No. 22-785

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the government violated petitioner's due-process rights by declining to immunize a potential defense witness.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is not published in the Federal Reporter but is available at 2022 WL 3640449.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 2022. A petition for rehearing was denied on October 12, 2022 (Pet. App. 33a-34a). On January 11, 2023, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including January 13, 2023, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner

was convicted of murder through the use of a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(j), and murder in furtherance of a criminal enterprise, in violation of 21 U.S.C. 848(e)(1)(A). Judgment 1. He was sentenced to life imprisonment. Judgment 2. The court of appeals affirmed. Pet. App. 1a-21a.

1. Petitioner was a gang leader who operated a crack-cocaine business in the Bronx. Gov't C.A. Br. 2. A rival drug dealer, Shaquille Malcolm, began selling crack cocaine in petitioner's territory. *Id.* at 4. In response, petitioner ordered two of his associates to kill Malcolm. *Ibid.* Petitioner provided them with Malcolm's location—enabling them to follow Malcolm to his apartment building and sneak inside—and then arranged for a drug customer to lure Malcolm downstairs. *Id.* at 5. When Malcolm appeared in the lobby expecting to make a sale, the associates ambushed him, shot him, and killed him. *Ibid.*

In 2021, a federal grand jury returned a superseding indictment charging petitioner with murder through the use of a firearm during and in relation to a drug-trafficking crime, in violation of 18 U.S.C. 924(j) and 2; murder in furtherance of a criminal enterprise, in violation of 18 U.S.C. 2 and 21 U.S.C. 848(e)(1)(A); and conspiring to commit murder for hire, in violation of 18 U.S.C. 1958. See Pet. C.A. App. A19-A22. Petitioner filed a motion to compel the government to grant immunity to a witness whom petitioner believed would provide testimony favorable to the defense, which the district court denied.[1] See Pet. App. 22a-32a.

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[1] The witness's name and statements are sealed. See Pet. App. 13a n.3. The government's sealed brief in the court of appeals (at

The district court noted that the witness had proffered statements to the government "in search of a deal," but the government "ultimately did not offer him a cooperation agreement." Pet. App. 23a. The court acknowledged that, "if one put on blinders and looked only at" particular proffered statements, "those statements would have been exculpatory." *Id.* at 24a. In particular, the witness "told the government that he had a dispute" with Malcolm, and "[o]ne might infer from that assertion that" the witness had Malcolm murdered "in a revenge plot unrelated to the turf dispute" involving petitioner. *Ibid.* The court observed, however, that there was also "a lot of inculpatory evidence in the proffer notes." *Id.* at 25a.

In particular, the notes documented that the witness's proffer included his recollection of petitioner's statements that "Malcolm should not have been selling crack" in petitioner's territory, that petitioner "was upset because he was losing customers to Malcolm," and that petitioner had told the associates who had carried out the killing "where Malcolm would be on the day of the murder." Pet. App. 25a-26a. The district court observed that the witness's testimony would thus be "very damaging" to petitioner because it helped "establish motive for [petitioner] to order the hit." *Id.* at 26a. And it therefore found that, "[n]et-net, the inculpatory information in the proffer notes outweigh[ed] significantly any exculpatory information." *Ibid.*

The district court also found "very good reasons to believe that [the witness] lied to the government at least part of the time during the proffers." Pet. App. 26a. In the proffer sessions, the witness had self-interestedly

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16-19) sets forth the pertinent facts in full; this brief recounts only the facts in the public record.

"minimize[ed] his own culpability" and "perhaps minimized [petitioner's] role" as well. *Id.* at 27a. The witness also had admitted to another person that he had botched his effort to obtain a cooperation agreement "by lying." *Id.* at 28a. The court accordingly observed that that, had the witness "been immunized," his "admissions of lies * * * would have made him hash as a witness." *Id.* at 29a. "He would have been destroyed on cross-examination, or at least so badly damaged," the court explained, "that there's no reasonable way to view his potential testimony * * * as significantly exculpatory." *Ibid.*

The district court was therefore not "remotely satisfied" that, if the witness had "been immunized," he "would have given exculpatory testimony in any significant way." Pet. App. 28a. And the court also rejected the contention that the "prosecutors used immunity in a discriminatory fashion" by granting immunity to a prosecution witness but not to petitioner's witness. *Id.* at 29a; see *id.* at 30a.

The government dismissed the conspiracy count before trial, and the jury found petitioner guilty on both remaining counts. Judgment 1; see Pet. C.A. App. A17. The district court sentenced petitioner to life imprisonment. Judgment 2.

2. The court of appeals affirmed in an unpublished opinion. Pet. App. 1a-21a.

The court of appeals rejected the contention that the district court denied petitioner due process by declining to compel the government to immunize the witness. Pet. App. 12a-14a. The court observed that the government has "no general obligation to grant use immunity to witnesses the defense designates as potentially helpful to its cause but who will invoke the Fifth Amendment

if not immunized." *Id.* at 12a (citation omitted). The court accepted, however, that in "extraordinary circumstances, due process may require that the government confer use immunity on a witness for the defendant." *Ibid.* (citation omitted). And it explained that, under its precedents, a defendant could show such extraordinary circumstances where (1) 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" and (2) "the evidence to be given by an immunized witness will be material, exculpatory and not cumulative and is not obtainable from any other source." *Ibid.* (citation omitted).

The court of appeals explained that petitioner had made neither showing here and accordingly found no abuse of discretion by the district court. Pet. App. 13a. The court of appeals not only observed that petitioner had "fail[ed] to demonstrate that the government was using immunity in a discriminatory manner or to gain a tactical advantage," but also found "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." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 10-30) that the government denied him due process by refusing to immunize the allegedly favorable witness testimony. The court of appeals correctly rejected that contention, and petitioner overstates the practical significance of the difference between the Second and Ninth Circuits' approaches. Indeed, his own claim would have failed in either circuit, making this case a poor vehicle for reviewing the question

presented. This Court has recently and repeatedly denied petitions for writs of certiorari concerning the denial of immunity to defense witnesses.[2] It should follow the same course here.

1. The Fifth Amendment's Self-Incrimination Clause guarantees that "[n]o person * * * shall be compelled in any criminal case to be a witness against himself." U.S. Const. Amend. V. But the government may overcome a witness's privilege against self-incrimination by immunizing him from the use of the compelled testimony and any evidence derived from that testimony. See *Kastigar* v. *United States*, 406 U.S. 441, 453 (1972). A court, however, has no authority to compel the government to grant such immunity. See *United States* v. *Doe*, 465 U.S. 605, 616 (1984); *Pillsbury Co.* v. *Conboy*, 459 U.S. 248, 261 (1983).

The decision to grant use immunity "necessarily involves a balancing of the Government's interest in obtaining information against the risk that immunity will frustrate the Government's attempts to prosecute the subject of the investigation." *Doe*, 465 U.S. at 616. Once a witness receives immunity, a prosecution of the witness must satisfy "the heavy burden of proving that all

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[2] See, *e.g.*, *Aviles* v. *United States*, 139 S. Ct. 1619 (2019) (No. 18-772); *Davis* v. *United States*, 138 S. Ct. 65 (2017) (No. 16-1190); *Viloski* v. *United States*, 575 U.S. 935 (2015) (No. 14-472); *Wilkes* v. *United States*, 574 U.S. 1049 (2014) (No. 14-5591); *Quinn* v. *United States*, 572 U.S. 1063 (2014) (No. 13-7399); *Brooks* v. *United States*, 586 U.S. 1085 (2013) (No. 12-218); *Walton* v. *United States*, 568 U.S. 1085 (2013) (No. 12-5847); *Phillips* v. *United States*, 568 U.S. 1085 (2013) (No. 12-5812); *Singh* v. *New York*, 555 U.S. 1011 (2008) (No. 08-165); *Ebbers* v. *United States*, 549 U.S. 1274 (2007) (No. 06-590); *DiMartini* v. *United States*, 524 U.S. 916 (1998) (No. 97-1809); *Wilson* v. *United States*, 510 U.S. 1109 (1994) (No. 93-607); *Whittington* v. *United States*, 479 U.S. 882 (1986) (No. 85-1974).

of the evidence it proposes to use was derived from legitimate independent sources" rather than from the immunized statements. *Kastigar*, 406 U.S. at 461-462. Article II's Vesting Clause and Take Care Clause accordingly place the authority to weigh the government's competing prosecutorial interests—like the authority to make other prosecutorial decisions—in the Executive Branch. See U.S. Const. Art. II, §§ 1, 3. And the federal use-immunity statute grants the Department of Justice "exclusive authority" to confer immunity. *Conboy*, 459 U.S. at 254; see 18 U.S.C. 6003.

Contrary to petitioner's suggestion (Pet. 25-29), the Due Process and Compulsory Process Clauses of the Fifth and Sixth Amendment do not override that allocation of authority. Those constitutional provisions guarantee a defendant a right "to present a complete defense," *Holmes* v. *South Carolina*, 547 U.S. 319, 324 (2006) (citation omitted), but that right is not absolute. "The accused does not have an unfettered right to offer testimony that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." *Taylor* v. *Illinois*, 484 U.S. 400, 410 (1988). And the Self-Incrimination Clause and the use-immunity statute are both "standard rules," *ibid.*, relating to the admission of evidence at trial. *Ibid.*

A regime in which criminal defendants could force the government to immunize defense witnesses would create not only separation-of-powers problems, but practical ones as well. For example, it would encourage "cooperative perjury" among defendants and their witnesses. *United States* v. *Turkish*, 623 F.2d 769, 775 (2d Cir. 1980), cert. denied, 449 U.S. 1077 (1981). "Co-defendants could secure use immunity for each other, and each immunized witness could exonerate his co-

defendant at a separate trial by falsely accepting sole responsibility for the crime, secure in the knowledge that his admission could not be used at his own trial for the substantive offense." *Ibid.* "A person suspected of [a] crime should not be empowered to give his confederates an immunity bath." *In re Kilgo*, 484 F.2d 1215, 1222 (4th Cir. 1973).

2. The courts of appeals uniformly agree that, as a general matter, a court has no authority to grant (or to compel the government to grant) use immunity to a witness whom the defendant would like to call to the stand. See *United States* v. *Castro*, 129 F.3d 226, 232 (1st Cir. 1997), cert. denied, 523 U.S. 1100 (1998); *Turkish*, 623 F.2d at 772-773 (2d Cir.); *United States* v. *Quinn*, 728 F.3d 243, 260-261 (3d Cir. 2013) (en banc), cert. denied, 572 U.S. 1063 (2014); *United States* v. *Moussaoui*, 382 F.3d 453, 466-467 (4th Cir. 2004), cert. denied, 544 U.S. 931 (2005); *United States* v. *Brooks*, 681 F.3d 678, 711 (5th Cir. 2012), cert. denied, 568 U.S. 1085 (2013); *United States* v. *Pennell*, 737 F.2d 521, 527-528 (6th Cir. 1984), cert. denied, 469 U.S. 1158 (1985); *United States* v. *Herrera-Medina*, 853 F.2d 564, 568 (7th Cir. 1988); *United States* v. *Capozzi*, 883 F.2d 608, 613-614 (8th Cir. 1989), cert. denied, 495 U.S. 918 (1990); *United States* v. *Alessio*, 528 F.2d 1079, 1081-1082 (9th Cir.), cert. denied, 426 U.S. 948 (1976); *United States* v. *Serrano*, 406 F.3d 1208, 1217 (10th Cir.), cert. denied, 546 U.S. 913 (2005); *United States* v. *Cuthel*, 903 F.2d 1381, 1384 (11th Cir. 1990); *United States* v. *Perkins*, 138 F.3d 421, 424 (D.C. Cir.), cert. denied, 523 U.S. 1143 (1998).

The courts of appeals also agree that a court may order the government to choose between granting immunity and taking some other act (such as dismissing the charges), if ever, only in narrow circumstances.

Specifically, most courts to consider the issue have concluded that a district court may issue such an order only to provide a remedy for certain forms of prosecutorial misconduct. See, *e.g.*, *United States* v. *Angiulo*, 897 F.2d 1169, 1191-1192 (1st Cir.), cert. denied, 498 U.S. 845 (1990); *United States* v. *Ebbers*, 458 F.3d 110, 118-120 (2d Cir. 2006), cert. denied, 549 U.S. 1274 (2007); *Quinn*, 728 F.3d at 247-248, 261 (3d Cir.); *United States* v. *Washington*, 398 F.3d 306, 310 (4th Cir.), cert. denied, 545 U.S. 1109 (2005); *Brooks*, 681 F.3d at 711 (5th Cir.); *United States* v. *Emuegbunam*, 268 F.3d 377, 401 & n.5 (6th Cir. 2001), cert. denied, 535 U.S. 977 (2002); *United States* v. *Taylor*, 728 F.2d 930, 935 (7th Cir. 1984); *United States* v. *Blanche*, 149 F.3d 763, 768-769 (8th Cir. 1998); *Serrano*, 406 F.3d at 1218 n.2 (10th Cir.); *United States* v. *Sawyer*, 799 F.2d 1494, 1506-1507 (11th Cir. 1986) (per curiam), cert. denied, 479 U.S. 1069 (1987).

In *United States* v. *Straub*, 538 F.3d 1147 (2008), the Ninth Circuit concluded that, even without any misconduct by the prosecution, a grant of immunity may still be required in extraordinary circumstances. Specifically, the Ninth Circuit stated that a "court's decision to compel use immunity is *not* a sanction for prosecutorial misconduct"; rather, "it is a vindication of the defendant's Fifth Amendment due process right to a trial in which the fact-finding process has not been distorted." *Id.* at 1161 (emphasis added). At the same time, however, it recognized that the defendant does not have "a general right" to insist on use immunity for his witnesses and that courts should be "extremely hesitant to intrude on the Executive's discretion." *Id.* at 1166.

The Ninth Circuit accordingly emphasized that, even in its view, judicial intervention would be appropriate

only in "rare" and "exceptional" cases. *Straub*, 538 F.3d at 1162, 1166. In particular, it cautioned that a court should compel the government to choose between granting use immunity and dismissing the charges only "in exceptional cases" when "the fact-finding process [is] distorted through the prosecution's decisions to grant immunity to its own witness while denying immunity to a witness with directly contradictory testimony." *Id.* at 1166. And it found a due-process violation in *Straub* only because of the unusual facts of that case.

In *Straub*, the government had denied immunity to the "only defense witness listed," while immunizing (or granted other benefits to) 12 of the 13 prosecution witnesses. 538 F.3d at 1164. In addition, the defense witness's testimony, if believed, would have "ma[de] the government's key witness both a perjurer and possibly the actual perpetrator of the crime." *Id.* at 1162. And the government had expressly disclaimed any "interest in prosecuting [the defense] witness." *Id.* at 1164. Indeed, the defendant in *Straub* had never made a "direct, formal request to the prosecutor" that the witness be immunized, but had instead gone straight to the district court. See *id.* at 1164 n.9.

The Ninth Circuit's grant of relief on the unique facts in *Straub* does not suggest any need for this Court's intervention. In the almost 15 years since *Straub*, the Ninth Circuit has repeatedly rejected claims that the government has denied due process by refusing to immunize defense witnesses. Each time, the court found that the case did not involve the types of extraordinary circumstances that had led it to find a due-process violation in *Straub*. See *United States* v. *Loza*, No. 20-50062, 2022 WL 3210700, at *2 (Aug. 9, 2022); *United States* v. *Kuzmenko*, 671 Fed. Appx. 555, 556

(2016); *United States* v. *Lopez-Banuelos*, 667 Fed. Appx. 959, 960 (2016); *United States* v. *Miller*, 546 Fed. Appx. 709, 710 (2013). It is thus far from clear when (if ever) the Ninth Circuit might aberrantly grant such a claim.

3. This case would in all events be a poor vehicle for resolving disagreement among the courts of appeals. Even if *Straub* allows for the possibility of relief in some exceptional cases, it would not encompass relief in this case.

The district court in this case found that statements from the defense witness's proffer sessions would be exculpatory only "if one put on blinders and looked only at those particular potential statements." Pet. App. 24a. The court explained that the proffer notes also contained "a lot of inculpatory evidence," including evidence that "would have been very damaging" for petitioner because it would have "help[ed] establish motive for [petitioner] to order the hit." *Id.* at 25a-26a. On the whole, the court found that "the inculpatory information in the proffer notes outweigh[ed] significantly any exculpatory information." *Id.* at 26a. Nothing in *Straub* suggests that the Ninth Circuit would find a due-process violation where the potential witness's testimony could have done the defendant more harm than good.

In addition, the district court here found "very good reasons to believe that [petitioner's witness] lied to the government at least part of the time during the proffers." Pet. App. 26a; see *id.* at 29a (discussing the "evidence of lies"). Indeed, the witness specifically admitted to another person that he had botched "his effort to cooperate * * * by lying." *Id.* at 28a; see *id.* at 29a (discussing the "admissions of lies"). Whatever the Due Process Clause may require, it certainly does not

require the government to grant immunity that would facilitate the introduction of perjured testimony. See *United States* v. *Hooks*, 848 F.2d 785, 802 (7th Cir. 1988) ("It is well within the discretion of a prosecutor * * * to decline immunity to a witness who could be charged for false statement and perjury."). Nothing in *Straub* suggests that the Ninth Circuit would hold otherwise.

The government's immunity determinations in this case in this case did not distort "the fact-finding process" by granting immunity "to its own witness," while denying it to "a witness with directly contradictory testimony." *Straub*, 538 F.3d at 1166; Pet. App. 13a. The government granted use immunity to only one witness, Joel Riera. See Pet. 7; Gov't C.A. Br. 23. Riera did not inculpate petitioner in the murder at all; instead, Riera's testimony related to petitioner's codefendant. See Gov't C.A. Br. 23. Nor does petitioner contend that his witness, if granted immunity, would have "directly contradict[ed]" Riera's testimony. *Straub*, 538 F.3d at 1166. And this is not a case in which the government has expressly disclaimed any "interest in prosecuting [the defense] witness." *Id.* at 1164. The government *did* prosecute the defense witness at issue. Pet. App. 13a. Its decision not to grant that witness immunity rested on the "legitimate law enforcement concern" that such a grant could interfere with the then-ongoing sentencing proceedings in that other prosecution. *Ibid.*

The circumstances of this case thus both illustrate the questionable practical significance of the Ninth Circuit's decision in *Straub* and highlight the unsoundness of granting certiorari in this particular case. This Court does not grant a writ of certiorari to "decide abstract questions of law * * * which, if decided either way, affect no right" of the parties. *Supervisors* v. *Stanley*, 105

U.S. 305, 311 (1882); see *The Monrosa* v. *Carbon Black Exp., Inc.*, 359 U.S. 180, 184 (1959) ("While this Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial."). It should not do so here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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