No. _____

IN THE SUPREME COURT OF THE UNITED STATES

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JULIO CESAR GOMEZ,

Petitioner,

- v -

UNITED STATES OF AMERICA,

Respondent.

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

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QUESTION PRESENTED FOR REVIEW

The Second, Seventh, Eighth, Eleventh, and D.C. Circuits require that before the government may introduce otherwise inadmissible evidence to rebut a criminal defendant's entrapment defense, the defendant must raise entrapment during trial by introducing supporting evidence in the government's case-in-chief or the defense case. The Ninth Circuit stands alone in allowing introduction of otherwise inadmissible evidence to preemptively "rebut" an anticipated entrapment defense.

The question presented is whether a district court errs when it permits the government to introduce highly inflammatory, and otherwise inadmissible, evidence to preemptively rebut an entrapment defense that does not materialize during trial?

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INTRODUCTION

At his trial on charges that he distributed methamphetamine, Julio Gomez never claimed he was entrapped into committing those offenses. Nevertheless, to preemptively "rebut" an entrapment defense that never materialized, the government was allowed to introduce in its case-in-chief otherwise inadmissible evidence that guaranteed Gomez's conviction. That included testimony that Gomez was one of the "worst of the worst" gang members, that gang members arm themselves to "assault law enforcement," that Gomez was "making a power play under the umbrella of the Mexican Mafia for control of the streets within the Coachella Valley," and that he had spent fourteen years in prison for a juvenile carjacking conviction.

In a divided opinion, the Ninth Circuit affirmed the admission of this highly inflammatory testimony. *See United States v. Gomez*, 6 F.4th 992 (9th Cir. 2021) (attached in Appendix at 31-45). The majority acknowledged that Gomez never raised an entrapment defense. But it reasoned that he could have, therefore the government need not wait for him to do so before introducing rebuttal evidence, because imposing that requirement would, generally, create a risk that a defendant might sandbag the government by raising entrapment for the first time at the end of trial. *See id.* at 1002-03. There was, however, no risk of sandbagging in this case, because the district court and prosecutor were well aware before trial that defense counsel might present an entrapment defense. The majority opinion nevertheless cobbled together a rule to address a risk that was not present in this case.

Furthermore, it is practically impossible that the scenario the majority envisioned would play out in the real world, because that scenario relies on a prosecutor eliciting evidence to support an entrapment defense, and jury instruction, while not realizing the defendant might later argue that

defense. And in the highly unlikely event such a scenario did arise, a district could allow the government to re-open its case for rebuttal purposes.

On the other hand, the majority opinion's rule realistically risks substantial unfairness to a defendant, as the government may – as in this case – introduce highly inflammatory evidence to rebut an entrapment defense that never materializes. Moreover, even if an entrapment defense is actually presented, allowing it to be preemptively "rebutted" creates a substantial risk that a district court will not accurately foresee what evidence is relevant, or more probative than prejudicial, for the preemptive rebuttal. *See* Fed. Rules Evid. 401, 403.

These reasons underlaid the dissenting opinion in this case. *See Gomez*, 6 F.4th at 1010-13 (Steele, J., dissenting). And, as the dissent noted, the Ninth Circuit's rule is contrary to case law in the Second, Seventh, Eighth, Eleventh, and D.C. Circuits. *See id.* at 1012. Those circuit courts recognize that rebuttal evidence should only be admitted as rebuttal evidence normally is – to answer a defendant's entrapment defense *after* it has been raised at trial. *See*, *e.g.*, *United States v. Hicks*, 635 F.3d 1063 (7th Cir. 2011); *United States v. McGuire*, 808 F.2d 694, 1071-72 (8th Cir. 1987).

OPINION BELOW

On July 28, 2021, a Ninth Circuit panel filed a published opinion affirming Gomez's drug and firearms convictions and sentence, with one judge dissenting. *See United States v. Gomez*, 6 F.4th 992 (9th Cir. 2021) (attached in Appendix at 31-45).

JURISDICTION

On February 17, 2022, the Ninth Circuit denied Gomez's petition for panel rehearing and rehearing *en banc*. *See* 2/17/22 Order (attached in Appendix at 46).

On April 25, 2022, this Court extended the time for Gomez to file this petition, until July 17, 2022. *See* No. 21A641. Accordingly, this petition is timely under Supreme Court Rule 13, and the Court has jurisdiction under 28 U.S.C. §1254(1).

RELEVANT RULES OF EVIDENCE

Federal Rule of Evidence 401 states, "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."

Federal Rule of Evidence 403 states, "The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence."

Federal Rule of Evidence 404(a)(1) states, "Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait."

STATEMENT OF THE CASE

I. District Court Proceedings

Gomez was charged with drug and firearms offenses arising out of events in January and February 2016, during which two police informants bought methamphetamine and two guns from Gomez and his associates. *See Gomez*, 6 F.4th at 996-997.

In Gomez's pretrial motions and related hearings, defense counsel said he might present an entrapment defense on counts 1 and 2 of the indictment, related solely to a January 2016 drug sale. That potential defense was premised on the allegation that, unknown to his officer-handlers, one of

the informants (Lopez) gave Gomez methamphetamine on credit on January 13, 2016, which Gomez then sold to the other informant (Gabe) the next day. That is, defense counsel's theory was that Gomez was entrapped because informant Lopez was the source of the drugs that Gomez sold to informant Gabe on January 14, 2016. *See Gomez*, 6 F.4th at 998 (stating that "Carmona's [pretrial declaration] alleged that one confidential informant gave Gomez the drugs that Gomez subsequently sold to the other confidential informant," and that supported both an outrageous conduct motion and "Gomez's entrapment defense"). Beginning a year before trial, the district court repeatedly expressed skepticism that those circumstances supported an entrapment defense, because even if Lopez had provided drugs to Gomez without his officer-handlers' approval, that didn't show that Gomez was wrongly induced to sell the drugs to Gabe. *See, e.g.,* App'x at 7-9 (court told defense counsel "Gomez wasn't induced to do anything," and "I'm not seeing this entrapment thing"); App'x at 13 (court wrote that Gomez's potential defense "does not establish entrapment"); App'x at 10 (court expressing incredulity about proposed entrapment defense).

Prior to trial, the government noticed its intent to introduce expert testimony about gangs, and Gomez moved to exclude that testimony. The government responded that it would seek to "elicit such testimony *during rebuttal only* if defendants were to raise a defense, such as entrapment, and the government needs to rebut defendants' potential claim that defendants are not predisposed to commit the offenses alleged in the indictment." App'x at 3 (emphasis added); *see also Gomez*, 6 F.4th at 1010 ("[t]he government responded that it did not intend to introduce such testimony at trial, but reserved the right to introduce evidence of gang membership or affiliation on rebuttal should it become necessary") (Steele, J., dissenting).

The government subsequently provided additional expert notice, indicating that it intended to introduce wide-ranging testimony about the Mexican Mafia and Gomez's alleged gang affiliations. Gomez also moved to preclude that evidence. In response, the government repeated that it would only seek to introduce gang-related testimony to rebut an entrapment defense, or if Gomez called Angel Carmona as a witness, whom defense counsel had identified as the witness necessary to support his potential entrapment defense. *See* App'x at 5; *Gomez*, 6 F.4th at 998 (stating that "Carmona's [pretrial declaration] alleged that one confidential informant gave Gomez the drugs that Gomez subsequently sold to the other confidential informant").

On April 1, 2019, the day before trial, the district court addressed the motion to preclude "expert testimony concerning gangs and drug trafficking." App'x at 16-17. The court said that "but for [the potential defense of] entrapment," "all of this other stuff is irrelevant. I wouldn't let it in anyway." App'x at 17-18. The court said it viewed that as "an easy call," but said that if Gomez pursued an entrapment defense, "then I can understand how the prosecution feels it's necessary to paint a fuller picture of Mr. Gomez and what his intentions were and his predisposition was." App'x at 17. The government again said that it would only seek to introduce gang-related testimony if Gomez proceeded with an entrapment defense or called Carmona as a witness. *See* App'x at 22-23; *see also Gomez*, 6 F.4th at 998.

During the April 1, 2019 hearing, the district court asked defense counsel whether he intended to put on an entrapment defense, and "Gomez's counsel said that he was 'leaving open' whether to pursue an entrapment defense, depending on the evidence." *Gomez*, 6 F.4th at 998; *see also* App'x at 17. The court replied, "Then I won't be able to rule on the motion in limine" regarding evidence of gangs and drug trafficking, "we're all going to have to wait and see." App'x

at 21. The judge noted, however, the extreme prejudice that would flow from the proposed testimony, and said "we will wait until tomorrow morning to see what the defense is going to do." App'x at 24.

The next morning, prior to jury selection, the court told defense counsel to make "an election" about whether he would pursue an entrapment defense. *See* App'x at 26-27; *Gomez*, 6 F.4th at 1003 n.12. Pressed on that question, defense counsel responded, "We will be pursuing an entrapment defense." App'x at 26-27. The court said, "[t]his is just so dangerous," then ruled:

> [T]he defense requests to preclude testimony regarding various drug trafficking practices and procedures. That motion is denied. Likewise with respect to the defense request to preclude any introduction regarding gangs, etcetera. That is denied. Oh, boy.

App'x at 27. Defense counsel responded that he would continue to reevaluate the defense strategy during trial, and said the defense could change. *See* App'x at 27-29. Trial then began.

"Defense counsel did not give an opening statement prior to the beginning of the government's evidence, and therefore did not assert an entrapment defense to the jury." *Gomez*, 6 F.4th at 1011 (Steele, J., dissenting). Thus, when the government's case-in-chief began, the jury had heard nothing about entrapment. Furthermore, at that point the prosecutor knew: (1) the district court had repeatedly expressed skepticism of the proposed entrapment defense during pre-trial proceedings; and (2) the witness the defense needed to make the proposed defense, Carmona, was unavailable. *See* App'x at 11-13 (order indicating that Carmona, and other defense witnesses, were not available for trial); *Gomez*, 6 F.4th at 998 (stating that "Carmona's [pretrial declaration] alleged that one confidential informant gave Gomez the drugs that Gomez subsequently sold to the other confidential informant"). Yet "[t]he government wasted no time . . . in 'rebutting' the anticipated entrapment defense." *Gomez*, 6 F.4th at 1011 (Steele, J., dissenting).

Its first witness testified that he worked for the district attorney's office and investigated major organized crime, which he described as "gang members within the prison and the street-level-type of environment." *Id.* at 999. He explained that his unit focused "on the worst of the worst," and he said Gomez was a member of the North Side Indio gang and the Mexican Mafia. The investigator also said Gomez was on parole and his parole officer supervised "high risk" and "higher-level" gang members, and he added that he had received information that Gomez was "making a power play under the umbrella of the Mexican Mafia for control of the streets within the Coachella Valley." *Id.* Finally, the investigator testified that both the North Side Indio gang and Mexican Mafia are involved in drug trafficking and handling firearms. *See id.*; *see also id.* at 1011 (Steele, J., dissenting).

The government's next witness gave similar testimony about gangs and Gomez's membership in gangs. *See id.* After that, one of the government's informants testified that Gomez was apparently going to take over "collecting taxes" for the Mexican Mafia. *See id.* Then Gomez's parole officer testified that Gomez was a documented member of the North Side Indio gang, which is known for "criminal activities." *Id.* The parole officer added that Gomez had been released from state prison after serving fourteen years for a juvenile carjacking conviction. *See id.* Next a supervising investigator for the district attorney's office, who was qualified as an expert in drug trafficking, testified about the "close correlation between gangs and narcotics." *Id.* He also testified about the relationship between firearms and gangs, and the various reasons gang members arm themselves, including "to use to assault law enforcement." *Id.*; *see also Gomez*, 6 F.4th at 999-1000.

Gomez was unable to adduce evidence to support the entrapment defense his attorney mentioned before trial, either through questioning the government's witnesses during cross-examination or presenting his own witnesses. *See Gomez*, 6 F.4th at 1000; *see also id.* at 1011 (Steele, J., dissenting). That was unsurprising, given that the witness he needed to support that defense, Carmona, was unavailable. *See* App'x at 11-13; *Gomez*, 6 F.4th at 998. Gomez was convicted of all counts submitted to the jury and he appealed.

II. Ninth Circuit Majority And Dissenting Opinions

A. Majority Opinion

The Ninth Circuit's majority opinion framed the question presented on appeal as "whether the government may present evidence in its case in chief to rebut an anticipated entrapment defense." *Gomez*, 6 F.4th at 1001. The majority concluded that "[b]ecause in our circuit a defendant can argue that he was entrapped, and may be entitled to an entrapment instruction, based solely on evidence introduced by the government, we do not have a per se rule precluding the government from rebutting an anticipated entrapment defense in its case in chief, because such a rule would be unfair." *Id.* at 1002.

With respect to unfairness, the majority asserted that "a blanket rule 'that no evidence of a predisposition to commit the crime and no proof of prior convictions may ever be introduced by the government except in rebuttal to affirmative evidence of entrapment adduced by defendant' would 'work grave prejudice to the government,' because it would allow a defendant to invoke the defense without the government having had an opportunity to rebut it." *Id.* (quoting *United States v. Sherman*, 240 F.2d 949, 952-53 (2d Cir. 1957), *rev'd on other grounds by Sherman v. United States*, 356 U.S. 356 U.S. 369, 377-78 (1958)). But there was no such risk of sandbagging in this

case, because the prosecution knew Gomez might present an entrapment defense and was poised to deal with it, if it arose. Furthermore, on appeal Gomez didn't argue for the "blanket rule" posited by the majority opinion, nor does he do so here. Instead, he argues, consistent with a wealth of circuit case law, that the government should not be allowed to introduce otherwise inadmissible evidence to preemptively "rebut" an anticipated entrapment defense, and instead may only introduce such evidence to rebut that defense after it is raised during trial.

Rather than adopting that approach, the majority opinion in this case held that the government may introduce preemptive rebuttal evidence when a defendant "clearly indicates that he will invoke an entrapment defense." *Gomez*, 6 F.4th at 1003. Applying that test, the majority "conclude[d] that the district court permissibly allowed the government to present predisposition evidence," before any mention or evidence of entrapment was made to the jury, "because it was sufficiently clear" from defense counsel's pretrial statements that Gomez would invoke an entrapment defense. *Id.* It is debatable, at best, whether defense counsel's intentions before trial were "sufficiently clear." But the fact is that Gomez never actually presented evidence of, or even mentioned, entrapment during the trial, and the district court didn't instruct on it. The government nonetheless introduced a wealth of highly inflammatory evidence to "rebut" that defense, evidence that was clearly inadmissible in the absence of the defense.

B. Dissenting Opinion

The dissenting opinion concluded that "the trial court committed reversible error by allowing the government to present evidence to the jury in its case-in-chief to 'rebut' an anticipated entrapment defense which was never presented by the defendant," and that "[g]iven the

overwhelmingly prejudicial nature of that evidence, the harmless error doctrine cannot save the government's convictions." *Id.* at 1011 (Steele, J., dissenting).

The dissent began by agreeing with the majority's discussion of "the general principles relating to entrapment, including that a defendant may rely upon the government's evidence in its case-in-chief to establish an entrapment defense and that there are limited circumstances which allow the government to introduce entrapment rebuttal evidence in its case-in-chief." *Id.* at 1012 (Steele, J., dissenting). However, the dissent disagreed that "this case falls within such limited circumstances. While defense counsel told the trial court and the government that entrapment would be a defense and submitted a proposed jury instruction before trial, this alone is insufficient to allow introduction of rebuttal evidence in the government's case-in-chief." *Id.* The dissent went on to explain that "[t]he difficulty here is that the trial court admitted the totality of the government's anti-entrapment evidence before Gomez had uttered a single word to the jury suggesting entrapment or introduced any evidence suggesting entrapment:"

> [D]efense counsel did not inform the jury of entrapment in an opening statement (counsel did not give one prior to the government's evidence). The evidence presented by the government did not support an entrapment defense. Gomez's witness did not support an entrapment defense. The lack of entrapment evidence caused the trial court to properly decline to give a requested entrapment jury instruction. While Gomez may have been sufficiently clear that he intended to invoke an entrapment defense, he did not actually do so. Thus, in this case the government rebutted an issue which was not presented to the jury with highly inflammatory and prejudicial evidence which cannot be said to have been harmless.

Gomez, 6 F.4th at 1012 (Steele, J., dissenting). Under these circumstances, the dissent stated that it "was not persuaded by the only decision cited by the majority which supports the admission of such evidence" – the Second Circuit's 1957 *Sherman* opinion, discussed below – and cited contrary case law from several circuits. *See id.*

As for the majority opinion's concern with "the possibility of sandbagging by a defendant," the dissent correctly pointed out "that did not occur in this case. Additionally, a trial court has the ability to control the proceedings and certainly can allow the government to re-open its case under proper circumstances." *Id.* at 1013 (citing *Dietz v. Bouldin*, 579 U.S. 40, 45 (2016)). The dissent also noted that "it is well-established that rulings on motions *in limine* can be changed as a case proceeds," thus it makes more sense to deal with evidentiary issues as they arise, rather than allowing a raft of otherwise inadmissible evidence to be introduced to "rebut" a defense that may never be – and in this case, never was – presented. *Gomez*, 6 F.4th at 1012 (Steele, J., dissenting) (citing *Luce v. United States*, 469 U.S. 38, 41-42 (1984)).

REASONS FOR ALLOWING THE WRIT

I. Introduction

Gomez requests that the Court grant this petition because there is a circuit split on the issue presented, which involves an "important question of federal law that has not been, but should be, settled by this Court." S. Ct. R. 10(a) & (c).

II. The Ninth Circuit's Rule Is Contrary To The Holdings Of Every Other Circuit Court That Has Addressed The Preemptive Rebuttal Of An Entrapment Defense

Other than the Ninth Circuit, every circuit court that has addressed the issue presented has held that the government may not introduce otherwise inadmissible evidence to rebut an entrapment defense until that defense is raised in front of the jury. That is even true in the Second Circuit, though the majority opinion's holding in this case relied almost exclusively on the Second Circuit's 1957 opinion in *Sherman*, 240 F.2d at 952-53. *See Gomez*, 6 F.4th at 1002. As discussed below, *Sherman*, and a raft of case law from other circuits, actually supports Gomez's position.

A. Eighth Circuit

In *United States v. McGuire*, 808 F.2d 694 (8th Cir. 1987), the defendant was charged with making two methamphetamine sales to an undercover agent. "In her opening statement at trial, defense counsel indicated to the jury that McGuire would assert a defense of entrapment. The defense, however, presented no evidence of coercion or inducement to the jury either through presentation of its own witnesses or through cross-examination of government witnesses." *Id.* at 695. Nevertheless, during "its case-in-chief, the government sought to elicit testimony from informant Weir and his wife . . . concerning their many prior drug transactions with McGuire. Defense counsel objected that such evidence was relevant only as rebuttal to a defense of entrapment and was being presented prematurely." *Id.* at 695-96. The district court overruled that objection and admitted the evidence. *Id.* at 696.

On appeal, McGuire "contend[ed] the district court committed reversible error in admitting the predisposition evidence because no defense of entrapment was, in fact, ever raised at trial." *Id.* He argued "that defense counsel did not place the issue of entrapment into controversy merely by stating in opening argument that entrapment would be the defense theory." *Id.* And he asserted that "because the issue of entrapment was not placed into controversy . . . it was error to permit the government in its case-in-chief to introduce evidence of predisposition, which is properly admissible only as rebuttal of the entrapment defense." *Id.*

The government responded that "the defense not only asserted during opening argument, but also during voir dire, that it would rely on entrapment," and the "'talk of entrapment' so permeated the proceedings that the issue had, in fact, been put into controversy." *Id.* And, in words similar to those used by the majority opinion in this case, the "government contend[ed] that because the

issue of entrapment had been clearly raised at the trial, the district court was within its discretion in permitting the government to introduce evidence of predisposition in its case-in-chief." *Id.* The Eighth Circuit disagreed and held "that it was error for the district court to allow the government to introduce rebuttal evidence in its case-in-chief in anticipation of an entrapment defense that was proposed, but that never actually materialized." *Id.*

The majority in this case recognized that its holding conflicts with *McGuire*, but said that conflict is driven by the fact that in the Eighth Circuit "[t]he defendant carries the initial burden of presenting some evidence that he or she was induced by government agents to commit the offense," whereas in the Ninth Circuit a defendant may raise the entrapment defense based solely on evidence presented during the government's case-in-chief. *See Gomez*, 6 F.4th at 1003 n.11. That is, the majority opinion in this case asserts that in the Eighth Circuit a defendant must adduce evidence during the defense case in order to establish entrapment, whereas a defendant in the Ninth Circuit may rely solely on evidence introduced during the government's case-in-chief. According to the majority in this case, this feature of Eighth Circuit case law forestalls "the risk, present in our circuit, that a defendant will sandbag the government by electing not to introduce any evidence of entrapment and then raising the defense in closing argument based on the government's evidence." *Id.*

As will be discussed in Section III below, the risk of unfairness due to defense sandbagging imagined by the majority opinion is just that, imaginary. Furthermore, the majority opinion is wrong about Eighth Circuit law. Long before *McGuire*, the Eighth Circuit held that "[t]he defense of entrapment may be raised by cross-examination of the government's witnesses," and when that occurs the door is open to the government introducing evidence "to rebut the defense of entrapment

. . . ." *United States v. Brown*, 453 F.2d at 101, 108 (8th Cir. 1971). Furthermore, Eighth Circuit case law indicates that a defendant may base an entrapment defense solely on evidence submitted by the prosecution, not that the defendant must introduce that evidence, whether through cross-examination or during the defense case. *See*, *e.g.*, *United States v. Kutrip*, 670 F.2d 870, 877 (8th Cir. 1982) (finding that "the evidence of the prosecution did not make a submissible defense of entrapment"). And that holding is required by *Sherman*, 356 U.S. at 373, where this Court held that an entrapment defense was established as a matter of law based on "the undisputed testimony of the prosecution's witnesses."

In sum, in the Eighth Circuit the government may not introduce otherwise inadmissible evidence to rebut an entrapment defense until that defense "materializes" through presentation of evidence at trial, which may occur during the government's or the defense's cases.

B. Seventh Circuit

In *United States v. Hicks*, 635 F.3d 1063 (7th Cir. 2011), the defendant was charged with distributing cocaine. Three days before trial, defense counsel said he might present an entrapment defense. *See id.* at 1066. The government filed a motion to preclude that defense, asserting it was "unavailable to" Hicks, and Hicks responded with "an entrapment proffer." *Id.* But "Hicks's counsel did not make an opening statement and therefore Hicks did not refer to his entrapment defense at the beginning of trial." *Id.* at 1067.

During the government's case-in-chief, the district court allowed the government to introduce evidence of Hicks's prior convictions, ostensibly under Federal Rule of Evidence 404(b). *See id.* The government then rested, "at which point the court asked Hicks's attorney to 'take the time necessary to talk with Mr. Hicks and decide on the entrapment' defense. After [a] recess,

defense counsel told the court, 'After a long discussion with my client . . . my client wishes to take the stand, and we are going to proceed with the entrapment defense." *Id.* Hicks then testified that he had been pressured into making the drug sale charged. *See id.* The court subsequently gave an entrapment instruction, and Hicks was convicted.

On appeal, the government tried to support the admission of evidence about Hicks's prior convictions under Rule 404(b). *See id.* at 1069-71. When that argument failed, the government fell back on the claim that evidence of Hicks's prior convictions was "admissible to rebut Hicks's entrapment defense." *Id.* at 1071. Relying on its prior opinion in *United States v. Goodapple*, 958 F.2d 1402, 1407 (7th Cir. 1992), and the Eighth Circuit's opinion in *McGuire* discussed above, the Seventh Circuit in *Hicks* began by stating that "the government may not introduce propensity evidence [to rebut an entrapment defense] unless the defendant places the issue of entrapment into controversy." *Hicks*, 635 F.3d at 1071-72. The court found Hicks hadn't done that because "[a]lthough Hicks's counsel discussed the possibility of raising an entrapment defense prior to trial . . . the entrapment defense did not materialize until the defense presented its case. Hicks did not refer to his entrapment defense during an opening statement, which he waived, nor during the government's case-in-chief." *Id.* at 1072. The court concluded that the "proper course of action would have been for the government to offer the convictions after Hicks's entrapment defense materialized, either during cross-examination or during its rebuttal case." *Id.* Accordingly, the court granted relief under a plain error review standard.

Thus, in the Seventh Circuit the government may not preemptively rebut an entrapment defense based on defense counsel's pretrial statement that he intends to pursue an entrapment defense, which is what occurred in this case.

The majority opinion in this case tries to distinguish *Hicks* by comparing when the government preemptively introduced entrapment rebuttal evidence in each case and asserting that at that point, Gomez had provided a stronger indication of his intent to proceed with an entrapment defense than had Hicks. *Gomez*, 6 F.4th at 1003 n.9. That is inaccurate. In this case, the day before trial began Gomez's counsel said he wanted to keep his options open, and after he was pressed by the court to make "an election" he nonetheless said he'd re-evaluate whether to present an entrapment defense as the case proceeded. *See* App'x at 17, 26-29. Gomez's counsel also waived opening statement, to keep his options open. In *Hicks*, on the other hand, three days before trial defense counsel said he might present an entrapment defense, the government filed a motion to preclude that defense, and Hicks responded with "an entrapment proffer" in which he said he'd pursue an entrapment defense. *Hicks*, 635 F.3d at 1066.

But even were the majority opinion's characterization of *Hicks* accurate, it is irrelevant because the Seventh Circuit's holding in *Hicks* turns on when the entrapment issue was put into controversy during the trial. And that court held that evidence to rebut the entrapment defense was not admissible until the defense "materialized" during trial, which did not occur "until the defense presented its case." *Id.* at 1072. In Gomez's trial, the entrapment defense never materialized.

Furthermore, the Seventh Circuit's holding in *Goodapple*, on which that court relied in *Hicks*, indicates that to put entrapment into "controversy," and thus open the door to government rebuttal evidence, it is not sufficient for a defendant to mention the defense in opening statement. Instead, the defense must "materialize[during trial] through a defendant's presentation of its own witnesses or through cross-examination of the government's witnesses . . . ." *Goodapple*, 958 F.2d

at 1407. In this regard, the Seventh and Eight Circuits are in accord. Indeed, for its holding in *Goodapple* – and *Hicks* – the Seventh Circuit cited the Eighth Circuit's opinion in *McGuire*.

C. Eleventh Circuit

In *United States v. Salisbury*, 662 F.2d 738, 741 (11th Cir. 1981), the Eleventh Circuit held that "the government may not normally introduce evidence of a defendant's predisposition to engage in criminal activity in its case in chief," but it "may do so once a defendant *submits some evidence* which raises the possibility that he was induced to commit the crime." *Id.* (quotation omitted, emphasis added). And because the defendant in that Hobbs Act case "raised the issue of entrapment" during the government's case-in-chief, the government was allowed to subsequently introduce predisposition evidence during its case-in-chief to rebut that defense. *Id.* at 739, 741.

Consistent with the holding in *Salisbury*, in *United States v. Brannan*, 562 F.3d 1300, 1308 (11th Cir. 2009), the court held that only after there was evidence submitted that supported an entrapment defense was the government allowed to introduce predisposition evidence. The court explained that is because once such evidence is adduced, the government needs to be ready to respond should the defendant wait to "assert entrapment as a defense until the close of its case." *See id.* That is, the court in *Brannan* recognized and dealt with any potential unfairness due to defense sandbagging, but it did so in a way that was realistic, unlike, as discussed below, the majority opinion in this case.

Thus, as in the Seventh and Eighth Circuits, prejudicial predisposition evidence is not admissible in the Eleventh Circuit until the defendant raises an entrapment defense during the evidentiary phase of the trial.

D. D.C. Circuit

The test for admission of entrapment rebuttal such evidence is more stringent in the Eleventh Circuit. In *Hansford v. United States*, 303 F.2d 219, 225 (D.C. Cir. 1962) (*en banc*), a drug sale case, the Eleventh Circuit held that only "when there is sufficient evidence of entrapment to go to the jury" may "the prosecution answer the claim of entrapment by" adducing otherwise inadmissible evidence to "show[] that the defendant was predisposed to commit the crime" charged. Thus, that some evidence of entrapment is introduced during trial it not enough to open the door for predisposition evidence, the evidence supporting entrapment must be sufficient to support a jury instruction on that defense.

E. Second Circuit

The Second Circuit's opinion in *United States v. Sherman*, 240 F.2d 949 (2d Cir. 1957), is also in accord with the case law discussed above, though the majority opinion in this case relied almost exclusively on *Sherman* for its holding. *See Gomez*, 6 F.4th at 1003; *see also id.* at 1012 (Steele, J., dissenting) (identifying *Sherman* as the sole case the majority relied on for its holding).

Sheman involved a second appeal, following a second jury trial. During the first trial, the defendant relied on the testimony of a government informant, given during the government's case-in-chief, to assert an entrapment defense. *Sherman*, 240 F.2d at 953. Before the second trial, defense counsel told the prosecutor and district court that he would again rely on the entrapment defense, and he "devoted his entire opening statement to a denunciation of [the government's informant], telling the court and jury that appellant had been entrapped. His cross-examination was of the same pattern, bringing out the facts relevant to entrapment." *Id.*

Nonetheless, during the second appeal the defendant argued that the government should have been precluded from eliciting evidence of his prior convictions during its case-in-chief, to rebut the entrapment defense *he had already raised*. That is, the defendant argued that the government may only introduce evidence to respond to an entrapment defense during the government's rebuttal case, and may only do so if the defendant introduces evidence of entrapment during the defense case. The Second Circuit rejected that argument, stating:

> It has been argued that [prior] decisions are not applicable here, since they deal only with the introduction of [predisposition] evidence in rebuttal, whereas in the case at bar the evidence of prior convictions was admitted as part of the government's case in chief. But to understand these decisions as making the admissibility of such evidence always depend upon whether the defendant had introduced evidence would emasculate the rule and work grave prejudice to the government in cases where defendant, as here, elected to to [sic] the jury on the proofs adduced by the prosecution in its case in chief. Accordingly, we reject appellant's contention that no evidence of a predisposition to commit the crime and no proof of prior convictions may ever be introduced by the government except in rebuttal to affirmative evidence of entrapment adduced by defendant. *But we are not called upon to, nor do we, propound any broad general rule on the subject.* We do not now hold that evidence of predisposition or prior convictions may be introduced by the prosecution whenever there is a possibility that entrapment will be invoked as a defense.
>
> This is one of those cases where it is safer to prick out the contours of the rule empirically, by successive instances, than to attempt definitive generalizations. [Quotation and citation omitted.]
>
> We now need go no further than to hold that proof of prior convictions is admissible as part of the prosecution's case in chief *where it is clear, as in the case before us, that the defense will be invoked*.

Id. at 952-53 (emphasis added). As the emphasized language indicates, the court explicitly noted that it was not setting out a general rule before using the "where it is clear . . . that the defense will be invoked" language.[1]

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[1] As indicated above, this Court subsequently reversed *Sherman* because it found that the defendant in that case had established the entrapment defense as a matter of law. 356 U.S. at 373.

The majority opinion in this case nevertheless seized on *Sherman's* "where it is clear" language and modified it to a "sufficiently clear" general rule. In doing so, the majority opinion ignored that in *Sherman*, unlike in this case, the Second Circuit didn't rely on defense counsel's pretrial statements to find that the defendant had "made clear" his intent to rely on an entrapment defense. Instead, in *Sherman* the court made that assessment based on defense counsel's having "devoted his entire opening statement," and his cross of the government's informant, to the entrapment defense. 240 F.2d at 953. Gomez did neither of those things, and, unlike in *Sherman*, his entrapment defense never materialized.

There is no fair comparison between what occurred in *Sherman* and this case. Moreover, the holding in *Sherman* is entirely consistent with the case law discussed above that holds an entrapment defense must be pursued at trial in front of the jury – not just mentioned as a potential defense by counsel pretrial – before the government may introduce otherwise inadmissible predisposition evidence to rebut that defense.

III. The "Fairness" Concerns Underlying The Majority's Opinion Are Illusory, But Its Rule Risks Grave Unfairness To Defendants, Visited On Gomez In This Case

The majority opinion's holding is driven by what it perceived as "fairness," which it defined solely as the risk of sandbagging by a defendant. Any such risk is illusory, but the risk of unfairness to a defendant from the majority's approach is substantial, as starkly shown in this case.

Looking first at a defendant's side of that balance, the most serious risk is that the government will preemptively introduce highly inflammatory, and otherwise inadmissible, evidence

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For this, and the other reasons stated, the Second Circuit's 1957 *Sherman* opinion is a dubious basis for the Ninth Circuit's rule.

to rebut an entrapment defense that never materializes at trial. That risk is not conjectural, it happened in this case.

Furthermore, even if an entrapment defense later materializes, there is the substantial risk that a district court will allow the government to preemptively introduce more evidence to "rebut" the actual entrapment defense presented than is warranted under Federal Rules of Evidence 401 or 403. That is because the district court cannot accurately gauge what is relevant to rebut the not-yet presented entrapment defense under Rule 401, or what is more probative than prejudicial for that purpose under Rule 403.

As far as the potential for unfairness to the government, or sandbagging by the defendant, that risk is illusory, and imaginary in this case.

With respect to cases generally, the sandbagging scenario the majority envisions is as follows: (1) the defendant does nothing to raise or support the entrapment defense in opening statement, or during the government's or defense's cases; (2) the government introduces evidence that supports an entrapment defense during its case, but is nonetheless unaware the defendant might rely on that evidence to raise an entrapment defense; (3) the defendant then asks for an instruction on entrapment right before closing argument, the court gives the instruction, and defense counsel argues entrapment to the jury; and (4) the government never has a chance to rebut the defense. That scenario is not realistic, because no sentient prosecutor will set up an entrapment defense – particularly to the degree a jury instruction is warranted – yet not know the defendant might rely on that defense. Thus, in any real world scenario a prosecutor will be aware of, and able to protect against, the possibility of sandbagging. But even if a defendant were able to manipulate things in the highly unlikely manner envisioned by the majority opinion, a district court has ample authority

to allow the government to re-open its case to address any unfairness, as noted in the dissenting opinion in this case. *See Gomez*, 6 F.4th at 1012-13 (Steele, J., dissenting); *see also United States v. Goode*, 814 F.2d 1353, 1355 (9th Cir. 1987) (recognizing district courts' "broad discretion" to manage the order and conduct of criminal trials).

The risk of defense sandbagging, therefore, is vanishingly small, and easily dealt with in the highly unlikely event such a scenario arises. Indeed, the government effectively acknowledged that when it stated repeatedly in its pretrial filings that it would only seek to rebut the entrapment defense if and when it was raised by Gomez during trial.[2] *See* App'x at 3, 5, 22-23. And in this case, the risk of sandbagging was nonexistent because the prosecutor and district court were well aware before trial that Gomez might proceed with an entrapment defense. There was, therefore, no danger in the government's waiting to introduce the highly inflammatory "rebuttal" evidence until the entrapment defense actually materialized during trial. Of course, had the district court followed that course, none of the highly inflammatory, and inadmissible, gang evidence would have been introduced.

For all these reasons, requiring the entrapment defense to materialize during trial before allowing the government to rebut it is the far more sensible – and fair – approach. Which is why that is the approach that has been followed for decades by the Second, Seventh, Eighth, Eleventh, and D.C. Circuits.

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[2] On appeal, the government also did not argue for, or even hint at, the rule the majority came up with – that was all the majority's doing.

CONCLUSION

Because the error raised in this petition involves a broad circuit split on an important issue, Gomez requests that the Court grant the petition for a writ of certiorari.

Respectfully submitted,

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