue since the issue is preserved and would affect the outcome in Petitioner's case.

Petitioner's case presents an ideal vehicle to address the rights of criminal defendants in keeping their duress defenses and proffers confidential until trial. The issue was preserved and ruled on in district court and squarely addressed by the Ninth Circuit. *See* 818 F. App'x at 655-56.

Moreover, remanding after establishing that a defendant is entitled to keep the details of his duress testimony and proffer confidential until trial would make a difference in the outcome of Petitioner's case. If Petitioner were allowed a new trial, one where the prosecution was not allowed to know exactly what he would testify to in his defense and he did not have to incriminate himself before trial, the prosecution would not be able to do what it did here—have time to investigate and then ambush Petitioner with a surprise rebuttal witness who undermined the entire defense. Though the panel majority found any error by the district court harmless, it did so by ignoring the important fact that the *only* evidence that

contradicted Petitioner's duress defense was the testimony and evidence presented by the prosecution's surprise rebuttal witness. All of the other evidence the Ninth Circuit cited—that Petitioner had exclusive control and dominion over a car containing a large amount of drugs, that he had told Border Patrol that he was on his way to work when he actually was smuggling drugs, and that he was previously convicted of a felony—were entirely consistent with his defense that he had been threatened and forced to smuggle the drugs. The only evidence that undercut his defense was the testimony of the officer and the jail calls that showed that Petitioner had not called his family to check on their safety until several months after his arrest, even though he testified that his fear for their safety motivated his conduct. In light of this, remanding to the district court with instructions to conduct a new trial and allow Petitioner to file his duress proffer under seal to protect his constitutional rights would affect the outcome.

Finally, though the memorandum is unpublished, the Court should nevertheless grant the petition. Requiring defendants to disclose the details of their defense before trial, and therefore force their self-incrimination, appears to be a longstanding practice throughout the Ninth Circuit. *See*, *e.g.*, *United States v. Guzman-Parra*, 401 F. Supp. 2d 1055 (S.D. Cal. 2005). And the lower courts trying to determine the bounds of a defendant's constitutional rights have reached conflicting results. *See e.g.*, *United States v. Chambers*, 2009 WL 1208015, *1 (E.D. Kentucky May 1, 2009) (unpublished); *United States v. Murillo*, 2008 WL 11411629, *24 (C.D. Cal. May 23, 2008) (unpublished). These lower courts rely on unpublished

memoranda like the one in Petitioner's case as persuasive authority to guide their rulings, so the Court should address the issue.

## CONCLUSION

This Court should grant the writ to address this important question of constitutional and criminal law, and ensure that defendants do not have to give up their Fifth and Sixth Amendment rights to defend themselves at trial.

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Respectfully submitted,

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