No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA - RESPONDENT

VS

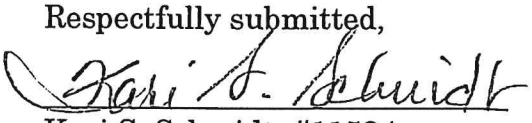
GAVIN WAYNE WRIGHT, *et al.* - PETITIONER

ON PETITION FOR WRIT OF CERTIORARI TO

UNITED STATES COURT OF APPEALS FOR TENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Respectfully submitted,



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QUESTIONS PRESENTED

I. Petitioner pointed to the Government agent's testimony about his "recruitment" role and activities for co-defendant Patrick Stein, and admitted testimony from two witnesses about his positive relationships with members of a criminal conspiracy's target class. Was the quantum and character of this evidence in the record sufficient to entitle him to a jury instruction on entrapment?

II. The District Court used a process for determining admissibility of co-conspirator statements against Petitioner in which it: accepted the Government's proffer, alone, and over Petitioner's objection, as the manner-of-proof for preliminary Rule questions; and utilized a variation on the narrative approach expressly rejected by this Court in *Williamson v. United States*. Did the District Court's process violate Fed. R. Evid. 801(d)(2)(E)?

III. The District Court specifically found that there was no evidence supporting the materiality element of Petitioner's 18 U.S.C. § 1001(a)(2) but permitted the question to go to the jury anyway. Does due process require the record to reflect evidence of materiality in order to sustain an 18 U.S.C. § 1001(a)(2) conviction when false statements are given to FBI investigators?

PARTIES TO THE PROCEEDINGS

[ ] All parties appear in the caption of the case on the cover page.

[X] All parties do not appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

Curtis Wayne Allen
Patrick Eugene Stein
Gavin Wayne Wright
United States of America

RELATED PROCEEDINGS

United States District Court for the District of Kansas:

United States v. Curtis Wayne Allen,
No. 16-10141-01-EFM (Jan. 31, 2019)

United States v. Patrick Eugene Stein,
No. 16-10141-02-EFM (Jan. 31, 2019)

United States v. Gavin Wayne Wright,
No. 16-10141-03-EFM (Jan. 31, 2019)

Tenth Circuit Court of Appeals:

United States v. Patrick Stein,
No. 19-3030 (Jan. 25, 2021)

United States v. Curtis Wayne Allen,
No. 19-3034 (Jan. 25, 2021)

United States v. Gavin Wayne Wright,
No. 19-3035 (Jan. 25, 2021)

Tenth Circuit Court of Appeals, Consolidated Case:

United States v. Patrick Stein, et al.,
No. 20-3053 (Jan. 25, 2021)

United States Supreme Court:

United States v. Patrick Eugene Stein,
(June 24, 2021) (no docket number assigned)

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IN THE

SUPREME COURT FOR THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit appears at Appendix A to the petition and is reported at 985 F.3d 1254. There is no opinion by the United States District Court for the District of Kansas.

JURISDICTION

The date on which the United States Court of Appeals for the Tenth Circuit decided the case below was January 25, 2021.

No petition for rehearing was filed in this case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The Solicitor General of the United States has been served with notice of this petition in accordance with Supreme Court Rule 29.4(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"No person shall . . . be deprived of life, liberty, or property, without due process of law."

Fifth Amendment, U.S. Constitution

"(a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully –

. . .

(2) makes any materially false, fictitious, or fraudulent statement ore representation; . . .

shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

18 U.S.C. § 1001.

STATEMENT OF THE CASE

This case arises out of an FBI investigation into alleged domestic terrorism. In 2016, Petitioner and his co-defendants, Patrick Stein and Curtis Allen, were arrested and indicted for conspiring to use an explosive device against the Somali Muslim refugee population living at an apartment complex in Garden City, Kansas. Petitioner was also charged with making false statements to the FBI during the course of their investigation into the conspiracy. The proceedings below are pocked by four issues.

A. The Jury Selection Process Challenged.

The District of Kansas is bisected into eastern and western halves by Interstate 35. The defendants' charged conduct occurred exclusively in their home communities like Garden City, Dodge City, Liberal, and other small, rural towns near the Colorado border. All of the District of Kansas courts, however, are found in the eastern half of the state in metropolitan cities like Wichita, Topeka and Kansas City. Defendants discovered that the District of Kansas uses a *venire* selection process that systematically excludes qualified jurors who reside in western Kansas. The defendants moved the District Court to implement a jury selection procedure that would prevent such systematic exclusion. The District Court denied this motion. The Tenth Circuit affirmed. This issue is not further addressed here as it is more fully outlined in Stein's petition to this Court.

B. The Rule 801(d)(2)(E) Process Challenged.

1. During the investigation, FBI informant Dan Day recorded hours of conversations on a body wire. The Government transcribed those recordings into thousands of pages of transcripts. Those transcripts purported to accurately represent contents of those recordings. Facts the Government alleged in its transcripts included: (i) identities of declarants, (ii) content of declarations, and (iii) marriage of certain declarants to certain declarations.

2. Defendants moved in January 2018 for a pre-trial *James* hearing to rule on admissibility of co-conspirator statements against defendants under Fed. R. Evid. 801(d)(2)(E). The Government produced to the District Court several notebooks containing over 1,800 total pages of transcripts. The Government used highlighters and brackets to identify excerpts from those transcripts as *James* exhibits. The Government identified over 500 *James* exhibits. A substantial portion of those exhibits embodied multiple declarations by multiple declarants. Those declarations were narrative in nature, containing multiple statements. *E.g.* R6.708-711[1]. The Government asked the District Court to make Rule 801(d)(2)(E) findings in connection with each exhibit, whether such exhibit contained multiple narrative declarations. These exhibits were often multiple pages long.

[1] Petitioner cites to the Tenth Circuit Record on Appeal using the following citation format: "R1.230." The "R1" heading refers to the record volume, such that R1 refers to volume 1, and R6 refers to volume 6. Numbers following the period, such as ".230," refer to the record page number, such that R1.230 refers to page 230 of volume 1 of the Tenth Circuit's consolidated record.

The Government offered no other exhibits. The Government called no witnesses to testify to the contents of the transcripts. The District Court proceeded based solely on facts proffered by the Government in the transcript notebooks.

Defendants objected to the District Court's Rule 801(d)(2)(E) determinations using this process for two reasons. First on the grounds that Rule 801(d)(2)(E) required a statement-by-statement approach; not a narrative approach. R6.684, 698-699, 772. They objected second to allowing the Government to proceed by proffer as manner-of-proof alone. R6.700, 750. Thus, Defendants denied the facts asserted by the Government in its transcripts, including the identities of declarants, the content of declarations, and the marriage of declarants to declarations. The District Court overruled defendants' objections and proceeded by proffer alone (vis-à-vis the transcripts), ruling on each exhibit rather than each statement within each exhibit. Ultimately, the District Court admitted at trial over 300 of the Government's *James* exhibits.

3. During trial, the District Court permitted Petitioner to cross-examine Dan Day on exactly one excerpt from one *James* exhibit on veracity of the Government's factual claims, as set forth in the transcripts. Day testified that the Government's factual claims were wrong in connection with the identity and marriage of the declarant to a particular statement. Specifically, the transcript reported a man known as Earnest Lee as the declarant of several declarations. Day testified that Lee did not make those declarations and could not have because Lee was absent from the meeting at which the recording was made. R6.3532, 4780. Later, after Day

completed his testimony and the transcripts and audio recordings had been published to the jury, Petitioner examined FBI Agent Amy Kuhn. Kuhn testified that it was "very possible" similar false facts existed throughout the transcripts. R6.4876.

4. Petitioner raised both issues at the Tenth Circuit. Regarding the "narrative vs. statement" approach, he pointed the appellate court to this Court's precedent in *Williamson v. United States*, 512 U.S. 594 (1994). App. B at 13, 14. He explicitly challenged every one of the more than "350 of the Government's recordings . . . admitted against Wright as co-conspirator statements, based on the rulings from the *James* hearing." App. B at 19; App. C at 13 ("Wright objects to the admission of *all* non-Wright statements against him"). Despite the clear statements in his written briefs, the Tenth Circuit held that his narrative approach argument was "meritless" due to his counsel's failure to recall a specific statement admitted against him in violation of *Williamson*. App. A at 1269. The Tenth Circuit also affirmed the District Court's process in connection with the proffer issue, but merely focused on whether the court "followed the preferred procedure . . . to determine whether the predicate conspiracy existed," without regard to whether the District Court followed the preferred procedure for determining the other factual findings necessary to admit statements against Petitioner under Rule 801(d)(2)(E). *Id.*

C. The Motion for An Entrapment Jury Instruction

1. During the trial, Dan Day testified that the FBI paid him nearly $30,000 to act as its paid informant. R6.2653, 2661. He testified that sometime in February

2016, he became the "vetting officer" for Patrick Stein. R6.1710. He testified that his duties were "for new members, the possible new recruits." R6.2710. He testified that he joined Stein at meetings "to recruit people to help [Stein] plan *something*." R6.2768, 2771. He testified that he first encountered Petitioner as Stein's recruiter at a recruiting meeting in March 2016. R6.2721. Day testified that he "directed [defendants'] attention to Garden City." R6.3261, 3263. He testified that at a meeting in June 2016, it was his idea to "encourage and direct their attention to Garden City." R6.3262. Ultimately, Day testified that the FBI assigned him the task of "choos[ing] a target" for the defendants. R6.3264.

2. During trial, Petitioner called two witnesses who testified to his disposition on Somalis, Muslims and refugees. Lee Raynor testified that Petitioner had regular business dealings and good relationships with members of the Somali refugee population and the Muslim community in Garden City prior to and during Summer 2016. R6.5100-5103. Charles Alicia testified about events prior to spring 2016 while he lived with Petitioner in Manhattan, Kansas. Alicia testified that during that time Petitioner gave another room in his house to a man named Mir, an immigrant and a man Petitioner believed to be Muslim, and Mir's preteen son. R6.5134-5137.

3. At the conclusion of the evidence, defendants moved the District Court for a jury instruction on entrapment. The District Court denied the motion, finding that there was insufficient evidence in the record that would entitle defendants to the instruction.

4. The Tenth Circuit affirmed the denial, finding there was no evidence Day induced Petitioner, and that Petitioner was predisposed to enter the conspiracy. Regarding inducement, the Tenth Circuit focused primarily on the fact that "Mr. Wright [was] engaged in [his] own efforts to develop explosives at the time [he] resisted meeting with the undercover agents posing as arms dealers," without addressing that his efforts to develop a bomb occurred in late Summer 2016 – long after Day approached him throughout Spring 2016. App. A at 1266. Regarding predisposition, the Tenth Circuit weighed Raynor and Alicia's testimony, *supra*, against "the fact that defendants were charged with conspiracies," and that "predisposition is judged by examining whether defendants were 'ready and willing to commit the crime'" alone. *Id.*

D. The Motion For Judgment of Acquittal.

1. During the investigation, the only FBI employee Petitioner made statements to was FBI Agent Robin Smith. The conversation between Petitioner and Smith formed the nexus for the false statement charge against Petitioner.

2. At trial, the Government did not call Smith to testify. The only FBI witness to testify was Amy Kuhn. She did not testify about the impact Petitioner's false statements did or naturally could have had on the FBI's investigation.

3. After close of the Government's case-in-chief, Petitioner filed a motion for judgment of acquittal on his false statement charge. The District Court denied the motion. At the close of all evidence, Petitioner renewed his motion on the grounds

there existed insufficient evidence supporting his conviction, specifically in connection with the materiality element.

Both the District Court and the Government acknowledged that there existed no evidence in the record supporting the materiality element. The District Court specifically found that "there [was] no evidence of materiality." R6.5223-5224. Despite the District Court's specific finding that there was no evidence of materiality in the record, it nevertheless permitted the question to go to the jury. In its closing, the Government told the jury that it "ha[d] no obligation to provide them evidence of" materiality, calling it "obvious." R6.5526. Instead, the Government merely invited the jury to speculate "how differently things would have gone on October 12th if [Petitioner] . . . had told the truth." R6.5526.

4. The Tenth Circuit affirmed denial of Petitioner's motion for judgment of acquittal on the grounds that Petitioner's statements "were clearly material to the federal investigation," echoing the Government's earlier statement that materiality was obvious. App. A at 1270. But the Tenth Circuit merely restated the admittedly false statements, reflecting that "[t]he government was not required to introduce additional evidence that investigators were *actually* influenced." *Id.* The Tenth Circuit then held that "[t]he jury's verdict is supported by the record," while failing to actually point to any evidence in the record supporting the verdict on materiality. *Id.*

REASONS FOR GRANTING THE WRIT OF CERTIORARI

I. PETITIONER MOVES THIS COURT TO JOIN HIS CASE WITH CO-DEFENDANT PATRICK STEIN'S CASE IN THIS COURT, OR IN THE ALTERNATIVE, MOVES THIS COURT TO HOLD HIS PETITION PENDING THIS COURT'S DECISION IN STEIN'S CASE, IF ANY, IN CONNECTION WITH THE DISTRICT COURT'S ERRORS APPLYING THE JURY ACT.

The District Court and the Tenth Circuit consolidated the cases of Petitioner and his co-defendants. Order, No. 19-3030 (10th Cir. February 19, 2019)(consolidated Tenth Circuit case number 20-3053). Petitioner and co-defendant Patrick Stein are identically situated in connection with the District Court and Tenth Circuit's application of the Jury Act. Accordingly, Petitioner requests under Supreme Court Rule 12.4 that this Court join his petition with any petition submitted by Stein for review of the Jury Act issue as set forth in the Tenth Circuit's judgment in *United States v. Stein*, 985 F.3d 1254 (10th Cir. 2021)(Tenth Circuit Nos. 19-3030, 20-3053). Alternatively, Petitioner moves this Court to hold his petition pending a decision in any case brought to this Court by Stein concerning the Jury Act which arises out of the Tenth Circuit's judgment in *Stein*, 985 F.3d 1254.

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO RESOLVE THE IMPORTANT, RECURRING CONSTITUTIONAL OF WHAT CONSTITUTES "SUFFICIENT EVIDENCE" TO ENTITLE THE CRIMINALLY ACCUSED TO AN ENTRAPMENT JURY INSTRUCTION.

This case presents an important question of Constitutional law in criminal conspiracy prosecutions. Entrapment is an affirmative defense. Thus, the accused is required to make a *prima facie* case of entrapment to present the issue to the jury.

The law requires the accused to point to "sufficient evidence" to fulfill this initial burden. However, this Court has never defined what constitutes evidence "sufficient" for entitlement to the instruction. The facts of this case present an ideal vehicle to resolve the question: what is the character and quantum of evidence the record must contain for the accused to overcome this sufficiency threshold to trigger his right to an entrapment jury instruction?

A. Whether the criminally accused is entitled to an entrapment defense instruction is subject to a burden shifting test that places the initial burden on the accused to point to "sufficient evidence" of a colorable entrapment defense.

The Fifth Amendment states that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law." U.S. Const., amt. v. The criminally accused's due process rights include the right to acquittal "except upon proof beyond a reasonable doubt of every fact [*i.e.* element] necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). Due process also includes the right to present a complete defense to the charges brought against the accused. *Chambers v. Mississippi*, 410 U.S. 284, 294 (1973); *California v. Trombetta*, 467 U.S. 479, 485 (1984); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986).

This Court has never directly addressed whether lack of entrapment is an implied element of a criminal offense. The circuit courts tend to treat it as such. *United States v. Duran*, 133 F.3d 1324, 1331 (10th Cir. 1998)("proof that the defendant was not entrapped effectively becomes an element of the crime"); *See United States v. Polito*, 856 F.2d 414, 416 (1st Cir. 1988)("the burden of proof does

not shift -- the prosecution must prove guilt beyond a reasonable doubt []including lack of entrapment"); *See United States v. Hollingsworth*, 9 F.3d 593, 596 (7th Cir. 1993)("the government to convict is required to prove lack of entrapment beyond a reasonable doubt"), *rev'd en banc*, 27 F.3d 1196 (7th Cir. 1994)(reversed on grounds that panel created "readiness" as new element of entrapment defense). Thus, subject to certain limitations, *infra*, due process protects the accused's right to present entrapment as part of his complete defense, whether as an affirmative defense or as a defense on the elements.

Whether the accused is *entitled* to the entrapment instruction is subject to a burden shifting test. Ultimately, the test for entrapment is a road well-trod by this Court: "a valid entrapment defense has two elements [*i.e.* prongs]: [i] government inducement of the crime, and [ii] a lack of predisposition on the part of the defendant to engage in the criminal conduct. *Mathews v. United States*, 485 U.S. 58, 62-63 (1988)(internal citations omitted). This Court has held that the criminally accused has a right to receive a jury instruction on entrapment so long as he makes a *prima facie* showing that "sufficient evidence" exists in the record supporting both prongs. *Mathews*, 485 U.S. at 63; *Duran*, 133 F.3d at 1330 ; *Polito*, 856 F.2d at 416 (described as "an 'entry-level burden'"); *Hollingsworth*, 9 F.3d at 596 ("a colorable case"). Lower courts acknowledge that the accused is not required to admit such evidence, as long as it may be identified in the record. *United States v. Theagene*, 565 F.3d 911, 918 (5th Cir. 2009)("by identification or production of evidence"). Once the accused overcomes this evidentiary hurdle, he has the *right* to the entrapment

instruction and the burden shifts to the government to prove beyond a reasonable doubt that the accused was *not* entrapped. *See Jacobson v. United States*, 503 U.S. 540, 548-549 (1992).

B. This Court never crafted a standard to measure whether evidence is "sufficient" to trigger the accused's right to an entrapment instruction.

This Court recognizes the jury as the last and greatest bulwark against tyranny. *See United States v. Booker*, 543 U.S. 220, 239 (2005). The right of "the accused . . . to a speedy and public trial, *by an impartial jury*," is embodied in the Constitution. U.S. Const., amt. vi. And due process requires "the truth of every accusation . . be confirmed by the unanimous suffrage of twelve of [the defendant's] equals and neighbors, *Booker*, 543 U.S. at 239 (quoting *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000)). It is little wonder that this Court holds "[t]he question of entrapment is generally one for the jury, rather than the court." *Mathews*, 485 U.S. at 63. Petitioner acknowledges the District Court's role as gatekeeper to prevent undue delays in justice and confusion of the issues. *See Barker v. Wingo*, 407 U.S. 514, 519 (1972). However, this Court has never addressed the character or quantum of evidence to which the accused must point to obtain the jury instruction.

Some lower courts have filled this gap. Those doing so tend to apply a low bar. For instance, the Fifth Circuit requires the accused to "produce '*some evidence, but more than a scintilla*, that he was induced to commit the offense." *United States v. Gonzales*, 606 F.2d 70, 75 (5th Cir. 1979)(emphasis added). And prior to this case, the Tenth Circuit held "the degree of proof required to submit an entrapment

defense to a jury [had] been described as only 'slight' or 'some' evidence," so long as it merely put the factual issue in dispute. *United States v. Fadel*, 844 F.2d 1425, 1430 (10th Cir. 1988). In practice, this "minimal degree" standard has proven arbitrary. This case presents facts illustrating how courts manipulate the standard in ways that frustrate the accused's right to put the defense before a jury.

Consider first the question of the quantum of evidence. The quantum question has two parts. First, how much evidence against predisposition and for inducement is sufficient? Second, may district courts engage in preliminary weighing of the evidence? The impact of absence of a coherent standard on quantum is illustrated by the Tenth Circuit's decision on the predisposition element in this case. Evidence must point to the accused's disposition to commit the crime "*prior* to [the accused] *first being approached* by the government agents. *Jacobson*, 503 U.S. at 549 (emphasis added). The evidence first painted Petitioner into the case in March 2016, which is when Dan Day testified he first approached Petitioner. Thus, under *Jacobson*, evidence must exist that Petitioner was predisposed to commit the crime *prior* to March 2016. But no such evidence exists. The Tenth Circuit merely relied on Petitioner's alleged "eagerness to enter the conspiracy" in June 2016 to support its finding he was predisposed prior to March 2016 to enter the conspiracy. App. A at 1266. Alone, the *absence* of predisposition evidence is arguably insufficient. However, Petitioner admitted direct evidence bearing on his pre-March 2016 disposition to commit the crime.

The Government's theory was that Petitioner held violent hatred toward immigrants, refugees, Muslims and Somalis *prior* to Day entering his life in March 2016, and was thus predisposed to conspire to use an explosive device to harm them. However, Petitioner called two witnesses whose testimony specifically contradicted such allegations.

First, Petitioner called Lee Raynor. Raynor was Petitioner's neighbor and friend, and he personally witnessed Petitioner's professional and "respectful" interactions during the spring and summer of 2016 with members of the Somali refugee community and the Muslim community which were the allegedly intended targets. Raynor also testified to Petitioner's regular disavowal of Stein's hateful tendencies during those periods. Second, Petitioner called Charles Alicia. Alicia lived with Petitioner in Petitioner's home prior to March 2016. While living with Petitioner, Alicia testified to Petitioner's personal relationship with a man named Mir, an immigrant Petitioner believed to be Muslim. Specifically, Alicia testified that Petitioner provided a home to Mir and his son by inviting them into his home when they needed a place to live.

While a jury may have ultimately found Raynor and Alicia's testimony unavailing, this Court must determine whether it at least raised a triable issue on the question of predisposition. In *Gonzales*, the Fifth Circuit appears to dismiss "even an arguable suggestion[s] of entrapment," such as two witnesses testifying directly on such matters, as sufficient to trigger the instruction. 606 F.2d at 76. But it raises the issue before this court – if two witnesses called specifically for the

purpose of providing direct evidence of an element of entrapment is *insufficient*, then how much evidence *is* required to trigger the right to the instruction?

This introduces the second question on quantum. Despite two witnesses, the Tenth Circuit impliedly found no evidence of Petitioner's lack of predisposition. But compounding the problem is the Tenth Circuit's analytical framework. The Tenth Circuit at once declares Raynor and Alicia's testimony alone as insufficient. But the Tenth Circuit *also* weighed that evidence against evidence it believed supported a finding of predisposition: "the fact that defendants were charged with conspiracies." In other words, the Tenth Circuit did not merely scour the record to find *evidence* tending to prove Petitioner's lack of predisposition. To determine sufficiency, the Tenth Circuit engaged in actual *fact-finding*, weighing evidence against other evidence. In light of this framework, this Court needs to determine whether the law limits courts to finding evidence tending to favor entrapment, or whether the law is so broad in scope that it permits courts to weigh the evidence in the record to determine whether the question should reach the jury at all.

Now consider the question of the character of evidence. This Court has not addressed the issue, but circuit courts hold that district courts must view evidence in the light most favorable to the defendant to determine sufficiency. *E.g. Theagene*, 565 F.3d at 917-918; *United States v. Vasco*, 564 F.3d 12, 18 (1st Cir. 2009); *United States v. Pillardo*, 656 F.3d 754, 758 (7th Cir. 2011). This, of course, raises the issue: does evidence need to directly support entrapment? Or is circumstantial evidence sufficient if it supports mere inferences casting reasonable doubt on the

Government's lack of entrapment? At least one circuit implies the latter. In *Theagene*, the Fifth Circuit held that evidence is sufficient if "a reasonable jury could *derive* a reasonable doubt" as to entrapment. 565 F.3d at 918.

The impact of a lack of a coherent standard from this court is illustrated by the Tenth Circuit's decision in this case. First, it bears repeating that the onus is on the *Government* to prove *lack* of entrapment beyond a reasonable doubt. The *Theagene* Court implies that evidence is sufficient if mere inferences may reasonably be derived that do nothing more than have a natural tendency to cast doubt on entrapment. In this case, such evidence appears to exist in the form of Dan Day's testimony about his role and activities as they existed at the time he first approached Petitioner.

Day testified to receiving thousands of dollars from the FBI to report chargeable offenses. Day testified to becoming Stein's "vetting and intelligence officer." Day testified that as vetting officer, he was responsible for "recruitment." He testified to actively participating in recruitment activities for Stein. He testified to helping Stein "recruit people to help him plan something" in June 2016. He testified to participating as a recruiter at a recruitment meeting at which Petitioner was present. When considered together, Day's testimony supports the inference that Day *may have* induced Petitioner; that in his undercover persona as Stein's vetting officer, he actively recruited other people – including, specifically, Petitioner – to join Stein in criminal activities so that Day could report them to the FBI in exchange for money he desperately needed.

Regarding particulars of the charged conduct, Day testified that he told the defendants his strength "would be more like help[ing] put the plan together." Day testified that he "directed their attention to Garden City." Day specifically testified that the FBI assigned him "to choose a target" for the group. Taken together, Day's testimony supports the logical inference that Day *may have* induced defendants to agree to attack a *specific target*; focusing their ire on the Somali Muslim residents of a Garden City apartment complex. Furthermore, Day's continual use throughout his testimony describing his activities as "recruiting," a rational juror could infer that he meant more than simply providing opportunities to would-be criminals to commit crimes; but went so far as to do what recruiters do, which is *encouraging* them through persuasion to merely *agree* to commit an unlawful act (the crimes charged were inchoate conspiracies; not substantive offenses). The reasonableness of these inferences is supported by recent scholarship finding an increased danger of entrapment-by-informants in post-9/11 terrorism investigations. *E.g. generally* Trevor Aaronson, *The Terror Factory: Inside the FBI's Manufactured War On Terrorism* (Ig Publishing 2014) (2013); Dejan M. Gantar, *Criminalizing the Armchair Terrorist: Entrapment and the Domestic Terrorism Prosecution*, 42 Hastings Const. L.Q. 135, 144-145 (2014); Jesse J. Norris, *Accounting For The (Almost Complete) Failure Of The Entrapment Defense in Post-9/11 US Terrorism Cases*, 45 Law & Soc. Inquiry 194, 203 (2020).

Now, fairly, Day contradicted his own testimony. And this testimony would be insufficient to prove inducement beyond a reasonable doubt. However, the rule

developed by the lower courts does not require *uncontroverted* evidence; merely evidence that has a character contradicting the fact of predisposition, inducement, or both. And this Court's *Mathews* rule does not put the ultimate onus on the accused to prove inducement, but on the Government to prove *lack* of inducement. The question as to character of evidence, then, is whether the standard for "sufficiency" countenances circumstantial evidence and its application. In other words, is circumstantial evidence sufficient so long as it supports logical *inferences* that minimally bring into question the matter of inducement?

Importantly, Petitioner does not aver he was entitled to a finding of entrapment as a matter-of-law. Petitioner merely asks this Court to define "sufficiency" of evidence necessary to entitle him to an entrapment defense *instruction*. There is no guarantee a jury would find reasonable doubt on the issue of entrapment. However, if allowed the opportunity to present the defense to the jury, it might have found the evidence present in the record sufficient to raise such reasonable doubts as to the lack of entrapment. But what is the sufficient amount and character necessary to have triggered Petitioner's right to present the defense?

C. This question is made much more potent in prosecutions for criminal conspiracy because of its nature as an inchoate offense.

Petitioner was charged with two conspiracies. This court has recognized that "[t]he essence of conspiracy is 'the combination of minds in an unlawful purpose.'" *Smith v. United States*, 568 U.S. 106, 110 (2013). In other words, an agreement. This case is also an anticipatory prosecution of terrorism. Petitioner was not

charged with *planning* an act of terrorism. He was charged with *agreeing to commit* an act of terrorism, whether any planning occurred or not. Legal scholars rightfully criticize the heightened danger of entrapment inherent in conspiracy cases, "the most inchoate of offenses." *See* Jessica A. Roth, *The Anomaly of Entrapment*, 91 Wash. U. L. Rev. 979, 986 (2014).

Conspiracy cases raise special entrapment concerns because the elements of conspiracy are different from underlying offenses which may be the object of such conspiracies. The heart of *conspiracy* is not in the *commission or attempt* of an underlying offense, but in the *agreeing* to commit an underlying offense. Thus, the bar for commission of a conspiracy offense is significantly lower than it is for substantive offenses which may be the object of such conspiracies. The Tenth Circuit suggests that "defendants, not Mr. Day or the UCE, originated a plan to kill innocent Muslims with explosives." However, the origination question must relate to the crime *charged*; not uncharged crimes. Thus, even assuming *arguendo* the Tenth Circuit is correct, whether a plan to kill Muslims with explosives originated with Petitioner or any of his co-defendants is *not* the primary issue of inducement. Instead, the issue of inducement is limited in scope to whether Petitioner's *agreement* to kill Muslims originated with Day. While evidence of planning may prove an agreement *existed*, with respect to Petitioner the issue is whether Day induced Petitioner to engage in such planning vis-à-vis his agreement to do so. Typically, the planning of an act *follows* an agreement to commit an act; it is the agreement in and of itself which is at the heart of a conspiracy charge.

Inchoate offenses are difficult to parse, as they ask courts and juries to pass judgment on another person's state of mind without a crystal ball. Common sense suggests the number of genuine actors who would actually follow through on their agreements to commit terroristic acts is significantly lower than the number of people who would use words of agreement about doing so. And even fewer, still, compared to the number of people who entertain such thoughts even without agreement to do so. Common human experience reminds us that people sometimes use words of contract even when they have no true intention to follow through. Whether it is hyperbolic, or with an eye to "fitting in," our words and actions are seldom as transparent as the law pretends them to be.

This Court should grant cert on this issue because the opaque nature of inchoate offenses like conspiracy raises the specter that the innocent will be convicted based on what they said, without regard to what they truly intended or would have done. This is especially true when the accused (and even the informants) are unsophisticated, mentally ill, or otherwise lack a broad spectrum of human communication tools. In a recent study of entrapment defenses in post-9/11 terrorism prosecutions, an interviewed FBI informant is quoted as saying "[a]fter spending enough time with me, you *become* a terrorist. I'm *making you* sound like it . . . you at least become one in the recordings. Norris, 45 Law & Soc. Inquiry at 203. In such cases, due process raises the prospect that these decisions should ultimately be left to a jury of twelve members of the community instead of one judge. Only this Court can make that determination.

III. THIS CASE PRESENTS AN IDEAL VEHICLE TO CONFIRM THE PROPER PROCESS TRIAL COURTS MUST FOLLOW WHEN DETERMINING WHETHER STATEMENTS OF THIRD-PARTY DECLARANTS ARE ADMISSIBLE AGAINST THE CRIMINALLY ACCUSED AS CO-CONSPIRATOR STATEMENTS UNDER RULE 801(d)(2)(E) OF THE FEDERAL RULES OF EVIDENCE.

A. The Tenth Circuit's judgment affirms the narrative approach used by the District Court in a pre-trial *James* hearing to make Rule 801(d)(2)(E) admissibility determinations; an approach expressly rejected by this Court in *Williamson v. United States*, 512 U.S. 594 (1994).

1. Petitioner properly identified the discrete class of statements unlawfully admitted against him under Rule 801(d)(2)(E).

At first glance, this Court may be tempted to deny cert on this question because of the Tenth Circuit's finding that "[Petitioner] does not identify a single statement that he contends was improperly admitted as a result of the district court's election to proceed in this manner." App. A at 1269. However, Petitioner specifically re-typed into his brief a 20-statement declaration from Government's Exhibit 13C, which was later admitted against Petitioner under Rule 801(d)(2)(E). App. B at 10. Furthermore, Petitioner explicitly "object[ed] to the admission of *all* non-Wright statements against him." App. C at 7.

Furthermore, this Court should approach the Tenth Circuit's decision with caution given the numerous factual errors alleged regarding the events of the *James* hearing. The Tenth Circuit suggests that the District Court admitted *audio clips* embodying statements. The Government never offered any audio recordings at the *James* hearing; just written transcripts. The Tenth Circuit is also under the impression that Dan Day testified to his "observations and contacts with

[Petitioner]" at the *James* hearing. App. A at 1269. The District Court received no testimony from any witness at the *James* hearing.

2. The Tenth Circuit's decision directly contradicted this Court's unequivocal, unambiguous, and on-point *Williamson*.

At the pre-trial *James* hearing, the Government offered for Rule 801(d)(2)(E) purposes a series of notebooks totaling over 1,800 pages of Government-prepared written transcripts. Within those pages, the Government identified, using highlighters and/or hand-drawn brackets, excerpts of those transcripts. Each excerpt was labeled an exhibit for purposes of conducting the Rule 801(d)(2)(E) *James* hearing. In total, the Government offered over 500 exhibits, each constituting an excerpt from a longer transcript. Hundreds of those exhibits (*i.e.* transcript excerpts) contained *multiple* narrative declarations by *multiple* declarants. And almost every one of those declarations contained *multiple* *Williamson* statements, *see infra*. Mr. Wright illustrated this breakdown to the Tenth Circuit by providing in his brief just *one* declaration by *one* declarant in *one* exhibit (*i.e.* transcript excerpt) offered by the Government in the *James* hearing. In that one declaration, Mr. Wright identified 20 different *Williamson* statements. App. B at 10.

Throughout the *James* proceeding, the District Court insisted on conducting Rule 801(d)(2)(E) analysis on an exhibit-by-exhibit basis. This process exceeds the narrative-by-narrative approach rejected by this Court, *see infra*, because exhibits were not limited to one narrative; but instead contained *multiple* narratives. The

District Court then purported to conduct Rule 801(d)(2)(E) analysis on each *exhibit* (*i.e.* each multi-narrative excerpt), over the defendants' numerous objections and insistence that Rule 801(d)(2)(E) requires a statement-by-statement approach – not a narrative-by-narrative approach, and certainly not an exhibit-by-exhibit approach. This is the Rule 801(d)(2)(E) *James* analysis the District Court employed, and the same approach affirmed by the Tenth Circuit in its decision. In total, the District Court admitted 354 of these exhibits at trial. R6.2682-2695.

The Tenth Circuit's affirmation of the District Court's process directly conflicts with this Court's on-point decision in *Williamson v. United States*, which Mr. Wright explicitly put before the appellate court. The *Williamson* Court analyzed the meaning of the phrase "statement," as used in Rule 801 of the Federal Rules of Evidence. 512 U.S. 594, 599 (1994). The *Williamson* Court *expressly* rejected Rule 801 hearsay analysis conducted on multi-statement narratives, even if those narratives arguably contained *some* statements that may have been admissible under the rule. This Court put it plainly:

> [W]e must first determine what the Rule means by "statement," which Federal Rule of Evidence 801(a)(1) defines as "an oral or written assertion." One possible meaning, "a report or narrative," connotes an extended declaration. Under this reading, Harris' entire confession -- even if it contains both self-inculpatory and non-self-inculpatory parts -- would be admissible so long as in the aggregate the confession sufficiently inculpates him. Another meaning of "statement," "a single declaration or remark," would make Rule 804(b)(3) cover only those declarations or remarks within the confession that are individually self-inculpatory.
>
> Although the text of the Rule does not directly resolve the matter, the principle behind the Rule, so far as it is discernible from the text, points clearly to the narrower reading. . . .

> Congress certainly could, subject to the constraints of the Confrontation Clause, make statements admissible based on their proximity to self-inculpatory statements. But we will not lightly assume that the ambiguous language means anything so inconsistent with the Rule's underlying theory. In our view, the most faithful reading of Rule 804(b)(3) is that it does not allow admission of non-self-inculpatory statements, even if they are made within a broader narrative that is generally self-inculpatory. The district court may not just assume for purposes of Rule 804(b)(3) that a statement is self-inculpatory because it is part of a fuller confession, and this is especially true when the statement implicates someone else.

Id. at 599-601.

This Court held that the definition of "statement" in sub-section (a)(1) of Rule 801 is subject to the much narrower interpretation. Thus, the same narrow definition applied to sub-section (d)(2)(E) of Rule 801 in this case. The Tenth Circuit's finding that "the district court followed the preferred procedure" in "a multi-day James hearing" not only conflicts with, but directly contradicts, this Court's long-standing and binding precedent in *Williamson*.

B. The Tenth Circuit decision to affirm the District Court's process in allowing the Government to proceed by proffer alone, over the defendants' objections, departed so far from the accepted and usual course of judicial proceedings that it compels this Court to exercise its supervisory powers.

The Federal Rules of Evidence ("FRE" or "Rules" herein) provide the scope of what evidence may be admitted at trial, the purposes for which such evidence may be admitted, and the circumstances under which such evidence may be admitted for such purposes. Often within the FRE, the Rules require the district court to make preliminary factual determinations to admit evidence for a specific purpose. According to the Notes of the Advisory Committee on Rules, "[i]f a question is

factual in nature, the judge will of necessity *receive evidence* pro and con on the issue." Fed. R. Evid. 104, Notes of the Advisory Committee on Rules at Subdivision (a) (emphasis added). It is generally accepted that under Rule 104(a), the offeror of evidence bears the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States*, 483 U.S. 171, 175 (1987); *also United States v. Nacchio*, 555 F.3d 1234, 1251 (10th Cir. 2009).

This has the practical effect of turning *in limine* proceedings into evidentiary hearings. While the rules of evidence are relaxed in *in limine* proceedings, they are certainly not dispensed with. Nor is the adversarial nature of the *in limine* proceeding. Implicit in the burden of proof is the non-offering party's right to hold the offering party to prove the preliminary facts using a proper manner of proof. Generally, the offeror will proceed first with an offer of proof; a "proffer." Under this manner of proof, the offeror merely declares that certain preliminary facts exist (such as the existence of a conspiracy, or that a particular person made a particular declaration, etc.). However, it would relieve the offeror of the burden to allow them to proceed on proffer alone when the non-offering party objects to doing so. Thus, it has long been the fashion that when a non-offering party objects to proceeding by proffer, the burden shifts back to the offeror to admit *evidence* to satisfy its burden.

A wide swath of the FRE is dedicated to hearsay rules of admissibility. Fed. R. Evid., Art. VIII. Hearsay is generally inadmissible. Fed. R. Evid. 802; *Lee v. Illinois*, 476 U.S. 530, 543 (1986) ("presumptively unreliable and inadmissible").

However, out-of-court statements *may* be admitted if they fall within a "firmly rooted hearsay exception" or exclusion. *Ohio v. Roberts*, 448 U.S. 56, 66 (1980)(*overruled, Crawford v. Washington*, 541 U.S. 36, 62 (2004). Rule 801(d)(2)(E) provides such an exemption.

Rule 801(d)(2)(E) is unique among the hearsay rules. While most Article VIII Rules exist due to the presumed lack of reliability that hearsay has to prove the truth of the matter asserted therein, Rule 801(d)(2)(E) concerns less the *reliability* of a statement and more the *purpose* for which the statement is admitted. Specifically, Rule 801(d)(2)(E) permits the statements of a declarant to be admitted against a non-declarant of that statement on the ground the declarant and the non-declarant are co-conspirators. The Rule is rooted in agency theory and vicarious liability. Fed. R. Evid. 801, Notes of the Advisory Committee on Rules, Subdivision (d)(2)(E).

The Rules Advisory Committee acknowledges the substantial stakes involved when one man's words may be artificially crammed into another man's mouth to deprive the latter of his constitutionally-protected liberty: "the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established" by the plain language of the rule. *See id.* This Court's prior rulings evoke similar sentiment. *See Wong Sun v. United States*, 371 U.S. 471, 490 (1963)("We have consistently refused to broaden that very narrow exception to the traditional hearsay rule which admits statements of a codefendant made in furtherance of a conspiracy or joint undertaking").

Found in its plain language, Rule 801(d)(2)(E) placed on the Government the burden to prove admissibility of each non-Wright *Williamson* statement it offered against Petitioner by proving each of the following preliminary facts in connection with each such statement: (i) a conspiracy existed, (ii) the declarant and the criminally accused were both members of that conspiracy, (iii) the declarant made the statement during the conspiracy, and (iv) the declarant made the statement in furtherance of the conspiracy. Fed. R. Evid. 801(d)(2)(E); *United States v. Piper*, 298 F.3d 47, 51-52 (1st Cir. 2002); *United States v. Gigante*, 166 F.3d 75, 82 (2d Cir. 1999); *United States v. Weaver*, 507 F.3d 178, 181 (3d Cir. 2007); *United States v. Sinclair*, 109 F.3d 1527, 1533 (10th Cir. 1997).

Existence of a conspiracy is only one of four strict requirements for admissibility under Rule 801(d)(2)(E). However, the Tenth Circuit examined the record to determine only "whether the predicate conspiracy existed." App. A at 1269. Even if true, these findings only satisfied the first element of any Rule 801(d)(2)(E) analysis in connection with any particular statement offered by the Government. Petitioner's contention focuses on the second, third and fourth facts the Government – as offeror – bore the burden of proving by a preponderance of evidence. It is necessarily implied in these three preliminary fact inquiries that to prove the *declarant* of any statement was a member of a conspiracy in which Petitioner was also a member, that the Government bore the burden of proving (i) the truthful *identity* of the declarant, and (ii) the truthful *marriage* of the declarant to the Rule 801(d)(2)(E) *Williamson* statement at issue.

The only evidence the District Court admitted to prove those preliminary facts was Dan Day's assertion at trial that he "[found] the attributions in the transcripts to be accurate." R6.2744. However, not only does this blanket statement in connection with hundreds of exhibits, containing hundreds of narratives, containing hundreds of statements run afoul of *Williamson, supra*, it is an especially dubious claim considering Day's later testimony. After the Government concluded its examination of Day (including admission and publication to the jury of over 300 narrative exhibits), the District Court permitted Petitioner an extremely limited cross-examination on the second, third and fourth Rule 801(d)(2)(E) elements. The District Court permitted Petitioner to examine Day on just *one* excerpt from *one* exhibit. The transcript at issue proffered that a man identified as Ernest Lee made certain declarations during a July 31 meeting that Day supposedly recorded. Upon cross-examination, Day testified that nobody named Ernest Lee was present at that meeting. R6.3532, 4780. FBI Agent Amy Kuhn later testified that it was "very possible" the transcripts admitted as the written proffer at the *James* hearing contained other errors. R6.2876.

C. This Court should certify this question in order to clarify and confirm the proper process district courts must adhere to in order to satisfy the predicate factual inquiries of Rule 801(d)(2)(E).

The Government offered into evidence for Rule 801(d)(2)(E) purposes over 500 exhibits, more than 300 of which were ultimately admitted at trial. Despite those exhibits' embodiment of narrative declarations, the District Court utilized the narrative-approach this Court expressly rejected in *Williamson*. Furthermore, the

District Court overruled Petitioner's objection to allowing the Government proceeding to prove Rule 801(d)(2)(E) predicate facts by proffer; facts which were later verified as false on the one excerpt of one exhibit on which Petitioner was permitted to cross-examine the Government's foundation witness. The Tenth Circuit affirmed this Rule 801(d)(2)(E) process. These two errors clearly illustrate the need for a standardized Rule 801(d)(2)(E) process, an important federal question. This Court must clarify and confirm the proper process courts must utilize when making Rule 801(d)(2)(E) admissibility determinations.

IV. THIS CASE PRESENTS AN IDEAL OPPORTUNITY TO ADDRESS THE IMPORTANT CONSTITUTIONAL AND FEDERAL LAW QUESTION WHETHER FALSITY, ALONE, IS SUFFICIENT TO SUSTAIN AN 18 U.S.C. § 1001(a)(2) CONVICTION ON THE ELEMENT OF MATERIALITY IN THE CONTEXT OF STATEMENTS MADE TO FBI INVESTIGATORS.

Constitutional due process demands the Government prove *every* element of an offense beyond a reasonable doubt. *In re Winship*, 397 U.S. at 364; *United States v. Gaudin*, 515 U.S. 506, 509 (1995). A criminal offense violates due process for overbreadth if, as applied, it reaches conduct Congress did not intend to prohibit. *See Booker*, 543 U.S. at 273-274 (2005)(Stevens, J., dissent)(concerning "extraordinary overbreadth" of Sentencing Reform Act); John F. Decker, *Overbreadth Outside the First Amendment*, 34 N.M. L. Rev. 53, 54, 105-107 (2004).

Section 1001 is known as the "false statement" offense. Enacted in 1948, Congress at first merely prohibited "mak[ing] any false, fictitious, or fraudulent statements or representations" in connection with "any matter within the jurisdiction of any department or agency of the United States." 18 U.S.C. § 1001

(1948). This Court judicially imposed materiality as an element of the offense. *Cf. Julian v. United States*, 463 U.S. 1308, 1310 (1983)("§ 1001 requires . . . material false statements"). This Court defined "materiality" as a "natural tendency to influence" or "capab[ility] of influencing the decision of" the agency addressed. *Gaudin*, 515 U.S. at 509. During that same period, this Court held that statements which merely pervert "any government function" fulfilled Section 1001's "agency decision" element. *United States v. Rodgers*, 466 U.S. 475, 479-481 (1984); *see Brogan v. United States*, 522 U.S. 398, 403 (1998)(overturning "exculpatory no" doctrine). In 1996, Congress amended Section 1001, adding materiality as a statutory element separate from the falsity element. Since then, Section 1001(a)(2) prohibits "mak[ing] any *materially* false, fictitious, or fraudulent statement[s]." 18 U.S.C. § 1001(a)(2) (1996)(emphasis added). Thus, in accord with *Winship* and *Gaudin*, the Government – at least theoretically – bears the burden of admitting or pointing to evidence in the record which proves beyond a reasonable doubt the "natural tendency or capability" a statement has to influence an FBI decision or investigation.

However, in this case, the Tenth Circuit ignores the fundamental issue whether the record reflects *evidence* supporting a materiality finding beyond a reasonable doubt. The appellate court merely restates this Court's definition of materiality, App. A at 1269-1270, but never actually cites to evidence or testimony in the trial record supporting a *finding* of materiality. This is especially troubling given the District Court's express finding that "there is no evidence of materiality,"

R6.5223-5224, 5223-5224, and its contradictory submission of the question to the jury anyway on the theory Petitioner had an affirmative obligation to provide "truthful cooperation," instead of simply a negative obligation to refrain from making *materially* false statements. R6.5223, 5236. Even the Government conceded the lack of evidence on materiality, telling the jury it had no obligation to prove materiality beyond a reasonable doubt because jurors could simply imagine "how differently things would have gone . . . if [Petitioner] . . . told the truth." R6.5526. In affirming the District Court's denial of the motion for judgment of acquittal considering its express finding, the Tenth Circuit's decision renders a conviction on the falsity element alone a *per se* conviction on the materiality element of Section 1001(a)(2) as applied to FBI investigations.

But the Tenth Circuit is only one of the circuits to re-write *Winship*'s due process rule in this context. For instance, the Seventh Circuit holds that if a declarant makes a false statement to the FBI intending to misdirect it, then such statement is material, even if the statement "stand[s] *absolutely no chance* of succeeding," despite the minimal *Gaudin* requirement that a statement must have at least *some* "natural tendency" to influence an investigation. *United States v. Lupton*, 620 F.3d 790, 806-807 (7th Cir. 2010)(emphasis added).

Congress made materiality a statutory element. This raises the implication that Congress contemplated scenarios in which the accused *could* make an admittedly-false statement to an FBI agent which is *not* material. Thus, Congress did not intend to prohibit the making of false statements to the FBI unless those

statements are also material. The Tenth Circuit's application in this case clearly criminalized *non-material* statements; statements which Congress never intended to criminalize. This Court must decide whether the District Court and Tenth Circuit's decision overbroadly applies Section 1001(a)(2).

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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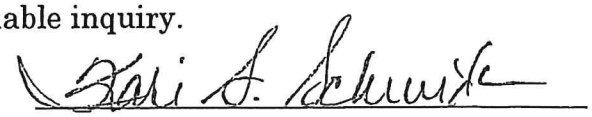
CERTIFICATE OF COMPLIANCE

As required by Rule 33 of the Rules of the Supreme Court of the United States, I certify that this petition is proportionally spaced and contains 8,248 words, which includes footnotes. I relied on my word processor to obtain the count, and it is Microsoft Word 10. My petition was prepared in Century, a proportional typeface, and contains 34 pages of text.

I certify that the information on this form is true and correct to the best of my knowledge and belief formed after a reasonable inquiry.



Kari S. Schmidt
Counsel of Record for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that paper copies of this original Petition for Writ of Certiorari were forwarded by third-party commercial carrier this __th day of June, 2021, in accordance with Rule 29 of the Rules of the Supreme Court of the United States. I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope with the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days:

Original with 10 copies to:

Clerk of the Court
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Washington, D.C. 20543

And 3 copies to:

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Room 5614
Department of Justice
950 Pennsylvania Ave., N.W.
Washington, D.C. 20530-0001

And 1 copy to:

Curtis Allen

And 1 copy to:

Patrick Eugene Stein

And 1 copy to:

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