No. _____

In the Supreme Court of the United States

MICHAEL HERMAN, *PETITIONERS*,

V.

UNITED STATES OF AMERICA, *RESPONDENT*

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

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QUESTION PRESENTED FOR REVIEW

The Compulsory Process Clause of the Sixth Amendment guarantees a right to "'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). Decisions from the Court hold that the right to present one's own witnesses to establish a defense ranks as a "fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967); *see also Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Crane*, 476 U.S. at 690; *Rock v. Arkansas*, 483 U.S. 44, 55 (1987); *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006).

The Court has held—and most circuits recognize—that a trial court violates this right when the exclusion of reliable evidence "infringe[s] upon a weighty interest of the accused" and is "'arbitrary' or 'disproportionate to the purposes [the rule of evidence] are designed to serve.'" *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (quoting *Rock*, 483 U.S. at 56); *see also Holmes*, 547 U.S. at 324; *Kubsch v. Neal*, 838 F.3d 845, 862 (7th Cir. 2016) (en banc). Or, as *Chambers* held, the exclusion of "critical," "trustworthy" evidence "directly affecting the ascertainment of guilt" based on "mechanistic[ ]" application of an otherwise valid rule of evidence violates a defendant's due process rights. 410 U.S. at 302.

The question presented is:

Can a defendant's right to present a complete defense be violated by the arbitrary and disproportionate application of a general evidentiary standard when it infringes a weighty interest of the accused, such as negating the mens rea element of the offense, or only where there is a "categorical prohibition of certain evidence," as the Fifth Circuit holds?[1]

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[1] This question is also raised in the petition for writ of certiorari in *Lucio v. Lumpkin*, No. 21-5095, pending before the Court.

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Petitioner Michael Herman asks that a writ of certiorari issue to review the opinion and judgment entered by the United States Court of Appeals for the Fifth Circuit on May 6, 2021.

PARTIES TO THE PROCEEDING

The caption of this case names all parties to the proceeding in the court whose judgment is sought to be reviewed, except for co-defendant Cynthia Herman, who does not join this petition.

RELATED PROCEEDINGS

All proceedings directly related to the case are as follows:

- *United States v. Herman*, No. 19-50830 (5th Cir. May 6, 2021) (affirming conviction)

- *United States v. Herman*, No. 1:17-cr-00301-XR-1 (W.D. Tex. Sept. 9, 2019) (judgment of conviction)

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A copy of the published opinion of the court of appeals, *United States v. Herman*, 997 F.3d 251 (5th Cir. 2021), is reproduced at Pet. App.

JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES

The opinion and judgment of the United States Court of Appeals for the Fifth Circuit were entered on May 6, 2021. On March 19, 2020, the Court extended the deadline for filing a petition for writ of certiorari due after that date to 150 days from the date of the lower court's judgment. *See also* Sup. Ct. R. 13.1, 13.5. On July 19, 2021, the Court rescinded its March 19, 2020 order, but clarified that the deadline of 150 days would remain for any relevant lower court judgment issued prior to July 19, 2021. This petition is filed within that time. The Court has jurisdiction to grant certiorari under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment to the U.S. Constitution provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right … to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATEMENT

1. After Michael Herman retired from the Houston Fire Department, he and his wife, Cynthia Herman, opened several restaurants—Cindy's Gone Hog Wild, Cindy's Downtown, and Hasler Brothers Steakhouse—in the Western District of Texas. The businesses became too burdensome, and the Hermans placed Cindy's Gone Hog Wild for sale through a broker. An undercover agent with the Internal Revenue Service pretended to be a potential buyer and began an investigation into whether the Hermans had underreported their business income.

As a result of the investigation, Michael was indicted on seven counts related to the tax filings for the restaurants.[2] Count One alleged a conspiracy to defraud the United States from 2007 to 2015, in violation of 18 U.S.C. § 371, based on the filing of false tax returns. It alleged that the Hermans concealed the true business incomes of their restaurants by relying only on deposited—not gross—cash receipts and overstated business expenses by including personal expenses, based on six separate instances where they

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[2] Cynthia Herman was indicted and convicted as a co-defendant on Counts One, Two, and Three.

paid for personal expenses out of business accounts and, including two individuals on business payrolls who were not employees.

Counts Two through Four alleged false statements, in violation of 26 U.S.C. § 7206(1), on the tax returns for Cindy's Downtown for tax years 2010, 2011, and 2012, respectively. Counts Five through Seven alleged false statements, in violation of 26 U.S.C. § 7206(1), on the same three years of tax returns for Cindy's Gone Hog Wild. Counts Two and Three alleged that the false and material statements on the tax returns were the totals listed as gross receipts and business expenses. Counts Four through Seven alleged that the false and material statements on the tax returns were the totals listed for gross receipts.

2. The parties filed numerous pretrial motions. Relevant here, the Government moved to exclude the Hermans' noticed expert, William Brown, a certified public accountant, forensic accountant, and former FBI agent. Brown performed a forensic accounting of the Hermans' tax returns and all underlying bank accounts and documentation and was prepared to opine that the gross receipts and business expenses charged in the indictment mischaracterized the accuracy of the tax returns. He opined that the gross receipts on the tax returns were not understated by the amounts the Gov-

ernment alleged in the indictment. That is because the total income reported on their tax returns included amounts that were not properly considered "income" for accounting purposes, such as loans or bank transfers. The total amounts reported on the tax returns as business expenses were also erroneous, because they failed to include legitimate business expenses that the Hermans had paid for using their personal account.

Brown prepared corrected gross receipts and business expense calculations for each tax year in question, subtracting non-income items that had been erroneously included by Greg Peden, who had prepared and filed the Hermans' tax returns for nearly 40 years. Brown's forensic accounting analysis was directly relevant to both the falsity of the statements themselves and to the Hermans' intent in making them—both essential elements the Government had to prove, and the jury was charged with finding beyond a reasonable doubt, to convict the Hermans of the alleged offenses. The Hermans also argued that the accuracy of the gross receipts numbers alleged in the indictment were fact issues under Rule 702(a), and Brown's testimony would help the jury to determine these facts. Because the Government charged Michael with falsely stating gross receipts, the Government made accuracy of the alleged numbers a fact issue for the jury.

There was no dispute that Brown was qualified, and the district court initially ruled that Brown's testimony was arguably relevant. The court determined that Brown could testify that certain transactions that the Government contended should be considered gross receipts or sales are in fact not gross receipts or sales, and that certain transactions that the Government contended were not business expenses are in fact legitimate business expenses. The court, however, preliminarily ruled that Brown could not opine on what the amended amount of taxes should have been, or that the Hermans should have included other expenses paid from personal accounts as business expenses.[3]

3. At trial, the Government set out to prove that the total "gross receipts" listed on the subject tax returns were fraudulently understated by the amounts alleged in each count because the Hermans did not include all their cash receipts in that total. Similarly, the total business expenses on each tax return were overstated in the alleged amounts based on the listed personal expenses paid from the business accounts.

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[3] The district court also designated Brown as an essential expert witness and allowed to him to sit in the courtroom through trial.

Special Agent Daniel Vela, who pretended to be an interested buyer of the Hermans' businesses, testified that, over the course of the sales negotiations, Michael mentioned several times that he could operate the business with just the credit card sales; the business generated a lot of cash; "what you do with the cash is your business;" and that there was cash that did not make it to the point-of-sale system, the software system that is supposed to record all transactions, whether cash, check, or by credit. The district court denied the Hermans' attempt to admit into evidence other exculpatory and contextual statements about his accounting practices recorded at the same time.

Greg Peden, a certified public accountant, testified that he had prepared the annual tax returns for the Hermans, personally, as well as for their businesses, for decades. To prepare the Hermans' tax filings at issue in this case, Michael furnished to Peden bank statements for all operating accounts, and sometimes prepared Excel spreadsheets that summarized expenses. Peden could not remember if Michael mentioned whether the Hermans used a point-of-sale system. He was not told about undeposited cash receipts.

Peden also explained that he developed a coding system for the Hermans to use to track whether a check was issued for business or personal expenses. He testified that sometimes codes on the

memo line of checks would be wrong or missing. He would keep a list of questions to send to Michael for clarification. If Peden didn't receive clarification about whether an expense was personal or business-related, he assumed that it was personal and would not include it as a business expense. Peden said the alleged personal payments itemized in the indictment were paid out of the Hermans' business accounts.

The Hermans moved to admit into evidence examples of Peden's expense-coding, where he had made unilateral and erroneous coding decisions—at times recoding a personal expense as a business expense—and accounting errors. The court sustained the Government's objection.

Special Agent Daniel Fannin, the Government's case agent, concluded that, between 2007 and 2012, the total amount of undeposited cash receipts for Cindy's Downtown and Cindy's Gone Hog Wild was $570,789. Fannin assumed that, if the cash receipts weren't deposited into the business bank accounts, then they weren't included as income on the tax returns. This was based on Fannin's other assumption that, if the Hermans told their tax preparer that all cash receipts were deposited, Peden would not have included the undeposited cash receipts on the tax returns. According to Fannin, then, the undeposited cash receipts meant that the

gross receipts statements on the Hermans' tax returns were false. Fannin also concluded that the Hermans were paying for personal expenses with business funds, and that these personal expenses were being wrongly deducted on their tax returns as business expenses.

But Fannin acknowledged that the indictment accused the Hermans of understating *gross* receipts in the cited tax years—not just cash receipts. Fannin, who is also a certified public accountant, clarified that gross receipts refer to all income received from sales and other sources, of which cash is just one part. Tax returns do not have a line for only cash receipts. He also clarified that not all bank account deposits are automatically gross receipts, because loan proceeds and transfers between bank accounts should not be treated as gross receipts.

The district court did not allow Michael to cross-examine Fannin about other non-income items that were incorrectly included in the total gross receipts identified on the Hermans' tax returns. Nor did the court allow Fannin to answer the question on cross-examination: "Are you confident that everything else about that number [i.e., the total gross receipts listed on each tax return], aside from the undeposited cash receipts, is correct?"

However, Fannin confirmed that he identified many errors in Peden's work, including mistakenly reporting net operating losses from Cindy's Gone Hog Wild from a prior year, cutting and pasting information from 2005 into the tax return for 2007, and failing to include income from Herman's pension. Fannin also admitted that in his original chart prepared for this investigation, his numbers were much lower than the chart he had prepared for trial approximately a week before it commenced. But that he had ultimately incorporated Peden's accounting mistakes into his final reports.

Before the Government rested, the district court informed Michael that the court would not allow Brown to testify before the jury, but he could proffer Brown's expert testimony outside the presence of the jury. Michael objected that the court's exclusion of Brown deprived him of a valid theory of defense, and thus violated his right to a complete defense. Michael argued that testimony about the many accounting errors committed by Peden, and incorporated by Fannin, was relevant to whether the Hermans knowingly, willfully, and intentionally committed the charged crimes.

Michael pointed out that Counts Two through Seven stated the received gross receipts in a particular tax year, and that the Hermans allegedly knew said gross receipts substantially exceeded that amount. And, because "the government has the burden of

proving willful filing of a false tax return, … if the Hermans' accountant misstated this on the tax return in a way that was both favorable and unfavorable to them, that undercuts any indication of a willful intent to file a false tax return."

The Government reiterated that its theory of the case was that the gross receipts were underreported because the cash receipts were underreported. Defense counsel pointed out that, on that theory, the Government is arguing that $570,000 should have been included in the Hermans' tax returns, but that it was not. And, if the Government's argument is that the tax returns are incorrect by that amount, the Hermans must be allowed to set forth affirmative evidence that the Government's allegations are not correct. The real amount is much lower, and that lower amount goes to the mens rea of each offense that the Government has the burden of proving beyond a reasonable doubt. The court overruled the Hermans' objections, concluding that Brown's expert testimony was irrelevant and confusing.

Michael proceeded to proffer Brown as an expert outside the presence of the jury. As a forensic accountant, certified public accountant, and former FBI agent, there were no challenges to Brown's qualifications as an expert or the reliability of his testimony. He testified that he had reviewed the indictment, focusing

on the fact that Counts Two through Seven alleged specific amounts of gross receipts and/or expenses, and that Count One alleged a conspiracy to file false income tax returns based on those false gross receipts and expenses. To prepare his opinion, Brown reviewed all the Government's appendices, Peden's work papers and files, bank records for all the accounts involved, and the tax returns. Based on these materials, he examined the gross receipts for the businesses and concluded that the gross receipts identified on the tax returns improperly included items such as loans and inter-bank transfers. When he eliminated all those inclusions, he found that there was approximately $409,000 combined for both companies that were improperly included in gross receipts statements. In other words, Peden had overstated the Hermans' gross receipts by $409,000.

He also found that Fannin had adopted these same values, and thus incorporated these same mistakes in his analysis. In every tax year there were nonrevenue items included in Peden's—and thus Fannin's—work. These mistakes erroneously enlarged the total gross receipts, and Peden incorporated these errors on the tax returns. Even when Fannin correctly identified Peden's mistakes, Fannin still incorporated those same mistakes into his analysis.

Similar types of errors existed for each business in each tax year, especially tax years 2009 and 2010.

The district court asked Brown if any of the Government's evidence that personal expenses being paid by business accounts was incorrect. Brown replied that the Government's statements were not incorrect, but that they were incomplete. Brown identified many business expenses that were paid out of personal accounts, adding up to approximately $94,000 of business expenses that were not included in the tax returns because Peden had not accounted for them.

The district court again ruled that Brown's testimony was not relevant and that his testimony would confuse the jury. The Hermans renewed their objection to the ruling and rested.

The jury returned a verdict finding Michael guilty on Counts One, Two, Three, Five, Six, and Seven, and not guilty on Count Four. Michael was sentenced to 21 months' imprisonment, followed by three years' supervised release, restitution in the amount of $157,719, and a special assessment of $600.

4. On appeal, Michael argued that the district court erroneously excluded recordings, expert testimony, and cross-examinations of Government witnesses that prevented him from present-

ing evidence to show that he lacked the requisite mens rea to commit the charged crimes. Specifically, Michael argued that the exclusion of Brown violated his Sixth Amendment right to a complete defense. Brown's testimony was highly relevant and probative to Michael's theory of defense that he did not have the specific intent to conspire against and defraud the United States when he filed the tax returns. If the tax filings were erroneous based on multiple accounting errors by Peden, as Brown's testimony would have shown, then Brown's testimony about the errors was highly relevant and probative as to whether Michael knew the tax filings were, in fact, false at the time they were filed.

The Fifth Circuit affirmed the convictions. Regarding the Sixth Amendment right to present a complete defense, the Fifth Circuit disposed of Michael's constitutional claim in a footnote because his claim did not involve "categorical prohibition" of evidence:

> The Supreme Court has recognized that the Constitution guarantees criminal defendants "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) [cleaned up]. But the Constitution also "leaves to the judges who must make these decisions 'wide latitude' to exclude evidence that is 'repetitive, only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" *Id.* at 689–90 [cleaned up]. Further, as this court has recognized, the Supreme Court's "cases typically focus on categorical prohibitions of certain evidence and not discretionary decisions to

> exclude evidence under general and otherwise uncontroversial rules." *Caldwell v. Davis*, 757 F. App'x 336, 339 (5th Cir. 2018) (per curiam) (unpublished).

Herman, 997 F.3d at 269 n. 8.

The Fifth Circuit acknowledged that the jury could have considered Brown's testimony and inferred that the Hermans were incompetent bookkeepers, which could tend to negate the "knowledge" element of 18 U.S.C. § 371, and the "willful" element of 26 U.S.C. § 7206(1). *Id.* at 271 (discussing *Cheek v. United States*, 498 U.S. 192 (1991)). But it held that the district court did not abuse its discretion under the valid Federal Rules of Evidence in excluding Brown's testimony. *Id.*

REASONS FOR GRANTING THE WRIT

The Court should clarify whether the right to present a complete defense applies to arbitrary and disproportionate exclusions of defense evidence made under valid rules of evidence.

It is well established that the Compulsory Process Clause of the Sixth Amendment guarantees a right to "a meaningful opportunity to present a complete defense." *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)). Decisions from the Court hold that the right to present one's own witnesses to establish a defense ranks as a "fundamental element of due process of law." *Washington v. Texas*, 388 U.S. 14, 19 (1967); *see also Chambers v. Mississippi*, 410 U.S. 284, 302 (1973); *Crane*, 476 U.S. at 690 (1986); *Rock v. Arkansas*, 483 U.S. 44, 55 (1987); *Holmes v. South Carolina*, 547 U.S. 319, 324 (2006).

The Court has also held that a trial court violates this right when the exclusion of reliable evidence "infringe[s] upon a weighty interest of the accused" and is "'arbitrary' or 'disproportionate to the purposes [the rules of evidence] are designed to serve.'" *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (quoting *Rock*, 483 U.S. at 56); *see also Holmes*, 547 U.S. at 324. Or, as *Chambers* held, the exclusion of "critical," "trustworthy" evidence "directly affecting the ascertainment of guilt" based on "mechanistic[ ]" application of

an otherwise valid rule of evidence violates a defendant's due process rights. 410 U.S. at 302.

But the Fifth Circuit did not address whether the exclusion of Michael's qualified expert violated his right to a complete defense, because the right, according to the Fifth Circuit, exists only when there is a "categorical prohibition[ ] of certain evidence," and not when a trial court's discretionary decision to exclude evidence is made under "general and otherwise uncontroversial rules." *Herman*, 997 F.3d a 269 n. 8. Such a circumscribed view of a defendant's right to present a complete defense misreads the Court's precedents and establishes a conflict between circuits. Resolution of this question is of paramount importance to a defendant's ability to present evidence of his innocence.

A. The Fifth Circuit, by limiting the complete-defense right to barring "categorical prohibitions" of certain evidence, misreads the Court's cases.

The district court barred reliable expert testimony that had bearing on the mens rea elements of the charged offenses when it excluded Brown's testimony as irrelevant and prejudicial. In fact, the court truncated every attempt by Michael to present evidence that he did not have the knowing or willful mens rea to commit the charged crimes. When the district court excluded Michael's qualified expert witness, he objected on the ground that it violated his

right to a complete defense. The district court, however, ruled that Brown's testimony was irrelevant and confusing. On appeal, Michael again argued that the district court's exclusion of Brown violated his right to a complete defense. The Fifth Circuit addressed Michael's Sixth Amendment claim in a footnote—rejecting the need to address the constitutional claim because his objection was to a discretionary decision by the district court under valid evidentiary rules, not a "categorical prohibition" of evidence.

In support of its circumscribed application of the Sixth Amendment, the Fifth Circuit quoted *Crane*, that the Constitution "leaves to the judges who must make these decisions 'wide latitude' to exclude evidence that is 'repetitive … only marginally relevant' or poses an undue risk of 'harassment, prejudice, [or] confusion of the issues.'" 997 F.3d at 269 n. 8 (quoting *Crane*, 476 U.S. at 689–90). But the Fifth Circuit fundamentally misreads *Crane* and its progeny, ignoring that a complete-defense right applies even when a court excludes evidence based on a generally applicable and valid rule, such as relevancy or jury confusion.

In *Chambers*, the petitioner was denied the opportunity to cross-examine his witness based on a Mississippi common-law rule that a party may not impeach his own witness. 410 U.S. at 295. The Court held that the "'voucher' rule, *as applied* in this case,

plainly interfered with Chambers' right to defend against the State's charges," *Id*. at 298 (emphasis added). But *Chambers* also said it "need not decide … whether this [voucher] error alone would occasion reversal" because there was other evidence excluded as hearsay that, together with the "voucher" evidence violated Chambers' rights. *Id*. at 298–300. The Court found that witness testimony excluded under hearsay rules, but critical to the defense, also deprived Chambers of a fair trial. *Id*. at 302. "In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." *Id*.

In *Crane*, the Court decided "whether the exclusion of testimony about the circumstances of the confession violated petitioner's rights under the Sixth and Fourteenth Amendments to the Federal Constitution"—the "constitutional right to a fair opportunity to present a defense." 476 U.S. at 686–87. The Court acknowledged that it has a general "reluctance to impose constitutional constraints on ordinary evidentiary rulings by state trial courts," and it emphasized that it had "never questioned the power of States to exclude evidence through the application of evidentiary rules that themselves serve the interests of fairness and reliabil-

ity." *Id.* at 689–90. But it also added that, because "the Constitution guarantees criminal defendants a 'meaningful opportunity to present a complete defense," "[t]hat opportunity would be an empty one if the State were permitted to exclude *competent, reliable evidence* bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Id.* at 690 (emphasis added). Therefore, the Court held that, "[i]n the absence of any valid state justification, exclusion of this kind of exculpatory evidence deprives a defendant of the basic right to have the prosecutor's case encounter and survive the crucible of meaningful adversarial testing." *Id.* at 690–91.

Holmes v. South Carolina also instructs that the Fifth Circuit's understanding—that the complete-defense right arises only in the context of categorical prohibitions—is wrong. In *Holmes*, this Court reviewed a particular interpretation of a common—and presumptively valid—"third-party guilt rule," "regulating the admission of evidence proffered by criminal defendants to show that someone else committed the crime with which they are charged." 547 U.S. at 327. But in Bobby Holmes's case, the South Carolina Supreme Court "radically changed" that valid rule by holding in effect that, "[i]f the prosecution's case is strong enough, the evidence of third-party guilt is excluded even if that evidence, if

viewed independently, would have great probative value and even if it would not pose an undue risk of harassment, prejudice, or confusion of the issues." *Id*. at 329. While that rule may seem, at first blush, to categorically prohibit any third-party evidence when the prosecution's case was strong enough, it also entrusted to the reviewing court a highly discretionary judgment—to determine how strong the prosecution's case was. This Court noted that, "*as applied* in this case," the state supreme court had overlooked defense objections to the prosecution's evidence in evaluating the strength of the case. *Id*. (emphasis added). *Holmes* involved the type of "discretionary application of a general evidentiary standard" that the Fifth Circuit believes is excluded from this Court's case law. *See also Sears v. Upton*, 561 U.S. 945, 950 & n.6 (2010) ("[W]e have also recognized that reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay rule.") (referencing *Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curiam)).

B. The Fifth Circuit's "categorical prohibition" rule conflicts with the majority of circuits, which apply the complete-defense right to evidence excluded under generally applicable and valid rules.

Most circuits—the First, Second, Third, Fourth, Sixth, Seventh, Eighth, Tenth, and Eleventh—have held that *Chambers*,

Green v. Georgia, *Rock*, *Crane*, and *Holmes* clearly establish a complete-defense right that applies when a court excludes evidence based on generally applicable and valid rules, such as relevance, hearsay, or that the evidence is more confusing than probative.

These circuits recognize that, although "broad latitude" is afforded to rulemakers to prescribe evidentiary standards, "'[t]his latitude … has limits.'" *Kubsch v. Neal*, 838 F.3d 845, 857 (7th Cir. 2016) (quoting *Holmes*, 547 U.S. at 324). Accordingly, these circuits hold that valid evidentiary rules yield to a defendant's fundamental due process right to present a defense where its application is "'arbitrary or disproportionate' and 'infringe[s] upon a weighty interest of the accused.'"[4] *Fortini v. Murphy*, 257 F.3d 39, 46 (1st Cir. 2001) (citing *Crane*, 476 U.S. at 690, and quoting

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[4] *See also Scrimo v. Lee*, 935 F.3d 103, 112 (2d Cir. 2019) (reasoning that the right to present evidence cannot be limited by arbitrary or disproportionate rules); *Brown v. Luebbers*, 371 F.3d 458, 467–68 (8th Cir. 2004) (en banc) (state court reasonably applied *Green* when it determined "stale evidence of a convicted murderer's character … well before the murder was committed [ ] not "highly relevant" to a "critical issue" and cumulative of other evidence). The Fourth Circuit implicitly found applications of generally valid rules of evidence fell within the clearly established ambit of the complete-defense cases, and found a state court application of this rule unreasonable. *Barbe v. McBride*, 521 F.3d 443, 460 (4th Cir. 2008) (concluding "that application of the West Virginia rape shield law at Barbe's trial was disproportionate to the State's interests in having the law applied").

Scheffer, 523 U.S. at 308); *see also Dodd v. Trammell*, 753 F.3d 971, 988 (10th Cir. 2013) (holding that "Supreme Court precedents like *Rock* and *Chambers* 'make clear that a state court may not apply a state rule of evidence in a per se or mechanistic manner so as to infringe upon a defendant's constitutional right to a fundamentally fair trial.'"); *Brown v. Ruane*, 630 F.3d 62, 72 (1st Cir. 2011) ("Even a generally defensible rule of evidence may be applied so as to produce an unconstitutional infringement."); *Ferensic v. Birkett*, 501 F.3d 469, 475 (6th Cir. 2007) (holding that the state unreasonably applied the complete-defense rule when it failed to evaluate whether the exclusion of the expert's testimony was disproportionate to the purpose of the rule requiring timely expert disclosures); *Guinn v. Kemna*, 489 F.3d 351, 354 (8th Cir. 2007) (stating *Chambers* stood for the proposition that an "erroneous evidentiary ruling can, of course, be one made without sufficient justification"); *Savage v. Dist. Att'y of Cty. of Philadelphia*, 116 F. App'x 332, 338 (3d Cir. 2004) (citing *Chambers* for the proposition that "state evidentiary rules cannot be inflexibly applied in such a way as to violate fundamental fairness").

The accused can thus exercise his right if he can demonstrate that the excluded testimony was "unusually reliable."[5] *Kubsch*, 838 F.3d at 860 (holding state court's conclusion, that *Chambers* did not require the admission of an exculpatory video that was excluded on hearsay grounds, was contrary to or an unreasonable application of this Court's clearly established complete-defense law); *see also Fieldman v. Brannon*, 969 F.3d 792, 800 (7th Cir. 2020) (holding state court's ruling that excluded as irrelevant defendant's testimony attempting to discredit incriminating video was contrary to clearly established federal law).

The Fifth Circuit, along with the Ninth Circuit, stand in sharp contrast to the broadly held view about *Chambers, Crane,* and their progeny. These two circuits narrow the reach of the complete-defense right to the categorical invalidity of the rules applied in district court. *See Herman*, 997 F.3d at 269 n. 8 (citing *Caldwell v.*

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[5] *See also Pittman v. Sec'y, Fla. Dep't of Corr.*, 871 F.3d 1231, 1248 (11th Cir. 2017) (upholding exclusion where defendant failed to show "hearsay statement was sufficiently trustworthy and reliable"); *Brown*, 371 F.3d at 467–68 (upholding state court's exclusion of hearsay where state court implicitly found defendant failed to satisfy *Green*'s requirement to show "substantial reasons exist to assume … reliability"); *cf. Chia v. Cambra*, 360 F.3d 997, 1006 (9th Cir. 2004) (finding sufficient indicia of reliability under *Chambers*).

Davis, 757 F. App'x 336, 339 (5th Cir. 2018) (per curiam) (interpreting *Crane* and its progeny as establishing a "general rule" that "typically focus[es] on categorical prohibitions of certain evidence and not discretionary decisions to exclude evidence under general or otherwise uncontroversial rules")); *Moses v. Payne*, 555 F.3d 742, 758 (9th Cir. 2009).

According to the Ninth Circuit, this Court's cases "have focused only on whether an evidentiary rule, by its own terms, violated a defendant's right to present evidence." *Moses*, 555 F.3d at 758. Hence, Supreme Court law "do[es] not squarely address whether a court's exercise of discretion to exclude expert testimony violates a criminal defendant's constitutional right to present relevant evidence," *id*. at 758 (citing *Wright v. Van Patten*, 552 U.S. 120, 124 (2006)), and doesn't "clearly establish 'a controlling legal standard' for evaluating discretionary decisions to exclude the kind of evidence at issue here." *Id*. at 758-59 (cleaned up).

C. This question concerns an issue of paramount importance: the ability of a defendant to present a defense of his innocence.

The exclusion of Brown's reliable, expert testimony completely deprived Michael of a defense and his ability to present evidence

of his innocence.[6] The charged offenses required the Government to prove a knowing (18 U.S.C. § 371) and willful (26 U.S.C. § 7206(1)) mens rea. To prove this, the Government relied on cherry-picked, surreptitiously recorded snippets of Michael's statements about cash during sales negotiations and an assumption that, but for undeposited cash and certain personal expenses, the tax returns were otherwise correct. This assumption allowed the Government to allege that there were significant discrepancies in the total value of gross receipts and business expenses, and those discrepancies were the product of the Hermans' conspiracy and fraud against the United States.

But the Government's assumptions were factually false. The tax returns filed by the Hermans had been prepared by their longtime accountant, Greg Peden, and contained significant accounting errors, many of which originated with and were executed by Peden. Special Agent Fannin incorporated these same errors, despite identifying them during his own analysis, into his investigation. Had the jury heard the expert testimony by Brown, the jury

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[6] The harm to Michael was compounded by the fact that he was also prevented from cross-examining Peden and Fannin on the same topics that Brown would have affirmatively addressed—the tax returns contained significant accounting errors that originated with Peden.

could have considered whether the erroneous tax returns filed by Michael were made with the requisite criminal mens rea, or because of bad bookkeeping or negligence. If the jury determined the latter, then Michael was innocent of the charged crimes.

D. This case is the ideal vehicle for resolving the circuit split.

This is a compelling case for the Court to review. First, there was a miscarriage of justice because Michael was not allowed to present unusually reliable and critical, expert testimony that negated the mens rea elements of the charged crimes. Second, the decision below presents a purely legal question about the circumstances under which the right to a complete defense arises. Finally, the question here is likely to be outcome determinative. Under the majority approach, Michael would prevail. The excluded evidence infringed upon his weighty interest to negate the mens rea elements of the charged crimes.

The exclusion of Brown's critical and trustworthy testimony was arbitrary and disproportionate to the purposes served by the rules governing relevancy and jury confusion. Relevance is a rule of efficiency, designed to streamline evidence and to focus the jury on evidence that makes the question of guilt more or less probable. *See* John W. Strong, McCormick on Evidence § 185 (4th ed.). And before relevant evidence is excluded for undue prejudice under

Fed. R. Evid. 403, a court should consider "the probable effectiveness or lack of effectiveness of a limiting instruction," or the "availability of other means of proof." Fed. R. Evid. 403 advisory committee's note.

As the Seventh Circuit has said, arbitrariness "might be shown by a lack of parity between the prosecution and defense; the state cannot regard evidence as reliable enough for the prosecution, but not for the defense." *Kubsch*, 838 F.3d at 858. There was no question as to Brown's qualifications or the reliability of his testimony. Once the Fifth Circuit's categorically-prohibited rule is rejected, the issue to analyze is the district court's arbitrary and disproportionate rejection of Brown's testimony as irrelevant and confusing. No coherent rationale supports the court's assessment.

CONCLUSION

FOR THESE REASONS, the Court should grant certiorari to resolve this important question.

Respectfully submitted.

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