PUBLIC COPY – SEALED MATERIALS REDACTED

No. 22-____

IN THE

Supreme Court of the United States

THERYN JONES, PETITIONER

v.

UNITED STATES OF AMERICA

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

REDACTED PETITION FOR A WRIT OF CERTIORARI

MARC L. GREENWALD
DANIEL R. KOFFMANN
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue
22nd Floor
New York, NY 10010

CHRISTOPHER G. MICHEL
QUINN EMANUEL URQUHART & SULLIVAN, LLP
1300 I Street NW
Suite 900
Washington, DC 20005

ANDREW H. SCHAPIRO
Counsel of Record
QUINN EMANUEL URQUHART & SULLIVAN, LLP
191 N. Wacker Drive
Suite 2700
Chicago, IL 60606
(312) 705-7403
andrewschapiro@quinnemanuel.com

Counsel for Petitioner

QUESTION PRESENTED

The Fifth and Sixth Amendments provide the criminally accused with the right to call witnesses and present a defense. In defending against murder and other serious charges, petitioner sought to call a witness who would have exonerated petitioner and inculpated himself. The witness, however, declined to testify by invoking his Fifth Amendment right against compelled self-incrimination. Petitioner asked the government to immunize the witness under 18 U.S.C. § 6003. But the government refused, even though it had immunized many of its own witnesses against petitioner. Without hearing from the exculpatory witness, the jury found petitioner guilty, and he was sentenced to life in prison.

Had petitioner been tried within the Ninth Circuit, his conviction would have been vacated. But because he was tried within the Second Circuit, his conviction was affirmed. The question presented is:

When, if ever, the Due Process Clause of the Fifth Amendment requires vacatur of a criminal conviction based on the government's refusal to seek immunity for a defense witness under 18 U.S.C. § 6003.

RELATED PROCEEDINGS

U.S. District Court for the Southern District of New York:

United States v. Melendez, No. 17-cr-791 (Nov. 9, 2020)

U.S. Court of Appeals for the Second Circuit:

United States v. Jones, No. 20-3876 (Aug. 24, 2022)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

Petitioner Theryn Jones respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

ORDER BELOW

The order of the court of appeals (App., *infra*, 1a-21a) is not published in the Federal Reporter but is available at 2022 WL 3640449. A hearing transcript containing the district court's reasoning (App., *infra*, 22a-32a) is unpublished.

JURISDICTION

The order of the court of appeals affirming the district court's judgment (App., *infra*, 1a-21a) was issued on August 24, 2022. The order of the court of appeals denying a petition for rehearing (App., *infra*, 33a-34a) was issued on October 12, 2022. On January 11, 2023, Justice Sotomayor extended the deadline for the filing of a petition for a writ of certiorari to January 13, 2023. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution provides in relevant part: "In all criminal prosecutions, the accused shall enjoy the right ... to have compulsory process for obtaining witnesses in his favor."

Sections 6002 and 6003 of Title 18 of the United States Code and other relevant statutory provisions are set forth in the appendix to this petition. App., *infra*, 36a-43a.

STATEMENT

"Few rights are more fundamental than that of an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). Both the Fifth Amendment (through the Due Process Clause) and the Sixth Amendment (through the Compulsory Process Clause) protect that right. See *id.*; *Washington v. Texas*, 388 U.S. 14, 19 (1967). The Fifth Amendment also provides a right against compelled self-incrimination. Those rights can come into conflict in cases like this one, when the defendant seeks the exculpatory testimony of a witness, but the witness refuses to testify by invoking the protection against compelled self-incrimination. Congress devised a mechanism to address such a conflict in 18 U.S.C. §§ 6002 and 6003, which allow the United States to grant a limited form of immunity (often called "use immunity") that requires a witness to testify but "leaves the witness and the prosecutorial authorities in substantially the same position" as if the witness had been allowed to invoke the Fifth Amendment. *Kastigar v. United States*, 406 U.S. 441, 462 (1972).

The courts of appeals have squarely divided over when the government's denial of immunity for a defense witness requires vacatur of a conviction under the Due Process Clause. As pertinent here, the Ninth Circuit has held that vacatur is required where "(1) the defense witness's testimony was relevant; and (2) ... the prosecution granted immunity to a government witness in order to obtain that witness's testimony, but denied immunity to a defense witness whose testimony would have directly contradicted that of the government witness, with the *effect* of so distorting the fact-finding process that the defendant was denied his due process right to a fundamentally fair trial." *United States v. Straub*, 538 F.3d 1147, 1162 (9th Cir. 2008) (emphasis added). The Second Circuit, in contrast, has held that vacatur is required only where (1) the defense "witness'[s] testimony will be material, exculpatory and not cumulative and is not obtainable from any other source," and (2) the government "has *deliberately* denied immunity for the purpose of withholding exculpatory evidence and gaining a tactical advantage through such manipulation" or engaged in similar *intentional* misconduct. *United States v. Ebbers*, 458 F.3d 110, 119 (2d Cir. 2006) (emphasis added); *see* App., *infra*, 12a-13a (applying that standard).

The conflict between the Second and Ninth Circuits on this question is deeply entrenched, widely recognized, and highly significant. Commentators have highlighted the "split among the courts of appeals" on the issue. Nathaniel Lipanovich, *Resolving the Circuit Split on Defense Witness Immunity: How the Prosecutorial Misconduct Test Has Failed Defendants and What the Supreme Court Should Do About It*, 91 Tex.

L. Rev. 175, 176 (2012); *see* William F. Johnson & Jennifer K. Kim, *Defense Witness Immunity: The Time Has Come in the 9th Circuit – Will It Catch On?*, 24 No. 6 Andrews White-Collar Crime Rep. 1, 2010 WL 697368, at *4 (2010) (describing the same "circuit split on the appropriate standard for compelling immunity"). A district court recently noted that "the Ninth Circuit has articulated its own use-immunity test," and explained that—if the Tenth Circuit "decides to adopt the test that the Ninth Circuit has stated"—"the outcome [of cases] would be different." *United States v. Baca*, 447 F. Supp. 3d 1149, 1224 (D.N.M. 2020), *aff'd sub nom., United States v. Cordova*, 25 F.4th 817 (10th Cir. 2022).

This case demonstrates what a profound difference the circuit conflict makes. On trial for murder and other serious charges, petitioner Theryn Jones sought to call a witness, [redacted], who had both admitted ordering the killings and fully exculpated petitioner. When [redacted] declined to testify by invoking his Fifth Amendment protection against self-incrimination, petitioner asked the government to immunize him under 18 U.S.C. § 6003. But the government declined, even though it had immunized witnesses who testified against petitioner and whose testimony was directly contradicted by [redacted] account. As a result, the jury heard only the testimony inculpating petitioner. The gap created by [redacted] absence was so striking that the jury sent a note to the court asking to hear from [redacted] When the court refused, the jury found petitioner guilty, and the court imposed a life sentence.

In the Ninth Circuit, petitioner's conviction would have been vacated, because the government's refusal

to grant immunity plainly had the *effect* of "distorting the fact-finding process." *Straub*, 538 F.3d at 1162. But the Second Circuit affirmed, finding dispositive a lack of government *intent* to distort the factfinding process. App., *infra*, 12a-13a (citing *Ebbers*, F.3d at 119). The Second Circuit, moreover, acknowledged that its standard is so demanding that it has *never* vacated a conviction for failure to grant defense-witness immunity. *See id.*

This case presents an ideal vehicle for the Court to resolve the circuit conflict on this critical question of federal criminal procedure. Petitioner expressly raised the government's failure to grant immunity as a basis to vacate his conviction, and the Second Circuit cleanly resolved that issue against him, relying on its precedential decisions in *Ebbers* and other cases. The Second Circuit's holding squarely conflicts with the result that the Ninth Circuit would have reached on the same facts. And the Second Circuit's decision is wrong. The "right to a fair opportunity to defend against the [government's] accusations," *Chambers*, 410 U.S. at 294, protects against more than just intentional government misconduct; it also protects against denials of immunity having "the effect of so distorting the fact-finding process that the defendant was denied his due process right to a fundamentally fair trial." *Straub*, 538 F.3d at 1162.

The stakes could hardly be higher. Petitioner is an innocent man who sought to present testimony from a witness who could credibly attest to his innocence. But unless this Court grants review, petitioner will spend the rest of his life in prison without ever having the opportunity to present that defense.

A. Trial Proceedings

1. In January 2014, Shaquille Malcolm was murdered in the lobby of his building in the Allerton Coops in the Bronx, New York. The government alleged that the killers were Alexander Melendez and Arius Hopkins, and that the murder was ordered by two unrelated men: [redacted] who was Melendez's and Hopkins' lifelong friend; and petitioner, an alleged crack dealer who lived in a neighboring section of the Allerton Coops. *See* App., *infra*, 3a-6a. Melendez became the government's principal cooperator. The government then indicted Hopkins, [redacted] and petitioner together. Shortly before the scheduled trial, [redacted] pleaded guilty. Hopkins and petitioner were tried together. *See id.* at 2a.

On the eve of trial, pursuant to its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), the government turned over notes of proffer sessions held by [redacted] with the government before he pleaded guilty. *See* App., *infra*, 24a. In those sessions, [redacted] made clear that he was responsible for the murder of Shaquille Malcolm and stated consistently and in detail that petitioner had nothing to do with Malcolm's murder. *See id.* at 24a-25a. [redacted] statements directly contradicted the testimony from government witnesses. *See* Pet. C.A. App. 153-54, 177-78, 182.[1] [redacted] told the government he had never even *met* petitioner until they were jailed together in connection with this case. Pet. C.A. S.A. 39. Even after it

---

[1] Pet. C.A. App. refers to the public appendix filed by petitioner in the court of appeals with his opening brief. Pet. C.A. S.A. refers to the sealed appendix filed by petitioner in the court of appeals with his opening brief.

became clear that the government would not offer him a cooperation agreement, [redacted] continued to affirm his statements about petitioner's lack of involvement in Malcolm's murder, stating "he [did] not want to lie about [petitioner]" simply to curry favor with the government. *Id.*

Hopkins and petitioner went to trial on charges of murder through the use of a firearm, in violation of 18 U.S.C. § 924(j), and murder while engaged in a narcotics conspiracy, in violation of 21 U.S.C. § 848(e)(1)(A). Only two witnesses at trial testified about petitioner. Melendez, the government's principal cooperator, testified that he and Hopkins shot and killed Malcolm at the behest of both [redacted] and petitioner. App., *infra*, 4a-5a. The second witness, Jamal Costello, testified pursuant to a non-prosecution agreement only that petitioner had been displeased with an unnamed individual and made a vague statement about Hopkins. *Id.* at 5a-6a. A third witness, Joel Riera, received statutory immunity and offered testimony that he was childhood friends with both shooters and [redacted] and that he stalked the victim with the two shooters the night of the murder, but that he did not know petitioner and had no inkling that petitioner had anything to do with the crime. *See* Pet. C.A. App. 218-234. Nevertheless, the government argued that Riera's immunized testimony demonstrated Melendez was credible in his testimony overall, and by implication, Melendez's testimony about petitioner.

Upon receiving the exculpatory [redacted] proffer notes on the eve of trial, petitioner's counsel sought [redacted] testimony, but was informed by [redacted]

counsel that [redacted] would invoke his Fifth Amendment privilege against compelled self-incrimination. *See* Pet. C.A. S.A. 1-2. Petitioner thus asked the district court to compel the government to grant immunity to [redacted]—just as the government had provided immunity for its witnesses—so that [redacted] could testify. The government opposed, and the district court denied the motion. App., *infra*, 33a-34a.

Had [redacted] testified consistent with his numerous pretrial statements to the government, he would have explained that petitioner had nothing to do with the murder—directly contradicting the testimony of the main government witness (Melendez), who claimed petitioner had ordered the murder. *See* Pet. C.A. S.A. 1-4. Because Melendez's testimony was not corroborated by any physical evidence or testimony from any other witness, [redacted] testimony would have been particularly useful to the jury—which in fact specifically requested to hear from him, Pet. C.A. App. 236—in determining the veracity of the government's proof.

The jury found petitioner guilty, and the district court imposed a life sentence. App., *infra*, 2a.

B. Appellate Proceedings

The Second Circuit affirmed. The court explained that, under circuit precedent, a conviction will be vacated based on the government's failure to immunize a defense witness pursuant to 18 U.S.C. § 6003 only in "extraordinary circumstances." App., *infra*, 12a (citation omitted). First, a defendant must show "that the government has used immunity in a discriminatory way" or "has deliberately denied immunity for the

purpose of withholding exculpatory evidence and gaining a tactical advantage through such manipulation." *Id.* (quoting *Ebbers*, 458 F.3d at 119). "Second, the defendant must show that the evidence to be given by an immunized witness will be material, exculpatory and not cumulative and is not obtainable from any other source." *Id.* (quoting *Ebbers*, 458 F.3d at 119).

Applying that standard, the Second Circuit rejected petitioner's claim. The court stated:

> After reviewing the record, we find that the district court did not abuse its discretion in denying [petitioner's] motion to compel immunity based upon the government's legitimate law enforcement concern that the witness at issue had not yet been sentenced for his own criminal conduct, as well as [petitioner's] failure to demonstrate that the government was using immunity in a discriminatory manner or to gain a tactical advantage. There was also sufficient support in the record for the district court's determination that the witness's testimony, even if somewhat exculpatory, would not materially alter the total mix of evidence before the jury.

App., *infra*, 13a (footnote omitted).

REASONS FOR GRANTING THE PETITION

This case presents an ideal vehicle to resolve a clear circuit split on a critical question of federal criminal procedure: when, if ever, does the Due Process Clause require vacatur of a criminal conviction based on the government's refusal to seek immunity for a defense witness under 18 U.S.C. § 6003. Relying on longstanding circuit precedent, the Second Circuit held that such a vacatur is required only in the theoretical (never actually occurring) circumstance that the government *deliberately intends* to distort the fairness of the factfinding process by refusing to immunize a witness who would deliver testimony that is "material, exculpatory and not cumulative and is not obtainable from any other source." App., *infra*, 12a (quoting *Ebbers*, F.3d at 119); *see id.* at 13a. "In stark contrast to" that standard, the Ninth Circuit applies a "much lower" and "markedly different" standard that allows vacatur "without any showing of the government's intent." Johnson & Kim, *Defense Witness Immunity*, 2010 WL 697368, at *1, 3-4; *see Straub*, 538 F.3d at 1160-1162 (expressly rejecting the intent-only standard). While petitioner could not clear the Second Circuit's higher hurdle, he would have cleared the Ninth Circuit's lower one. The real-world consequence of that conflict in circuit authority is *life imprisonment* for petitioner, who vigorously asserted his innocence and contended throughout the proceedings below that the government's failure to grant immunity violated his constitutional rights. It is difficult to imagine a more compelling vehicle for resolving this entrenched and profoundly important circuit conflict.

A. The Circuits Are Divided On When The Due Process Clause Requires Vacatur Of A Conviction Based On The Government's Refusal To Immunize A Defense Witness

1. The governing framework

"The right of an accused in a criminal trial . . . to call witnesses in [his] own behalf" is a component of "the right to a fair opportunity to defend against the State's accusations" and has "long been recognized as essential to due process." *Chambers*, 410 U.S. at 294. Indeed, "[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense." *Id.* at 302; *see Washington*, 388 U.S. at 19 (describing "the right to present the defendant's version of the facts ... to the jury" as "a fundamental element of due process of law"); *see also Holmes v. South Carolina*, 547 U.S. 319, 324 (2006) ("Whether rooted directly in the Due Process Clause ... or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'") (citation omitted); *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (same).

At the same time, the Fifth Amendment protects defendants by prohibiting compelled self-incrimination. While those protections often reinforce each other, they can come into conflict in cases like this one, where the defendant on trial seeks to present exculpatory evidence from a witness, who in turn invokes the Fifth Amendment to avoid inculpating himself. *See, e.g.*, Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 861 (1995) (explaining

that those constitutional protections "seem to be at war with one another" in such a scenario).

The federal use-immunity statute, 18 U.S.C. § 6001 *et seq.*, provides a way to reconcile that tension. It authorizes the government to grant limited-purpose immunity to a witness who has invoked the Fifth Amendment, thereby enabling the witness to testify—and vindicating the defendant's due process right to present a defense—while preserving the witness's constitutional protection against prosecution based on compelled self-incrimination. *See* 18 U.S.C. §§ 6002-6003; *Kastigar*, 406 U.S. at 453. Government invocation of the use-immunity statute accordingly serves the parties, the court, and the public by advancing the search for truth while also respecting constitutional rights. *See Kastigar*, 406 U.S. at 445 (explaining that immunity statutes "have historical roots deep in Anglo-American jurisprudence").[2]

The difficulty arises when the government and the defendant disagree—as they often do, given their adverse relationship in a criminal prosecution—about whether immunity should be granted to a defense witness. Courts broadly agree that, in light of separation-of-powers principles and the discretionary language of Section 6003, "[t]he government is under no general obligation to grant use immunity to witnesses the defense designates as potentially helpful to

---

[2] Importantly, the statute protects the government and the public against the possibility of false testimony from an immunized witness by providing that the witness's testimony may not "be used against the witness in any criminal case, *except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order*" to testify. 18 U.S.C. § 6002(3) (emphasis added).

its cause but who will invoke the Fifth Amendment if not immunized." *Ebbers*, 458 F.3d at 118. At the same time, those courts also broadly agree that, under at least some circumstances, "due process may require that the government confer use immunity on a witness for the defendant." *United States v. Stewart*, 907 F.3d 677, 685 (2d Cir. 2018) (citation omitted); *accord Straub*, 538 F.3d at 1156 ("To interpret the Fifth and Sixth Amendments as conferring on the defendant the power to demand immunity for co-defendants, potential co-defendants, or others whom the government might in its discretion wish to prosecute would unacceptably alter the historic role of the Executive Branch in criminal prosecutions. Of course, whatever power the government possesses may not be exercised in a manner which denies the defendant the due process guaranteed by the Fifth Amendment.") (citation omitted).

Critically, however, the agreement among courts stops there. In resolving claims arising from government decisions not to immunize defense witnesses, the Second Circuit and several other courts of appeals have adopted a "rigorous" rule that focuses on the government's *intent*, while the Ninth Circuit has adopted a "much lower" standard that focuses on the *effects* of the government's decision—and expressly rejects the necessity of an intent inquiry. Johnson & Kim, *Defense Witness Immunity*, 2010 WL 697368, at *1-2. That acknowledged "circuit split on the appropriate standard for compelling immunity," *id.* at 4, should be resolved by this Court, *see* Lipanovich, *Resolving the Circuit Split on Defense Witness Immunity*, 91 Tex. L. Rev. at 195 ("The Supreme Court should resolve the circuit split on defense witness immunity.").

2. *The Second Circuit's intent-focused standard*

For decades, the Second Circuit has maintained that a criminal conviction may be vacated based on the government's failure to immunize a defense witness only in "exceptional circumstances." *United States v. Wright*, 588 F.2d 31, 35 (2d Cir. 1978); *see Stewart*, 907 F.3d at 685. In fact, such exceptional circumstances exist only in theory, because the Second Circuit has *never* vacated a conviction based on the government's failure to immunize a defense witness. *Stewart*, 907 F.3d at 685; *see* App., *infra*, 12a-13a.

In contemplating the potential circumstances in which vacatur could be warranted, the Second Circuit has identified two significant hurdles. "First, the defendant must show that the government has used immunity in a discriminatory way, has forced a potential witness to invoke the Fifth Amendment through 'overreaching,' or has deliberately denied 'immunity for the purpose of withholding exculpatory evidence and gaining tactical advantage through such manipulation.'" *Ebbers*, 458 F.3d at 119 (citation omitted); *see Stewart*, 907 F.3d at 685. Each of those possibilities focuses on the government's *intent* in denying the request to immunize a defense witness. *See Ebbers*, 458 F.3d at 118 ("[A] district court must find facts as to the government's acts *and motives*.") (emphasis added). The prong of the test referring to the "discriminatory" use of immunity can be satisfied "[o]nly when a prosecutor has abused the government's ability to grant immunity by using ... *for the purpose* of gaining a tactical advantage." *United States v. Diaz*, 176 F.3d 52, 115 (2d Cir. 1999) (emphasis added); *see also United States v. Ballistrea*, 101 F.3d 827, 837 (2d Cir.

1996) (discussing the possibility that the government "granted immunity to its witnesses, and refused to grant immunity to defendant's witnesses, *in order to gain a tactical advantage*") (emphasis added). The prong of the test referring to government "overreaching" can "be shown through the use of 'threats, harassment, or other forms of intimidation,'" each of which necessarily involves prosecutorial intent. *Ebbers*, 458 F.3d at 119 (citation omitted). And the prong of the test referring to the government "*deliberately* den[ying] 'immunity for the purpose of withholding exculpatory evidence and gaining tactical advantage,'" *id.* (emphasis added; citation omitted), requires government intent by definition. Thus, as commentators have summarized, a "lack of [government] intent" to distort the factfinding process "would doom [a defendant's] request for immunity under the" test adopted by the Second Circuit and other courts of appeals. Lipanovich, *Resolving the Circuit Split on Defense Witness Immunity*, 91 Tex. L. Rev. at 186.

The Second Circuit also imposes a second hurdle that a defendant must clear before prevailing on a claim that the government violated the Constitution by failing to immunize a defense witness. The "defendant must show that the evidence to be given by an immunized witness 'will be material, exculpatory and not cumulative and is not obtainable from any other source.'" *Ebbers*, 458 F.3d at 119 (citation omitted); *see* App., *infra*, 12a. Merely satisfying one of those conditions does not suffice; the "bottom line at all times is whether the non-immunized witness's testimony would materially alter the total mix of evidence before the jury." *Ebbers*, 458 F.3d at 119.

3. The Ninth Circuit's effects-focused standard

"In stark contrast to the standard applicable in" the Second Circuit and other courts of appeals, Ninth "Circuit law permits a federal judge to order immunity for a defense witness without any showing of the government's intent." Johnson & Kim, *Defense Witness Immunity*, 2010 WL 697368, at *3. The Ninth Circuit suggested that position as early as its decision in *United States v. Westerdahl*, 945 F.2d 1083, 1087 (9th Cir. 1991), and adopted it expressly in *Straub*. The defendant in *Straub* noted that the government had immunized many of its own witnesses—allowing them to testify against him—but refused his request to immunize one defense witness who would directly contradict those government witnesses. *Straub*, 538 F.3d at 1149-1154. Because the defendant could not establish that the government had undertaken its immunity decisions with the intent to distort the fact-finding process, the Ninth Circuit was forced to address "whether a defendant requesting compelled use immunity on the ground that his witness has relevant testimony that directly contradicts that of an immunized prosecution witness must prove that the prosecution's *purpose* in denying use immunity to the defense witness was to distort the fact-finding process, or merely that the prosecution's selective denial of use immunity had the *effect* of distorting the fact-finding process." *Id.* at 1148.

In a unanimous opinion by Judge Bybee, the Ninth Circuit concluded that a "selective denial of immunity" by the government that "had the effect of distorting the fact-finding process is sufficient" to establish a constitutional violation, notwithstanding

that the government lacked intent to bring about that result. *Straub*, 538 F.3d at 1158. The court explained that, "[e]ven where the government has not denied a defense witness immunity for the very purpose of distorting the fact-finding process, the government may have stacked the deck against the defendant in a way that has severely distorted the fact-finding process at trial" and thereby violated the defendant's due process rights. *Id.* at 1160.

That understanding, the court observed, was "consistent with [this] Court's authority on due process at trial." *Straub*, 538 F.3d at 1160. "When dealing with due process rights '*outside the courtroom*,' th[is] Court has been hesitant to find constitutional violations by law enforcement absent some kind of malicious intent." *Id.* (emphasis added) (citing cases). "However, when dealing with due process violations *in the context of the fundamental fairness of the trial*, [this] Court has been more concerned with protecting the integrity of trial and the defendant's right to mount a defense, *irrespective of any government intent to interfere with these rights*." *Id.* (emphases added); *see id.* at 1160-61 (citing cases). Because "a decision to compel use immunity is not a sanction for prosecutorial misconduct" but rather "a vindication of the defendant's Fifth Amendment due process right to a trial in which the fact-finding process has not been distorted," the court reasoned that "the defendant need not prove that the prosecution acted intentionally to distort the fact-finding process." *Id.* at 1161. The defendant can instead make that showing if "the prosecution granted immunity to a government witness in order to obtain that witness's testimony, but denied immunity to a defense witness whose testimony would have directly

contradicted that of the government witness, with the effect of so distorting the fact-finding process that the defendant was denied his due process right to a fundamentally fair trial." *Id.* at 1162.

The Ninth Circuit has also broken with the Second Circuit in an additional way. While the Second Circuit requires that the testimony from the relevant defense witness be "material, exculpatory and not cumulative and is not obtainable from any other source," *Ebbers*, 458 F.3d at 119 (citation omitted), the Ninth Circuit requires only that such testimony "be relevant," *Straub*, 538 F.3d at 1163. Indeed, the Ninth Circuit has "cautioned that the relevance requirement is minimal," and that a defendant "*need not show* that the testimony sought was either 'clearly exculpatory' or 'essential to the defense.'" *Id.* (emphasis added; citation omitted); *see Westerdahl*, 945 F.2d at 1086. The Ninth Circuit has thus expressly departed from the requirements of the Second Circuit in multiple ways—and it has continued to reiterate its conflicting position in recent decisions. *See, e.g.*, *United States v. Moalin*, 973 F.3d 977, 1004 (9th Cir. 2020) (reiterating *Straub* test); *United States v. Wilkes*, 744 F.3d 1101, 1104–05 (9th Cir. 2014) (same).[3]

---

[3] The Ninth Circuit has explained that "the remedy granted" for a due process violation based on the government's failure to immunize a defense witness without intent to distort the fact-finding process "is neither an automatic acquittal for the defendant, nor an automatic grant of use immunity for the defense witness." *Straub*, 538 F.3d at 1161. In such a scenario, the government also "may, at a new trial, attempt to proceed without the witness whose testimony would have been contradicted by the defense witness." *Id.*

B. The Circuit Conflict Is Square, Acknowledged, Significant, And Directly Implicated By This Case

1. The conflict between the Second Circuit and Ninth Circuit standards for adjudicating challenges to the government's denial of a request to immunize a defense witness is square. As just explained, the Second Circuit will vacate a conviction based on such a challenge only where (1) the defense "witness'[s] testimony will be material, exculpatory and not cumulative and is not obtainable from any other source," and (2) the government "has used immunity in a discriminatory way, has forced a potential witness to invoke the Fifth Amendment through overreaching, or has deliberately denied immunity for the purpose of withholding exculpatory evidence and gaining tactical advantage through such manipulation." *Ebbers*, 458 F.3d at 119 (internal quotation marks and citations omitted). The Ninth Circuit, by contrast, will vacate such a conviction where "(1) the defense witness's testimony was *relevant*; and (2) ... the prosecution granted immunity to a government witness in order to obtain that witness's testimony, but denied immunity to a defense witness whose testimony would have directly contradicted that of the government witness, with the *effect* of so distorting the fact-finding process that the defendant was denied his due process right to a fundamentally fair trial." *Straub*, 538 F.3d at 1162 (emphases added).

The Ninth Circuit thus has a "much lower" standard than the Second Circuit at both prongs of the analysis. Johnson & Kim, *Defense Witness Immunity*, 2010 WL 697368, at *1. And the distinction between

the circuits' standards is not merely a variation in verbal formulation. As detailed above, the Ninth Circuit has consciously rejected both aspects of the "more rigorous" standard applied by the Second Circuit, *id.* at *2, expressly holding that a defendant "need not show that the testimony sought was either clearly exculpatory or essential to the defense," *Straub*, 538 F.3d at 1163 (internal quotation marks and citation omitted), and that a defendant "need not prove that the prosecution acted intentionally to distort the fact-finding process," *id.* at 1161 (internal quotation marks and citation omitted). That "conflict" between the decisions of two federal court of appeals "on the same important matter" is precisely the kind of the issue that warrants this Court's review. S. Ct. R. 10(a).[4]

2. The existence and significance of the circuit conflict—as well as the propriety of this Court's review—have been acknowledged by commentators and courts alike.

Shortly after the Ninth Circuit's decision in *Straub*, practitioners drew attention to the "stark contrast" between the position of the Second Circuit and other circuits that "require the defense to meet the

[4] In addition to the conflict on the substantive standard for adjudicating challenges of the kind at issue here, the Second and Ninth Circuits' positions also conflict on the proper standard of appellate review. The Ninth Circuit reviews *de novo* a district court's denial of a defendant's motion to compel immunity. *See Straub*, 538 F.3d at 1156; *United States v. Alvarez*, 358 F.3d 1194, 1216 (9th Cir. 2004). The Second Circuit reviews such denials only for abuse of discretion. *See* App., *infra*, 12a; *Ebbers*, 458 F.3d at 118. That related conflict in circuit authority further underscores the need for this Court's review.

high standard that the government's refusal to immunize a defense witness was purposefully made in bad faith to distort the fact-finding process," and the Ninth Circuit's "focus on whether the refusal to immunize had that effect, a much lower standard." Johnson & Kim, *Defense Witness Immunity*, 2010 WL 697368, at *1, 3. The practical consequences of the conflict were illustrated in a high-profile white-collar criminal prosecution in which the district court "emphasized that he did *not* find that the government had *intentionally* distorted the fact-finding process," yet "concluded that there was a fundamental unfairness in permitting the jury to hear the testimony of [the prosecution witness immunized by the government] without also hearing the testimony of [the defense witnesses who were not immunized], which he found directly contradicted [the prosecution witness's] testimony." *Id.* at *3 (emphases added). That result, the authors emphasized, would not have been possible under the "markedly different ... standard in the 2nd Circuit." *Id.* at *4. They added that this Court could "grant a writ of certiorari to clarify the circuit conflict." *Id.* at *5.

The conflict was elaborated more fully by another commentator two years later. Lipanovich, *Resolving the Circuit Split on Defense Witness Immunity*, 91 Tex. L. Rev. at 175. That analysis similarly recognized the "split between the circuits" on the standard for defense-witness immunity, with the Ninth Circuit applying a "more lenient" approach than the Second Circuit and other courts of appeals on both how relevant the desired defense-witness testimony must be and whether the defendant must show that the gov-

ernment's "*purpose* was to distort the fact-finding process" or could instead prevail by showing only "prosecutorial actions that had the *effect* of distortion." *Id.* at 179, 184 (emphases added); see *id.* at 185. The author documented the practical effect of the divergent standards, reporting that the Ninth Circuit had endorsed defendants' challenges to government denials of immunity in five cases, while neither the Second Circuit nor any of the other courts of appeals that apply a more stringent standard had ever done so. *Id.* at 178; *see Stewart*, 907 F.3d at 685 (explaining that the Second Circuit has never vacated a conviction under its standard). Given both the legal and practical significance of the circuits' disagreement, the author concluded that this "Court should resolve the circuit split on defense witness immunity." *Id.* at 195.[5]

Courts have likewise recognized the significance of the circuit conflict. A district court within the Tenth Circuit recently explained that "the Ninth Circuit has articulated its own use-immunity test," which "lessens the burden defendants carry" by focusing on "whether the United States' conduct had the *effect* of distorting the fact-finding process" rather than on "whether the United States intended to distort the fact-finding process." *Baca*, 447 F. Supp. 3d at 1224.

---

[5] At the time of the article, the Third Circuit also applied a more lenient standard that had some similarities to (but was not identical to) the Ninth Circuit's. *See* Lipanovich, *Resolving the Circuit Split on Defense Witness Immunity*, 91 Tex. L. Rev. at 180-181; *see also Government of Virgin Islands v. Smith*, 615 F.2d 964, 969-974 (3d Cir. 1980). The Third Circuit has subsequently adopted a position that generally tracks the Second Circuit's. *See United States v. Quinn*, 728 F.3d 243 (3d Cir. 2013) (en banc).

The district court explained that the conflict in standards was practically significant, and that—if the Tenth Circuit were to "decide[] to adopt the test that the Ninth Circuit has stated"—"the outcome [of cases] would be different." *Id.*; *accord, e.g.*, *People v. Nabong*, No. A132451, 2013 WL 2473041, at *15 (Cal. Ct. App. June 10, 2013) (describing "the more relaxed articulation of the test for" defense-witness immunity "announced by the federal Ninth Circuit Court of Appeals, in [*Straub*] and [*Westerdahl*]").

3. Few cases illustrate the practical significance of the circuit conflict as starkly as this one. As explained above, petitioner sought to present testimony from [redacted] that would have directly contradicted central aspects of the government's case. The government's theory was that petitioner and [redacted] had met and coordinated with each other as they each planned the murder. But [redacted] told the government—and would have told the jury if allowed to testify—that he had *never even met* petitioner at the time of the murder. See pp. 6-8, *supra*. If credited by the jury, that testimony would have powerfully undermined the prosecution's case against petitioner. Yet, despite having granted immunity for its own witnesses, the government refused to immunize [redacted]

The jury thus heard a one-sided presentation: the inculpatory testimony of the government's witnesses, but no rebuttal from the defense witness who could have directly undercut it. The significance of [redacted] absence was so conspicuous that the jury took the unusual step of *sending a note to the court asking to hear from him*. Pet. C.A. App. 236. But the court, deferring to the government's determination, declined to grant immunity. And, following the guilty verdict

and imposition of a life sentence, the Second Circuit affirmed based on the finding that the government lacked intent to distort the factfinding process. App., *infra*, 12a-13a. The court added that there was "sufficient support in the record for the district court's determination that the witness's testimony, even if somewhat exculpatory, would not materially alter the total mix of evidence before the jury." *Id.* at 13a.

This case would have been resolved differently in the Ninth Circuit. As explained above, the first prong of the Ninth Circuit's test for reviewing claims like petitioner's requires only that the defense-witness testimony in question "be relevant." *Straub*, 538 F.3d at 1163. [redacted] testimony readily satisfies that requirement, which the Ninth Circuit has "cautioned ... is minimal," given that it would have directly exculpated petitioner and contradicted the government's key witness. *Id.* (emphasis added); *see Westerdahl*, 945 F.2d at 1086. Petitioner would also meet the second prong of the Ninth Circuit's test, because the government "granted immunity to a government witness in order to obtain that witness's testimony" but "denied immunity to a defense witness"—[redacted]—"whose testimony ..., if believed, would make the government's key witness ... a perjurer." *Straub*, 538 F.3d at 1162. As in *Straub*, those decisions had "the effect of so distorting the fact-finding process that the defendant was denied his due process right to a fundamentally fair trial." *Id.*

There was also no apparent law-enforcement justification to deny immunity to [redacted]. [redacted] already had pleaded guilty both to dealing heroin and orchestrating the murder of Malcolm. The government had its conviction and took a killer off the street. Nor has

the government ever identified any other investigation of which [redacted] was a target or other misconduct of which it suspected him. The only law enforcement interest the government has ever asserted is that [redacted] testimony could have affected sentencing arguments the government might make. That argument misunderstands *Kastigar*, which ensures that granting limited-purpose use immunity under Section 6003 would not have meaningfully hampered the sentencing arguments the government could make. *See Kastigar*, 406 U.S. at 462 (upholding the statute's constitutionality because it "leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege"). And in any event, it is the slenderest of reeds on which to justify preventing someone whose liberty is on the line from calling a witness who could disprove the charges against him. The government's interest in making unfettered sentencing arguments regarding someone who has pleaded guilty to murder pales in comparison to petitioner's constitutional right to put on a defense. *Accord* C.A. Amicus Brief of New York Council of Defense Lawyers 3 ("[I]t was error for the district court not to compel the government to immunize [redacted] for his trial testimony.").

C. The Second Circuit's Position Is Incorrect

The Second Circuit's position not only conflicts with the Ninth Circuit's position, it conflicts with the Constitution. This Court has long and repeatedly protected a "criminal defendant's right to have 'a meaningful opportunity to present a complete defense.'" *Holmes*, 547 U.S. at 331 (quoting *Crane*, 476 U.S., at

690). In particular, the Court has stressed that a defendant's right "to call witnesses in [his] own behalf" is "essential to due process." *Chambers*, 410 U.S. at 294. A witness's constitutional protection against compelled self-incrimination is essential as well. But Section 6003 provides a mechanism to vindicate both rights—the defendant's right to present his defense, and the witness's protection against compelled self-incrimination. Requiring vacatur of convictions where the government refuses to exercise its immunity authority in the circumstances identified by the Ninth Circuit properly gives meaning to both constitutional protections. *See Straub*, 538 F.3d at 1160-1162.

The Second Circuit's position, by contrast, means that "the Fifth Amendment rights of a witness" essentially always "trump the" rights of the defendant on trial, "thereby undercutting the most basic of all criminal procedure rights—the right of an innocent defendant to mount a truthful defense." Amar & Lettow, *Fifth Amendment First Principles*, 93 Mich. L. Rev. at 861. "It is rare in criminal jurisprudence that a court is completely foreclosed from enforcing or protecting the constitutional rights of the accused." *State v. Belanger*, 210 P.3d 783, 795 (N.M. 2009) (rejecting the Second Circuit's position as "extreme" and adopting a more lenient rule as a matter of state law). Yet that is the impermissible result of the Second Circuit's position here. *Cf. Earl v. United States*, 361 F.2d 531, 534 n.1 (D.C. Cir. 1966) (Burger, J.) (explaining that allowing the government to "secure[] testimony from one eyewitness by granting him immunity while declining to seek an immunity grant for" a witness essential to the defense would "vividly dramatize an

argument on behalf of [the defendant] that the statute as applied denied him due process").

Critically, granting immunity to a defense witness does not require the government to leave the witness's account unrebutted; the government can vigorously cross-examine the witness and expose flaws for the jury to evaluate. *See United States v. Mackey*, 117 F.3d 24, 28 (1st Cir. 1997) ("[O]ne might think that it was a matter for the jury, not the prosecutor, to decide whether testimony seemingly helpful to the defendant was actually false."). If the defense witness lies on the stand, moreover, the government can prosecute that witness for perjury, which is expressly carved out from the scope of statutory use immunity. 18 U.S.C. § 6002(3); see p. 12 n.2, *supra*. And nothing requires the government to allow a defense witness to testify if it determines the costs are too high; under the Ninth Circuit's rule, the government can continue to prosecute the defendant without using the witnesses whose testimony would be contradicted by the defense witness. *Straub*, 538 F.3d at 1161. That range of "options give the prosecution several choices and provide some mitigation for the intrusion on prosecutorial discretion that compelled use immunity causes." *Id.*

The Second Circuit's position ultimately comes down to the proposition that an absence of government intent to distort the factfinding process means that no due-process violation has occurred. But as Judge Bybee persuasively explained for the Ninth Circuit in *Straub*, "when dealing with due process violations in the context of the fundamental fairness of the trial, th[is] Court has been more concerned with protecting the integrity of trial and the defendant's right

to mount a defense, irrespective of any government intent to interfere with these rights. *Straub*, 538 F.3d at 1160. In *Brady*, for example, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process ... *irrespective of the good faith or bad faith of the prosecution*." 373 U.S. at 87 (emphasis added); *accord, e.g.*, *Doggett v. United States*, 505 U.S. 647, 656-57 (1992) (holding that the government may violate the defendant's Sixth Amendment speedy trial right even if it had no intent to harm the accused's defense). Simply put, the "Due Process Clause addresses the defendant's right to a fair trial, not just whether the government intended to deny the defendant his rights." *Straub*, 538 F.3d at 1160; *cf. United States v. Agurs*, 427 U.S. 97, 110 (1976) ("If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor.").

This Court's decision in *Washington v. Texas* is illustrative. There, the defendant was convicted of murder in connection with the fatal shooting of his ex-girlfriend's new boyfriend. The defendant sought to present the testimony of a co-defendant, who had already been convicted of firing the fatal shot and who would have testified that the defendant sought to prevent the shooting. 388 U.S. at 15-16. Although indisputably relevant, material, and "vital to the defense," *id.* at 16, the testimony was barred under a state rule that prevented co-participants in the same crime from testifying on behalf of one another. This Court struck down the rule as an impermissible infringement of "the right to present the defendant's version of the facts as well as the prosecution's to the jury so it may

decide where the truth lies"—a right that is "a fundamental element of due process of law." *Id.* at 19, 23. In pointing out the arbitrary nature of the rule, this Court underscored that an accused accomplice could be called by the prosecution to testify against the defendant, despite the fact that an accomplice "often has a greater interest in lying in favor of the prosecution rather than against it." *Id.* at 22.

The Second Circuit's position allowed the government in this case to subject petitioner to the same type of injustice. Like the defendant in *Washington*, petitioner was prevented from introducing powerfully exculpatory testimony from a participant in the murder that, if believed by the jury, likely would have resulted in his acquittal. Yet the prosecution, through its selective use of immunity, was able to present its version of the facts through the testimony of other participants in the crime. Use of government power in that manner, regardless of the prosecutor's intent, undermines a central tenet of our criminal justice system—that "the truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court." *Id.*

D. This Case Is An Ideal Vehicle For Resolving The Circuit Conflict

This case presents an ideal vehicle for the Court to resolve the entrenched and recognized circuit conflict over when the Due Process Clause requires vacatur of a conviction based on the government's failure to immunize a defense witness. As explained above, this

case squarely implicates the conflict, because the Ninth Circuit would have vacated petitioner's conviction if his case had arisen within its jurisdiction. There can be no dispute that petitioner clearly preserved his argument that the Due Process Clause required vacatur. *See* Pet. C.A. Br. 26-33; *id.* at 30 (citing the Ninth Circuit's decision in *Straub*). The Second Circuit directly resolved that contention based on its binding circuit precedent. App., *infra*, 12a-13a. No jurisdictional or other threshold barriers prevent the Court from cleanly deciding the question. And the stakes could not be higher: if this Court were to adopt the Ninth Circuit's position, petitioner's conviction and life sentence would be vacated, and he would be entitled to either acquittal or a retrial without the imbalance of witness immunity that the government obtained below. Otherwise, he will spend the rest of his life in prison.

This Court has frequently granted cases to resolve conflicts among the appellate courts on important questions of constitutional criminal procedure. *See, e.g.*, *Caniglia v. Strom*, 141 S. Ct. 1596 (2021) (Fourth Amendment); *Carpenter v. United States*, 138 S. Ct. 2206 (2018) (same); *Turner v. United States*, 137 S. Ct. 1885 (2017) (Fifth Amendment Due Process Clause); *Beckles v. United States*, 580 U.S. 256 (2017) (same); *United States v. Bryant*, 579 U.S. 140 (2016) (Sixth Amendment); *Kaley v. United States*, 571 U.S. 320 (2014) (Fifth Amendment Due Process Clause and Sixth Amendment). It should do so again here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARC L. GREENWALD
DANIEL R. KOFFMAN
QUINN EMANUEL URQUHART & SULLIVAN, LLP
51 Madison Avenue
22nd Floor
New York, NY 10010

CHRISTOPHER G. MICHEL
QUINN EMANUEL URQUHART & SULLIVAN, LLP
1300 I. Street
Suite 900
Washington, DC 20005

ANDREW H. SCHAPIRO
Counsel of Record
QUINN EMANUEL URQUHART & SULLIVAN, LLP
191 N. Wacker Drive
Suite 2700
Chicago, IL 60606
(312) 705-7403
andrewschapiro@quinnemanuel.com

Counsel for Petitioner

January 13, 2023