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

REPLY BRIEF FOR PETITIONER

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On trial for murder, petitioner sought to call a witness whose testimony would directly support his factual innocence.* But the witness invoked his Fifth Amendment right not to testify. Petitioner asked the government to grant the witness use immunity under 18 U.S.C. § 6003, which would allow petitioner to present his defense while leaving the government and the witness "in substantially the same position as if the witness had claimed the Fifth Amendment privilege." *Kastigar v. United States*, 406 U.S. 441, 462 (1972). But the government refused, even though it had already obtained a guilty plea from the witness based on the information that would be covered by his testimony—and even though it had immunized many of its own witnesses. The witness's absence at trial was so conspicuous that the jury sent a note requesting to hear his testimony. Yet the government stood firm, the jury heard only one side of the story, and petitioner was convicted and sentenced to life in prison.

The federal courts of appeals are squarely divided on when such a denial of defense-witness immunity violates a defendant's due process rights. In the Second Circuit, where petitioner was tried, a violation occurs only if the government denied immunity with the *intent* to prevent a fair trial. *United States v. Ebbers*, 458 F.3d 110, 119 (2006). In the Ninth Circuit, by contrast, it is enough that the *effect* of the government's denial was to prevent a fair trial. *United States v. Straub*, 538 F.3d 1147, 1162 (2008).

The government concedes the existence of that circuit conflict, but contends that it is not implicated by

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* Detail about the witness is available in the sealed petition. To facilitate a public filing, this brief uses general terms.

this case. That is not true. The proposed witness's testimony was "relevant" testimony that "directly contradicted" an immunized government witness, and the government refused immunity "with the effect of" denying petitioner a fair trial. *Straub*, 538 F.3d at 1162. As informed amici and commentators agree, this case would have come out differently in the Ninth Circuit. NACDL Br. 14; William F. Johnson, *Defense Witness Immunity: Time for Supreme Court To Weigh In*, New York L.J., Mar. 1, 2023, bit.ly/3LGedAo.

The Second Circuit's position is not only contrary to the Ninth Circuit's; it is wrong. The government declines to defend the Second Circuit's intent-based rule, instead advancing a sweeping theory under which due process poses no constraint. That alarming approach further heightens the need for this Court's intervention. While the Court has denied prior petitions presenting similar questions, those petitions had defects not present here. This is a clean, compelling vehicle to resolve an important and recurring question of federal criminal procedure. And the stakes could hardly be higher: without this Court's review, petitioner will spend the rest of his life in prison.

A. Federal Courts Of Appeals Are Squarely Divided On The Question Presented

The government concedes that the circuits are split on the question presented. *See* Br. in Opp. 5 (acknowledging the "difference between the Second and Ninth Circuits' approaches"); *id.* at 11 (noting "disagreement among the courts of appeals"). It nevertheless seeks to minimize the "practical significance" of that conflict, asserting that courts agree defense-witness-immunity claims should be granted only "in narrow

circumstances." *Id.* at 5, 8. As a "practical" matter, however, the Second Circuit treats "narrow circumstances," *id.*, to mean *no* circumstances; it has *never* vacated a conviction based on "failure to immunize." *United States v. Stewart*, 907 F.3d 677, 685 (2d Cir. 2018) (citation omitted). And contrary to the government's suggestion, the Ninth Circuit does not grant defense-witness-immunity claims only under the "unique facts in *Straub*." Br. in Opp. 10. Courts in that circuit have granted such claims on numerous other occasions. *See* Pet. 22 (citing study); *United States v. Westerdahl*, 945 F.2d 1083, 1087 (9th Cir. 1991) (vacating conviction before *Straub* based on similar reasoning).

A vivid example of the split's significance came in a prosecution of former Broadcom executives in the Central District of California. Pet. 21. The court there expressly *declined* to find that the government had "intentionally distorted the fact-finding process"—as would be required to sustain a defense-witness-immunity claim in the Second Circuit—yet granted the defense motion under the Ninth Circuit's rule. *Id.* (citation omitted). By the same token, courts that follow the Second Circuit's rule have denied defense-witness-immunity claims in cases closely resembling *Straub*. *See, e.g.*, *United States v. Davidson*, No. 10-cr-201, 2010 WL 3521726, at *4 (S.D. Tex. Sept. 8, 2010) (denying claim where the prosecution "immunized approximately ten government witnesses while refusing to immunize one defense witness"). The "practical significance" of the circuits' divergent standards thus is not "questionable." Br. in Opp. 12. The circuit conflict has "a profound and recurring impact on criminal cases." NACDL Br. 13.

B. This Case Presents A Compelling Vehicle For Resolving The Question Presented

The government contends that the Ninth Circuit's rule "would not encompass relief in this case," Br. in Opp. 11, but that is incorrect.

1. As pertinent here, the Ninth Circuit's rule has two prongs: (1) the prospective witness's testimony must be "relevant," and (2) the prosecution must "grant immunity to a government witness" while denying 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.

This case satisfies both prongs. Pet. 24-25. The proposed witness's testimony addressing petitioner's lack of a role in planning the murder was plainly relevant; the jury itself asked to hear it. *Id.* The testimony also directly contradicted the testimony of the government's lead witness, who testified pursuant to a cooperation agreement that petitioner and the witness met together to plan the murder. *Id.* And given the centrality of that testimony—along with the relative dearth of other evidence against petitioner and the fact that the government had already secured the proposed witness's guilty plea—the effect of denying immunity was to deny petitioner a fair trial. *Id.*

2. The government principally contends that the proposed witness's testimony was not exculpatory. Br. in Opp. 11-12. But the Ninth Circuit, unlike the

Second Circuit, does not require an express judicial finding that the proposed testimony will be "exculpatory." *Straub*, 538 F.3d at 1157 (citation omitted). The Ninth Circuit requires only that the testimony be "relevant," which properly recognizes that inferences from a witness's testimony regarding a defendant's guilt "are matters for counsel to probe and the jury to decide." *Id.* at 1157, 1163.

The government's claim that the testimony would not have been exculpatory is also flat wrong. The government relies heavily on a district court transcript, Br. in Opp. 11, but the court there was "ruling on the *missing witness charge*"—not the "compelled immunity" question, which at best had "some commonality," Pet. App. 23a (emphasis added). To the extent the court addressed the testimony's impact on petitioner, the court recognized that it would be "exculpatory" and "help[ful]" in multiple respects. *Id.* at 24a-25a. Most of the rest of the court's discussion pertained to the consequences of the testimony for a different defendant—*not petitioner*. *E.g.*, *id.* at 25a (discussing "Hopkins"). And the "damaging" aspects for petitioner—*e.g.*, that he dealt drugs in the same area as the victim, *id.* at 26a—were cumulative of points petitioner's counsel conceded, *e.g.*, Pet. C.A. App. 100.

The government suggests that the proposed witness lied in some parts of his proffer. Br. in Opp. 11-12. If so, the government could have made that point to the jury—the "lie detector" in our trial system. *United States v. Scheffer*, 523 U.S. 303, 313 (1998) (citation omitted). But it was not for the prosecutor or court to unilaterally pronounce that the testimony petitioner sought with his liberty on the line "would have done [him] more harm than good." Br. in Opp. 11.

The government separately contends that the Ninth Circuit's standard would not be satisfied because the only immunized prosecution witness was Joel Riera (to whom the government "granted use immunity"), and the proposed witness's testimony would not have "directly contradicted" Riera's. Br. in Opp. 12. But the Ninth Circuit's "cases make clear that government witnesses who are *granted favorable plea deals in return for their testimony* are encompassed by *Straub*'s use of the term 'immunized.'" *United States v. Wilkes*, 744 F.3d 1101, 1105 n.1 (9th Cir. 2014) (emphasis added). One of the many government witnesses granted a favorable plea deal in return for his testimony in this case was Melendez—the prosecution's principal cooperator. Pet. App. 4a n.1; Pet. C.A. App. 102, 438-44. The proposed witness's testimony would have directly contradicted Melendez's by (among other things) stating that the witness had *never met* petitioner at the time of the murder, despite Melendez's description of multiple meetings in which petitioner and the witness purportedly planned the crime. Pet. 6; Pet. C.A. App. 153-54, 177-78, 182.

Finally, the government contends that denying petitioner's immunity request did not "distort the fact-finding process," because "this is not a case in which the government has expressly disclaimed any 'interest in prosecuting'" the proposed witness. Br. in Opp. 12 (quoting *Straub*, 538 F.3d at 1164). But the Ninth Circuit has never suggested that defense-witness-immunity claims can be granted *only* in that circumstance. The government here *had already secured the proposed witness's guilty plea* by the time of petitioner's trial. *See* Pet. 24-25. Allowing the proposed witness to testify therefore would not have frustrated

the government's interest in prosecuting him any more than in *Straub*. *Id.*

The government's only response is that granting immunity "could interfere with the then-ongoing sentencing proceedings in" the proposed witness's case. Br. in Opp. 12. But granting use immunity does not affect the government's ability to rely on "evidence from legitimate independent sources," *Kastigar*, 406 U.S. at 460, which here included the proposed witness's guilty plea. Of course, the government could not have used at sentencing *new* information that it learned *only* from the proposed witness's trial testimony, but that limitation would not leave the government any *worse* off; after all, without the immunity grant, the proposed witness did not testify at all. *See id.* at 462. In any event, the proposed witness's sentencing is now complete, so granting him immunity to testify at a new trial on remand would not undermine any prosecutorial interests.

In sum, there can be no legitimate dispute that the Ninth Circuit would have vacated petitioner's conviction. But because petitioner was tried within the Second Circuit, he now faces a life sentence.

C. The Second Circuit's Decision Is Wrong

The decision below not only squarely implicates the circuit conflict; it is wrong.

1. "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes v. South Carolina*, 547 U.S.

319, 324 (2006) (citation omitted). That guarantee includes the right of "an accused to present witnesses in his own defense." *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973). The Second Circuit's position is that the government violates that right *only* when it *intends* to do so. *Ebbers*, 458 F.3d at 118. But as explained in the petition and Judge Bybee's opinion for the unanimous Ninth Circuit in *Straub*, that position has no grounding in the constitutional text or this Court's decisions interpreting trial rights. Pet. 27-29. In some of its leading decisions, this Court has found due-process violations "irrespective of the good faith or bad faith of the prosecution." *Brady v. Maryland*, 373 U.S. 83, 87 (1963). In short, 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.

2. The government neither refutes that reasoning nor defends the Second Circuit's rule. The government instead states that "Article II's Vesting Clause and Take Care Clause … place the authority to weigh the government's competing prosecutorial interests" in determining whether to grant immunity "in the Executive Branch," and "the Due Process and Compulsory Process Clauses of the Fifth and Sixth Amendment do not override that allocation of authority." Br. in Opp. 7.

To the extent the government is claiming power to deny immunity without *any* due-process limitation, that is startling. As the government acknowledges, virtually all courts—including the Second Circuit—have recognized at least theoretical due-process "limits on the government's use of immunity." *Ebbers*, 458

F.3d at 119; *see* Br. in Opp. 8. The government's Article II authority to make decisions about witness immunity does not free it from its obligation to abide by other constitutional provisions (*e.g.*, due process) any more than its Article II authority to make charging decisions allows it to contravene other constitutional provisions. Prosecutors have substantial discretion, but that "discretion is 'subject to constitutional constraints.'" *United States v. Armstrong*, 517 U.S. 456, 464 (1996) (citation omitted).

Regardless, the government's objections fail on their own terms. Neither petitioner nor the Ninth Circuit endorses a "regime in which criminal defendants could force the government to immunize defense witnesses." Br. in Opp. 7. The result of vacating petitioner's conviction would be a remand for further proceedings, at which the government could *either* (1) retry petitioner while allowing the proposed witness to testify with use immunity, *or* (2) retry petitioner without immunizing the proposed witness but also without using contradictory testimony from its own immunized witnesses (*e.g.*, Melendez), *or* (3) if it determines that its interest in retrying petitioner is not strong enough to accept either of those alternatives, dismiss the prosecution. Pet. 27; *Straub*, 538 F.3d at 1161. Under no circumstances would the government have to immunize any witness against its will. The "separation-of-powers problems" that the government invokes, Br. in Opp. 7, are illusory.

The government's "practical" concerns are likewise overstated. Br. in Opp. 7. The government's parade of horribles hypothesizes a fanciful scheme in which each of multiple co-defendants attempts to "exonerate

his co-defendant 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." *Id.* at 7-8 (citation omitted). If a real-world defendant contemplated such an endeavor, multiple roadblocks would stand in the way. The use-immunity statute permits prosecution for perjury by an immunized witness, 18 U.S.C. § 6002(3), so anyone attempting such a scheme would risk new legal jeopardy. And if that were not enough, the government could cross-examine the witness, impeach his testimony with contradictory evidence, and expose his motives to lie. Such "adversarial testing 'beats and bolts out the Truth,'" and greatly reduces the prospect that any jury will be fooled. *Crawford v. Washington*, 541 U.S. 36, 61-62 (2004) (citation omitted).

Of course, for all the government's discussion of "cooperative perjury" and "immunity bath[s]," Br. in Opp. 7-8 (citations omitted), there remains the possibility that a defense witness will testify honestly that —despite testimony from immunized prosecution witnesses—the defendant is innocent. In that scenario, a rule like the Ninth Circuit's is pivotal to vindicating the "truth-seeking function of the trial process." *United States v. Agurs*, 427 U.S. 97, 104 (1976). The government's rule, by contrast, risks "undercutting the most basic of all criminal procedure rights—the right of an innocent defendant to mount a truthful defense." Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 Mich. L. Rev. 857, 861 (1995).

D. This Court Should Grant Review

This case includes all the elements that warrant this Court's review: a square circuit conflict on an important federal question that is directly implicated and profoundly affects the parties. It is difficult to imagine a more compelling context to address the question presented than in this case, where petitioner faces life imprisonment because he was unable to present direct evidence of his factual innocence to the jury—evidence that the jury itself asked to hear.

The government notes that this Court has declined to grant prior petitions presenting similar questions. Br. in Opp. 6 & n.2. But in many of those cases, the government urged the Court to deny review for reasons unrelated to the propriety of reviewing the circuit conflict. In *Aviles v. United States*, 139 S. Ct. 1619 (2019), the question presented was not "passed upon below." U.S. Br. in Opp. 7, *supra* (No. 18-772). In *Davis v. United States*, 138 S. Ct. 65 (2017), the petitioner failed to contend that the Ninth Circuit standard should govern. U.S. Br. in Opp. 16, *supra* (No. 16-1190). In *Viloski v. United States*, 575 U.S. 935 (2015), the petitioner argued that the district court itself should grant immunity. U.S. Br. in Opp. 25, *supra* (No. 14-472). And in *Brooks v. United States*, *Phillips v. United States*, and *Walton v. United States*, 568 U.S. 1085 (2013), the court of appeals held that the claims would fail under any circuit's standard. U.S. Br. in Opp. 17-23, *supra* (Nos. 12-218, 12-5847, and 12-5812). The other petitions cited by the government predate *Straub* and thus did not present the conflict now at issue.

Those denials highlight rather than undermine the case for review here. The government does not dispute that petitioner timely moved the trial court to grant immunity and fully preserved his argument on appeal. The government does not dispute that the Second Circuit squarely resolved the question. The government does not argue that any error would be harmless or that any other barrier to further review exists. This is accordingly the best opportunity this Court has ever had to resolve the question presented. As informed amici and commentators agree, "[i]t is time for th[is] Court to weigh in." Johnson, *Defense Witness Immunity*, *supra*; *see* NACDL Br. 3-4; Pet. 13.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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May 5, 2023