No. 22-

In The
Supreme Court of the United States

BAKHTIYOR JUMAEV,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether the judge-made and ahistorical balancing test for assessing a deprivation of the Sixth Amendment's right to a speedy trial set out in *Barker v. Wingo*, 407 U.S. 514 (1972) should be overruled.

II. May a court penalize a defendant for asserting his constitutional right to exculpatory evidence by weighing resultant delays against him in determining whether his right to a speedy trial was violated?

III. Must a defendant undergo exceptional and disfavored efforts to properly invoke his right to a speedy trial, such as by filing *pro se* motions, despite his representation by counsel?

RELATED PROCEEDINGS

This petition arises from the decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Jumaev*, No. 18-1296. The Tenth Circuit's panel decision was filed on December 8, 2021, and is reported at 20 F.4th 518.

The petition is related to the proceedings in the United States District Court for the District of Colorado, *United States v. Jumaev and Muhtorov*, No. 1:12-cr-00033-JLK-2, and the Tenth Circuit proceedings related to a co-defendant in *United States v. Muhtorov*, Tenth Circuit No. 18-1366, reported at 20 F.4th 558.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Bakhtiyor Jumaev respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The split panel decision of the court of appeals is reported at 20 F.4th 518 and is reprinted in the Appendix to the Petition (Pet. App.) at App.1. The relevant proceedings in the district court are unpublished.

JURISDICTIONAL STATEMENT

The panel decision was issued on December 8, 2022. On March 25, 2022, the court of appeals denied en banc review. On June 16, 2022, Justice Gorsuch extended the deadline to file this petition until July 22, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the U.S. Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

INTRODUCTION

Bakhtiyor Jumaev was imprisoned for six years and one day while he waited for his trial to begin. But his trial could not start until the government turned over exculpatory evidence that had been in its possession since before his arrest. All the while he was presumed to be innocent.

Even while recognizing that "six years is an exceptionally long time to await trial," and that the delay caused specific prejudice to his defense, a divided panel of the Tenth Circuit sustained Mr. Jumaev's conviction. The majority applied the balancing test set out in *Barker v. Wingo*, 407 U.S. 514 (1972), before deciding that, despite the extraordinary delay, and the clear harm to Mr. Jumaev, the equities nevertheless justified Mr. Jumaev's treatment.

This Court should reconsider this ahistorical, judge-made test, which cannot be squared with the Sixth Amendment's guarantee of a speedy trial. The Framers, after all, were familiar with how government had trampled on liberty by excessive delays in proceeding to trial. Recognizing the need for protection for such abuse, the founding generation understood the Speedy Trial Clause to reinforce strict limits on pretrial incarceration. Application of this constitutional right did not turn on *why* the government failed to timely bring cases to trial. Nor did the Amendment require defendants to continuously object to mistreatment. The question was instead simple: Die the government provide a speedy public trial?

Barker's balancing test uproots this straightforward historical test. It requires courts to weigh policy factors that are not relevant to the Constitutional speedy-trial

protections. And it allows courts to infuse their own views of the relative social values of enforcing the constitutional limits. This ahistorical test should be reformed, and this Court should apply the original public understanding of the constitutional text.

The decision below show how far afield the *Barker* test sits from the Sixth Amendment's text. Even though the six-year delay caused specific and demonstrable prejudice to Mr. Jumaev, the *Barker* test still allowed the court to avoid finding a constitutional violation, mostly because Mr. Jumaev actively litigated his case and *merely* moved to dismiss his case on speedy trial grounds *twice*. At common law such reasoning would be unthinkable, because a right so malleable would rightly be seen as no right at all.

Even if this Court hews to the *Barker* analysis, review is warranted because the Court of Appeals created two new limits on the right to a speedy trial that threaten the Sixth Amendment's core constitutional protections. The court of appeals excused the delay largely because of the government's claim that the delay was caused by Mr. Jumaev's efforts to acquire discovery. In other words, it was Mr. Jumaev's *fault* for trying so hard to see the evidence against him. This conclusion creates a new rule that offends core precepts of fairness, rewards the government's misconduct and conflicts with the rule that a defendant may not be required to forfeit one constitutional right to preserve another. *See Simmons v. United States*, 390 U.S. 377, 394 (1968).

The court of appeals also faulted Mr. Jumaev for failing to invoke *pro forma* speedy trial objections, and even for not raising them *pro se* despite his representation

by counsel. This analysis mocks the Sixth Amendment's protections, incentivizes hybrid representation, and undermines the attorney-client relationship.

The Court should grant certiorari and reverse.

STATEMENT OF THE CASE

On March 15, 2012, Mr. Jumaev was arrested on a criminal complaint charging him, along with Jamshid Muhtorov, with one count of providing material support to a foreign terrorist organization, and one count of conspiring to do so. Vol. I, 269-70; Vol. XV, 151.[1] He has not been at liberty since.[2]

Mr. Jumaev moved for production of discovery on September 5, 2012, because he lacked, among other things, his complete recorded statements. Vol. I, p. 465, 467-69. The government did not produce this information for more than *four years*.

On "September 1, 2016," "[m]ore than four years after the defense requested their respective client's statements[,] the government produced a hard drive containing approximately 39,000 files of recorded statements" from 2011 and 2012. Vol. V, 438. As the government later acknowledged, these statements included "information that we identified as *Brady*." Vol. XIII, 426.[3]

An original March 13, 2017, trial date was set based on the government's 2016 production. Vol. XI, 367.

But Mr. Jumaev didn't proceed to trial in 2017. Instead, trial was delayed an additional year—until March 2018—because the government improperly withheld additional *Brady* material from the defense.

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[1] Citations to the Tenth Circuit's Record on Appeal set forth volume and page numbers.

[2] Since his release from federal detention Mr. Jumaev has been held in the custody of the Department of Homeland Security, where he remains, pending final adjudication of a separate appeal of an order of removability.

[3] In this petition "*Brady* material" refers to exculpatory information that the government is constitutionally required to disclose to the defense under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny.

For instance, shortly before trial the defense learned that one of the government's primary translators had misrepresented his qualifications. Vol. VII, 37; Vol. XI, 867. This led the defense to discover translation errors that directly undermined the government's case. One error infected the government's 2016 superseding indictment, which included new allegations that Mr. Jumaev had sent his son to a madrassa in Turkey to further acts of terrorism. Vol. III, 262-63. At a pretrial hearing shortly after the new indictment was filed, a special agent relied on a translation of a phone call to testify, falsely, that Mr. Jumaev told his son, "Be patient. There's one bullet from that conflict still left. I think. All right my child?" Vol. XI, 448. But the actual recording included no such statement. Vol. XVIII, 53.

Mr. Jumaev then moved for dismissal on speedy trial grounds, in part because counsel could not go forward to trial as scheduled based on the new revelations. Vol. VII, 48. The district court denied the motion but granted a continuance and sanctions against the government. Vol. XVIII, 83.

The government, however, had engaged in even more *Brady* violations—a fact that was discovered only much later. For instance, materials concerning the government translator's lack of qualifications and his eventual termination by the FBI after failing a polygraph examination were not disclosed until well into 2018. Vol. VII, 347. Further, it was not until late 2017 that the government disclosed—contrary to its earlier false implications—it had granted immigration benefits to a cooperating witness. Vol. VII, 405. As the trial court concluded, the government had

been "not forthright" with the court its representation "bordered on deceitful." Vol. VII, 403.

On February 16, 2018—five years and 11 months after his arrest—Mr. Jumaev moved once again to dismiss the indictment for want of a speedy trial. Vol. XVI, 81. But the court denied that motion, and Mr. Jumaev finally went to trial in March 2018. He was convicted of both counts against him, and on July 18, 2018, the court sentenced Mr. Jumaev to time served in prison. Vol. XV, 448.

On appeal, Mr. Jumaev argued, as did Mr. Muhtorov, that he had been deprived of his right to a speedy trial. Mr. Jumaev also argued that the trial court had inadequately remedied the government's *Brady* violations.

A split panel of the Tenth Circuit issued a published opinion in both cases, each of which partially incorporated the other. *See United States v. Jumaev*, 20 F.4th 518 (10th Cir. 2021); *United States v. Muhtorov*, 20 F.4th 558 (10th Cir. 2021). Despite concluding that "six years is an exceptionally long time to await trial," and that the delay caused Mr. Jumaev specific prejudice in *two* distinct ways—through "his pretrial incarceration" and "due to impairment of his defense," a majority concluded that "the delay in this case was due to discovery" and the prejudice did not show a constitutional violation. *See Jumaev*, 20 F.4th at 532, 535, 542-43. The majority also concluded that the remedies imposed by the trial court for the *Brady* violations, namely exclusion of certain evidence and a continuance, were sufficient. *Id.* at 550.

Senior Judge Lucero dissented in both cases, and in his dissent in *Jumaev*, he incorporated his speedy trial analysis in *Muhtorov* "in its entirety." *Id.* at 553. Judge

Lucero would have vacated the convictions. *See id*. He also noted that Mr. Jumaev's case was "even more compelling" than Mr. Muhtorov's because of the government's extended failure "to provide discovery information long in its possession until the eve of Jumaev's first scheduled trial." *Id*.

REASONS FOR GRANTING THE WRIT

The Sixth Amendment's guarantee of a speedy trial is now a moribund remnant of the bulwark envisioned by the Framers. Instead of categorically requiring the government to provide a speedy trial, the Sixth Amendment now—according to the Tenth Circuit—permits trial delays to drag on for years, even when they result from the government's failure to abide by its discovery obligations. That is wrong.

This Court's adoption of a policy-driven balancing test set the stage for the right's gradual eradication, which the Tenth Circuit embraced by declining to find a violation here. If no remedy exists against the government for forcing a presumptively innocent person to spend six years in custody, even when it demonstrably prejudices his trial defense, then the Sixth Amendment is little use to thousands of others facing such treatment across the country. But the original understanding of the Sixth Amendment would never have accepted such outcomes. This Court should therefore grant the writ.

I. The Balancing Test in *Barker v. Wingo*, 407 U.S. 514 (1972) Conflicts with the Original Public Understanding of the Right to a Speedy Trial

A. The *Barker* Court's Reasoning Was Not Based on History

The Sixth Amendment's Speedy Trial Clause provides simply: "In all criminal prosecutions, the accused shall enjoy the right to a speedy … trial[.]" But what is a "speedy trial," and when does the government violate a defendant's rights?

This Court's attempted to answer these questions in *Barker v. Wingo*, 407 U.S. 514 (1972), which established the now-familiar balancing test for Sixth Amendment speedy trial claims. Describing the right as "slippery" and "amorphous," the Court identified four factors to consider: "Length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 522, 530. It emphasized in parting, "We regard none of the four factors identified above as either a necessary or sufficient condition to the finding of a deprivation of the right of speedy trial. Rather, they are related factors and must be considered together with such other circumstances as may be relevant. In sum, these factors have no talismanic qualities; courts must still engage in a difficult and sensitive balancing process." *Id.* at 533.

The Court's decision was very much a product of its time, and explicitly rejected competing "inflexible approaches," advocated by the litigants. *Id.* at 529. In so doing, the Court considered only contemporary practice. *See id.* at 524 n. 20, 524 n. 21. It set out *no* historical analysis, merely referencing its then-recent acknowledgement that the right is "fundamental," but then crafting its own balancing analysis. *See id.* at 515 (citing *Kloper v. North Carolina*, 386 U.S. 213, 223 (1967)).

In the Court's mind, the Constitution's clear demand had to give way to various interests such as "a large backlog of cases in urban courts," or even, how, in the Court's view the "deprivation of the right may work to the accused's advantage," because "[d]elay is not an uncommon defense tactic." *Id.* 520-21. Thus, the Court took great pains to adopt a test that excused even long delays based on government "negligence or overcrowded courts" and one that weighed heavily "the defendant's responsibility to assert his right." *Id.* at 531. Neither factor, however, relied on any historical justification. *See id.*

Nonetheless, *Barker*'s ahistorical balancing test remains controlling today, and was the basis for the Court of Appeals' decision below.

B. The Sixth Amendment Rejects a Balancing Test

The "amorphous" balancing test created out of thin air by the *Barker* Court is no more justified today than it was 50 years ago. The Speedy Trial Clause incorporated a preexisting right very different from the one recognized by the Court, and one that considers neither policy-driven considerations of expediency nor imposes any burden on a defendant to bring himself to trial. *Barker*'s policy-driven, judge-made balancing test in fact *defies* the historical right encompassed by the Sixth Amendment's text. It should be overruled.

1. The Bill of Rights Must Be Read Consistently With the Public Understanding of the Rights When It Was Adopted

As this Court recently emphasized, "the scope of the protection applicable to the Federal Government and States is pegged to the public understanding of the right

when the Bill of Rights was adopted in 1791." *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, 142 S. Ct. 2111, 2137 (2022). Indeed, while this Court has often employed balancing tests, and "means-end scrutiny" in constitutional adjudication, its decisions increasingly recognize that such analysis might depart from the public understanding of the relevant rights. *See id.* at 2127; *Crawford v. Washington*, 541 U.S. 36, 62-63 (2004) (abandoning longstanding balancing test for the Sixth Amendment's Confrontation Clause because it was not faithful to historical understanding).

Reading constitutional language in accord with the original public understanding of the rights accords with the proper role to the judiciary. Rather than empowering judges to make "difficult empirical judgments" regarding the conflict between constitutional protections and legislative determinations, the Constitutional protection itself is often "the very *product* of an interest balancing by the people." *Bruen*, 142 S.Ct. at 2131 (citation omitted). "It is this balance—struck by the traditions of the American people—that demands our unqualified deference." *Id.*

An "unqualified" constitutional right preserves the same right understood in 1791 and carries that right forward to today. *See id.* at 2126. In such instances, "the Constitution presumptively protects that conduct. The government must then justify its regulation by demonstrating that it is consistent with the Nation's historical tradition" of intrusion into that right. *Id.* at 2130. This historical analysis might occasionally be difficult, of course. *See id.* "But reliance on history to inform the meaning of constitutional text—especially text meant to codify a *pre-existing* right—

is, in our view, more legitimate, and more administrable, than asking judges to make difficult empirical judgments about the costs and benefits" of restricting liberty. *Id.* (cleaned up).

This Court has also explained which constitutional rights must be viewed based on historical practice. We must always start with the relevant amendment's "text, as informed by history." *Id.* at 2118. And when the text creates an "unqualified" right, and a clear prohibition against government encroachment, then it brings the presumption that any infringement is impermissible. *See id.* Moreover, if the constitutional provision has "codified a *pre-existing* right"—i.e. it "was not intended to lay down a novel principle but rather codified a right inherited from our English ancestors," then it must be viewed in context of the how the right was understood at the time of its codification. *Id.* at 2127 (cleaned up).

2. The Speedy Trial Clause Must Be Read Based on Historical Understanding

The Sixth Amendment codifies a pre-existing right to a "speedy trial," and must, therefore, be read in accord with the original public understanding of that right. This Court has emphasized, of course, that the Sixth Amendment should be viewed through this same historical lens. *See, e.g., Crawford*, 541 U.S. at 62-63 (adopting historical test for Confrontation Clause violations). In fact, this Court in *Bruen* highlighted this analysis as applied to Sixth Amendment guarantees, to support its application to the Second Amendment. *See* 142 S.Ct. at 2130 ("If a litigant asserts the right in court to 'be confronted with the witnesses against him,' U.S.

Const., amend. 6, we require courts to consult history to determine the scope of that right.").

More specifically, the Speedy Trial Clause bears the hallmarks of the kinds of rights analyzed in *Bruen*. Like the "unqualified" right to bear arms, the "accused *shall* enjoy the right to a speedy … trial." U.S. Const. amend. 6 (emphasis added). There is no qualifier, for instance, that the invasion of the right be "unreasonable." *See* U.S. Const. amend. 4. And like the right to bear arms, the guarantee of a speedy trial incorporated an existing right well understood by the Framers. *See United States v. Fox*, 3 Mont. 512, 515–16 (Mont. Terr. Ct. 1880) (the right to a speedy trial is "in accord with the enlightened spirit of the common law, and form a part of the framework of the English Constitution" and it is "guaranteed and secured by Magna Charta, the Petition of Rights, the Bill of Rights, and by a long course of judicial decision, and [it] belong[s] to us as a part of our inheritance from the mother country. Th[is] right[] w[as] claimed by our ancestors in Colonial times, and [it has] been engrafted into and secured by our Constitution, the supreme law of the land[.]"). Thus, the right should be viewed with a presumption against government infringement, which can be justified only by pointing to a historically-acceptable intrusion. *See Bruen*, 142 S.Ct. at 2126-27. In other words, the government must be able to point to comparable delays that are consistent with historical practice.

3. The Original Public Meaning of the Speedy Trial Clause Does Not Excuse Extreme Delays Based on Policy Preferences Nor Does It Require Repeated Invocation By a Defendant

The historical record and tradition—which *Barker* failed to consider—reveals that, the Sixth Amendment's original guarantee of a speedy trial looks very different than what was created by the justices in 1972.

Even though it was decided just five years before *Barker* this Court did engage in a limited historical analysis of the speedy trial right in *Klopfer v. North Carolina*, 386 U.S. 213 (1967). But it did so only to decide whether the right set out in the Sixth Amendment was worthy of incorporation under the Fourteenth Amendment. *Id.* at 226. The Court steadfastly declined to incorporate the historical understanding of the right when it finally "attempted to set out the criteria by which the speedy trial right is to be judged" in *Barker*. *See* 407 U.S. at 516.

Klopfer's analysis concluded that "the right to a speedy trial is as fundamental as any of the rights secured by the Sixth Amendment." 386 U.S. at 223. In so doing it recognized that the "right has its roots at the very foundation of our English law heritage," having been referenced in the Magna Carta (1215) ("To no one will we sell, to no one deny or delay, right or justice."), and having been recognized "in even earlier times … in the Assize of Clarendon (1166)." *Id*. The latter document recognized that "when a robber or murderer or thief or receiver of them has been arrested through the aforesaid oath, if the justices are not about to come speedily enough into the country where they have been taken," the sheriffs were required to bring forth alternate justices for their trial. *Id.* n. 9 (citation omitted). Historical practices

confirmed that "[b]y the late thirteenth century, justices, armed with commissions of gaol delivery and/or *oyer* and *terminer* were visiting the countryside three times a year" to dispense "speedy" trials. *Id.* at 223-24.

Historical practice further confirms that the overriding interest in a speedy trial was limiting pre-trial incarceration. *Id.* at 234. The traveling justices ensured that "at their next coming [they] have given the prisoner full and speedy justice, without detaining him long in prison." *Id.* (citation omitted). And Sir Edward Coke, writing in the 17th Century, emphasized that "prolonged detention without trial would have been contrary to the law and custom of England." *Id.* (quoting *The Second Part of the Institutes of the Laws of England* 45 (1642)). "'And therefore, every subject of this realme, for injury done to him … without exception, may take his remedy by the course of the law, and have justice, and right for the injury done to him, freely without sale, fully without any deniall, and speedily without delay.'" *Id.*

This English practice was well-know to the Founders. *Id.* Coke's writing on this topic was "read in the American Colonies by virtually every student of the law," and, according to Thomas Jefferson, "Coke Lyttleton was the universal elementary book of law students." *Id.* at 225 (citations omitted). And the right was incorporated into "the first of the colonial bills of rights," the Sixth Amendment, of course, and today, each of the constitutions of the 50 states. *Id.* at 225-26.

But what did the right to a speedy trial *mean* when it was included in the Sixth Amendment? Two themes become apparent when viewing historical practice: (1) The right to a speedy trial was meant to prevent periods of pretrial detention drastically

shorter than contemporary practice allows; and (2) A defendant had no affirmative duty to continuously assert his right. And, at the very least, no historical evidence even *hints* at the government's ability to hold a prisoner for six years before trial.

Consider first the length of acceptable pretrial detention intended by the Sixth Amendment. "The full contours of the right may be unresolved, but the text and history of the Speedy Trial Clause establish an enduring principle: the primary guarantee of the right is to protect against prolonged pretrial detention by the government." *United States v. Olsen*, 21 F.4th 1036, 1058 (9th Cir. 2022) (Bumatay, J., concurring). The "history of the development of the right strongly indicates that it" applied after arrest and was seen as having "granted a right that was virtually absolute." Alan L. Schneider, *The Right to A Speedy Trial*, 20 Stan. L. Rev. 476, 483 (1968) (citing Coke, *Institutes* at 45).

The Magna Carta's speedy justice provision "was first implemented by special writs and commissions under which the jails were cleared twice a year. Later, in response to a number of abuses, one of which was lengthy imprisonment prior to indictment, Parliament passed the Habeas Corpus Act of 1679." *Id.* "Whereas great delays have been used by Sheriffes, Goalers [jailers] and other Officers, to whose Custody, any of the King's Subjects have beene committed for criminall or supposed criminall Matters," the Act established a procedure "in makeing Returnes of Writts of Habeas Corpus to them directed[.]" Act of 1679, § 1. Its stated purpose was clear: "For the prevention whereof and the more speedy Releife of all persons imprisoned for any such criminall or supposed criminall Matters whensoever." *Id.* "[I]f any person

or persons committed [for treason or felony] ... upon his prayer or petition in open court ... to be brought to his trial, shall not be indicted and tried the second term, sessions of *Oyer* and *Terminer* or general gaol-delivery, after his commitment, or upon his trial shall be acquitted, he shall be discharged from his imprisonment." *Id*. § 7(2). Such sessions usually occurred twice a year. Judith Avrutick, *Commissions of* Oyer *and* Terminer *in Fifteenth Century England*, 24 (1967). Thus, for felonies, the Act required trial within a year, or discharge, with no discussion at all about various balancing tests. And while a defendant could benefit from the Act by seeking a writ of habeas corpus, courts did not, as a part of their analysis, consider how strenuously a defendant had objected to his treatment. *See* Act of 1679, § 7(2).

In 1765 William Blackstone observed that the English law had incorporated the 1679 Act's into its constitutional directives. *Olsen*, 21 F.4th at 1060 (Bumatay, J., concurring) (citing William Blackstone, 1 *Commentaries on the Laws of England*, 131 (1765)). Blackstone wrote, "English law commanded that 'no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer." *Id.* Thus, "at least twice a year, prisoners would be tried or released—setting a general outer limit for pretrial detention. For Blackstone, this right was the 'bulwark of [the British] constitution.'" *Id.* (citing 4 Blackstone at 431).

Shortly after the Sixth Amendment was ratified, most states considered the right to a "speedy trial" to follow the contours of the English right and the Act of 1679. *Petition of Provoo*, 17 F.R.D. 183, 197 (D. Md.), *aff'd sub nom. United States v. Provoo*, 350 U.S. 857 (1955). Many states enacted statutory provisions that tracked the

English statute, and others interpreted their own constitutional provisions *in light of* the English Act. *See id.* For instance, in an early decision in Tennessee, the court construed the state constitutional right to "a speedy public trial" to require trial within two terms of court, and when the state simply failed to "provide a public prosecutor," there was "no ground to keep the prisoner six months longer in confinement." *State v. Sims*, 1 Tenn. 253, 253 (Tenn. Super. L. & Eq. 1807). As in England, the analysis did not balance competing interests, much less consider whether the defendant had invoked the right more than once. *See id.*

Similarly, in Virginia, an early decision recognized that the state constitutional speedy trial clause "guaranties to every one accused of crime a speedy trial, and thereby secures him against protracted imprisonment. And this provision of the bill of rights announced or enacted no new principle or safeguard of freedom. It was but the re-affirmance of a principle declared and consecrated by the famous habeas corpus act, that second Magna Carta of English liberty." *Commonwealth v. Adcock*, 49 Va. 661, 676–77 (Va. Gen. Ct. 1851). Rather than impose any balancing test, or burden on the accused, the re-affirmed right to a speedy trial set an outer limit on the *government's* ability to detain someone pre-trial. "[I]ndeed the evil the act was chiefly intended to remedy, is the neglect of the *accuser* to prosecute in time. Even in case of high treason, where the party has been committed upon the warrant of the secretary of state, after a year has elapsed without prosecution, the Court will discharge him upon adequate security being given for his appearance." *Id.* (emphasis added).

Two things are thus clear about the understanding of the Speedy Trial Clause in 1791. A delay of more than a year while a defendant was in custody would have been almost unthinkable. And it would have been no excuse for the prosecutor to insist that the defendant hadn't objected strenuously enough to the delay. A proper test therefore presumes that long delays are unlawful, and can be justified only if the government can prove that such delays would have been historically justified. *See Bruen*, 142 S.Ct. at 2126-27.

C. The Court of Appeals' Analysis Ignores the Historical Understanding of the Speedy Trial Clause

Viewed with a proper historical perspective, one wonders whether the speedy trial analysis applied by the Court of Appeals refers to the same constitutional provision. Indeed, while *Barker*'s balancing test was created out of thin air, the version applied by the majority below is a parody of the preexisting right reaffirmed by the text of the Sixth Amendment.

The Court of Appeals allowed the "exceptionally long" sex-year delay, which demonstrably impaired Mr. Jumaev's defense, because it weighed the reason for the delay and the assertion of the right against Mr. Jumaev. *See Jumaev*, 20 F.4th at 532, 535. The court recognized that "the delay in these cases was due to discovery." *Jumaev*, 20 F.4th at 534. But it credited the government's claims that the delays came with the territory of prosecuting the case. "Under the circumstances of this case, a primary consideration is that the delay was attributable to necessities of the discovery process untainted by government bad faith or negligence." *Muhtorov*, 20

F.4th at 658-59; *see also Jumaev*, 20 F.4th at 547 ("Here, the government acted diligently and without bad faith or negligence.") (citation omitted). Further, the court concluded that Mr. Jumaev did not "sufficiently assert his speedy trial right," even though he filed to formal motions to dismiss, one of which was a year before his ultimate trial. *Jumaev*, 20 F.4th at 536-37.

The Tenth Circuit could have just as easily held that it simply didn't want to find a Sixth Amendment violation, or that it did not believe it advisable to remedy the harm caused to Mr. Jumaev. Either would have been just as faithful to the text of the Speedy Trial Clause. Indeed, the pre-existing right to a speedy trial didn't account for motives, and it applied with equal rigor even if judges might not have agreed with the outcome. *See, e.g.*, *Sims*, 1 Tenn. at 253. The point, of course, was to deter delays through a clear and predictable remedy. *See* Act of 1679 § 1 ("For the prevention whereof and the more speedy Releife of all persons imprisoned for any such criminall or supposed criminall Matters whensoever."). Just as with the Second Amendment, a historical Speedy Trial Clause analysis avoids the "difficult empirical judgments" about the advisability of a certain outcome because the Constitutional protection itself is "the very *product* of an interest balancing by the people." *See Bruen*, 142 S.Ct. at 2131 (citation omitted).

D. Review Is Necessary to Restore the Right to a Speedy Trial

Mr. Jumaev is not the only person harmed by the evisceration of the Speedy Trial Clause started by *Barker*. "The flexibility of the *Barker* test leaves defendants at the mercy of a court's discretion. A court can find that a defendant made a timely

demand for a speedy trial, was prejudiced by the delay, did not personally cause the delay, but deny dismissal because the defendant did not sufficiently and vigorously assert his right. Courts essentially have the power to determine whether a defendant actually *wanted* a speedy trial, and decide that to be dispositive." Seth Osnowitz, *Demanding A Speedy Trial: Re-Evaluating the Assertion Factor in the* Barker v. Wingo *Test*, 67 Case W. Res. L. Rev. 273, 293 (2016). The legacy of *Barker* "seem[s] to arrive at a distorted formula for the interplay of the elements of the speedy trial guarantee." H. Richard Uviller, Barker v. Wingo*: Speedy Trial Gets A Fast Shuffle*, 72 Colum. L. Rev. 1376, 1400 (1972). Indeed, "the flexibility of the *Barker* test allows courts to create nearly impossible conditions for defendants to prove speedy-trial-right violations, which begs the question of whether the Sixth Amendment actually guarantees the accused the right to a speedy trial." Osnowitz, 67 Case W. Res. L. Rev. at 298–99. And this is primarily because of supposed expediency—"the speedy trial right is now under attack in many jurisdictions because pragmatic judges are loath to address the pending crisis of crowded dockets." Darren Allen, *The Constitutional Floor Doctrine and the Right to A Speedy Trial*, 26 Campbell L. Rev. 101 (2004)

While it has grown more elusive, the right to a speedy trial is more pressing than ever. For instance, an investigation in 2021 in California found more than 7,000 people in pretrial custody for a year or more, with at least 1,317 people having been in custody for more than 3 years, and 332 in custody for more than *five years. See* Robert Lewis, *Waiting for Justice* (Mar. 31, 2021), https://calmatters.org/justice/2021/03/waiting-for-justice/. In the midst of the Covid

pandemic, moreover, at least 4,998 people *died* in jail in the United States while waiting for trial. *See* Peter Eisler, Linda So, Jason Szep, Grant Smith and Ned Parker, Reuters, *Why 4,998 Died in U.S. Jails Without Getting Their Day in Court* (Feb. 16, 2020) https://www.reuters.com/investigates/special-report/usa-jails-deaths/.

Without a meaningful constitutional backstop, extended pretrial detention will continue to plague presumptively innocent people. And until this Court restores the Speedy Trial Clause to its proper place, these abuses will remain a feature of our system.

II. The Tenth Circuit Improperly Penalized Mr. Jumaev for Asserting his Constitutional Right to Exculpatory Evidence by Weighing Resultant Delays Against Him

Even if this Court allowed the *Barker* test to remain, review is still appropriate because the Tenth Circuit created a new rule that traded the constitutional right to exculpatory evidence for that of a speedy trial. The majority refused to find a constitutional violation primarily because Mr. Jumaev requested the production of evidence to which he was constitutionally entitled. This conclusion creates a new rule penalizing defendants who exercise their constitutional rights, forcing them to choose between *which* rights they wish to preserve.

The majority was clear why it took so long—"the delay in these cases was due to discovery, which lasted for Jumaev [from March 2012] until February 2018." *Jumaev*, 20 F.4th at 534. But it gave the government a pass because *Mr. Jumaev* requested the discovery in the first place: "'Given the volume of materials requested,

meeting those requests required time,'" and thus "the government has carried its burden." *Id.* (quoting *Muhtorov*, 20 F.4th at 645).

The Tenth Circuit got the standard exactly backward. "A defendant has no duty to bring himself to trial; the [government] has that duty as well as the duty of insuring that the trial is consistent with due process." *Barker*, 407 U.S. at 527. Accordingly, the government "must" disclose a defendant's recorded statements, regardless of whether it intends to use the statement at trial. Fed. R. Crim. P. 16 (a)(1)(A), (B). Moreover, the government has a constitutional obligation to disclose *Brady* material without ever being asked. *See United States v. Agurs*, 427 U.S. 97, 110 (1976) ("there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request").

But because Mr. Jumaev *did* ask for the relevant discovery, which the government conceded included *Brady* material, the majority held it against him because "meeting those requests required time." *Jumaev*, 20 F.4th at 534. The Tenth Circuit essentially concluded that Mr. Jumaev should not have been so insistent on his other constitutional rights.

Make no mistake either, the majority acknowledged that the government's delays weren't limited to producing discovery under Rule 16, but also extended to a wealth of *Brady* material that it was constitutionally obligated to disclose. But the panel majority found no error in Mr. Jumaev's related claim concerning the sufficiency of the trial court's remedies for the government's *Brady* violations, despite

"the slow pace of discovery, the late-filed charges, and a last-minute disclosure of potential impeachment information [that] caused Jumaev some prejudice," and despite the fact that these *Brady* violations resulted in the need to delay the trial until 2018. *Jumaev*, 20 F.4th at 549-50.

The court of appeal's discussion just scratched the surface of the government's misdeeds. The record is replete with evidence of *Brady* material withheld from Mr. Jumaev until years into this case. It was included in the vast disclosures withheld until September 1, 2016. *See* Vol. XIII, 426. And then the first trial was delayed for another year because of late disclosures undermining the existing transcript translations, including the revelation that a government witness had testified using a transcript that had simply been fabricated. *See* Vol. VII, 37; Vol. XI, 448, 867; Vol. XVII, 53. Finally, in the run-up to the second trial the defense learned, among other things, that the government had been, in the district court's views, "not forthright," concerning benefits given to one of its witnesses. *See* Vol. VII, 347, 403.

Judge Lucero cataloged many of these government failures, noting that the central impediment to bringing the case to trial was the "excessive governmental delay in responding to timely discovery requests made by" the defense. *Jumaev*, 20 F.4th at 553. While those failures were present in Mr. Muhtorov's case, Mr. Jumaev's case was "even more compelling," "because the government waited to provide discovery information long in its possession until the eve of Jumaev's first scheduled trial," which "caused an additional delay of one year." *Id.* This "constitutionally-required evidence" simply wasn't produced when it should have been. *Id.*

But how was Mr. Jumaev able to obtain this exculpatory information? He had to fight for it. As Judge Lucero put it, long after the "court-imposed discovery cut-off" Mr. Jumaev "waited on the government to fulfill its responsibilities, diligently and persistently filing discovery motions that were not met in a timely fashion." *Id.* at 557. The Tenth Circuit majority's contention that it was still *the defendants'* fault because these materials were for their benefit "approaches double-speak: what the majority is saying is that any and all government delay is excusable because of its own delay in discovery production." *Muhtorov*, 20 F.4th at 663 (Lucero, J., dissenting).

By holding the delays against Mr. Jumaev for litigating these issues, the Tenth Circuit has created the "intolerable" condition "that one constitutional right should have to be surrendered in order to assert another." *See Simmons*, 390 U.S. at 394. To avoid this unlawful compromise, Judge Lucero would simply have held the delay *against* the government, not Mr. Jumaev for pointing these failures out. *See Jumaev*, 20 F.4th at 558.

The absurdity of the Tenth Circuit's rule is best demonstrated by comparing how it resolved Mr. Jumaev's speedy trial and *Brady* claims. As discussed, it did not fault the government for the delays caused solely through its failure to meet its discovery obligations. *See id.* at 534. Yet it also dismissed Mr. Jumaev's argument that he needed a better remedy for the *Brady* violations than just the delay of the trial. *Id*. at. 550. According to the majority, the "remedy that Jumaev most strongly objects to—the continuance—was not only within the district court's discretion to

order, but is generally the preferred method for dealing with discovery violations." *Id*. In other words, according to the majority, the proper remedy for a *Brady* violation is a continuance, but *even that* remedy shall not be weighed against the government in the speedy trial analysis.

Surely the government will take note of the incentives presented by this rule. Why should it endeavor to meet its *Brady* requirements at all, much less in a timely fashion? If the worst it will face is a delay that won't even be counted against it, why not err on the side of omission? This is particularly so when the government can "avoid its fundamental discovery obligations in order to coerce a plea from a defendant incarcerated and awaiting trial." *See Muhtorov*, 20 F.4th at 666 n. 9 (Lucero, J., dissenting).

III. A Defendant Need Not Undergo Exceptional and Disfavored Efforts to Properly Invoke His Right to a Speedy Trial, Such as by Filing *Pro Se* Motions Despite His Representation by Counsel

Finally, the Court should grant the petition because the Tenth Circuit's holding creates a new requirement for defendants to invoke their right to a speedy trial that is not only inconsistent with *Barker* itself, but also creates bizarre incentives that frustrate the attorney-client relationship.

Even though Mr. Jumaev filed *two* formal motions to dismiss for want of a speedy trial, the first of which he filed a year before his eventual trial, the majority concluded that he did not "sufficiently assert his speedy trial right." *Jumaev*, 20 F.4th at 536-37. The Tenth Circuit also discounted his counseled objections to the "pace of discovery," and his repeated requests to proceed to trial quickly, because these did

not "expressly rais[e] a speedy trial objection." *Id.* at 539-40. By contrast, the majority found that Mr. Muhtorov *did* sufficiently assert his speedy trial right, because he filed two additional *pro se* motions complaining of the delay, even though they were not accepted by the trial court as he was represented by counsel. *See id*. at 556 (Lucero, J., dissent).

Barker requires "a balancing test, in which the conduct of both the prosecution and the defendant are weighed." 407 U.S. at 530. In *Barker* the Court specifically rejected a requirement for "a purely pro forma objection." *Id*. at 529. Instead, a court must ask "whether the defendant's behavior during the course of litigation evidences a desire to go to trial with dispatch." *United States v. Batie*, 433 F.3d 1287, 1291 (10th Cir. 2006).

The Tenth Circuit "majority conducted a rigid and formalistic *Barker* analysis" that failed to follow this precedent. *Jumaev*, 20 F.4th at 554 (Lucero, J., dissenting). The complete record showed Mr. Jumaev's desire to go to trial as soon as possible, even if he did not always raise "a purely pro forma objection." *See Barker*, 407 U.S. at 530. After all, in January 2013, less than a year after Mr. Jumaev's arrest, counsel informed the court that because "discovery [wa]s far from complete," they could not provide appropriate advice about whether Mr. Jumaev should proceed to trial at all. Vol. I, 518-19. Then, on December 2, 2015, at a status conference, defense counsel asserted that "this case needs to move forward" and "echo[ed]" the "refrain" that they "want[ed] to get this case to trial." Vol. XI, 305, 322-23. Then again on March 24, 2016, three years after Mr. Jumaev's arrest, both defendants moved for an order to

set pretrial deadlines and a trial date. Vol. XV, 183. Again on July 13, 2016, when the court held a status conference to set "a trial date for this case," Mr. Jumaev's counsel objected to the government's request to continue the trial date into 2017. Vol. XI, 344-47. Relatedly, counsel objected to the government's request for a September 1, 2016, discovery deadline because any future trial date would be "illusory" because none of the relevant trial deadlines would be "feasible until discovery is produced." Vol. XI, 371. Then, of course, Mr. Jumaev moved to dismiss the case for lack of a speedy trial on February 28, 2017, almost five years after his arrest, and then *again* on February 16, 2018, almost six years after his arrest. Vol. VI, 693; Vol. XVI, 81. Under the majority's analysis, *none* of those efforts told the court that Mr. Jumaev wanted to go to trial.

Even more problematically, the path the Tenth Circuit embraced for raising a speedy trial objection undermines the attorney-client relationship. The majority "fault[ed] Jumaev for not filing a *pro se* speedy trial motion separate and apart from those filed by his counsel." *Jumaev*, 20 F.4th at 554 (Lucero, J., dissenting). But "it is obvious that [the Court] cannot require counseled defendants to file *pro se* motions in order for *Barker*'s assertion-of-the-right factor to weigh in their favor." *Id.* at 556. After all, a defendant has a constitutional right to counsel, *or* self-representation, not *both*. *See McKaskle v. Wiggins*, 465 U.S. 168, 183 (1984). Indeed, many courts "clearly disfavor[] any form of hybrid representation, because it typically results in neither competent counseled representation nor independent *pro se* representation. *United States v. Kosmel*, 272 F.3d 501, 506 (7th Cir. 2001). By penalizing Mr. Jumaev for *not*

engaging in hybrid representation, the Tenth Circuit suggests that the proper way to invoke the Sixth Amendment right to a speedy trial is to undermine the Sixth Amendment right to counsel.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

DATED: July 22, 2022

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